STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County
Honorable Paul M. Burch, Circuit Court Judge
Appellate Case Tracking No. 2012-212324

The State, Respondent,

vs.

James C. Tyner, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in denying Appellant's motion for directed verdict on the assault and battery of a high and aggravated nature (ABHAN) charge because the State established sufficient evidence demonstrating Appellant injured the victim and the act was accomplished by means likely to produce death or great bodily injury.

II. The trial court did not err in denying Appellant's Batson motion when the State presented race neutral reasons for the strikes and Appellant failed to demonstrate the reasons were mere pretext.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in denying Appellant's motion for directed verdict on the assault and battery of a high and aggravated nature (ABHAN) charge because the State established sufficient evidence demonstrating Appellant injured the victim and the act was accomplished by means likely to produce death or great bodily injury.

Appellant contends the trial court erred in denying his motion for a directed verdict arguing the State failed to produce evidence sufficient to convict Appellant of ABHAN. Specifically, he maintains the State failed to produce evidence he either caused great bodily injury or used means likely to produce death or great bodily injury. The State presented testimony Appellant or others acting with Appellant choked the victim in such a way that the injury was accomplished by means likely to produce death or great bodily injury.

Preservation

First, the issue is not properly preserved for review on appeal. "A general directed verdict motion, however, does not preserve any issue for appeal." State v. Sterling, 396 S.C. 599, 612, 723 S.E.2d 176, 183 (2012). "In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review." State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) (citing State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970)); see also, State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) (noting a general or nonspecific objection presents no issue for appellate review); McCray v. State, 271 S.C. 185, 188, 246 S.E.2d 230, 232 (1978) (questioning whether a motion on the ground that the evidence did not support the verdict was sufficiently specific to preserve any

issue on appeal). The motion in the instant case merely stated: "Defense moves for a directed verdict. Feels the State has carried their burden beyond a reasonable doubt at this time and ask for a directed verdict of not guilty on behalf of all charges of Mr. James Tyner." (T.134-135; R. pp. 73-74). This generic motion did not preserve the specific argument raised on appeal the testimony regarding choking was insufficient to establish great bodily injury as required for a conviction on ABHAN.

Merits

On the merits, Section 16-3-600 of the South Carolina Code (Supp. 2011) provides in part:

> A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and:
> (a) great bodily injury to another person results; or
> (b) the act is accomplished by means likely to produce death or great bodily injury.

S.C. Code Ann. § 16-3-600 (B)(1) (Supp. 2011). The statute defines great bodily injury:

> "Great bodily injury" means bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

S.C. Code Ann. § 16-3-600(A)(1) (Supp. 2011).

In the instant case, the State submits the victim was injured by an act likely to produce death or great bodily injury. Appellant, Bruce Walters, and Adam Quick went to the victim's home to try and get some cash off of the victim. (T.111; R. p.58). When they arrived, two of the individuals got out of the car and attacked the victim. (T.113; 125; R.

p.60; p.67). While the co-defendants each testified they were the driver, both testified Appellant was one of the individuals who got out of the car.[1]

The individuals beat the elderly victim to the ground and one began choking him, covering his mouth and nose so the victim could not breathe. (T.52-53; R. pp. 32-33). The victim testified he kept trying to pry or break the person's fingers because they were covering his mouth and he could not breathe. He testified: "I could put enough pressure on it every once in a while so I can get a little air, and I begged them not to kill me." (T.53; R. p. 33). The victim testified he believed he was going to die. He stated:

> I couldn't breathe. The only time, like I said - - I mean I was trying to break his fingers. I never could, but I could put enough pressure on it to get it off enough for me to get some air and holler for my wife. And I'd tell them, you know, don't kill me. Just take what I got and go. I did that two or three times I know.

(T.65; R. p.45).

The victim was an elderly man who has a severe heart condition and emphysema. (T.64; R. p. 44). He has to wear an ICD, which acts as a pacemaker and defibrillator in one. He had open heart surgery several years before the beating and choking and indicated: "I just feel really fortunate that I didn't get a lick on it or I didn't get a lick right in my chest." (T.64; R. p. 44). Even the beating in this case could have proven fatal given his condition.

The victim's wife testified regarding the effects on the victim. She stated she found him on his hands and knees crawling onto the back doorstep. She said he was a "bloody mess." (T.71; R. p. 51). Significantly, she testified bruising appeared around his

[1] The victim identified Bruce Walters as one of his assailants.

neck after the beating and choking. She testified: "There was a good bit of bruising around his neck." (T.75; R. p.55).

