STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
The Honorable George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2024-000741

THE STATE, Respondent,

v.

DYWAIN CA MEL MCKENZIE, Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

AMBREE M. MULLER
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

215 N. Harvin St.
Sumter, SC 29150
(803)-436-2185

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the trial judge properly granted the State's motion to quash the initial jury selected in Appellant's trial when Appellant's peremptory strikes were used in a racially and gender discriminatory manner?

STATEMENT OF THE CASE

In July of 2022, the Sumter County Grand Jury indicted Appellant for two counts of attempted murder and two counts of armed robbery. On April 22, 2024, a jury trial was held before the Honorable George M. McFaddin, Jr. The jury was unable to reach a verdict as to one count of attempted murder. The jury found Appellant not guilty of the second count of attempted murder. However, the jury found Appellant guilty of both counts of armed robbery. Appellant was sentenced to consecutive terms of twenty years' imprisonment for each count of armed robbery.

STANDARD OF REVIEW

When reviewing a Batson challenge, an appellate court is "limited to determining whether the trial court abused its discretion." State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). "This court will give the trial court's finding great deference on appeal and review the trial court's ruling with a clearly erroneous standard." State v. Taylor, 399 S.C. 51, 57, 731 S.E.2d 596, 600 (Ct. App. 2012).

ARGUMENT

I.

The trial judge properly granted the State's motion to quash the initial jury selected in Appellant's trial because Appellant's peremptory strikes were used in a racially and gender discriminatory manner.

Appellant argues the trial court erred by granting the State's Batson challenge pursuant to Batson v. Kentucky[1] and quashing the jury because Appellant's stated reasons were facially race and gender neutral and pretext was not proven by the State. Appellant's argument is without merit. The trial judge did not abuse his discretion in quashing the initial jury selected in Appellant's trial because while Appellant did give a reason for striking certain jurors, the trial judge found that the reasoning for three of the jurors was an insufficient reason for a strike because it was a generalization about an entire group. Therefore, the trial judge did not abuse his discretion in granting the State's Batson motion.

Relevant Facts

On April 23, 2024, the trial court held jury selection for Appellants 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. (Tr. 29-72). Counsel for Appellant struck jurors: 127 a white male, 20 a black female, 51 a white female, 61 a white male, 113 a white male, 177 a white female, 83 a white female, 177 a white female, and 94 a white male. (Random Strike Sheet 1). During jury selection, the solicitor requested the court "please note a state's motion for the record." (Tr. 34). At the conclusion of jury selection, the solicitor made a Batson motion arguing that counsel for Appellant used nine of his strikes and of those nine, eight of them "identified as white." (Tr. 38). The court listed the challenged jurors one by one and defense counsel gave his reasoning for each strike.

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

Juror 127 a white male was struck because he was in the communication field and his client believed that would "put him in the world of potential conspiracy theorists." (Tr. 39). The State argued that working in the field of communication does not make you a conspiracy theorist. (Tr. 40). The State was not concerned with the strike of Juror 20, a black female. (Tr. 41). The third strike was Juror 51, a white female, who knew the solicitor and the State was not concerned with that strike. (Tr. 41-42). The fourth strike was Juror 61, a white male, and the reasoning given was that his wife worked in the insurance business and "people who are that deep into the insurance business typically are very, very conservative, and tend to believe [whatever] the state and the police tends to tell them." (Tr. 42). The State argued that the juror's wife was retired from the insurance business and was not the juror herself. (Tr. 42). The fifth strike was Juror 113, a white male, and the reasoning given was that he had pro-gun posts on his Facebook and that tends to mean he was very conservative and would listen to what the police told him. (Tr. 43-44). The State argued that a person's position on gun control is not reflective of their political persuasion. (Tr. 45). The sixth strike was Juror 177, a white female, and the reasoning given was she was a nurse, and nurses tend to be more conservative. (Tr. 45-46). The State argued that defense seated a lady who worked in a medical office and the defense responded that those were not the same jobs. (Tr. 45-46). The seventh strike was Juror 83, a white female, and the reasoning was that she was Facebook friends with another solicitor in the office. (Tr. 46). The eighth strike was Juror 77, a white male, and the reasoning again was his wife was in insurance and followed the same reasoning as Juror 61. (Tr. 47). The State reiterated their position on that reasoning. (Tr. 47-48). The final strike was Juror 94, a white male, and the reasoning was that his Facebook stated he was former police and had many posts supporting law enforcement that made defense counsel feel he would lean towards whatever the State and police told him.

The trial judge in making his ruling explained that the reasoning need not be persuasive or even plausible. (Tr. 55). He then cited to Payton v. Kearse [2] in explaining insufficient strikes. He stated:

> An insufficient strike would be a generalization about an entire group. And I find that at least three jurors were struck just because they were in a group. And it goes on further to say that the reason is just found to be fundamentally implausible, that being the two persons related to either directly or indirectly to insurance work or business and the nurse. As much as I respect Mr. Brooks, I don't find those reasons were fundamentally proper. Sure, the nurse may see lots of violence. But I [don't] find that as a reason to just strike her or justify her strike. And then, the insurance situation, if this were a civil case, I could certainly buy that for a reason. But I cannot here in a criminal case. So I, therefore, grant the motion.

