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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

V.

SAMUEL LAMAR BURNSIDE,

PETITIONER

Opinion No. 2023-UP-180

APPELLATE CASE NO. 2023-000967

REPLY RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Introduction

Petitioner writes to clarify the facts as presented during the trial regarding the case in general, but also as to the specific legal issue raised. In its statement of facts, respondent cited to argument of counsel and statements made by individuals during the sentencing proceeding. See e.g., Return at 3 (citing the prosecutor's opening statement and information provided to the judge during sentencing that the deceased was a mother of five). Generally, these matters are not considered facts because argument of counsel is not evidence and the statements of individuals during sentencing proceedings are not for the jury's consideration.

Other facts stretched the definition of "a reasonable inference" to incredulity. For example, respondent claimed that "[f]orensic evidence indicated one bullet had gone through her chest, but that after the petitioner saw the round did not kill her, fired another into her cheek, and finally executed her at point-blank range with one more through her skull." Return at 3. Respondent cited to the testimony of the pathologist for this assertion. Return at 3. Forensic evidence from the pathologist did *not* support respondent's claims.

The pathologist found "three separate gunshot wounds." R. 56, ll. 13-14. When asked to explain each wound, the pathologist made clear that he did not "know which came first," and therefore, he would discuss them by number, but each wound would be arbitrarily assigned a number. R. 56, ll. 18-20. Not once did the pathologist indicate the order of the gunshot wounds, that petitioner inflicted the wounds, or that gunshots were fired upon realization the deceased survived earlier shots. Cf. R. 54, l. 1 – R. 62, l. 12 with Return at 3. In fact, the pathologist opined to a reasonable degree of medical certainty that all three of the gunshot wounds would have been fatal. R. 60, ll. 8-10.

Respondent's inaccurate quotation of Investigator David Picone's testimony suggests the source of the information contained within the quotation was from more than one individual. However, Picone's testimony was clear – his information on this point was from only one person, Roville Williams, who was also a suspect in the death. According to Picone, Williams "referred to [petitioner] as a pimp." R. 251, l. 21 – R. 252, l. 3. This contrasts sharply with respondent's claim that [petitioner] "was refer[ed] to as a pimp." See Return at 3. Additionally, respondent's quotation of Picone's testimony suggests the police confirmed that petitioner was a pimp, that the deceased was working for petitioner, and that the two argued because the deceased refused to work while she was menstruating. See Return at 3. When the entirety of Picone's statement is examined, it is clear that the only thing "confirmed" was that the deceased was using a maxi pad at the time of her death. R. 252, ll. 5-9 ("this argument stemmed from her being on her period and not being able to perform those sexual acts. And we did confirm that by a video at Dollar General. She was buying maxi pads. And, B, at the autopsy when we found a maxi pad in her pants.").

Along these lines, respondent boldly asserted "[t]he evidence supported that Catherine Clark [the deceased] had been 'working' for the petitioner." Return at 4. Respondent offered no citation to the record to support this supposition. The only evidence that petitioner was a pimp or that the deceased was "working" for him was the hearsay testimony from Picone. When the state called Roville Williams as a witness, Williams testified only that petitioner wanted the deceased to have sex with other people. R.174, ll. 12-15. The state never even asked Williams if petitioner were a pimp.

Respondent brazenly mischaracterized Williams' actual testimony. Respondent claimed "Williams testified the petitioner then drove them to a desolate area, forced the victim out of the

car, drove past her, stopped the car, got out, kicked her, and then fired at her four times with a black nine-millimeter automatic revolver." Return at 4-5. Williams testified that he, petitioner, and the deceased were outside the car near a storage facility. R. 175, l. 16 – R. 176, l. 18. Petitioner and the decedent argued while Williams walked away. R. 175, l. 16 – R. 176, l. 18. Williams, however, had a change of heart and returned to the two in order to mediate. R. 176, ll. 23-25. According to Williams, the two returned property to each other, then they "rode on." R. 177, ll. 2-18. Williams and petitioner were in the car, while the decedent was outside of the car. R. 180, l. 3 – R. 183, l. 5. Williams claimed that petitioner "jumped out" of the car with a gun on his side. R. 183, ll. 8-19. The gun was a black automatic. R. 184, ll. 1-4. Petitioner was out of the car for "a couple of minutes." R. 184, ll. 14-16. Petitioner returned to the car with his gun. R. 184, ll. 16-20. Williams *did not hear anything* while petitioner was outside of the car. R. 185, ll. 17-18. Notably, and in sharp contrast to respondent's claim, Williams testified unequivocally that he *did not hear any gunshots*. R. 185, ll. 19-20. At no point did Williams testify that petitioner kicked the deceased. Cf. Return at 4. At no point did Williams testify that petitioner fired at her four times – or at all. Cf. Return at 4. At no point did Williams testify that petitioner had a nine-millimeter. Cf. Return at 4-5.