The State presented ample evidence the victim was injured by means likely to produce death or great bodily injury. The choking of the victim, requiring him to pry up fingers of his assailant in order to breathe at all and to gasp "don't kill me," is certainly a means likely to produce death or great bodily injury. Choking is a unique form of assault in that it may not leave a severe resulting injury, but may create a substantial risk of death. It is hard to fathom how choking a victim to the point he believes he could die does not amount to a means likely to produce death or great bodily injury.

The fact the victim was able to spare his own life by several times prying up the finger of his attacker does not lessen the impact or likely result of the choking. Further, the victim was an elderly man, who already had heart and lung issues. The strain and impact of the beating and choking certainly were likely to cause death in this case.

Other states have also found choking to be a means to cause death or great bodily injury. See State v. Young, 800 So.2d 847, 852 (La. 2001) ("defendant's act of choking [the victim] could have resulted in a substantial risk of death."); Cooper v. Com., 569 S.W.2d 668, 671 (Ky. 1978) (Court found, considering the totality of the evidence and the circumstances, the physical injuries sustained, including choking and bruising inflicted to a 74-year-old woman in poor health, were sufficient to support a conclusion that a substantial risk of death had been created); Sellers v. State, 108 So.3d 456, 459 (Miss. App. 2012) (finding choking the victim with hands until she nearly passed out and she felt like he was "choking [her] to death" was sufficient evidence to show the act was likely to produce death or serious bodily harm); People v. Miller, 736 N.Y.S.2d 773, 774

(N.Y. App.Div. 3 2002) (finding defendant's strangulation of the victim was an impairment of her physical condition which created a substantial risk of death); Mathis v. State, ___ S.W.3d ___, 2012 Ark. App. 285 (Ark. App. 2012) (Finding evidence defendant choked victim, she could not breathe, he had his hands around her neck, and he threatened to kill her and "take her out" sufficient to demonstrate substantial risk of death); Akbar v. State, 660 S.W.2d 834, 836 (Tex. App. 11 Dist. 1983) (finding "it is certainly common knowledge that the throat is a particularly vulnerable part of the body, as exemplified by the popular expression 'go for the throat' and "[f]rom the evidence in the instant case since the victim was strangled to the point of 'near blackout,' we hold that the jury could draw the inference that her injuries created a substantial risk of death."); State v. Carpenter, 580 A.2d 497, 500 (Vt. 1990) ("It is equally clear that an act can create a substantial risk of death without resulting in either death or permanent impairment, and choking is a good example of such act.").

Accordingly, this Court should find Appellant's directed verdict motion was properly denied because the State presented sufficient evidence the victim was attacked and injured by means likely to produce death or great bodily injury when he was choked to the point he could not breathe and believed he was going to die.

II. The trial court did not err in denying Appellant's Batson motion when the State presented race neutral reasons for the strikes and Appellant failed to demonstrate the reasons were mere pretext.

Appellant maintains the trial court erred in refusing to quash the jury panel pursuant to his Batson[2] motion. He asserts the State's reasons for striking the jurors were mere pretext. Further, he argues there is "no support in the record that Juror 39's demeanor could be credibly said to have exhibited the basis for the strike attributed to the juror by the solicitor." (App. Br. 15). Finally, he asserts "with respect to Juror 101, the solicitor began to mention the area in which she lived, although stopping short of a full explanation, showing that the solicitor was about to use the juror's residence as a substitute for her race and as a stereotype of the experiences that can be ascribed to that race." (App. Br. 15).

The State proffered race-neutral reasons as required when conducting a Batson analysis. Appellant failed to demonstrate any of the reasons were mere pretext. As a result, the trial court properly denied his motion to quash the jury panel. Finally, the specific arguments as to Jurors 39 and 101 were never raised to the trial court and are clearly not preserved for review on appeal.

Preservation

In order to preserve grounds for review on appeal, they must be raised to and ruled upon by the trial court. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court). Further, Appellant cannot articulate one ground at trial and raise another ground on appeal. See State v. Freiburger,

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

366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (same).

At trial after the State presented its race neutral explanations for the strikes, Appellant's counsel stated:

> To me I think they're fishing for reasons to find compliance with the Batson v. Kentucky. Furthermore, jurors traditionally typically do not - - they've got other things, very important things to do. Work related or family related, and so just the general demeanor of a potential juror I don't think is a valid reason to strike a person.

(T.29; R. p. 29). Counsel never argued the record failed to demonstrate the demeanor relied upon by the State in its grounds and certainly never argued the use of the juror's residence as the basis for a strike was merely a substitution for their race. As a result, these arguments are clearly not preserved for review on appeal.

Merits

On the merits, in Batson the United States Supreme Court, through the Equal Protection Clause, forbade the use of peremptory challenges to strike jurors because of their race. See, State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999). In State v. Evins, the South Carolina Supreme Court reiterated the procedure the trial court is to follow for a Batson hearing:

> After a party objects to a jury strike, the proponent of the strike must offer a facially race neutral explanation. 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. The burden of persuading the court that

> a Batson violation has occurred remains at all times on the opponent of the strike.