(Tr. 56). Subsequently a new jury was picked composed of seven black individuals, four white individuals and a nonwhite individual.[3] (Tr. 60-67). Two of the previously struck jurors, Juror 177 and 61, were seated on the second jury.

During trial, two of the primary jurors, Juror 172 a black woman and Juror 181 a nonwhite woman were excused and both alternates, Juror 48 a white male and Juror 41 a white male, deliberated in Appellant's trial. The composition of the jury that deliberated was six black individuals and six white individuals. (Random Strike Sheet 2).

Discussion

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). In criminal cases, both the State and the defendant are prohibited from striking jurors on the basis of race. Georgia v. McCollum, 505 U.S. 42 (1992); Batson v. Kentucky, 476 U.S. 79 (1986). "[G]ender, like race, is an

---

[2] Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).
[3] The individual's race was indicated with an "M"

unconstitutional proxy for juror competence and impartiality." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 217, 129 (1994).

A trial judge should employ a three step analysis to determine whether a Batson violation has occurred. "First, the opponent of a peremptory challenge must make a prima facie showing that the challenge was based on race." State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014). If a prima facie showing is made, the trial court must then require "the proponent of the challenge to provide a race neutral explanation for the challenge." Id. "In order for the explanation provided by the proponent of a peremptory challenge at the second stage of Batson process to be legally sufficient and not deny the opponent of the challenge, as well as the trial court, the ability to safeguard the right to equal protection, it need not be persuasive, or even plausible, but 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 with a bearing on it." State v. Giles, 407 S.C. 14, 21-22, 754 S.E.2d 261, 265 (2014). "Reasonable specificity is necessary because comparison to other members of the venire for purposes of a disparate treatment analysis, which is often used at the third step of the Batson process to determine if purposeful discrimination has occurred, is impossible if the proponent of the challenge provides only a vague or very general explanation." Id. "The trial judge need not proceed to step three of the Batson process when no constitutionally permissible reason has been proffered at step two." Id.

"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." State v. Rogers, 405 S.C. 520, 526, 748 S.E.2d 247, 250 (2013). "Once the proponent states a reason that

is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were 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." State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). "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." Payton v. Kearse, 329 S.C. 51, 55, 495 S.E.2d 205, 208 (1998). "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." Hernandez v. New York, 500 U.S. 352, 365 (1991). "A strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes." State v. Cochran, 369 S.C. 308, 327, 631 S.E.2d 294, 304-305 (Ct. App. 2006). The best evidence of whether an explanation for a strike is believable "often will be the demeanor of the attorney who exercises the challenge." Id. The evaluation of an attorney's "state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" Hernandez 500 U.S. at 365 (quoting Wainwright v. Witt, 469 U.S. 412, 428 (1985)). The Supreme Court in Mississippi has continuously held that employment history is a sufficient race-neutral reason for strike a venire member, however, disparate treatment of similarly situated jurors "is strong evidence of discriminatory intent." Stewart v. State, 291 So.3d 738, 743-744, (2020). "Once a discriminatory reason has been uncovered -- either inherent or pretextual -- this reason taints the entire jury selection procedure." Kearse 329 S.C. at 59.

The trial court did not err in granting the State's Batson motion. First, the trial court utilized the proper procedure for the Batson hearing. Counsel for Appellant identified the jurors against whom it asserted the defense improperly struck based on race by stating that defense struck eight white individuals out if its nine strikes. (Tr. 38). The trial court then moved to steps two and three of the process and allowed the proponent of the strikes, the defense, to provide race-neutral explanations for the peremptory strike while the State presented argument as to why the racially neutral reasons given by the defense was mere pretext. (Tr. 38-52).

"Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). Our courts follow the "tainted" approach "where a discriminatory explanation will vitiate the entire selection process regardless of the genuineness of the other explanations for the strike. Kearse at 59, 495 S.E.2d at 210. Defense Counsel used nine strikes and, out of those, just under 89% were white jurors. There were 57 jurors in the jury pool, only 23 of those were white individuals. In viewing the totality of the circumstances striking 8 of the only 23 white jurors is inherently racially discriminatory. The trial judge specifically pointed to three jurors: Jurors 61, 77, and 177. Almost every explanation was basically the same for the disputed ones, that they were conservative based on their occupations of either the juror or the juror's spouses. The trial judge found the explanations given by counsel for Appellant to be fundamentally implausible. Juror 61 and Juror 77 were struck because their wives had some connection to insurance work. The trial judge further noted that he did not find that the reasoning of being indirectly connected to insurance work made them extremely conservative was a plausible explanation. Finally, the State pointed to similarly situated jurors. Defense counsel did not want two white males who were indirectly related to insurance or a white female because she was a

nurse but was satisfied with a black individual, Juror 166, who worked in **medical** insurance as well as a black individual, Juror 68, who worked in the medical office. (Tr. 50). Confronted with the totality of the circumstances in defense counsels peremptory strikes and reasonings, the trial judge did not abuse his discretion in resolving the third step against defense counsel.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

AMBREE MULLER
Assistant Attorney General

ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit

215 N. Harvin St.
Sumter, SC 29150
(803) 436-2185

BY: _____
AMBREE MULLER
Bar # 104213

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3747

ATTORNEYS FOR RESPONDENT

June 20, 2025