Finally, respondent claimed "[t]here was a Facebook post that named him as the killer." Return at 5. For this proposition, respondent cited to Williams' testimony. Return at 5. Williams claimed that he heard petitioner "arguing with somebody about something, about a poster, something." R. 187, ll. 16-18. When asked to be more specific, Williams responded, "Something was posted on Facebook about he supposed to have done - - I guess something to - - to the victim." R. 187, ll. 19-22. The following exchange then occurred:

> Q Are you testifying that he was talking about a post that he had seen about him being involved with the murder of the victim?

A Yes.

Q And what was [petitioner] saying?

A He was, like, basically, saying, like, that was some BS. He didn't do it. I know what they've got going on.

Q And he was talking to you about this or you overheard?

A I just heard it.

Q And do you - -

A And once he got off, he had told me.

Q I'm sorry.

A Once he got off, he was saying, like, That's some bull, BS.

R. 187, l. 23 – R. 188, l. 12. Williams' testimony was that petitioner mentioned a Facebook post that claimed petitioner was *involved* in the death of the deceased. Nowhere did Williams claim the Facebook post named petitioner as the killer. Being involved in a death does not equate to being a killer. According to the solicitor, Williams was *involved* as he was charged and pled guilty to misprision of a felony concerning the death. R. 189, l. 14 – R. 190, l. 3. Despite this involvement, the state never accused Williams of being the killer, and in fact, the lead investigator went to great lengths to remove suspicion from Williams. R. 251, ll. 7-20. Furthermore, despite the state's vast resources, the state never presented this alleged Facebook post or a witness who actually saw the post or created the post.

The trial judge erred by 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.

Just as respondent took considerable liberties with its statement of facts, respondent did so as well with the "relevant facts" portion of its brief concerning the issue presented. According to respondent, "238 jurors were noticed, 76 appeared and were qualified, and 40 were placed on the panel for selection." Return at 9. For this proposition, respondent cited to a single line of the transcript, which provides the judge stating, "We've got 40 coming up." R. 2, l. 4. Nowhere does the transcript list the number of jurors who were noticed or how many appeared. Furthermore, respondent claimed "[t]he first venireperson presented by the state as a potential alternate, #60, a white male (born 1973), was excused by the defense." Return at 10. However, according to the transcript, the *solicitor* stuck Juror #60, William Davis. R. 16, l. 23 – R. 17, l. 1. Specifically, the transcript identified "Mr. Moroney" as the attorney who struck Mr. Davis. R. 17, l. 1.

Additionally, respondent asserted "the solicitor only exercised two of his *ten* strikes and the defense only exercised eight of his ten." Return at 10 (emphasis added). To the contrary, the solicitor exercised two of his *five* strikes when selecting the main jury but exercised a third strike when selecting the alternates. R. 10, l. 22 – R. 17, l. 21; R. 2, ll. 24-25 (the judge remarking, "Well, 10 and five" presumably in reference to the number of strikes); S.C. Code Ann. § 14-7-110 (providing the prosecution is entitled to peremptory challenges not exceeding five in murder cases). In listing the years of birth for the white female jurors seated for the petit jury,

respondent listed "1973, 1976, 1961, 1965, and 1998." Return at 10. The fourth white female juror selected was Carol Mullan and her year of birth was 1964, *not* 1965. R. 337 – 339.

