

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1676-12T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAIVON K. BRINSON,

Defendant-Appellant.

Submitted January 6, 2016 – Decided April 19, 2017

Before Judges Fuentes, Koblitz and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No. 10-
05-0553.

Joseph E. Krakora, Public Defender, attorney
for appellant (Jason A. Coe, Assistant Deputy
Public Defender, of counsel and on the brief).

Grace H. Park, Acting Union County Prosecutor,
attorney for respondent (Kimberly L. Donnelly,
Special Deputy Attorney General/Acting
Assistant Prosecutor, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

Defendant Daivon K. Brinson was tried before a jury and convicted of aggravated manslaughter, N.J.S.A. 2C:11-4a(1), a lesser-included offense of murder, and third degree possession of a knife for an unlawful purpose, N.J.S.A. 2C:39-4d; the jury acquitted defendant of felony murder, N.J.S.A. 2C:11-3a(3), and first degree robbery, N.J.S.A. 2C:15-1. After merging the third degree possession of a knife for an unlawful purpose with the homicide, the judge sentenced defendant to a term of twenty-four years, with an eighty-five percent period of parole ineligibility and five years of parole supervision as required by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. We now reverse and remand for a new trial.

In this appeal, the State does not dispute the following facts.

In 2009, Bernard Rice was employed by the Congregation Bna' Israel, in the Township of Millburn. While on his way to work on November 30, 2009, at approximately 2:00 p.m., Rice stopped at the Three Stooges Deli in Union Township to purchase a lottery ticket for his coworker Carmella Mayne. Rice walked in and stood near the counter waiting to be served. At this point, he noticed the food scale was on the floor of the store. While he waited, another man came into the Deli. As time passed, Rice and the other customer wondered out loud where the Deli owner could be.

Rice was a frequent customer of the deli and knew the owner personally. When more time passed, Rice's initial curiosity evolved into genuine concern for the owner's wellbeing. Rice testified that he and the other man "were afraid something . . . happened, something is rank, and one of us said, 'Maybe he's down.'" Rice walked around the store in search of the owner. When he reached the back area where a freezer was located, Rice saw "a body outstretched beyond the freezer[] . . . facing toward the rear across the doorway." Rice immediately recognized this was the body of the deli's owner, "Mohinder."¹ Rice yelled out "no good, no good, call 9-1-1."

Rice testified that he instinctively motioned to the other customers to leave the store as he returned to his car where his coworker Carmella Mayne was seated waiting for him. Mayne immediately called 9-1-1; the police arrived approximately five minutes later. Union Township Police Officer Adam Jovic was one of the first responders. According to Jovic, "the store was in disarray, . . . stuff was thrown all around, shelves were knocked over[,] . . . [and there were] large amounts of blood throughout the store." The responding officers also saw blood on the walls and on the cash and lottery tickets that were lying on the floor.

¹ The police investigation confirmed the victim's name was Mohinder Singh.

The officers checked the victim for vital signs and confirmed he was dead. The police found a broken umbrella next to the victim.

The officers at the crime scene expanded their search and investigation to the areas surrounding the deli. This led them to a yard behind the deli where they discovered a shed which appeared to have blood on its walls. There was also blood on the fence located behind the shed which continued into the yard on the other side of the fence. The blood evidence stopped at this location.

Other officers expanded the search parameter and found blood along the siding of a nearby house. The officers recovered a jacket stained with blood in the yard of the house. The police also found a bloody knife in the yard adjacent to the yard where they found the bloody jacket. Following the blood trail, the police came to another backyard where they discovered a pool of blood in the rear porch of an abandoned house. A search of the abandoned residence did not yield any further evidence.

It is not disputed that further police investigation revealed defendant's connection to this homicide with sufficient probable cause to sustain the issuance of a warrant for his arrest. When defendant learned of the warrant, he retained counsel and voluntarily surrendered himself to law enforcement authorities on

December 8, 2009. At the time of his arrest, defendant had a deep, medically untreated wound on his forearm.

In this appeal, defendant raises the following arguments.