State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007) (citing Purkett v. Elem, 514 U.S. 765 (1995); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)). Step two of this process "does not demand an explanation that is persuasive or even plausible." State v. Cochran, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct.App.2006) (quoting Purkett, 514 U.S. at 767–68). At step two, "the proponent of the strike does not carry 'any burden of presenting reasonably specific, legitimate explanations for the strikes.'" Id. (quoting Adams, 322 S.C. at 123, 470 S.E.2d at 371). "Therefore, '[u]nless a discriminatory intent is inherent' in the explanation provided by the proponent of the strike, 'the reason offered will be deemed race neutral' and the trial court must proceed to the third step of the Batson process." Id. (quoting Purkett, 514 U.S. at 768).

The South Carolina Supreme Court explained the standard of review of a Batson motion:

> Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. The opponent of the strike carries the ultimate burden of persuading the trial court that the challenged party exercised strikes in a discriminatory manner. Appellate courts give the trial judge's finding great deference on appeal and review the trial judge's ruling with a clearly erroneous standard.

State v. Edwards, 384 S.C. 504, 682 S.E.2d 820, 822 (2009) (internal citations omitted). The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. Id. at 509, 682 S.E.2d at 823. "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 [court's] province.'" Id. (quoting

Hernandez v. New York, 500 U.S. 352, 365 (1991)). This Court recently utilized the same standard in reviewing a challenge to the trial court's finding on a Batson motion. See State v. Rogers, Op. No. 5170 (S.C.Ct. App. Filed September 4, 2013).

In the instant case, the State provided the following reasons for striking the jurors:

> Number 39, I consulted with the victim on that as to with all the jury strikes, and she indicated that she had an attitude. She didn't think she would participate in jury discussions. And per State v. Casey that is a race neutral reason.
>
> And Juror Number 101, that juror had a lip ring. And I believe talked to the victim and co-counsel lives in the area where - - and don't think she would participate in a jury discussion.

(T.27-28; R. pp. 27-28). On their face, the reasons are race neutral and provide no inherent discriminatory intent. Counsel pointed to no jurors who were similarly situated and provided no other basis for determining the reasons were mere pretext.

On appeal, Appellant maintains there is no evidence in the record supporting the State's reason given as to Juror 39. South Carolina has never required the trial court, or anyone else, to verify the non-verbal conduct or demeanor of a juror prior to allowing their demeanor to satisfy a race neutral basis for a strike. Appellant points to Haynes v. Union Pac. R.R. Co., 395 S.W. 3d 192 (Tex. Ct. App. 2012), for support in his argument that verification in the record must be shown in order to support the strike. In that case, the attorney provided four grounds for the strike. Three were determined to be mere pretext based on similarly situated individuals. The fourth and final basis was the demeanor of the juror. The Court did not specifically find it could not have served as a basis for a strike, but instead found because the trial court did not credit it as a basis and

the others were mere pretext, the Court rejected it. Id. at 201. This is clearly inapposite to the situation here.

Further, South Carolina has specifically recognized the juror's demeanor as a valid basis for a strike without requiring any additional evidence in the record supporting the finding. See State v. Wright, 304 S.C. 529, 533, 405 S.E.2d 825, 827 (1991) (finding demeanor and apparent disinterest in the courtroom proceedings a race neutral explanation and not racially discriminatory); State v. Tomlin, 299 S.C. 294, 299, 384 S.E.2d 707, 710 (1989) (finding "demeanor has been upheld by many jurisdictions as a legitimate reason.") (citing Lockett v. State, 517 So.2d 1346 (Miss.1987) and cases cited therein); State v. Guess, 318 S.C. 269, 273, 457 S.E.2d 6, 8 (Ct. App. 1995) ("Demeanor has been upheld by many jurisdictions as a legitimate reason to strike a juror."); see also, United States v. Forbes, 816 F.2d 1006 (5th Cir.1987) (upholding a strike based on prosecution sensing "by her posture and demeanor that she [the juror] was hostile to being in court and feared that she might respond negatively to the prosecution simply because the government was responsible for calling her to jury duty").

Further, this Court examined a strike in State v. Cochran, 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006). In Cochran, Appellants' counsel explained the strike by stating: "[the juror] gave an 'indignant' and 'shocked' look." Id. at 317, 631 S.E.2d at 299. This Court expounded: "The trial judge preempted the State's response, noting that he did not observe any such indignant or shocked expression from Juror 52. The trial court pronounced Appellants' reason as pretextual." Id. This Court then held: "The demeanor of a prospective juror is generally a race-neutral reason for employing a peremptory challenge. We hold, however, that where a strike is based solely on a

purported specific demeanor and disposition, and the trial judge makes an express and contrary finding, the deferential clearly erroneous standard of review applies." Id. No such express finding was made in the instant case. Furthermore, both the prosecutor and defense counsel must be allowed to make credibility determinations when exercising peremptory challenges. State v. Tucker, 334 S.C. 1, 9, 512 S.E.2d 99, 103 (1999).

