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SC Court of Appeals

**STATE OF SOUTH CAROLINA
In The Court of Appeals**

APPEAL FROM SPARTANBURG COUNTY

**Court of General Sessions
Hon. Grace G. Knie, Circuit Court Judge**

Appellate Case No. 2022-000485

THE STATE,

Respondent,

v.

DONALD KING POLLOCK,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

A party may not strike a juror on the basis of race or gender. After Pollock used eight of nine strikes to eliminate women from the jury, the State challenged the strikes as gender-discriminatory. In response, Pollock explained he struck Juror Seher Kur because "maybe English was not her first language," but failed to cite any facts to support this assertion. Was this a race-neutral explanation, and was the trial court's finding that the explanation was pretextual clearly erroneous?

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted Appellant Donald Pollock for Criminal Sexual Conduct with a Minor (CSCM) in the first degree, CSCM in the second degree, and two counts of CSCM in the third degree. The indictments alleged a continuing course of sexual abuse by Pollock against his stepdaughter, including groping and repeated instances of digital penetration, beginning when she was in the fourth grade. (Tr.p.155, 282–305). The victim testified that in one instance Pollock attempted penile penetration, but she was able to fight him off. (Tr.p.295–96). Pollock proceeded to jury trial on April 4–6, 2002, before the Honorable Grace G. Knie, circuit court judge. He was acquitted of CSCM in the first degree, and convicted of the remaining charges. Pollock was sentenced to 15 years' incarceration for CSCM 2nd, to be served consecutively with the remainder of his sentence. For CSCM 3rd, he was sentenced to 15 years' incarceration on both counts, with the sentences suspended upon the completion of five years' probation, with these sentences to be served concurrently. In this direct appeal, Pollock alleges the trial court improperly granted the State's motion to quash the initial petit jury based on a claim of discriminatory peremptory jury strikes in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny.

STANDARD OF REVIEW

Whether the trial court employed the correct Batson hearing procedure is a question of law, which is reviewed de novo. State v. Stewart, 413 S.C. 308, 316, 775 S.E.2d 416, 420 (Ct. App. 2015). However, the trial court's determination whether a peremptory strike was exercised in a discriminatory manner is reviewed under a "clearly erroneous" standard. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). Under this standard, the appellate court gives the trial court's finding "great deference." State v. Dyar, 317 S.C. 77, 79, 452 S.E.2d 603, 604 (1994).

ARGUMENT

The trial court correctly quashed the original petit jury because Pollock failed to provide a race-neutral explanation for his peremptory strike, and the record supports the trial court's determination that Pollock's explanation for the strike was pretextual.

The trial court correctly quashed the original petit jury based on a Batson violation. Contrary to Pollock's claim, the trial court followed the correct Batson procedure, requiring Pollock to provide a race- and gender-neutral explanation for his strike of Juror 82, Seher Kul, and hearing the State's response before ruling on the motion to quash. The trial court correctly quashed the jury because Pollock failed to provide a race-neutral justification for the strike, explaining that he assumed—without any evidence—that Kul could not speak fluent English. The trial court determined Pollock's explanation was a pretextual excuse to exclude women from the jury, and this determination was not clearly erroneous. This Court should affirm.

a. The trial court employed the correct Batson procedure.

In his brief, Pollock claims the trial court did not follow the correct Batson procedure. As an initial matter, this claim is not preserved for review because Pollock did not raise any objection to the procedure at trial. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (explaining an objection must be contemporaneous and "should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error"). Regardless, the claim is meritless.

The Equal Protection Clause of the Fourteenth Amendment prohibits the striking of a venire person on the basis of race or gender. Edwards, 384 S.C. at 508–09, 682 S.E.2d at 822. "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one." Id. "Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. State v. Rogers, 405 S.C. 520, 525, 748 S.E.2d 247, 250 (Ct. App. 2013) (emphasis added).

