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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 REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provision:

Rules of Court:

REPLY TO RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

The state, as respondent, has filed a brief that articulates a different statement of the issue on appeal than that articulated by the appellant, culminating in the question: "Was this a race-neutral explanation, and was the trial court's finding that the explanation was pretextual clearly erroneous?" *See* Final Brief of Respondent, at 1. Appellant disagrees with the respondent's statement of the issue on appeal.[1] The issue on appeal is the lower court's ruling on a gender-based *Batson*[2] challenge by the state to one of the defense's peremptory juror challenges. Respondent has recharacterized what transpired at trial in an apparent effort to avoid reversal, where the lower court committed reversible error in its ruling on the state's gender-based *Batson* challenge. However, this reply brief will address whether the juror strike was for a race-neutral reason and whether the defense engaged in purposeful racial discrimination.

SUPPLEMENTAL STATEMENT OF THE CASE

In the statement of the case in his principal brief, the appellant articulated the relevant procedural matters in "a concise history of the proceedings," as required by the appellate court rules. *See* Rule 208(b)(1)(C), SCACR. In its statement of the case, the respondent has included references to the prosecution's opening argument and certain trial

[1] In addition to disagreeing with the question framed by the respondent, appellant also disputes two of the factual assertions contained in the respondent's statement of the issue on appeal. First, the defense exercised ten peremptory challenges, not nine. *See* R. pp. 117-18. Eight of those challenges pertained to women, while two were strikes of men. *Id.* Second, defense counsel did articulate the factual basis for his questioning the juror's understanding of English – his own perception and impression based on his observations of the juror during the initial qualification of the jury. *See* R. p. 121, lines 4-8.

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

testimony, and has cited certain pages of argument and testimony from the trial transcript. *See* Final Brief of Respondent, at 2. These passages of the respondent's statement of the case should be disregarded, because their inclusion is contrary to the appellate court rules: "The statement shall not contain contested matters." *See* Rule 208(b)(1)(C), SCACR, made applicable to the respondent's brief by Rule 208(b)(2), SCACR. The substance of the testimony of the complaining witness was a contested matter in this case. The defense theory was that the complaining witness's story was fabricated as part of her mother's attempt to exit her marriage to appellant, while concealing an extra-marital affair and financial improprieties the mother had committed during the marriage. *See* R. pp. 167-70 (defense closing argument to jury). The passages of the respondent's statement of the case based on the state's opening argument and the witness's testimony should not have been included in the statement of the case under the mandate of Rule 208(b)(1)(C).

As noted above, the only issue raised on appeal pertains to a *Batson* ruling during jury selection. Accordingly, both counsel's arguments and the trial testimony are irrelevant to this issue. The Court should not give any consideration to the summary of disputed testimony improperly included by the state in its statement of the case.

REPLY TO STATEMENT OF STANDARD OF REVIEW

The state correctly articulates the two applicable standards of review in this matter: (1) *de novo* (plenary) review with respect to the question whether the trial court followed the mandated *Batson* procedure; and (2) a clearly erroneous standard with respect to the trial court's ultimate determination of the validity of the peremptory strike. *See State v. Cochran*, 369 S.C. 308, 312-13, 631 S.E.2d 294, 297 (Ct.App. 2006), and additional decisions cited in the appellant's principal brief, at page 4. In the final sentence of its

statement of the standard of review, the state cites *State v. Dyar*, 317 S.C. 77, 452 S.E.2d 603 (1994), in which the South Carolina Supreme Court stated, "[t]he trial court's findings regarding purposeful discrimination are accorded great deference and are to be set aside only if clearly erroneous." *See Dyar*, 317 S.C. at 79, 452 S.E.2d at 604. However, the state omits the next, very important, sentence of the *Dyar* discussion of appellate review of a *Batson* determination: "The composition of the jury is a relevant consideration." *See id.*

Appellant's principal brief explained that the question of purposeful discrimination is evaluated on the basis of the totality of the facts and circumstances, with a relevant factor in that analysis being consideration of the selection and composition of the jury, and he cited multiple cases in support of that proposition. *See* Final Brief of Appellant, at 3. In his argument, he addressed this aspect of the analysis of a *Batson* challenge – the composition of the jury selected – and spelled out why the defense's juror strikes and the composition of the first jury selected in this case demonstrate that the defense did not engage in purposeful gender discrimination in the exercise of its peremptory challenges. *See* Final Brief of Appellant, at 10. The state's brief does not refute this aspect of appellant's argument. Indeed, the state's brief does not address this aspect of appellant's argument at all.

