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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
Grace G. Knie, Circuit Court Judge

Case No. 2020-GS-42-05458
Case No. 2020-GS-42-05459
Case No. 2020-GS-42-05460
Appellate Case No. 2022-000485

The State,

Respondent,

v.

Donald King Pollock,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court commit reversible error in finding a gender-based *Batson* violation with respect to one of the defense's peremptory juror challenges?

STATEMENT OF THE CASE

Appellant, Donald King Pollock, was indicted by the Spartanburg County grand jury on a charge of criminal sexual conduct with a minor, first degree; a charge of criminal sexual conduct with a minor, second degree; and two charges of criminal sexual conduct with a minor, third degree. R. pp. 1-6, 42-43. He was tried before a jury on April 4-6, 2022, in the Spartanburg County General Sessions Court, with Judge Grace G. Knie presiding. R. p. 15. The jury returned a verdict of not guilty with respect to the first-degree count and verdicts of guilty with respect to the second- and third-degree counts. R. pp. 7-8, 173-74. Judge Knie sentenced him to a term of 15 years on the second-degree court, consecutive to the sentences for the third-degree counts. On the third-degree counts, she sentenced him to concurrent terms of 15 years, suspended to time served, followed by five years' probation, with those terms consecutive to the term for the second-degree count. R. pp. 9-14, 175.

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING A GENDER-BASED *BATSON* VIOLATION WITH RESPECT TO ONE OF THE DEFENSE'S PEREMPTORY JUROR CHALLENGES.

During jury selection, the defense exercised ten peremptory challenges, striking two male and eight female prospective jurors. R. pp. 104-11. The state made a motion pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), based on the eight strikes of female

prospective jurors. R. pp. 116-17. The defense articulated its reasons for each of the eight strikes. R. pp. 117-24. After argument of counsel, the trial judge found the majority of the strikes were gender neutral but stated there were two that gave her concerns, the strikes of jurors number 82 and 118. R. p. 127. The court found the reasons given for those strikes were "a pretext concerning gender." R. p. 127. The court quashed the jury. R. p. 128. When the new jury was drawn, one of those jurors, juror 82, was seated. R. p. 133, lines 3-8. The trial court's finding of a *Batson* violation with respect to juror 82 was reversible error.

In *Batson*, the United States Supreme Court held the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a prosecutor from exercising peremptory challenges to prospective jurors on account of their race. *See Batson*, 476 U.S. at 84-89; U.S. Const. amend. XIV. The Court established a three-step analysis to be conducted when a *Batson* objection is made. *Id.*, 476 U.S. at 96-98. In later decisions, the Court refined the original *Batson* analysis and extended the principles of *Batson* to strikes based on gender and to strikes made on behalf of criminal defendants. *See Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (clarifying step two of the *Batson* analysis); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-46 (1994) (applying *Batson* to gender-based strikes); *Georgia v. McCollum*, 505 U.S. 42, 48-59 (1992) (extending *Batson* to strikes by criminal defendants).

As the analysis is now framed, when a party makes a prima facie showing that a juror challenge was race based or gender based (step one), the proponent of the juror challenge must articulate a race-neutral or gender-neutral explanation for the peremptory challenge (step two). *See State v. Giles*, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014); *State*

v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007); *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006), *abrogated on other grounds*, *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016); *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996), *overruled on other grounds*, *State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). Once the proponent of the juror strike offers a facially neutral explanation (step two), the objecting party has the burden to establish that the stated explanation is mere pretext and the juror was struck through purposeful discrimination (step three). *See Giles*, 407 S.C. at 18, 754 S.E.2d at 263; *Evins*, 373 S.C. at 415, 645 S.E.2d at 909; *Rayfield*, 369 S.C. at 112, 631 S.E.2d at 247. The objecting party may establish pretext either by showing that a similarly situated person of another race or other gender was seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. *See Evins*, 373 S.C. at 415, 645 S.E.2d at 909; *Rayfield*, 369 S.C. at 112, 631 S.E.2d at 247; *Adams*, 322 S.C. at 124, 470 S.E.2d at 372.

