UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0477

September Term, 2016

NABIEU MAKIEU BOCKARI

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: February 27, 2017

A jury sitting in the Circuit Court for Montgomery County convicted the appellant, Nabieu Makieu Bockari, on four counts of sex offense in the third degree. The victim was a female minor. Bockari was sentenced, concurrently on each count, to ten years confinement, with five years suspended. This appeal followed.

He presents two issues for review:

> "I) Whether it was clear error for the trial court to deny the defense *Batson* [*v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986)] challenge after the [S]tate explained it struck the juror in question because '195 is a black woman.'
>
> "II) Whether the trial court erred by asking jurors, over defense objection, if 'they could not find an individual guilty of sexual abuse without there being physical or scientific evidence presented.'"

The State concedes error on the first issue and suggests that the second issue is thereby mooted. We agree.

I

> "*Batson* and its progeny instruct that the exercise of peremptory challenges on the basis of race, gender, or ethnicity violates the Equal Protection Clause of the Fourteenth Amendment.[1] Excusing a juror on any of those bases violates both the defendant's right to a fair trial and the potential juror's 'right not to be excluded on an impermissible discriminatory basis.' *Edmonds v. State*, 372 Md. 314, 329, 812 A.2d 1034 (2002). Moreover, when the striking party's 'choice of jurors is tainted with racial basis, that overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial, invit[ing] cynicism respecting the jury's neutrality and undermin[ing] public confidence in adjudication.' *Miller-El v. Dretke*, 545 U.S. 231, 238, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (citations, internal quotation marks, and ellipses omitted).
>
> "[1]*See Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (prohibiting challenges based on race); *Hernandez v. New York*, 500 U.S. 352, 369, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (plurality opinion) (indicating that challenges based on ethnicity are prohibited); *J.E.B.*

> *v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (prohibiting challenges based on gender)."

Ray-Simmons v. State, 446 Md. 429, 435, 132 A.3d 275, 278-79 (2016).

During jury selection in the instant matter, prior to the defense exercise of peremptory challenges to additional jurors, the defense questioned the rationale for the State's peremptory challenge to "the last juror." Following the State's explanation, to which no exception was taken, the defense again addressed the court, but the transcript reads, "(Unintelligible.)." It is clear from the context, however, that the defense had objected to the State's exercise of a peremptory challenge against juror No. 195. The transcript then reads:

> "THE COURT: What juror was that?
>
> "[THE STATE]: 195 is a black women. Cheri (phonetic sp.). I felt that she would be sympathetic to the Defense's witnesses, who are elderly black women. And in a similar life position, I believe that she was also[,] I'm going to say[,] retired. I struck two white males, 215 and 235. And I also struck No. 250 who I believe – who is also a white male.
>
> "THE COURT: Okay. That challenge by the Defense will be denied."

This ruling was in error under *Batson* and its progeny. The State further concedes that the proper remedy is a new trial, per *Ray-Simmons v. State*, 446 Md. at 447, 132 A.3d at 285-86. Here, the State had the opportunity to give a neutral reason at trial and did not do so. *See Tyler v. State*, 330 Md. 261, 271, 623 A.2d 648, 653 (1993).

II

Over the objection by the defense, the court asked the venire on voir dire:

> "Is there any member of the jury panel that believes that they could not find an individual guilty of sexual abuse without there being physical or scientific evidence presented."

Bockari submits that this was error, citing *Charles v. Sate*, 414 Md. 726, 997 A.2d 154 (2010). There the trial court made the following inquiry on voir dire:

> "Therefore, if you are currently of the opinion or belief that you cannot convict defendant without 'scientific evidence,' regardless of the other evidence in the case and regardless of the instructions that I will give you as to the law, please rise …."

Id. at 736, 997 A.2d at 160 (italics omitted). The Court of Appeals concluded that the "voir dire question at issue here suggested that the jury's only option was to convict, regardless of whether scientific evidence was addressed." *Id.* at 737, 997 A.2d at 161.

It is unlikely that the challenged voir dire question before us will arise in the same form on a retrial. Consequently, the second issue presented by Bockari is moot.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED AND CASE REMANDED.

COSTS TO BE PAID BY MONTGOMERY COUNTY.