ARGUMENT IN REPLY

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

In his principal brief, appellant set out the proper framework for evaluation of *Batson* challenges in this state. *See* Final Brief of Appellant, at 2-4. That framework involves a three-step process for analyzing a claim that a juror strike violates the Equal

Protection Clause of the Fourteenth Amendment to the United States Constitution, as recognized by *Batson* and its progeny. *See* U.S. Const. amend. XIV; *Batson*, 476 U.S. at 96-98; *see also Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (clarifying step two of the *Batson* analysis); *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996) (adopting the standard delineated in *Purkett*), *overruled on other grounds*, *State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). This state's precedents dictate the procedure to be followed in addressing a *Batson* challenge and further establish that failure to follow that procedure is reversible error. *See State v. Inman*, 409 S.C. 19, 28, 760 S.E.2d 105, 109 (2014); *Cochran*, 369 S.C. at 312-13, 318-23, 631 S.E.2d at 297, 300-03.

Appellant challenged the lower court's *Batson* ruling, both in its failure to conduct the mandated three-step analysis and in its ultimate finding of pretext for a gender-based strike of juror 82. The state asserts the procedural aspect of appellant's claim of error is not preserved, citing *State v. Johnson*, 363 S.C. 53, 609 S.E.2d 520 (2005), and the contemporaneous objection rule. In *Johnson*, the Supreme Court found an evidentiary objection was not preserved because the ground argued on appeal was different than the ground argued in the lower court. *See Johnson*, 363 S.C. at 58, 609 S.E.2d at 523. The ruling in *Johnson* is not applicable to appellate review of a trial court's analysis of a *Batson* objection to a peremptory juror strike. Rather, when a party invokes *Batson*, the three-step process established by the United States Supreme Court and adopted by our own Supreme Court in *Adams* must be followed to determine if the opposing party unconstitutionally engaged in purposeful discrimination. *See Inman*, 409 S.C. at 28, 760 S.E.2d at 109; *Cochran*, 369 S.C. at 312-13, 318-23, 631 S.E.2d at 297, 300-03. At the second step of that process, where the burden rested upon the defense, it met its burden by articulating a

gender-neutral reason for its strike of juror 82. At the third step, the burden returned to the state to show the reason offered was mere pretext to engage in purposeful discrimination. *See Cochran*, 369 S.C. at 315, 322, 631 S.E.2d at 298, 302. The court committed reversible error in failing to require the state to make any showing at this stage of the *Batson* procedure before making a ruling that a *Batson* violation was committed. The contemporaneous objection rule is inapplicable in this context, and nothing more was required of the defense to preserve all aspects of the *Batson* issue raised in this appeal.

Throughout its brief, the state makes the assertion that, when the *Batson* challenge was made, the defense was required to give ***both*** a race-neutral and a gender-neutral reason for its strike. *See* Final Brief of Respondent, at 4, 9. This is an incorrect statement of the proper analysis. Here, the basis of the state's objection was that the defense improperly struck eight women, *see* R. pp. 116-17, 119, and the ensuing argument and analysis were premised on the gender-based nature of the state's objection. A review of the many *Batson* decisions of our Supreme Court and Court of Appeals demonstrates that the only response required of the party who exercised the challenged juror strike is to state a reason that is neutral with respect to the ground – whether gender or race – upon which the *Batson* challenge is made. When the challenge is race-based, the party who struck the juror must give a race-neutral reason. *See*, *e.g.*, *Inman*, 409 S.C. at 26, 760 S.E.2d at 108. When the challenge is gender-based, the striking party must give a gender-neutral reason. *See*, *e.g.*, *State v. Rayfield*, 369 S.C. 106, 112-13, 631 S.E.2d 244, 247-48 (2006), *abrogated on other grounds*, *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). Our courts have never required that a neutral reason be given with respect to an improper purpose not raised by the objecting party. The state did not object on the ground of purposeful racial

discrimination, and the argument of the attorneys and the ruling of the court were not made on that ground. Rather, the objection was that the defense's strikes were gender-based, and the court's ruling was that the reasons given for the strikes of jurors 82 and 118 "were a pretext concerning gender." R. p. 117, lines 4-5; p. 119, lines 10-13; p. 127, line 18 – p. 128, line 1.