A mere statement that the articulated reason is pretext, without more, is insufficient to meet the burden of establishing purposeful discrimination. *See State v. Inman*, 409 S.C. 19, 28, 760 S.E.2d 105, 109 (2014). A conclusory assertion of racial motivation is also insufficient. *See State v. Flynn*, 368 S.C. 83, 86, 627 S.E.2d 763, 765 (Ct.App. 2006). The question of purposeful discrimination is evaluated on the basis of the totality of the facts and circumstances, and a relevant factor to consider is the selection and composition of the jury. *See State v. Shuler*, 344 S.C. 604, 615, 621, 545 S.E.2d 805, 810, 813 (2001); *State v. Haigler*, 334 S.C. 623, 629-30, 515 S.E.2d 88, 91 (1999); *State v. Rogers*, 405 S.C. 520, 534-35, 748 S.E.2d 247, 255 (Ct.App. 2013); *State v. Ford*, 334 S.C. 59, 64, 512 S.E.2d 500, 503 (1999). The ultimate burden of establishing a *Batson* violation rests upon the

party objecting to the juror strike, and that party's burden is to prove purposeful discrimination. *See Giles*, 407 S.C. at 18, 754 S.E.2d at 263; *Evins*, 373 S.C. at 415, 645 S.E.2d at 909; *Adams*, 322 S.C. at 124, 470 S.E.2d at 372.

The appellate court ordinarily reviews a ruling on a *Batson* motion under a clearly erroneous standard. *Shuler*, 344 S.C. at 615, 545 S.E.2d at 810; *State v. Scott*, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct.App. 2013); *State v. Cochran*, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct.App. 2006). A lower court's finding is clearly erroneous if it is not supported by the record. *Shuler*, 344 S.C. at 620, 545 S.E.2d at 813; *Scott*, 406 S.C. at 113, 749 S.E.2d at 163. However, where the claim of error is the failure to following the required *Batson* hearing procedure, the matter is a question of law and the standard of review is plenary. *State v. Shands*, 424 S.C. 106, 116, 817 S.E.2d 524, 529 (Ct.App. 2018); *State v. Stewart*, 413 S.C. 308, 316, 775 S.E.2d 416, 420 (Ct.App. 2015); *Cochran*, 369 S.C. at 312-13, 631 S.E.2d 294, 297 (Ct.App. 2006). In this case, the trial court committed reversible error in both respects. It failed to follow the *Batson* procedural framework, and it also made findings that were clearly erroneous.

The state contended the defense improperly struck female prospective jurors because of their gender. R. pp. 117-19. The court indicated it would have the state make its prima facie showing and then have the defense respond. R. p. 119. The state contended a prima facie showing was made because the defense struck eight females. R. p. 119. The court then heard, juror by juror, the defense's explanations for its strikes, with the state responding intermittently by either conceding the explanation was gender neutral or arguing it was not. R. pp. 119-27. At the conclusion of this stage of the *Batson* procedure,

the court was required to make findings as to whether the stated reasons were gender neutral. The court took a brief recess, then returned and announced its ruling, as follows:

> I have considered in detail the State's motion, and while I do understand the majority of the strikes that were made by the defendant were gender neutral, there are two that give me concerns, specifically as to Juror 82 and Juror 118. And I am going to take it to the third part of the *Batson* consideration and find that those strikes were a pre -- the reasons given were a pretext concerning gender. Both of these jurors were white females.