POINT I

REVERSAL IS REQUIRED UNDER BATSON V. KENTUCKY AND STATE V. OSORIO BECAUSE THE STATE FAILED TO JUSTIFY ITS USE OF PEREMPTORY STRIKES AGAINST AFRICAN-AMERICAN VENIREPERSONS, AND THE COURT FAILED TO CONDUCT THE PROPER ANALYSIS BEFORE BRINSON'S OBJECTION DURING VOIR DIRE. (raised below)

POINT II

MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT, INCLUDING UNDUE EMPHASIS ON INFLAMMATORY AND GRUESOME CRIME SCENE PHOTOGRAPHS, INFECTED THE PRESENTATION OF THE CASE TO THE JURY AND PREVENTED BRINSON FROM RECEIVING A FAIR TRIAL. (partially raised below)

POINT III

THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON THE LIMITED PERMISSIBLE USE OF A DEFENDANT'S PRE-ARREST SILENCE, AND PROVIDED AN INCOMPLETE AND DEFECTIVE CHARGE ON THE USE OF A DEFENDANT'S FLIGHT AS EVIDENCE OF CONSCIOUSNESS OF GUILT. (not raised below)

POINT IV

THE CUMULATIVE EFFECT OF THE FOREGOING TRIAL ERRORS WAS SUFFICIENT TO DEPRIVE BRINSON OF HIS RIGHT TO A FAIR TRIAL.

The principal issue defendant raises in this appeal concerns the constitutionality of the State's use of preemptory challenges.

During jury selection, defense counsel claimed the prosecutor had improperly used preemptory challenges to exclude prospective African-American jurors from the jury panel, in violation of defendant's constitutional right under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and State v. Gilmore, 103 N.J. 508 (1986), as explained in State v. Osorio, 199 N.J. 486 (2009).

After defendant filed a timely notice of appeal, appellate counsel discovered that the audio record of defendant's Gilmore objections to the State's use of preemptory challenges during the jury selection process conducted on April 25, 2012 was not available. In response to defendant's motion to reconstruct this part of the record, this court entered an order on February 14, 2014, remanding the matter for the trial court to conduct a "hearing and reconstruction" of the missing record. This court directed the reconstruction "shall take place 90 days" from the date of the order. We therefore retained jurisdiction over the case.

By letter dated September 30, 2014, 228 days after the date of this court's order, the trial judge submitted a "Statement in lieu of Transcript in this matter." In the letter transmitting this document, the trial judge provided the following explanation

for why the system failed to create a verbatim transcription of this critical part of defendant's trial.

Your Order requires the Law Division to reconstruct the record of defendant's Gilmore application made during jury selection on April 25, 2012. Enclosed is a Statement in Lieu of Transcript in this matter. Other than that which is contained therein, the parties' and the [c]ourt's notes and recollections do not shed any further light on either the State's proffered reasons for exercising its challenges or the [c]ourt's reasons for denying defendant's motion.

As you probably know, [d]efendant's sidebar application was recorded on CourtSmart, and the recording was only partially audible. From an administrative point of view, you may be interested in the reasons why the recording was only partially audible. We recently learned that when this digital recording system was first implemented, several [c]ourt [c]lerks were activating the sidebar microphone but were unaware that there was another action necessary to ensure that this microphone was capable of recording. What is contained on the partially recorded transcripts is what was picked up on other microphones throughout the courtroom.

In attempting to reconstruct the record, the "master recording" of this proceeding was examined. That recording is also largely unintelligible. Based upon my notes, the partially audible transcript, my review of the CourtSmart recording and the transcript of the entire voir dire, I drafted a proposed Statement in lieu of Transcript and forwarded it to counsel. Several in camera conferences were conducted, typed copies of my notes were provided and an opportunity was afforded to listen to the digital recording. With the input of counsel, minor changes have been made

to the initial draft. The record has now been settled.

The Statement of Proceedings in Lieu of Transcript provides the following account of defendant's Gilmore objection, the prosecutor's response to the objection, and the action the trial court took to address it:

1. After the fifth challenge by the State, Counsel for the defendant requested a sidebar conference. This conference lasted approximately three (3) minutes.

2. During the conference, the Defense moved to strike the panel under Gilmore, pointing out that three (3) of the five (5) challenges exercised by the State were of African-Americans, two males and one female. The Defense pointed out that[:]

a. [The] State's second challenge was of an African-American male seated in seat number one.

b. The State's fourth challenge was of an African-American male seated in seat number seven.

c. The State's fifth challenge was of an African-American female seated in seat number twelve.

3. During the sidebar conference, the Defense contended that it had established a prima facie case such that the State must attempt to justify or excuse these challenges. The State did undertake to set forth the reasons for the challenges. Specifically, among the reasons given, there was a discussion that one of the African-American males had indicated that he had a relative who was accused of committing a criminal offense.

4. The [c]ourt denied defendant's Gilmore motion to strike the panel, ruling that the Prosecutor's challenges were not race driven.