The state also mischaracterizes what actually occurred during the *Batson* proceedings, stating, "the trial court followed the correct Batson procedure, requiring Pollock to provide a race-neutral and gender-neutral explanation for his strike . . . ." and further stating, "[t]he trial court correctly quashed the jury because Pollock failed to provide a race-neutral justification for the strike . . . ." *See* Final Brief of Respondent, at 4. This mischaracterization is later repeated, with the brief stating, "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." *See* Final Brief of Respondent, at 6. Contrary to these statements in the respondent's brief, the court did not require counsel to articulate a race-neutral reason and did not find a *Batson* violation on the basis of a failure to provide a race-neutral justification. Rather, the objection, the argument, and the court's ruling were gender based, as summarized in the paragraph to follow, with citations to the transcript.

When defense counsel stated that its reason for striking juror 82 was the juror's understanding of the English language, the prosecutor briefly interjected "that would be a race based strike." R. p. 121, lines 11-12. Notwithstanding this remark, however, in the same passage the prosecutor adhered to the gender-based argument, stating, "The State's

position is that is not a gender neutral strike."[3] R. p. 121, lines 15-16. The defense then stated, "that's not a race-based strike, that's a knowledge strike." R. p. 121, lines 17-18. No further mention of race was made – not by the state, not by the defense, and not by the court. Over the lengthy remaining argument, both attorneys addressed whether the stated reasons for the challenged strikes were gender neutral, and the court's ruling was grounded on the gender-based nature of the objection. R. p. 124, lines 22-23 (prosecutor); p. 125, lines 5-9 (prosecutor); p. 126, lines 1-3 (defense attorney); p. 126, lines 4-6 (defense attorney); p. 126, lines 18-22 (prosecutor); p. 127, line 18 – p. 128, line 1 (court).

Despite the prosecutor's brief interjection that the strike was race based, the clear ground of the state's objection was gender, as specifically stated immediately after the brief remark and as repeated continuously over the ensuing pages of argument. Both attorneys were arguing the question whether the stated reasons for the defense's strikes were gender neutral, and the court premised its ruling on "a pretext concerning gender." The state's attempt to recast this juror strike as impermissibly race based cannot be harmonized with the record of the proceedings, as documented by the transcript.

In setting out the framework for analysis of a *Batson* objection, the state's brief, at page 5, quotes a passage from *State v. Rogers*, 405 S.C. 520, 525, 748 S.E.2d 247, 250 (Ct.App. 2013), which is actually a quotation in *Rogers* from *Purkett*. The quoted passage, however, gives an incomplete picture of what occurs at step three of a *Batson* analysis, leaving the impression that no burden rests on the objecting party at that juncture but

[3] The respondent's brief incorrectly claims, "the State argued Pollock's strike of Juror Kul violated Batson because it was not race-neutral . . . ." *See* Final Brief of Respondent, at 5. On the contrary, the state did not argue the strike was not race neutral, instead stating, "The State's position is that is not a gender neutral strike." R. p. 121, lines 15-16.

instead the trial court merely rules. In fact, more is required. As the *Rogers* Court further explained,

> "At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." . . . "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." . . . "This burden is generally established by showing similarly situated members of another race were seated on the jury." . . . "Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment." . . . "When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo."

See Rogers, 405 S.C. at 526, 748 S.E.2d at 250-51 (citations to South Carolina Supreme Court and Court of Appeals decisions omitted).

The respondent's brief also contends, at page 6, that the state responded to the defense's explanation by arguing the explanation was pretextual. In fact, the state did not ever assert a claim of pretext. Rather, the state's position was that the articulated reason for the strike of the juror was not gender neutral. R. p. 121, line 16; p. 124, lines 22-23. When the reason was given, the prosecutor opined the juror did not appear to have any issues with understanding or answering questions, and the prosecutor referenced the court's earlier inquiry as to the jurors' understanding English. R. p. 121, lines 12-15; p. 124, line 25 – p. 125, line 2. However, the prosecutor did not contend the reason given was fundamentally implausible or make any argument or showing that the defense's concern about the juror's understanding of the language was mere pretext. The state did not argue or demonstrate that another similarly situated male juror was seated. Nor did the state

argue that the jury as selected demonstrated purposeful discrimination.[4] Step three of the process was simply not conducted. Rather, the court ruled immediately following the attorneys' arguments with respect to gender neutrality, without requiring any showing as to pretext or purposeful discrimination. This is the exact error recognized by our appellate courts in *Inman* and *Cochran*, as more fully discussed in the principal brief of appellant, at pages 6-7.

