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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable George M. McFaddin, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DYWAIN CA MEL MCKENZIE,

APPELLANT.

APPELLATE CASE NO. 2024-000741

INITIAL BRIEF OF APPELLANT

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Did the trial court err in granting the state's *Batson* challenge and quashing the jury where appellant's given reasons for exercising peremptory strikes were facially race and gender neutral and pretext was not proven by the state?

STATEMENT OF THE CASE

On July 7, 2022, a Sumter County grand jury indicted petitioner for two counts of attempted murder and two counts of armed robbery. *Indictment. On April 22, 2024, appellant's case was called to trial before the Honorable George M. McFaddin Jr., and a jury. Tr. 1. Charles Brooks III represented appellant and William J. Corbett prosecuted for the state. Tr. 1.

The jury was unable to reach a verdict as to one count of attempted murder. The jury found appellant was not guilty of the second count of attempted murder. However, the jury found appellant guilty of both counts of armed robbery. Tr. 418, l. 18—419, l. 6. Judge McFaddin sentenced appellant to consecutive terms of twenty years' imprisonment for each count of armed robbery. Tr. 431, ll. 18-22; Sentence sheet.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases, [the appellate court] will review errors of law only." *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* The reviewing court "is limited to determining whether the trial court abused its discretion" and "does not re-evaluate the facts based on its own view of the preponderance of the evidence." *Id.* The appellate court "simply determines whether the trial court's ruling is supported by any evidence." *Id.*

ARGUMENT

The trial court erred in granting the state's *Batson* challenge and quashing the jury where appellant's stated reasons for exercising the peremptory strikes were facially race and gender neutral and pretext was not proven by the state.

Relevant facts

On April 23, 2024, the trial court held jury selection for appellant's case. Tr. 29-72. Initially the state did not use any of their five peremptory strikes and counsel for appellant used nine of their ten peremptory strikes. Counsel for appellant struck jurors: 127 a white man, 20 a black woman, 51 a white woman, 61 a white man, 113 a white man, 177 a white woman, 83 a white woman, 177 a white woman, and 94 a white man. Random strike sheet 1; Tr. 29-37. During jury selection the solicitor requested the court "please note a state's motion for the record." Tr. 34, ll. 6-8. The composition of the selected jury was 6 black women, 3 black men, 2 white women, 2 white men, and 1 man whose identified race was Asian. Random strike sheet 1.

At the conclusion of jury selection, the solicitor made a *Batson*[2] motion arguing that, of the nine strikes defense counsel used, eight of the jurors "identified as white." The solicitor argued the defense violated *Batson* by deliberately attempting to remove white jurors from the panel. Tr. 38, ll. 7-22. The court listed the challenged jurors one-by-one and defense counsel gave a race neutral reason for each peremptory strike.

Defense counsel said juror 127, Zachariah Mues, was struck due to his being employed in "communication field." Appellant voiced concern to defense counsel that 127 could be prone to conspiracy theories because of his line of work. Tr. 39, ll. 13-23. The solicitor responded there

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

were other jurors seated, "specifically black males of similar age and similar work." Tr. 40, ll. 1-7. However, he offered no jurors specifically that met that criteria. Next was juror 51, Loren Infinger, defense counsel explained this juror stood during *voir dire* because she knew a state's witness and that was why she was struck. Tr. 41, l. 16—42, l. 1. The solicitor offered no response to that explanation. Defense counsel explained he struck juror 61, Joseph Gargan, due to his employment in insurance. Counsel clarified that he believed individuals employed in insurance are typically conservative and not sympathetic to criminal defendants. Tr. 42, ll. 2-12; 42, ll. 19-25. The solicitor's response did not address how this reason was mere pretext.

Next defense counsel struck juror 113, Jeremy Mayhew, because his Facebook page indicated he was a "frequent visitor of OAN," again explaining he was likely very conversative and pro-gun and pro law enforcement. Tr. 43, l. 4—45, l. 16. After asking for clarification the solicitor declared "we don't believe that a person's position on gun control is reflective of their political persuasion." Tr. 44, l. 2—45, l. 10; 45, ll. 12-14. Defense counsel stated he struck juror 177, Jennifer Welch, because of her employment as a nurse stating, "we tend to not have nurses, particularly when we're talking about injuries, wounds, bullets." Tr. 45, ll. 17-25. Counsel said he struck juror 83, Julie Hobday, because she was Facebook friends with a solicitor in the same office as was prosecuting appellant's case. Tr. 46, ll. 11-25. Regarding this juror the solicitor asserted that although he did not use Facebook, "I'm not sure that a Facebook connection, as tenuous as they can be, is any reflection of a race-neutral reason." Tr. 47, ll. 2-7.

