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STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY

Court of General Sessions
Hon. Grace G. Knie, Circuit Court Judge

Appellate Case No. 2026-000456

THE STATE,

Respondent,

v.

DONALD KING POLLOCK,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

A party may not strike a juror on the basis of race or gender. After Pollock used eight strikes to eliminate women from the jury, the State challenged the strikes as gender-discriminatory. In response, Pollock explained he struck Juror Seher Kur because “maybe English was not her first language,” but failed to cite any facts to support this assertion. Was this a race-neutral explanation, and was the trial court’s finding that the explanation was pretextual clearly erroneous?

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted Petitioner Donald Pollock for Criminal Sexual Conduct with a Minor (CSCM) in the first degree, CSCM in the second degree, and two counts of CSCM in the third degree. The State alleged a continuing course of sexual abuse by Pollock against his stepdaughter, including groping and repeated instances of digital penetration, beginning when she was in the fourth grade. (R.p.139, pp.141-164). Pollock proceeded to jury trial on April 4–6, 2022, before the Honorable Grace G. Knie, Circuit Court Judge. He was acquitted of CSCM in the first degree and convicted of the remaining charges. Pollock was sentenced to 15 years' incarceration for CSCM 2nd, to be served consecutively with the remainder of his sentence. For CSCM 3rd, he was sentenced to 15 years' incarceration on both counts, with the sentences suspended upon the completion of five years' probation, with these sentences to be served concurrently. On appeal, Pollock alleged the trial court improperly granted the State's motion to quash the initial petit jury based on a claim of discriminatory peremptory jury strikes in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny. The court of appeals affirmed Pollock's conviction in an unpublished decision, and Pollock now petitions for certiorari.

STANDARD OF REVIEW

Whether the trial court employed the correct Batson hearing procedure is a question of law, which is reviewed de novo. State v. Stewart, 413 S.C. 308, 316, 775 S.E.2d 416, 420 (Ct. App. 2015). However, the trial court's determination whether a peremptory strike was exercised in a discriminatory manner is reviewed under a "clearly erroneous" standard. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). Under this standard, the appellate court gives the trial court's finding "great deference." State v. Dyar, 317 S.C. 77, 79, 452 S.E.2d 603, 604 (1994).

ARGUMENT

The trial court correctly quashed the original petit jury because Pollock failed to provide a race-neutral explanation for his peremptory strike, and the record supports the trial court's determination that Pollock's explanation for the strike was pretextual.

The trial court correctly quashed the original petit jury based on a Batson violation. Contrary to Pollock's claim, the trial court followed the correct Batson procedure, requiring Pollock to provide a race- and gender-neutral explanation for his strike of Juror 82, Seher Kul, and hearing the State's response before ruling on the motion to quash. The trial court correctly quashed the jury because Pollock failed to provide a race-neutral justification for the strike, explaining that he assumed—without any evidence—that Kul could not speak fluent English. The trial court determined Pollock's explanation was a pretextual excuse to exclude women from the jury, and this determination was not clearly erroneous. Certiorari should be denied.

A. The trial court employed the correct Batson procedure.

Pollock claims the trial court did not follow the correct Batson procedure. This claim is not preserved for review because Pollock did not raise any objection to the procedure at trial. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (explaining an objection must be contemporaneous and “should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error”). Regardless, the claim is meritless.

The Equal Protection Clause of the Fourteenth Amendment prohibits the striking of a venireperson on the basis of race or gender. Edwards, 384 S.C. at 508–

09, 682 S.E.2d at 822. “When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one.” Id. “Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, **the trial court must then decide** (step three) whether the opponent of the strike has proved purposeful racial discrimination.” State v. Rogers, 405 S.C. 520, 525, 748 S.E.2d 247, 250 (Ct. App. 2013) (quoting Purkett v. Elem, 514 U.S. 765 (1995)) (emphasis added).

That is exactly what occurred in this case. The State raised a Batson challenge, and the trial court and attorneys addressed each juror one by one. (R.pp.116-128). Specifically regarding Juror 82, Seher Kul, who the prosecutor described as a “white female,” Pollock asserted he struck Kul because “it seemed as if English wasn’t her first language.” (R.p.121). In response, the State argued Pollock’s strike of Juror Kul violated Batson because it was not race-neutral and noted that Juror Kul “did not appear to have any issues with understanding or answering questions.” (R.p.121). Finally, the trial court found Pollock’s explanation for striking Juror Kul was pretextual, and quashed the jury.¹