To the extent the prosecutor disagreed with the defense's perception that the juror may not have had a good understanding of the English language, that disagreement does not alter the gender-neutral nature of the defense's reason for the strike, and a showing by the state of purposeful discrimination was still required. Nor was the defense required to make any evidentiary showing that in fact the juror had a less-than-perfect understanding of the English language. In *Cochran*, the defense asserted it struck one juror, juror 63, because she had the same last name as a local deputy sheriff. The state countered that neither the defendants nor their counsel knew for sure whether that juror was related to the deputy with the same last name. The appellate court did not hold the defense was required to establish a relationship between the juror and the deputy. Rather, the appellate court found error in the trial court's finding of pretext, stating the reason for striking the juror was race-neutral and the state failed to carry its burden of proving purposeful discrimination. *See Cochran*, 369 S.C. at 316, 631 S.E.2d at 299.

[4] In fact, the jury selection process and the composition of the jury selected refute any claim of purposeful gender discrimination, as explained in detail in appellant's principal brief, at page 10. With respect to the state's newly raised racial challenge, the selection process and the composition of the jury also refute any claim of purposeful racial or ethnic discrimination, as explained in this reply brief, *infra* pp. 15-16.

Similarly, here, although the prosecutor had a different impression of the juror's ability to understand English, her differing perception does not alter the gender-neutral nature of the explanation and does not establish purposeful discrimination. The trial court made no finding as to the juror's ability to understand English and made no finding that defense counsel's impression and stated concern about the juror's understanding of the language was not credible. Rather, the court merely concluded the stated reason was pretext, without requiring the state to meet its burden of proving purposeful discrimination. As with juror 63 in *Cochran*, this ruling was error. *Id.*

Contrary to the state's assertions throughout its brief, the lower court did not make a ruling that the defense's stated reason for striking the juror was not gender neutral, nor did the court find the reason was not race neutral. Had it done so, the ruling would have been clearly erroneous, because the question of a juror's understanding of the language is neutral, applying with equal force to jurors of either gender and to jurors of any race. *See State v. Wright*, 354 S.C. 48, 55-56, 579 S.E.2d 538, 542 (Ct.App. 2003) (solicitor's uncertainty as to juror's 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).

In its Argument B, the respondent's brief claims defense counsel failed to articulate a basis for the reason given for its strike of juror 82 and further claims counsel admitted there was no reason to believe the juror had any difficulty understanding English. These statements are a mischaracterization of what counsel said. Counsel explained that during the initial juror qualification, counsel "thought it seemed as if English maybe was not the juror's first language," and counsel "thought there might be a little discrepancy on what she could understand." R. p. 121, lines 4-8. Counsel's impression was clearly premised

on counsel's own observations and perceptions of the juror during the initial qualification. Moreover, counsel's so-called admission that the juror could understand the English language was expressly qualified by counsel's stated concern that she would have difficulty with the language (*i.e.*, legal terminology) that would be used during arguments to the jury. R. p. 124, lines 11-15.

This Court has previously recognized an attorney's perception of a juror's ability to understand the language to be a proper race-neutral basis for a peremptory challenge. *See Wright*, 354 S.C. at 55-56, 579 S.E.2d at 542. Indeed, this Court has held that a juror's demeanor is an appropriate basis for a challenge based on concern about the juror's communication and comprehension skills. *See State v. Guess*, 318 S.C. 269, 271, 273, S.E.2d 6, 7, 8 (Ct.App. 1995) (solicitor "felt like" the juror "was a little slow" . . . "my initial impression of him was that he really didn't have a good grasp of what was going on . . ."). Here, as in *Guess*, counsel's concern about this juror's understanding was based on what he observed in the qualification of the jurors, and counsel's observations and perceptions of the juror are a legitimate and proper basis for a strike. Indeed, in other contexts, our courts have upheld explanations premised on what an attorney perceived about a juror based on the juror's appearance and demeanor. *See*, *e.g.*, *State v. Stewart*, 413 S.C. 308, 315-17, 775 S.E.2d 416, 420 (Ct.App. 2016) (strike because juror was late and appeared disinterested); *Rayfield*, 369 S.C. at 113, 631 S.E.2d at 247-48 (strike because juror had a conservative appearance and was retired).