Regarding juror 77, Joshua Hayden, counsel explained the juror's wife was employed in insurance and he was struck for that reason. Tr. 47, l. 16—48, l. 6. Lastly, counsel explained juror 94, Brian Jamison, was struck because he was a former "cop" and "has a bunch of pro law enforcement positions" on his social media posts. Tr. 48, ll. 8-16; 49, ll. 2-12.

The solicitor listed some of the occupations of the seated jurors arguing that some of the seated jurors may also have "conservative leanings." Tr. 50, l. 1—51, l. 4. Defense counsel responded he did not have to "prove" what his client actually believed regarding the struck jurors but were merely required, and in fact did, state race and gender-neutral reasons for exercising their strikes. Tr. 51, ll. 6-25.

The court granted the state's *Batson* motion and ruled a new jury would be selected. Tr. 54-57. The court found defense counsel's reasons for striking at least three of the jurors was not "fundamentally proper." Tr. 56, ll. 1-12. The court cited *Payton v. Kearse*[3] for the proposition that an insufficient strike would be a generalization about an entire group and found "at least three jurors were struck just because they were in a group." Tr. 56, ll. 1-5.

Subsequently, a second jury was selected for appellant's trial. Tr. 60-67. During selection the state used four peremptory strikes and defense counsel used three strikes. Tr. 60-67. The state struck jurors: 123, 174, 46, and 69 all these jurors were black women. Defense counsel struck jurors: 20 a black woman, 26 a white man, and 113 a white man. The selected jury was composed of four white men, two black men, two white women, five black women, and one additional woman.[4] Tr. 60-66; Random strike sheet 2. During jury selection defense counsel made a motion which was heard after selection was complete. Tr. 62, l. 1.

When the jury was excused defense counsel made a *Batson* motion arguing the solicitor struck all black women and the jury should be quashed and re-selected. Tr. 67, l. 20—68, l. 4. As with the state's prior motion the court went one by one and asked the state to explain a race and gender neutral reason for their strikes. Tr. 68, l. 7.

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3 329 S.C. 51, 495, S.E.2d 205 (1998).

4 The random strike sheet has the letter M under race. Counsel is unsure what M stands for, but this juror was not black or white.

The solicitor began their explanation stating that of the twelve jurors selected six were black women, seated by the state which comprised half the jury. Tr. 68, ll. 8-12. Next the solicitor explained they struck juror 123, Ayana Miller, 174, Monica Washington, and 46, Kimberly Davis, because they were single and unemployed. The solicitor struck juror 69, Dianetta Green, for the same reasons and additionally stated juror 69 seemed to have difficulty responding to the court's questions. Tr. 68, l. 13—69, l. 17. The solicitor argued *State v. Ford*,[5] and *State v. Green*,[6] were supportive law stating lack of employment or place of employment were sufficient reasons to strike a juror. Tr. 69, l. 18—70, l. 3.

Defense counsel responded the state's reasons were pretextual and noted during the first selection the state sat Juror 46 and her status as single and unemployed had not changed. Counsel requested the jury be quashed and re-selected for a third time. Tr. 70, ll. 5-17.

The court denied defense counsel's motion and found unemployment was a sufficient reason to justify the solicitor's striking only black women during jury selection. The court also noted the panel's composition was a factor and it was made up of seven black individuals and five white individuals. Tr. 71, l. 17—72, l. 20.

During trial, two of the primary jury members, juror 172 a black woman and juror 181 a non-white woman[7] were excused and both alternates, juror 48 a white man and juror, 41 a white male, deliberated in appellant's trial. The composition of the jury that deliberated was: four white men, two white women, four black women, and two black men. Tr. 83, l. 4—85, l. 2; 185, l. 11—186, l. 15; 187, ll. 19; Random strike sheet 2.

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5 334 S.C. 59, 512 S.E.2d 500 (1999).

6 306 S.C. 94, 409 S.E.2d 785 (1991).

7 As stated above this juror was shown as M under race. Counsel is unsure what M stands for but this juror was not black or white. Random strike sheet 2.