¹ While Juror Kul was seated on the second jury, the other juror identified by the trial court as having been struck based on her gender was not. Accordingly, any error regarding this juror is necessarily harmless. See Rogers, 405 S.C. at 526, 748 S.E.2d at 251 (“If a trial court improperly grants the State’s Batson motion, but none of the disputed jurors serve on the jury, any error in improperly quashing the

The trial court employed the correct Batson procedure. Contrary to Pollock's assertion, the trial court did not absolve the State of its burden of persuasion. At the outset, the court established that the State was required to make a prima facie showing of discrimination, and Pollock in response was required to come forward with a race- and gender- neutral explanation. The court of appeals correctly found the State made a prima facie showing by pointing out Pollock used eight of his ten strikes against women. Pollock responded with neutral explanations for most of his strikes. But for Juror Kul, Pollock explained he struck her because: "I thought that it seemed as if maybe her English wasn't her first language, and I thought there might be a little discrepancy on what she could understand. I don't know that, but that was my only concern on that one, and that was my reason for the strike." (R.p.121).

The State responded to defense counsel's explanation of his strike of Juror Kul by disputing his assertion that the juror appeared to have trouble understanding English, noting there was nothing to support this assumption. The State argued the strike was both "race based" and pretextual. Only then did the court rule that, under the "third part of Batson," Pollock's explanation of his strike of Juror Kul was "pretext concerning gender." (R.p.127-28). The court did not place the burden on

jury is harmless because a defendant is not entitled to the jury of her choice."); State v. McMillan, 400 S.C. 298, 305, 734 S.E.2d 171, 175 (Ct. App. 2012) ("During the second jury selection, juror 34 was seated on the jury, and juror 27 was seated as an alternate. We find we need not discuss juror 27 because he was never required to serve as a juror; therefore, we only discuss the Batson issue as it relates to juror 34.").

the defense to prove their strikes were not pretextual. Cf. State v. Inman, 409 S.C. 19, 24, 760 S.E.2d 105, 107 (2014) (explaining how “the circuit court—and not the State—challenged the sufficiency of Appellant’s counsel’s explanation” and quashed the jury without hearing why the State challenged the strike). Rather, the court heard argument from both sides, including rebuttal argument from the State, and concluded the defense failed to offer a non-pretextual race- and gender-neutral justification for striking Juror Kul. The court explained it “considered in detail the State’s motion. (R.p.127). This scenario is thus distinguishable from Cochran, where the trial court rejected the defendant’s explanation “without hearing from the State.” State v. Cochran, 369 S.C. 308, 319, 631 S.E.2d 294, 300 (Ct. App. 2006). The court was not required to use “magic words” in announcing its ruling. The trial court employed the proper procedure.

B. Pollock failed to provide a race-neutral explanation for his peremptory strike, and the record supports the trial court’s finding that his explanation was pretextual.

Pollock further argues the trial court erred by finding his explanation for striking Juror Kul was not race- and gender-neutral. This determination is reviewed under a “clearly erroneous” standard. Edwards, 384 S.C. at 509, 682 S.E.2d at 822. Accordingly, appellate courts give the trial judge’s finding “great deference” on appeal. Dyar, 317 S.C. at 79, 452 S.E.2d at 604. The trial court correctly quashed the jury because Pollock failed to offer a race-neutral explanation for his strike of Juror Kul, and evidence supports the trial court’s finding that Pollock’s stated reason for the strike was pretextual.

Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. Riddle v. State, 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994). The question whether a party intended to discriminate is a “pure issue of fact,” subject to review under a deferential standard. Hernandez v. New York, 500 U.S. 352, 364 (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. Edwards, 384 S.C. at 509, 682 S.E.2d at 823.

The trial court’s findings of purposeful discrimination rest largely on its evaluation of demeanor and credibility. Sumpter v. State, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994). Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an “evaluation of the [attorney’s] mind lies peculiarly within a trial judge’s province.” Hernandez, 500 U.S. at 365. When a Batson challenge is raised, “the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two), and if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial [or gender] discrimination (step three).” State v. McMillan, 400 S.C. 298, 306, 734 S.E.2d 171, 176 (Ct. App. 2012) (emphasis added).

During the original jury selection, Pollock exercised ten peremptory strikes. Eight of those strikes were against women. (R.p.104–17). When challenged, defense counsel explained the basis for his strike: “I thought that it seemed as if maybe English wasn’t her first language, and I thought there might be a little

discrepancy on what she could understand. I don't know that, but that was my only concern on that one, and that was my reason for the strike." (R.p.121) (emphasis added). The solicitor noted in response that the juror "did not appear to have any issues with understanding or answering questions" and did not stand when the court asked whether any of the prospective jurors had difficulty understanding the English language. (R.p.121). Defense counsel shortly thereafter reiterated his reason for striking Juror Kul: "yes, she can understand the English language, but I don't know once we start getting into arguments and things like that in front of the jury, I wasn't sure that she would, you know, necessarily understand them." (R.p.125).