Turning to the merits of the issue presented, on appeal, respondent focused its analysis on the solicitor's stated reasons for striking Juror #237 of unemployment and demeanor, instead of what the solicitor initially said regarding the juror's age. Not once did respondent address petitioner's argument that the solicitor's alternative reasoning could not save the strike from discriminatory intent. As petitioner explained in the petition for a writ of certiorari, 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).[1] Petition at 11. "Once 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)). "Batson is only effective against the most obvious examples of racial and gender prejudices." Id. "To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the preemptory strike

[1] South Carolina is one of many jurisdictions that have adopted the "tainted" approach. See e.g., United States v. Greene, 36 M.J. 274, 280 (C.M.A. 1993) (holding that "all reasons proffered by trial counsel be untainted by any inherently discriminatory motives"); State v. Lucas, 18 P.3d 160, 163 (Ariz. Ct. App. 2001) (explaining that "[r]egardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose Batson and taints the entire jury selection process"); McCormick v. State, 803 N.E.2d 1108, 1113 (Ind. 2004) (adopting the "tainted" approach).

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.

In support of the state's strike on the purported basis of age, respondent cited Sumpter v. State, 312 S.C. 221, 439 S.E.2d 842 (1994). Return at 16. Sumpter, as apparently acknowledged by respondent, offers little help to respondent. Return at 16. The Supreme Court explained the prosecutor expressed that his strike of the black male juror was because of the juror's young age. Sumpter v. State, 312 S.C. 221, 223, 439 S.E.2d 842, 843 (1994). However, the defense failed to carry its burden of showing the strike was not exercised in a race neutral way because the age of the juror did not appear in the record. Id. at 223, 439 S.E.2d at 843-844. In essence, the Supreme Court declared it did not have a sufficient record to determine if the prosecutor exercised the strike in a racially discriminatory manner. Id. Thus, this case offers no help to respondent because the record before this Court provides ample evidence that the prosecutor struck Juror #237 in a discriminatory manner.

Important for this Court's analysis, the trial judge expressed disbelief that the solicitor exercised his strike against Juror #237 in a race-neutral way, specifically, his age. Reviewing State v. Easler, 322 S.C. 333, 344, 471 S.E.2d 745 (Ct. App. 1996) aff'd as modified State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997), the judge noted that in Easler, the Court held that age was not considered a racially neutral explanation because the party failed to strike several white venire persons in the same age bracket. R. 29, l. 19 – R. 30, l. 2. Then, the judge noted the defense in this case pointed to "another white male juror who appeared of a youthful age." R. 30, ll. 3-5. The judge asked the solicitor to distinguish his strike of Juror #237 from Easler. R. 30, l. 6. At this point, the solicitor tried to argue that there was a "meaningful" distinction between Juror #237's age

of "almost 20 years old" and the white juror who was born in 1995. R. 30, ll. 7-13. Notably, Juror #110, Alex Humphrey, a white male who was born in 1996, and was not struck by the solicitor. R. 337 - 339. Thus, this juror was only five years older than Juror #237. Furthermore, Juror #90, Allison Gregg, who was born in 1998, was not struck by the solicitor. R. 337 - 339. Thus, this juror was only three years older than Juror #237. The first alternate, Juror #38, Ashley Carlson, was born in 1997, and she was not struck by the solicitor. R. 31, ll. 9-12; R. 337 - 339. All three jurors were white. Perhaps realizing his dilemma, the solicitor switched course and told the judge that he struck Juror #237 because "he did not appear ... to have - - be as focused and appreciate the gravity of the situation that he was about to undertake potentially, if selected." R. 30, ll. 14-22. As previously explained, the solicitor's alternate reason cannot save this strike because it was exercised in a racially discriminatory manner based upon the reason initially provided by the solicitor – Juror #237's age.

Respondent appears to request this Court overrule the "tainted" approach adopted by our Supreme Court under the guise of arguing for an examination of the "totality of all of the facts and circumstances." See Return at 15. This Court must reject respondent's invitation. The employment status and demeanor of Juror #237 are not part of the "facts and circumstances." Rather, those observations were offered as alternative reasons for the solicitor's exercise of his peremptory strike. However, petitioner agrees with respondent that determining 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 petitioner 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 petitioner belonged from the jury also supports petitioner argument on appeal that the trial court erred in failing to grant petitioner's motion to quash the jury panel.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and allow full briefing of the issues.

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This 14th day of August, 2023.