The state's entire Argument B is an effort to have this Court affirm the court's *Batson* ruling on the basis that the strike of juror 82 was improper racial discrimination, a ground not asserted in the court below. As part of that argument, the state surmises that

counsel's impression as to the juror's understanding of English "must have been based on Kul's name, appearance, or a combination of the two," and it argues that stereotypes based on ethnicity are not race-neutral. *See* Final Brief of Respondent, at 9. Neither the broad racial discrimination argument nor the more specific points of the argument were articulated by the prosecutor in the court below, and the state cannot avail itself of these alternative rationales for a claim of purposeful discrimination on appeal. *See Inman*, 409 S.C. at 28-29, 760 S.E.2d at 109-10; *State v. Evins*, 373 S.C. 404, 417, 645 S.E.2d 904, 910 (2007). In both *Inman* and *Evins*, our Supreme Court rejected giving consideration to arguments of pretext raised on appeal but not articulated in the lower court during the *Batson* hearing. In *Inman*, addressing new arguments of pretext crafted by the state as the respondent in a defendant's appeal, the Court explained:

> However, because the State did not raise these arguments during the *Batson* hearing, we find these post hoc justifications untimely. . . . Regardless of their veracity in hindsight, neither explanation helped the State carry its burden of persuasion *at the time of the hearing*, and the circuit court therefore improperly granted the State's *Batson* motion and denied Appellant his right to exercise his peremptory challenges.

See Inman, 409 S.C. at 29, 760 S.E.2d at 110 (emphasis in original) (citation to *Evins* omitted). Similarly in this case, the state's arguments of pretext and purposeful racial discrimination made in its appellate brief, but not articulated during the *Batson* hearing in the court below, cannot serve as the basis for justifying the trial court's determination that the strike of juror 82 was a pretext concerning gender. As in *Inman*, the state did not meet its burden of persuasion in the court below to establish purposeful discrimination, and the lower court erred in granting the *Batson* motion.

The state invokes decisions of other jurisdictions that have no bearing on the issue before the Court. Indeed, on page 10 of its brief, the state cites two cases that did not

involve *Batson* challenges at all. Rather, those cases addressed the propriety of lower court rulings made after it came to light that a juror who had been seated had a language difficulty. In *United States v. Speer*, 30 F.3d 605, 610-11 (5th Cir. 1994), the appellate court upheld a trial judge's decision to excuse a juror and seat an alternate after concerns surfaced about the juror's ability to understand. In *United States v. Campbell*, 544 F.3d 577, 580-83 (5th Cir. 2008), the reviewing court rejected a claim of double jeopardy upon retrial after a mistrial was granted in the first trial, due to the limited ability of a juror to understand English that precluded the juror from meaningfully taking part in deliberations. Respondent's statement of the holding of *Campbell* is incorrect. *Campbell* did not involve a "finding juror's language difficulties were race-neutral justification for strike," as the state's brief asserts. *See* Final Brief of Respondent, at 10-11 (parenthetical explanation of citation to *Campbell*). In *Campbell*, the appellate court was ***not*** addressing a juror strike and ***did not*** decide if the reason for a strike was race neutral. These decisions cited by the state are not germane to the *Batson* issue presented in this appeal.

At page 11 of its brief, the state cites additional decisions from federal circuits that applied the deferential "clearly erroneous" standard in the context of strikes based on jurors' ability to understand or communicate. However, those cases involved actual findings by the lower court as to the ability of the juror to comprehend the language or the believability of the party's explanation for the strike, a situation not presented in this case. Those authorities, in addition to being from foreign jurisdictions, simply do not pertain to the situation presented in this appeal. In *United States v. Canoy*, 38 F.3d 893 (7th Cir. 1994), the lower court found the government's articulated reason – a concern with whether English was the juror's first language that made the juror the least desirable alternate – was

"plausible," even though the court also noted the juror had not exhibited any difficulty speaking or understanding English when questioned. *See Canoy*, 38 F.3d at 898. The circuit court quoted language from *Hernandez v. New York*, 500 U.S. 352, 365 (1991), as to the trial judge's province to determine whether the race-neutral explanation should be believed, and it applied a deferential standard of review to uphold the trial court's finding. *Id.*, 38 F.3d at 899. In this case, unlike *Canoy*, no determination was made by the court as to the plausibility or credibility of counsel's explanation for its strike.