The trial court found the reason given was race neutral and Appellant failed to provide any basis for a finding of pretext. The trial court did not make any express finding similar to that made in Cochran. As a result, this Court should affirm the trial court's finding as to Juror 39.

As to Juror 101, the solicitor struck the juror on the basis the juror had a lip ring and "don't think she would participate in jury discussion." Further, the solicitor began stating: "I believe talked to the victim and co-counsel lives in the area where - -" but he failed to complete his sentence. (T.28; R. p.28). Appellant attempts to argue he was using residence as a substitution for race. A fair reading of the statement indicates co-counsel lives in the area where the juror lived. However, nothing about the reason, even if based on residence, demonstrated an inherent racially discriminatory intent. Instead, the reason was entirely race neutral.

Appellant points to Williams v. State, 125 P.3d 627 (Nev. 2006), for support of its conclusion that residence is a substitute for race. The issue of the juror's residence played no part in the Williams decision. The case involved Nevada's jury venire selection process and random selection. The State objected to the venire "contending it was not randomly constituted since three African Americans sat in the first twelve spots of the venire." Id. at 634. The basis for the strike was explicitly based on race and the

Court concluded it could envision no justification by the State to "purge the taint of its racial remarks." Id. at 635.

Even the case partially relied on by Williams, U.S. v. Bishop, 959 F.2d 820 (9th Cir. 1992), provides no basis of support in the instant case. In Bishop, the reason provided for the strike relied on race. The Court explained:

> The prosecutor then volunteered an explanation for his decision. He stated that he felt that an eligibility worker in Compton is likely to take the side of those who are having a tough time, aren't upper middle class, and probably believes that police in Compton in South Central L.A. pick on black people.
>
> To some extent the rules of the game down there are probably different than they are in upper middle class communities. And they probably see police activity, which is, on the whole, more intrusive than you see in communities that are not so poor and violent.
>
> In response to a question from the bench, he added that "her primary sympathy . . . is likely to lay with people whom she comes into contact with every day."

Bishop, 959 F.2d at 822. Other courts have clearly distinguished Bishop. Further, Bishop itself indicates residence may be an appropriate consideration in using a peremptory strike. In U.S. v. Valenzuela, 17 F.3d 397 (9th Cir. 1994), the Court explained:

> Defendant cites Bishop, in which this court reversed a conviction where the prosecutor's explanation for striking a black prospective juror was that the juror lived in a poor, predominantly black neighborhood, and hence was likely to think that the police "pick on black people." 959 F.2d at 822. The court concluded that this socio-geographic criterion for exclusion was little more than a proxy for race, and hence was impermissible.

Id. Further, the Third Circuit Court of Appeals specifically disavowed the holding in Bishop and concluded the use of residence was appropriate. In U.S. v. Uwaezhoke, 995

F.2d 388 (3rd Cir. 1993), the Court concluded a strike because a juror is a single parent, is a person that rents, and may be involved in a drug situation where she lives was race neutral and not inherently discriminatory especially in light of the fact the likely residence of the juror was not tied to one particular race. Id. at 393-394.

In the instant case, there is no indication the strike by the State in this case was a proxy for race. We know nothing of the residence of the juror, other than a fair reading of the comment makes her residence in the same area as one of the solicitors on the case. The reason provided certainly contained no basis similar to that in Bishop which directly connected an African American juror to a predominantly African American neighborhood and indicated she was likely to believe police "pick on black people."

Further, the trial court made no ruling based on the juror's residence, and instead, he expressly based his decision regarding the propriety of the strike on the fact the juror has a lip ring. This basis is race neutral, and can be upheld similar to a strike of a juror for wearing a white t-shirt. See State v. Casey, 325 S.C. 447, 453 n.2, 481 S.E.2d 169, 172 n.2 (Ct. App. 1997).

The trial court properly concluded the State's reasons for the strike were not racially motivated and correctly refused to set aside the jury panel because Appellant failed to demonstrate any of the strikes were based on mere pretext. Accordingly, this Court should affirm the decision of the trial court.

CONCLUSION

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

Respectfully submitted,

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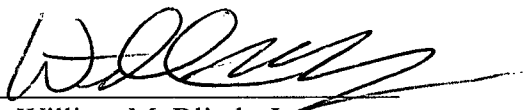
BY: 
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December 4, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 4th day of December, 2013.

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