Discussion

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.[8] 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 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

[8] 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).

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.*

Here, defense counsel gave "clear and reasonably specific" reasons as to why he struck the contested jurors that were race-neutral. Counsel and appellant researched the potential jurors including visiting their social media accounts to glean information that may not be available in the *voir dire* or during qualification. Counsel's race-neutral reasons included type of employment, social connections to witnesses and to the prosecutor's office, and indications of pro law enforcement leanings.

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).

Here, the state did not meet its burden of showing mere pretext. Instead, the solicitor made a false equivalence between a struck juror that was a nurse and a seated juror that worked in a medical office, which were clearly different types of employment. Tr. 45, l. 17—46, l. 8. The solicitor minimized the significance of struck jurors having social connections with state's witnesses and with employees of their office. Tr. 46, l. 14—47, l. 15. The solicitor offered reasons why they disagreed with defense counsel's explanations. However, none of the assertions of the solicitor made a "bona fide showing" that defense counsel sat a juror "who shared nearly every quality with the struck juror other than race to establish pretext."

Additionally, the court cited *Payton v. Kearse*, when granting the motion stating, that an insufficient strike would be a generalization about an entire group and found "at least three jurors were struck just because they were in a group." Tr. 56, ll. 1-5. In *Payton*, the Court found that Payton violated *Batson* because one of the stated reasons for striking a juror was that the juror was "kind of what we refer to as a redneck variety, so to speak." The Court concluded that "[t]he term 'redneck' is a racially derogatory term applied exclusively to members of the white race. [] The use of the term 'redneck' is not a valid race-neutral reason to strike a potential juror, and therefore, the strike is facially discriminatory and violates *Batson*." *Payton*, 329 S.C. at 56, 495 S.E.2d at 208. Here, the group it appears the court was referring to in the ruling are persons working in the fields of insurance or medicine. The state and the court may have disagreed with the reasons offered by defense counsel but the reasons were not facially discriminatory and no pretext was shown or proven.

In *State v. Ford*, the South Carolina Supreme Court reversed Ford's convictions and held the

record did not support finding defendant exercised peremptory strikes in a discriminatory manner. 334 S.C. 59, 512 S.E.2d 500 (1999). In that case, during jury selection Ford used twelve of his thirteen strikes against white jurors. A hearing was held on the state's *Batson* motion. *Id.* at 62, 512 S.E.2d 502.

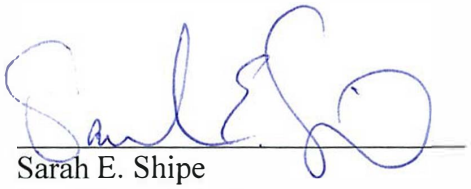
On appeal the Court found Ford's explanations were facially race-neutral. The Court found Ford's explanations were not so fundamentally implausible as to constitute mere pretext without some showing of disparate treatment where the state offered no evidence of pretext as required by step three. The Court reasoned that "although [Ford] exercised most of his strikes against white jurors, he did not strike every white juror. Instead, some white jurors were accepted by [Ford] and were placed on the first jury. The Court went a step further stating, "the fact that [Ford] used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination." *See State v. Tucker*, 334 S.C. 1, 512 S.E.2d 99 (1998) (no *Batson* violation where the State exercised all six of its peremptory strikes against blacks because the explanations were race-neutral); *State v. Casey*, 325 S.C. 447, 481 S.E.2d 169 (Ct.App.1997) (no *Batson* violation where solicitor had neutral reasons for all five strikes used against males).

This case is similar to *Ford*, where appellant's offered reasons were facially race-neutral and where the state failed to show the explanation was mere pretext. Defense counsel's explanation that certain types of employments have potential bias against persons charged with this type of crime was race-neutral. Moreover, as in *Ford*, defense counsel was concerned about the struck jurors pro law enforcement connections. *Compare* with *State v. Richburg*, 304 S.C. 162, 403 S.E.2d 315 (1991) (State's explanation that juror was anti-law enforcement was race-neutral). Like in *Ford*, counsel requested some white jurors be seated. And, while most of counsel's strikes were used against white jurors that fact alone was not sufficient to establish purposeful discrimination.

The record does not to support the trial court's finding of a *Batson* violation. Accordingly, the court erred in ruling defense strikes violated *Batson*, and appellant was denied his right to exercise his peremptory challenges.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.



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This 5th day of March.