R. p. 127, line 18 – p. 128, line 1. This ruling was reversible error, for a number of reasons.

First, the court's analysis was contrary to the procedural framework set out above. The *Batson* procedure places the burden of proving purposeful discrimination on the party objecting to the juror strikes, in this case the state. The trial court was required to follow a three-step process. First, the court was required to have the state make a prima facie showing of discriminatory strikes. Second, the court was required to have the defense give its explanation for each strike and make a determination if the articulated reason was gender neutral. In this case, the court ruled that the majority of the strikes were gender neutral but did not specifically rule on the other two, instead stating those two "give me concerns." R. p. 127, lines 20-22. However, the court then moved to the next step of the *Batson* process. Implicit in its doing so was a finding the reasons articulated by defense counsel were gender neutral, because the *Batson* analysis does not proceed to the third step if the explanation given at the second step is not deemed facially neutral. *See Giles*, 407 S.C. at 23, 754 S.E.2d at 265-66; *Robinson v. Bon Secours St. Francis Health Sys., Inc.*, 382 S.C. 224, 227, 675 S.E.2d 744, 746 (2009).

The court committed an error of law in the third step of the court's analysis. At that stage the burden rested on the state to prove the reasons were pretextual and the strikes were made through purposeful discrimination. The court clearly erred by not requiring the

state to make any showing. Essentially, the court merged steps two and three, and the court made its own finding of pretext, without any showing by the state. The court failed to require the state to establish purposeful discrimination, either by demonstrating another similarly situated juror of the other gender was seated on the jury or by demonstrating the articulated explanation was fundamentally implausible. The court's departure from the mandated *Batson* procedure contravened the principle that the burden rested upon the state, as the party objecting to the peremptory challenges, to demonstrate purposeful discrimination. *See Giles*, 407 S.C. at 18, 754 S.E.2d at 263; *Evins*, 373 S.C. at 415, 645 S.E.2d at 909; *Adams*, 322 S.C. at 124, 470 S.E.2d at 372; *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298.

This Court has reversed where the trial judge similarly abandoned the mandated process and failed to have the objecting party prove purposeful discrimination. In *State v. Cochran*, 369 S.C. 308, 631 S.E.2d 294 (Ct.App. 2006), the Court found error in the trial court's rulings on a number of the defense's juror strikes. Four of its findings of error are particularly instructive, given the circumstances of this case. The Court found error as to two jurors where the trial court did not require the state to prove purposeful discrimination but instead placed the burden on the defendants to disprove discrimination. *See Cochran*, 369 S.C. at 318-19, 321-22, 631 S.E.2d at 300, 302 (jurors 78 and 93). Additionally, the Court found error as to two other jurors where the trial court declared the reasons for the defendants' strikes of those jurors were pretextual, without requiring the state to prove purposeful discrimination. *See id.*, 369 S.C. at 319, 631 S.E.2d at 300-01 (jurors 90 and 41). As in *Cochran*, the trial court in this case erred in its failure to follow the *Batson* analytical framework and require the state to make a showing of purposeful discrimination.

The Supreme Court has also found error where the trial court did not require the state to establish purposeful discrimination as mandated by the *Batson* procedural framework. In *State v. Inman*, 409 S.C. 19, 760 S.E.2d 105 (2014), the state argued the race-neutral reason given by the defendant's counsel was "very pretext," without further elaboration. The Court held the conclusory statement that the reason was pretextual did not meet the state's burden of persuasion. *See Inman*, 409 S.C. at 28, 760 S.E.2d at 109. The Court further held that, by finding counsel's proffered rationale was "not sufficient," the court improperly placed the burden of persuasion on defense counsel to prove the explanation for the strike *was not pretextual*, rather than placing the burden on the state to establish the explanation *was pretextual. See id.*

In this case, the court clearly erred in abandoning the *Batson* analytical framework. The explanation of the strike of juror 82 was gender neutral. The state was required to show the neutral explanation was mere pretext and the strike was the result of purposeful discrimination. The court failed to place that burden on the state and failed to have the state make any showing, instead making its own finding, without explanation, that the reason given by defense counsel was pretextual. The failure to conduct the analysis in the manner dictated by the *Batson* line of cases, cited above, was reversible error.