The trial court found Pollock's explanation was pretextual, and this determination was not clearly erroneous. As the prosecutor noted, and defense counsel admitted, there was no reason to believe Juror Kul had any difficulty understanding English. If there was a reason, such as unintelligible speech or difficult interaction with the court, it does not appear in this record, and defense counsel was required to articulate it. He was unable to do so. The record supports the trial court's finding that defense counsel's explanation was pretextual.

Even accepting arguendo that counsel's explanation was gender-neutral, he still failed the Batson test because he failed to offer a race-neutral reason for the strike. A race-neutral explanation is "an explanation based on something other than the race of the juror." Hernandez, 500 U.S. at 360. Although the State's strike was originally premised on Pollock's gender-based use of strikes, Pollock was required to

state both a gender- and race-neutral basis for his strike. He did not do so, and thus failed to satisfy the second step of the Batson analysis.

“The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.” Hernandez v. Texas, 347 U.S. 475, 479 (1954). Defense counsel candidly admitted he had no information that Kul did not speak fluent English. His assumption otherwise must have been based on Kul’s name, appearance, or a combination of the two. Stereotypes based on ethnicity are not race-neutral. As the Ninth Circuit Court of Appeals explained in United States v. Changco, 1 F.3d 837, 840 (9th Cir. 1993):

So long as [a party] can convince the district court that the potential juror who is being struck in fact has difficulty with English, the justification is race-neutral. It would be much different, of course, if the prosecutor were to strike a potential juror based on her last name alone, and then justified the strike by arguing that people with a particular last name often have trouble understanding English. The latter would be the type of sweeping generalization about the language abilities of racial groups that would make the explanation race non-neutral.

This case is distinguishable from State v. Wright, 354 S.C. 48, 579 S.E.2d 538 (Ct. App. 2003), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). In that case, a defendant alleged the State improperly struck a juror based on her race. The State justified the strike by noting the juror’s “heavy accent” and her occupation as a “bilingual interpreter.” Id., 354 S.C. at 55, 579 S.E.2d at 542. By contrast, in this case Pollock did not cite Juror Kul’s accent, occupation, difficulty communicating with the court, or any other information supporting his suspicion that she could not “understand the English language.”

Counsel candidly admitted that he believed Juror Kul could speak English, and that he had no factual basis to question her ability to understand the proceedings.

(R.p.121, 125).

Pollock was required to articulate **some** reason justifying a concern about Juror Kul's ability to understand. See Changco, 1 F.3d at 840. There is no such evidence in this record. Cf. United States v. Speer, 30 F.3d 605, 611 (5th Cir. 1994) (affirming excusal of juror based on juror's statement that she had trouble understanding English and other objective facts showing her "inability to understand or communicate effectively in English"); United States v. Campbell, 544 F.3d 577, 582 (5th Cir. 2008) (finding juror's language difficulties were race-neutral justification for strike where the juror "asked to speak to the judge again to explain that he was 'not able to participate [in deliberations] because of [his] limited English'" and there were "numerous notes from the jury stating that they were unable to effectively communicate with" the juror). Absent such facts, Pollock's explanation cannot fairly be considered race-neutral.

The lack of facts justifying Pollock's explanation enhances the need for this Court to apply a deferential standard of review. The Ninth Circuit has explained:

The trial judge is in a unique position to determine whether a witness has difficulty communicating, and therefore we grant a high level of deference to the district court's finding on this point. . . . How slowly she spoke, whether she hesitated, how thick her accent was, and what her body language revealed are not recorded in a transcript, yet these are aspects of communication that may be considered by the trial judge.

United States v. Murillo, 288 F.3d 1126, 1136 (9th Cir. 2002). See also United States v. Canoy, 38 F.3d 893, 900 (7th Cir. 1994) (explaining “it is up to the district court, which has had the opportunity to view the challenged juror and to hear the government’s explanation, to assess whether the government is legitimately concerned about language skills or is instead utilizing that concern as a shield for prohibited discrimination”).

Pollock failed the second step of Batson twice: he offered an explanation that was both race-based and pretextual. Pollock did not cite any fact supporting his assertion that he was concerned about Juror Kul’s ability to understand English, and therefore failed to offer a race-neutral explanation for his strike. Further, the record supports the trial court’s finding that this flawed explanation was evidence of a pretextual gender-based strike. When viewed with the great deference owed this determination, the trial court properly quashed the jury. Certiorari should be denied.

CONCLUSION


For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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