In *United States v. Murillo*, 288 F.3d 1126 (9th Cir. 2002), one of the reasons for a government strike of a juror was its belief the juror had difficulty communicating with counsel during voir dire. *See Murillo*, 288 F.3d at 1135. The district court made a factual finding, agreeing with the government that the juror had difficulty communicating and rejected the *Batson* challenge. *Id.* The appellate court upheld this ruling under the deferential standard of review. *Id.*, 288 F3d at 1136-37. Unlike *Murillo*, the trial judge in this case made no determination as to the actual ability or inability of juror 82 to understand English.

Canoy and *Murillo* simply are not applicable here, where the lower court made no factual findings akin to the findings under review in those cases. The trial court never addressed and did not make any finding as to the credibility of defense counsel's explanation that he thought there was an issue with the juror's understanding of English. Nor did the trial court make a specific finding that this juror had an adequate understanding of the English language. There simply is no finding similar to those addressed in the cases cited by the state with respect to which this Court may apply a deferential standard of review. The court did not make any finding whatsoever as to the credibility of counsel's

explanation or as to the language comprehension of this juror. Rather, the court summarily concluded the defense's explanation was a pretext concerning gender.

If this Court entertains the argument newly crafted by the state as to purposeful racial discrimination in the defense's strike of juror 82, notwithstanding the state's failure to put forth such a *Batson* challenge in the court below, the Court must evaluate that argument in light of the totality of the facts and circumstances, including 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); *Dyar*, 317 S.C. at 79, 452 S.E.2d at 604; *Rogers*, 405 S.C. 520, 534-35, 748 S.E.2d 247, 255 (Ct.App. 2013). The totality of the facts and circumstances – including the strikes exercised by the defense and the racial composition of the first jury selected – refutes that the defense was engaged in purposeful racial discrimination.

Juror 82 was a white female. R. p. 106, lines 1-2; p. 120, lines 22-24. The first jury selected was composed of eight whites (jurors 107, 43, 5, 32, 45, 26, 33, and 76), two Asians (jurors 66 and 4), and two blacks (jurors 135 and 87). R. pp. 104-10. Two alternates were chosen, a Hispanic (juror 10) and a white (juror 21). R. p. 110. As to the jury itself, the defense seated seven white jurors while it still had strikes available, and it struck six white jurors, including juror 82. Its other four strikes were exercised against one Hispanic and three black jurors. As to the alternates, the defense did not exercise a strike, seating both a Hispanic and a white alternate. In the context of the actual exercise of the defense's peremptory challenges and the composition of the actual jury selected, the state's newly-articulated race-based *Batson* argument with respect to a single white juror, juror 82, is baseless.

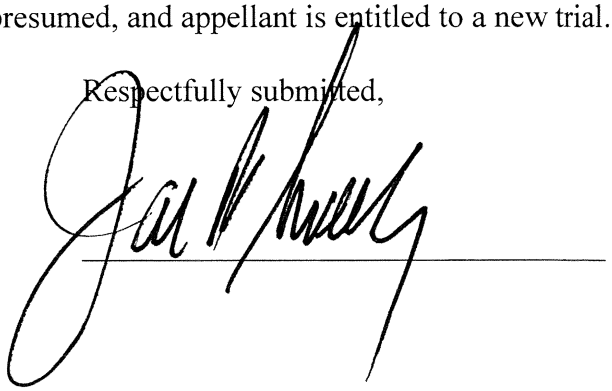
To the extent the state's new challenge to the strike of this juror is premised on ethnicity, the record is completely devoid of information concerning her ethnicity. The state's *Batson* motion in the lower court was not a claim that the defense engaged in purposeful discrimination on the basis of the juror's ethnicity, and no record was created on that question. However, the composition of the jury selected rebuts the state's new argument and clearly demonstrates the defense did not engage in purposeful racial or ethnic discrimination, seating individuals who were white, black, Asian, and Hispanic to serve as jurors or alternates. Viewing the totality of the facts and circumstances, there is simply no basis for a finding that the strike of juror 82 was the product of purposeful racial or ethnic discrimination.

Appellant's principal brief addresses the presumption of prejudice and the requirement of a new trial, where a court erroneously sustains a *Batson* challenge and the previously stricken juror is then seated on the jury that decides the case. *See* Final Brief of Appellant, at 12, and cited authorities. Because juror 82 was seated on the jury that heard and decided appellant's case, upon a finding the lower court erred in its *Batson* ruling, this Court must reverse and grant appellant a new trial.

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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