If the judge's statement that the reasons given for two of the defense's juror strikes "gave her concerns" was a finding that those reasons were not gender neutral, that finding was also erroneous with respect to juror 82, who was later seated on the redrawn jury. Counsel stated that during the initial qualification of the jury it appeared English was not the juror's first language, and counsel thought there might be a discrepancy in what she could understand. R. p. 121, lines 3-10. This reason was clear, specific, and legitimate,

and it was gender neutral. *See State v. Wright*, 354 S.C. 48, 51, 56, 579 S.E.2d 538, 539-40, 542 (Ct.App. 2003) (Court held prosecutor's strike of bilingual juror due to concern about her command of English language was race-neutral consideration), *overruled on other grounds*, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Guess*, 318 S.C. 269, 271, 273, S.E.2d 6, 7, 8 (Ct.App. 1995) (prosecutor struck juror who appeared "a little slow" based on prosecutor's observations of juror's demeanor; Court found those observations to be proper basis to question capability of juror to serve, since they involve communication and comprehension skills, and Court affirmed conclusion that strike was race neutral).

The ability of a juror to understand proceedings being conducted in the English language and to comprehend the legal terminology and principles that would be used throughout the trial is a legitimate concern. Counsel emphasized that the juror's ability to understand the English language would be particularly concerning "once we start getting into arguments and things like that in front on the jury." R. p. 125, lines 12-15. The ability of jurors to understand the English language is of such importance that it is the subject of a question appropriately put to the venire by the trial judge during the juror qualification process. R. p. 26, lines 15-17. Especially at the end of the trial, when the court gives its charge on the law and the attorneys make their closing arguments, the use of unusual words and legal terminology could be an impediment for a juror with only a weak or rudimentary understanding of the English language. Counsel's concern articulated with respect to juror 82 would be applicable to both male and female jurors alike, and it is therefore gender neutral. If the court's stated ruling can be deemed a finding the articulated reason for the strike was not gender neutral, that finding was error. *See Wright*, 354 S.C. at 56, 579 S.E.2d

at 542 (strike based on concern with command of English language was race neutral); *Guess*, 318 S.C. at 273, S.E.2d at 8 (strike based on perception juror was slow, implicating juror's communication and comprehension skills, was race neutral); *see also Purkett*, 514 U.S. at 769 (explanation that juror had long, unkempt hair and a moustache and beard was race neutral); *Stewart*, 413 S.C. at 315-17, 775 S.E.2d at 420 (explanation that strike was because juror was late and appeared disinterested was valid and race-neutral reason); *Rayfield*, 369 S.C. at 113, 631 S.E.2d at 248 (strike because juror had a conservative appearance and was retired was gender neutral); *State v. Tucker*, 334 S.C. 1, 9-10, 512 S.E.2d 99, 102-03 (1999) (strike because juror did not understand the court process was race neutral); *Adams*, 322 S.C. at 125, 470 S.E.2d at 372 (explanation that juror "looked 'too intelligent'" was race neutral).

Upon the defense's articulation of a gender-neutral reason for this juror strike, the burden was on the state to prove the stated reason was mere pretext and the strike of this juror was purposeful gender discrimination. As noted above, the state made no such showing, because the court abandoned the proper analytical framework and did not require the state to make any showing. However, had the state attempted to do so, its effort would have been futile. As previously noted, purposeful discrimination may be established in two ways: by showing that a similarly situated person of the other gender was seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. *See Evins*, 373 S.C. at 415, 645 S.E.2d at 909; *Rayfield*, 369 S.C. at 112, 631 S.E.2d at 247; *Adams*, 322 S.C. at 124, 470 S.E.2d at 372.

With regard to the first method of showing purposeful discrimination, there is no indication on the record that a male juror appearing to have a limited understanding of English was seated on the jury. *Cf. Stewart*, 413 S.C. at 317, 775 S.E.2d at 421 (though state offered racially-neutral explanation for strike of African American jurors, it negated the reason by seating similarly-situated Caucasians); *State v. Oglesby*, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (holding originally neutral reason was proven to be pretext, because white female with same characteristic was seated on the jury).

Nor is there any basis for concluding that the articulated explanation for the strike was fundamentally implausible. To the contrary, a concern about the ability to understand the language is completely legitimate, as discussed above. Moreover, the totality of the circumstances surrounding the selection of the first jury refutes any claim that the stated reason was a pretext for purposeful discrimination. The first jury was composed of three females and nine males. R. pp. 104-11. Importantly, two of the female jurors, jurors 66 and 32, were seated early in the selection process, while the defense still had a number of peremptory challenges available to it. Juror 66 was seated when the defense had nine strikes remaining, and juror 32 was seated when the defense had six strikes remaining. R. p. 105, lines 8-13 (juror 66); p. 106, lines 19-24 (juror 32). Thereafter, the defense exercised two of its peremptory challenges against male jurors. R. p. 107, lines 20-25 (juror 139); p. 108, line 23 - p. 109, line 3 (juror 85). Had the defense been engaged in purposeful discrimination against women jurors, it surely would have exercised strikes against female jurors 66 and 32, who were seated when most of the defense's peremptory challenges had not been used.

This case presents a situation akin to those presented in prior decisions of this Court and the Supreme Court, in which the totality of the circumstances surrounding the selection and composition of the jury negated any claim of purposeful discrimination. In *Rogers*, this Court noted the defendant exercised most of his strikes against white jurors, but he did not strike every white juror and he also struck several black jurors. The Court also noted the ultimate composition of the jury was diverse and found the trial court erred in finding pretext. *See Rogers*, 405 S.C. at 534-35, 748 S.E.2d at 255. In *Cochran*, this Court rejected an argument that there was a pattern of race-based strikes against whites, noting the defendants did not use their peremptory challenges solely on jurors from a single racial group. They selected a white male as their first juror and struck a black female. They struck five white women but also two black women, and they seated one white woman and four white men. *See Cochran*, 369 S.C. at 315-16, 631 S.E.2d at 298-99. In *Ford*, the Supreme Court noted that, while the defendant exercised most of his strikes against white jurors, he did not strike every white juror, instead accepting and placing some white jurors on the first jury. The Court specifically held, "the fact that appellant used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination." *See Ford*, 334 S.C. at 66, 512 S.E.2d at 504 (citations omitted); *see also State v. McMillan*, 400 S.C. 298, 307, 734 S.E.2d 171, 176 (Ct.App. 2012) (same).

In this case, the state did not argue there was purposeful discrimination, and the record demonstrates there was not purposeful discrimination. Defense counsel seated female jurors when he had a number of peremptory challenges remaining, and he struck male jurors as well as female jurors. The fact that he struck more females than males, in and of itself, does not establish purposeful discrimination. The first jury was gender-

diverse, with three females and nine males seated. The court's determination that the language-based strike of juror 82 was a "pretext concerning gender" is clearly erroneous, because it is not supported by the record.

As previously noted, when the court quashed the first jury due to its finding of a *Batson* violation, juror 82 was seated on the redrawn jury. R. p. 133, lines 3-8. Because the trial court erred in its *Batson* ruling as to juror 82, the effect is that appellant was denied his right to exercise his peremptory challenges. *See Scott*, 406 S.C. at 117, 749 S.E.2d at 165. Where a court improperly grants a *Batson* motion and one of the disputed jurors is ultimately seated, the erroneous *Batson* ruling is deemed to have tainted the jury and prejudice is presumed. *See Inman*, 409 S.C. at 29, 760 S.E.2d at 110; *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009); *Scott*, 406 S.C. at 117, 749 S.E.2d at 165; *McMillan*, 400 S.C. at 307-08, 734 S.E.2d at 176-77. Under these circumstances, the proper remedy is a new trial. *See Inman*, 409 S.C. at 29, 760 S.E.2d at 110; *Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009); *Scott*, 406 S.C. at 117, 749 S.E.2d at 165; *McMillan*, 400 S.C. at 307-08, 734 S.E.2d at 176-77.

CONCLUSION

The court committed clear, reversible error in its grant of the state's *Batson* motion with respect to juror 82. Prejudice is presumed, and appellant is entitled to a new trial.

Respectfully submitted,

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