That is exactly what occurred in this case. The State raised a Batson challenge, and the trial court and attorneys addressed each juror one by one. (Tr.p.102–114). Specifically regarding Juror 82, Seher Kul, Pollock asserted he struck Kul because it seemed as if English wasn't her first language." (Tr.p.107). In response, the State argued Pollock's strike of Juror Kul violated Batson because it was not race-neutral, and noted that Juror Kul "did not appear to have any issues with understanding or answering questions." (Tr.p.107). Finally, the trial court found Pollock's explanation for striking Juror Kul was pretextual, and quashed the jury.¹

¹ While Juror Kul was seated on the second jury, the other juror identified by the trial court as having been struck based on her gender was not. Accordingly, any error regarding this juror is harmless. See Rogers, 405 S.C. at 526, 748 S.E.2d at 251 ("If a trial court improperly grants the State's Batson motion, but none of the disputed jurors serve on the jury, any error in improperly quashing the jury is

The trial court employed the correct Batson procedure. Contrary to Pollock's assertion, the trial court did not absolve the State of its burden of persuasion. The State responded to Pollock's explanation of his strike by arguing the explanation was both race-based and pretextual. The trial court did not rule until hearing from both parties. This scenario is thus distinguishable from Cochran, where the trial court rejected the defendant's explanation "without hearing from the State." State v. Cochran, 369 S.C. 308, 319, 631 S.E.2d 294, 300 (Ct. App. 2006).

In this case, the State responded to defense counsel's explanation by disputing his assertion that the juror appeared to have trouble understanding English, noting there was nothing to support this assumption. Only then did the court rule. The court did not place the burden on the defense to prove their strikes were not pretextual. Cf. State v. Inman, 409 S.C. 19, 24, 760 S.E.2d 105, 107 (2014) (explaining how "the circuit court—and not the State—challenged the sufficiency of Appellant's counsel's explanation" and quashed the jury without hearing why the State challenged the strike). Rather, the court heard arguments from both sides and concluded the defense failed to offer a valid race- and gender-neutral justification for striking Juror Kul. The trial court employed the proper procedure.

harmless because a defendant is not entitled to the jury of her choice."); State v. McMillan, 400 S.C. 298, 305, 734 S.E.2d 171, 175 (Ct. App. 2012) ("During the second jury selection, juror 34 was seated on the jury, and juror 27 was seated as an alternate. We find we need not discuss juror 27 because he was never required to serve as a juror; therefore, we only discuss the Batson issue as it relates to juror 34.").

b. Pollock failed to provide a race-neutral explanation for his peremptory strike, and the record supports the trial court's finding that his explanation was pretextual.

Pollock further argues the trial court's erred by finding his explanation for striking Juror Kul was not race- and gender-neutral. This determination is reviewed under a "clearly erroneous" standard. Edwards, 384 S.C. at 509, 682 S.E.2d at 822. Accordingly, appellate courts give the trial judge's finding "great deference" on appeal. Dyar, 317 S.C. at 79, 452 S.E.2d at 604. The trial court correctly quashed the jury because Pollock failed to offer a race-neutral explanation for his strike of Juror Kul, and evidence supports the trial court's finding that Pollock's stated reason for the strike was pretextual.

Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. Riddle v. State, 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994). The question whether a party intended to discriminate is a "pure issue of fact," subject to review under a deferential standard. Hernandez v. New York, 500 U.S. 352, 364 (1991). A strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. Edwards, 384 S.C. at 509, 682 S.E.2d at 823.

The trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility. Sumpter v. State, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994). Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an "evaluation of the [attorney's] mind lies peculiarly within a trial judge's province." Hernandez v. New York, 500 U.S. at 365. When a Batson challenge is raised, "the burden of production shifts to the

proponent of the strike to come forward with a race-neutral explanation (step two), and if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial [or gender] discrimination (step three)." State v. McMillan, 400 S.C. 298, 306, 734 S.E.2d 171, 176 (Ct. App. 2012) (emphasis added).

During the original jury selection, Pollock exercised nine peremptory strikes. Eight of those strikes were against women. (Tr.p.90–103). When challenged, defense counsel explained the basis for his strike: "I thought that it seemed as if maybe English wasn't her first language, and I thought there might be a little discrepancy on what she could understand. I don't know that, but that was my only concern on that one, and that was my reason for the strike." (Tr.p.107) (emphasis added). The solicitor noted in response that the juror "did not appear to have any issues with understanding or answering questions" and did not stand when the court asked whether any of the prospective jurors had difficulty understanding the English language. (Tr.p.107). Defense counsel shortly thereafter reiterated his reason for striking Juror Kul: "yes, she can understand the English language, but I don't know once we start getting into arguments and things like that in front of the jury, I wasn't sure that she would, you know, necessarily understand them." (Tr.p.111).

The trial court found Pollock's explanation was pretextual, and this determination was not clearly erroneous. As the prosecutor noted, and defense counsel admitted, there was no reason to believe Juror Kul had any difficulty

understanding English. If there was a reason, such as unintelligible speech or difficult interaction with the court, it does not appear in this record, and defense counsel was required to articulate it. The record supports the trial court's finding that defense counsel's explanation was pretextual.

But even accepting arguendo that counsel's explanation was gender-neutral, he still failed the Batson test because he failed to offer a race-neutral reason for the strike. A race-neutral explanation is "an explanation based on something other than the race of the juror." Hernandez v. New York, 500 U.S. at 360. Although the State's strike was originally premised on Pollock's gender-based used of strikes, Pollock was required to state both a gender- **and** race-neutral basis for his strike. He did not do so, and thus failed to satisfy the second step of the Batson analysis.

"The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment." Hernandez v. Texas, 347 U.S. 475, 479 (1954). Defense counsel candidly admitted he had no information that Kul did not speak fluent English. His assumption otherwise must have been based on Kul's name, appearance, or a combination of the two. Stereotypes based on ethnicity are not race-neutral. See United States v. Changco, 1 F.3d 837, 840 (9th Cir. 1993) ("So long as [a party] can convince the district court that the potential juror who is being struck **in fact** has difficulty with English, the justification is race-neutral. **It would be much different, of course, if the prosecutor were to strike a potential juror based on her last name alone, and then justified the strike by arguing that people**

with a particular last name often have trouble understanding English. The latter would be the type of sweeping generalization about the language abilities of racial groups that would make the explanation race non-neutral.").

This case is distinguishable from State v. Wright, 354 S.C. 48, 579 S.E.2d 538 (Ct. App. 2003), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In that case, a defendant alleged the State improperly struck a juror based on her race. The State justified the strike by noting the juror's "heavy accent" and her occupation as a "bilingual interpreter." Id., 354 S.C. at 55, 579 S.E.2d at 542. By contrast, in this case Pollock did not cite Juror Kul's accent, occupation, difficulty communicating with the court, or any other information supporting his suspicion that she could not "understand the English language." Counsel candidly admitted that he believed Juror Kul could speak English, and that he had no factual basis to question her ability to understand the proceedings. (Tr.p.107, 111).

Pollock was required to articulate **some** reason justifying a concern about Juror Kul's ability to understand. See Changco, 1 F.3d at 840. There is simply no such evidence in this record. Cf. United States v. Speer, 30 F.3d 605, 611 (5th Cir. 1994) (affirming excusal of juror based on juror's statement that she had trouble understanding English and other objective facts showing her "inability to understand or communicate effectively in English"); United States v. Campbell, 544 F.3d 577, 582 (5th Cir. 2008) (finding juror's language difficulties were race-neutral

justification for strike where the juror "asked to speak to the judge again to explain that he was 'not able to participate [in deliberations] because of [his] limited English'" and there were "numerous notes from the jury stating that they were unable to effectively communicate with" the juror). Absent such facts, Pollock's explanation cannot fairly be considered race-neutral.

The lack of facts justifying Pollock's explanation enhances the need for this Court to apply the deferential "clear error" standard of review. The Ninth Circuit has explained:

The trial judge is in a unique position to determine whether a witness has difficulty communicating, and therefore we grant a high level of deference to the district court's finding on this point. . . . How slowly she spoke, whether she hesitated, how thick her accent was, and what her body language revealed are not recorded in a transcript, yet these are aspects of communication that may be considered by the trial judge.

United States v. Murillo, 288 F.3d 1126, 1136 (9th Cir. 2002). See also United States v. Canoy, 38 F.3d 893, 900 (7th Cir. 1994) (explaining "it is up to the district court, which has had the opportunity to view the challenged juror and to hear the government's explanation, to assess whether the government is legitimately concerned about language skills or is instead utilizing that concern as a shield for prohibited discrimination").

Pollock failed to meet the second step of the Batson analysis because he did not cite any fact justifying his assertion that he was concerned about Juror Kul's ability to understand English. Accordingly, he failed to offer a race-neutral explanation for his strike of Juror Kul. Furthermore, the record supports the trial court's finding

that this flawed explanation was evidence of a pretextual gender-based strike. There is absolutely no evidence in the record to support Pollock's assertion that it "seemed like maybe English wasn't her first language." When viewed with the great deference owed to the trial court's fact-based determination, the trial court properly quashed the jury. This Court should affirm.

CONCLUSION


For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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DONALD KING POLLOCK,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

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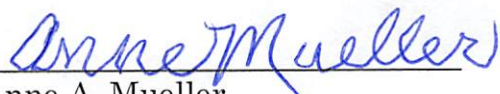
Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Brief Of Respondent and Designation Of Matter on Appellant by electronic mail addressed to Jack B. Swerling, Esquire, counsel of record for the Appellant, to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 18th day of May, 2023.



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