This document contains the only record of defendant's Gilmore challenge.

In Gilmore, our Supreme Court held that article I, paragraphs 5, 9, and 10 of the New Jersey Constitution prohibit prosecutors from exercising peremptory challenges to discriminate against potential jurors on the basis of religious principles, race, color, ancestry, national origin, or sex. Gilmore, supra, 103 N.J. at 524. The Gilmore Court adopted the underlying principles explained by the Supreme Court of California in People v. Wheeler, 583 P.2d 748, 755 (Cal. 1978):

[I]n our heterogeneous society[,] jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; . . . it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence . . . the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

[Gilmore, supra, 103 N.J. at 525]

In Osorio, the Supreme Court reaffirmed the three-step methodology that a trial court must employ to determine the validity of bias claims in the jury selection process based on a party's assertion that the other party used peremptory challenges to exclude a prospective juror based on his or her race or ethnic background.²

Step one requires that, as a threshold matter, the party contesting the exercise of a peremptory challenge must make a prima facie showing that the peremptory challenge was exercised on the basis of race or ethnicity. That burden is slight, as the challenger need only tender sufficient proofs to raise an inference of discrimination. If that burden is met, step two is triggered, and the burden then shifts to the party exercising the peremptory challenge to prove a race- or ethnicity-neutral basis supporting the peremptory challenge. In gauging whether the party exercising the peremptory challenge has acted constitutionally, the trial court must ascertain whether that party has presented a reasoned, neutral basis for the challenge or if the explanations tendered are pretext. Once that analysis is completed, the third step is triggered, requiring that the trial court weigh the proofs adduced in step one against those presented in step two and determine whether, by a preponderance of the evidence, the party contesting the exercise of a

² The United States Supreme Court has also prohibited the use of peremptory challenges to remove prospective jurors based on gender, J.E.B. v. Alabama, 511 U.S. 127, 143, 114 S. Ct. 1419, 1429, 128 L. Ed. 2d 89, 106 (1994), and, absent case-specific bias, our Supreme Court has expressly prohibited the use of peremptory challenges to remove prospective jurors based on the juror's religious principles. State v. Fuller, 182 N.J. 174 (2004).

peremptory challenge has proven that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias.

[Osorio, supra, 199 N.J. at 492-93 (emphasis added).]

Based on the limited reconstructed record before us, we are satisfied the trial court did not follow the Osorio three-step paradigm when it concluded the State did not use peremptory challenges to exclude these three potential jurors based on their race. The reconstructed record does not contain any information about the racial makeup of the venire or even the ultimate composition of the jury who decided the case. As the Court held in Osorio, a defendant can establish a prima facie case that the State has used preemptory challenges based on race by showing (1) the prosecutor used a disproportionate number of peremptory challenges against African-Americans; (2) the excluded jurors only share race as a common characteristic; and (3) the prosecutor failed to engage these same jurors in more than desultory voir dire. Osorio, supra, 199 N.J. at 503.

The reconstructed record shows that the prosecutor offered a race-neutral reason for only one of the three excluded African-American jurors. The trial judge's analytical response to the prosecutor's proffer with respect to this one juror not only failed to follow Osorio, but also does not address the two other African-

American prospective jurors who were removed from serving on the jury by the prosecutor's challenges. These material defects affect a critical part of the trial record and compel us to reverse defendant's conviction and remand this matter for a new trial. In the interest of completeness, we note that since this case was tried, the Supreme Court decided State v. Andrews, 216 N.J. 271 (2013), which eliminated the bright-line mandatory mistrial remedy for a finding of a Gilmore violation, and replaced it with the following flexible discretionary approach:

[W]e modify Gilmore to the extent it imposed a single remedy to respond to the constitutionally impermissible uses of peremptory challenges by any party, and hereby permit trial judges to choose from a broader set of remedies to address Batson /Gilmore violations on a case-by-case basis. Those remedies include dismissing the empaneled jury member(s) and the venire and beginning jury selection anew; reseating the wrongfully excused juror(s); reseating the wrongfully excused juror(s) and ordering forfeiture by the offending party of his or her improperly exercised peremptory challenge(s); permitting trial courts to require challenges to prospective jurors outside the presence of the jury; granting additional peremptory challenges to the aggrieved party, particularly when wrongfully dismissed jurors are no longer available; or a combination of these remedies as the individual case requires.

[Andrews, supra, 216 N.J. at 293]

Defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION