STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 2023-UP-180 (S.C. Ct. App. Filed May 17, 2023)

Lower Court Case No. 2019-GS-23-08759

THE STATE,

RESPONDENT,

V.

SAMUEL LAMAR BURNSIDE,

PETITIONER

APPELLATE CASE NO. 2020-000133

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Samuel Lamar Burnside, Appellant.

Appellate Case No. 2020-000133

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2023-UP-180
Heard April 6, 2023 – Filed May 17, 2023

AFFIRMED

Appellate Defender Sarah Elizabeth Shipe, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Julianna E. Battenfield, all of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

PER CURIAM: Samuel L. Burnside appeals his convictions for murder and possession of a weapon during the commission of a violent crime. On appeal, Burnside argues the trial court erred by failing to quash the jury panel when the State used a peremptory strike in a racially discriminatory manner. We affirm.

Weighing the totality of the facts and circumstances in the record, we hold the trial court did not err by denying Burnside's request to quash the jury panel. *See State v. Blackwell*, 420 S.C. 127, 148, 801 S.E.2d 713, 724 (2017) ("Whether a *Batson*[1] violation has occurred must be determined by examining the totality of the facts and circumstances in the record." (quoting *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001))); *State v. Weatherall*, 431 S.C. 485, 493, 848 S.E.2d 338, 343 (Ct. App. 2020) ("The trial court's findings regarding purposeful discrimination are accorded great deference and will be set aside on appeal only if clearly erroneous." (quoting *Blackwell*, 420 S.C. at 148, 801 S.E.2d at 724)); *id.* at 494, 848 S.E.2d at 343 ("In order to establish a prima facie case of discrimination, the challenging party must show (1) that the prospective juror was a member of a protected group; (2) that the State exercised peremptory challenges to remove members of the group from the jury; and (3) that these facts and other relevant circumstances raise an inference that the State used peremptory challenges to exclude the prospective juror from the jury on account of their group."); *State v. Inman*, 409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014) ("Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible."); *State v. Tucker*, 334 S.C. 1, 8, 512 S.E.2d 99, 102 (1999) ("Then, the opponent of the strike must show that the race-neutral explanation given was mere pretext."); *Shuler*, 344 S.C. at 621, 545 S.E.2d at 813 ("[T]he composition of the jury panel is a factor that may be considered when determining whether a party engaged in purposeful discrimination pursuant to a *Batson* challenge."); *State v. Cochran*, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006) ("[U]nless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext.").

AFFIRMED.

WILLIAMS, C.J., and GEATHERS and VERDIN, JJ., concur.

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

SAMUEL LAMAR BURNSIDE,

APPELLANT

APPELLATE CASE NO. 2020-000133

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

Opinion No.

PETITION FOR REHEARING

On May 17, 2023, this Court affirmed appellant's convictions for murder and possession of a weapon during the commission of a violent crime and his sentences. *State v. Burnside*, 2023-UP-180 (S.C. Ct. App. filed May 17, 2022). Pursuant to Rule 221(a), SCACR, appellant respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

In its opinion affirming appellant's convictions and sentences, this Court held the trial court did not err by denying appellant's request to quash the jury panel. In affirming the trial court's decision to deny appellant's request, this Court cited and quoted the controlling case law.

Although this Court provided no analysis to explain how it applied the case law to the facts presented, appellant must assume this Court's analysis overlooked and/or misapprehended significant points either in the governing law or in the facts presented regarding jury selection. Thus, appellant will review the necessary facts and case law again to show why the trial court erred in failing to quash the jury panel where the state used a peremptory strike in a racially discriminatory manner by striking a black juror due to the juror's age but did not strike white jurors in the same age bracket, in violation of the Equal Protection Clause of the United States Constitution.

The United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the prosecution from striking potential jurors on the basis of race. Batson v. Kentucky, 476 U.S. 79 (1986). In a subsequent opinion, the United States Supreme Court held that a criminal defendant may not engage in racial discrimination in exercising peremptory strikes. Georgia v. McCollum, 505 U.S. 42, 59 (1992). Two years later, the United States Supreme Court recognized that the Fourteenth Amendment also prohibits the striking of a juror on the basis of gender. J.E.B. v. Alabama, 511 U.S. 127, 146 (1994).

The Supreme Court has long recognized "that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror." Georgia v. McCollum, 505 U.S. 42, 48 (1992). The Court devised Batson and its procedures "to remedy the harm done to the dignity of persons and to the integrity of the courts." Id. (internal quotation omitted). When a party strikes a juror based on race, "there can be no doubt that the harm is the same – in all cases, the juror is subjected to open and public racial discrimination." Id. at 49.

When jury selection procedures purposefully exclude African-Americans, public confidence in the criminal justice system is undermined. Id. "Be it at the hands of the state or the defense, if a

court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it." Id. at 49-50 (internal quotation omitted).

In Purkett v. Elem, 514 U.S. 765, 767 (1995), the United States Supreme Court set out the procedures for a trial court to follow when a party challenges a peremptory strike. This Court adopted that procedure in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). The first step requires the moving party to make out a prima facie case of racial or gender discrimination.[1] At the second step, the burden of production shifts to the proponent of the strike to present a race or gender neutral explanation for the challenged strike. If a race or gender neutral explanation is provided, then the third step requires the trial judge to decide whether the moving party has proven purposeful racial or gender discrimination. Purkett, 514 U.S. at 767; see also State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007).

According to the United States Supreme Court, the "second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett, 514 U.S. at 767-68; see also State v. Inman, 409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014). This Court recognized that the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations" for the strikes. Adams, 322 S.C. at 123, 470 S.E.2d at 371. Unless discriminatory intent is inherent in the explanation, it is deemed race neutral at step two. Purkett, 514 U.S. at 768. However, the Supreme Court explained that while

> the explanation provided by the proponent of a peremptory challenge at the second stage of the Batson process ... need not be persuasive, or even plausible, ... it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to

[1] This Court has determined that "requesting a Batson hearing in effect sets out a prima facie case of discrimination." State v. Chapman, 317 S.C. 302, 305-306, 454 S.E.2d 317, 319-320 (1995) overruled on other grounds by State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998).

> fulfill its duty to assess the plausibility of the reason in light of all the evidence bearing on it.

State v. Giles, 407 S.C. 14, 21-22, 754 S.E.2d 261, 264 (2014). Otherwise, the opponent of the challenge and the trial court would not have the ability to safeguard the right to equal protection. Id. "Reasonably specific is necessary because comparison to other members of the venire for purposes of a disparate treatment analysis, which is often used at the third step of the Batson process to determine if purposeful discrimination has occurred, is impossible if the proponent of the challenge provides only vague or very general explanation." Id. at 22, 754 S.E.2d at 263. The explanation given "may not be so general or vague that it deprives the opponent of the challenge the ability to meet the burden to show, or the trial court of the ability to determine whether, the reason given is pretextual." Id. "The proponent of the challenge must provide an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it." Id.

During the third step, the moving party "must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." State v. Cochran, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006) (citing Adams, 322 S.C. at 124, 470 S.E.2d at 372). "This burden is generally established by showing similarly situated members of another race were seated on the jury." Id. "Unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext." Id. If the trial judge determines the race and gender neutral explanations were mere pretext, then the trial court must quash the jury panel and select a new jury. Id. "The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike." Evins, 373 S.C. at 415, 645 S.E.2d at 909. The trial judge must examine the totality of the facts and circumstances in the record to determine whether a Batson

violation occurred. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009).

This Court previously addressed an exercise of a jury strike based upon age. State v. Easler, 322 S.C. 333, 344, 471 S.E.2d 745, 752 (Ct. App. 1996) aff'd as modified State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). Easler's counsel struck a juror because "[h]e was young" and "not within the sort ... of profile that [the defense was] looking for in a juror." Id. The defense's profile "was a middle aged person, someone that's had some experience that ... would be willing to stand, listen to the evidence, had the maturity of foresight to listen to the evidence, determine what was true and what's not true." Id. The juror who was struck was twenty years old. Id. The trial judge determined the reason of age to strike was not race-neutral because "[t]he next person that sat was twenty-two, a white male. [Another juror] was twenty-seven, white female. [Another juror] was twenty-one. [Another juror] was twenty, [another juror] is twenty-nine." Id. at 345, 471 S.E.2d at 752. The judge determined those jurors were "in that same age bracket." Id. This Court held "[t]he trial judge did not err in finding that [Easler] was unable to articulate a racially neutral explanation for his peremptory challenges against black venire persons." Id. at 348, 471 S.E.2d at 754. This Court explained "age cannot be considered a racially neutral explanation for the striking of [the juror] since [Easler] failed to strike several white venire persons in the same age bracket." Id.

Similarly, here, the solicitor struck a juror who was born in 2001, or who was nineteen-years old at the time of the trial, but did not strike a juror who was born in 1997, or who was twenty-three years old at the time of the trial, and a juror who was born in 1995, or who was twenty-five years old at the time of the trial. Just like in Easler, the juror who was struck by the state was in the same age bracket as at least two jurors who were seated and participated in the trial. The trial judge erred in denying defense counsel's motion to quash the jury panel based upon the state's discriminatory exercise of peremptory strikes.

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The solicitor's remark that Juror #237 was unemployed cannot save the strike from discriminatory intent. South Carolina uses the "tainted approach" where multiple explanations are offered to explain a jury strike. Payton v. Kearse, 329 S.C. 51, 59-60, 495 S.E.2d 205, 210 (1998). The Supreme Court explained that "[o]nce a discriminatory reason has been uncovered – either inherent or pretextual – this reason taints the entire jury selection procedure." Id. at 59, 495 S.E.2d at 210. "[A]ny consideration of discriminatory factors in this decision is in direct contravention of the purpose of Batson which is to ensure peremptory strikes are executed in a nondiscriminatory manner." Id. at 59-60, 495 S.E.2d at 210. "'Active discrimination ... during th[e] process [of jury selection] condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.'" Id. at 60, 495 S.E.2d at 210 (quoting Powers v. Ohio, 499 U.S. 400, 412 (1991)). Noting "Batson is only effective against the most obvious examples of racial and gender prejudices," the Court explained that "[t]o excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the preemptory strike would erode what little protection Batson provides against discrimination in jury selection." Id. "The challenged party should not have an opportunity to convince the judge that he would have struck the juror regardless of discriminatory reason." Id.

Here, the state may not rely upon Juror #237's unemployment or demeanor as a reason for its strike to cleanse the taint of racial discrimination in light of South Carolina's adoption of the "taint approach." The solicitor's strike of Juror #237 based on age was a fundamentally pretextual reason in light of the white jurors who were not struck and were in the same age bracket as Juror #237. Furthermore, the exchange between the judge and the solicitor demonstrated that the solicitor's reason for striking Juror #237 was completely unrelated to his unemployment. Notably,

the solicitor remarked that Juror #237 was also unemployed when citing a case to argue that "a lack of life experience" based on age is "a credible reason for the same reason that unemployment is a sufficient reason for a strike." R. 27, ll. 12-17. It was only when the solicitor read this portion of the case did the solicitor note that "coincidentally," Juror #237 was "also" unemployed. The language used by the solicitor easily demonstrates that the solicitor did not exercise his strike against Juror #237 because he was unemployed.

The solicitor exercised his peremptory strike against Juror #237 in a racially discriminatory manner. Although the solicitor initially articulated a race neutral explanation for the strike, which was Juror #237's age, defense counsel and the judge noted that at least two other jurors, who were white and not struck, were in the same age bracket. The white jurors were similarly situated the black juror; thus, defense counsel, the opponent of the strike, carried his burden of showing the state reason for strike was a pretext for racial discrimination. The trial judge erred by denying defense counsel's motion to quash the jury panel in light of the state's exercise of its strike against Juror #237 in a discriminatory manner.

In its opinion this Court stated "weighing the totality of the facts and circumstances in the record, we hold the trial court did not err by denying [Appellant's] request to quash the jury panel." *State v. Burnside*, 2023-UP-180 (S.C. Ct. App. filed May 17, 2022). Appellant agrees that whether a strike was exercised in a race-neutral and gender-neutral way includes consideration of the circumstances under which the strike was exercised. See State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999).

Here, there were only two black males in the pool of forty that were used for jury selection. R. 340 – 343. The solicitor struck both. While there were four males selected for the jury, all were white. Further, there were two black individuals on the jury, but they were both female. The jury

consisted of *no* black males, the racial and gender group within which Appellant belonged as trial counsel made clear, due to the solicitor's exercise of his peremptory strikes. The solicitor's use of his peremptory strikes to eliminate the racial and gender group to which Appellant belonged from the jury also supports Appellant's argument on appeal that the trial court erred in failing to grant Appellant's motion to quash the jury panel.

Appellant respectfully requests this Court rehear the matter to consider how the trial judge's ruling was contrary to controlling case law.

Respectfully Submitted,

SARAH E. SHIPE
Appellate Defender

This 25th day of May, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

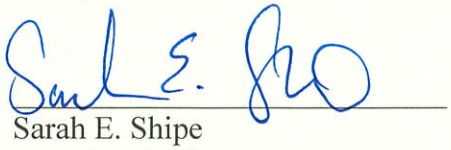
SAMUEL LAMAR BURNSIDE,

APPELLANT

APPELLATE CASE NO. 2020-000133

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Julianna E. Battenfield, Esquire, at the primary email address listed in the Attorney Information System (AIS); and Samuel Lamar Burnside, #382128, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 25th day of May, 2023.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

v.

Samuel Lamar Burnside, Appellant.

Appellate Case No. 2020-000133

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. Bruce Williams C.J.

J.

Kelcie H. Verdin J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
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Julianna E. Battenfield, Esquire
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FILED
Jun 01 2023

Sarah Elizabeth Shipe, Esquire
The Honorable Edward W. Miller