STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

Paul M. Burch, Circuit Court Judge

Opinion No. 2014-UP-222 (S.C. Ct. App. filed June 11, 2014)
10-GS-13-0239, 0240

THE STATE,

RESPONDENT,

V.

JAMES C. TYNER,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATION BY COUNSEL

The Court of Appeals issued its decision on June 11, 2014. App. 1-3. Counsel for Petitioner certifies that the petition for rehearing was made on June 26, 2014 and finally ruled on by the Court of Appeals on August 25, 2014. App. 4-17.

QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner was entitled to a directed verdict on the charge of assault and battery of a high and aggravated nature where the State did not establish that the alleged acts of Petitioner caused "great bodily injury to another person" or used "means likely to produce death or great bodily injury" as required by S.C. CODE ANN. § 16-3-600(B)(1)?

II. Whether the Court of Appeals erred in affirming the Trial Court's refusal to quash the jury panel pursuant to Petitioner's Batson motion where the State struck a young female black juror based on her alleged general demeanor and appearance without any corroborating factors other than the fact that she was a young female black juror?

STATEMENT OF THE CASE

On March 22, 2011, Petitioner James C. Tyner was indicted by the Chesterfield County Grand Jury for (1) assault and battery of a high and aggravated nature ("ABHAN") in violation of S.C. CODE ANN. § 16-3-600(B); and (2) strong armed robbery. R. 89.

A trial was held before the Honorable Paul M. Burch and a jury from June 18-20, 2012. R. 1. Tyner was represented by Trey Cockrell and Jason Turnblad, and the State was represented by Assistant Solicitor Chris Jones. Id.

On June 20, 2012, the jury found Tyner guilty of (1) assault and battery of a high and aggravated nature; and (2) strong armed robbery. R. 84, ll. 17-25. Judge Burch sentenced Tyner to fifteen years imprisonment for strong armed robbery and three years consecutive on the assault and battery of a high and aggravated nature. R. 88, ll. 10-15.

On June 11, 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions. *State v. Tyner*, Opinion No. 2014-UP-222 (S.C. Ct. App. filed June 11, 2014); App. 1-3. Tyner subsequently filed a petition for rehearing on June 26, 2014. App. 4-16. The Court of Appeals issued an order denying the petition for rehearing on August 25, 2014. App. 17.

This petition for writ of certiorari to the Court of Appeals follows.

STATEMENT OF FACTS

On December 31, 2010, Ralph Chapman and his wife heard someone beating on their door between 6:00 and 6:30 a.m. R. 30, ll. 20-15. Chapman went outside his house to check to see if anyone needed help. He saw a car parked on the side of the road about a hundred yards away and thought perhaps someone's car had broken down. Chapman decided to go get in his truck and drive down to the car to see what was the matter. R. 31, ll. 4-19.

After Chapman walked to his truck and unlocked it, he said two guys grabbed him and according to Chapman: "[T]hey slammed me into the truck and then they started beating on my head pretty good. And finally took me down. I guess I was in more or less a fetal position, had my head down, and one of them was choking me. He had his hand over my mouth and nose where I couldn't breathe." R. 32, ll. 2-8.

The two men finally got his billfold out of Chapman's pocket and ran off toward the highway. R. 33, ll. 18-24. The two men got into the car Chapman saw parked on the side of the road. The vehicle drove away. Chapman said there were three men in the vehicle as it drove away. R. 34, ll. 1-22.

Chapman recognized one of his attackers as Bruce Walters. R. 32, ll. 20-22. Two days before the attack, Chapman ran into Bruce Walters at a truck stop. Walters wanted Chapman to take him to Society Hill for a job interview. When Walters got into Chapman's truck, Walters started asking Chapman for money. R. 35, l. 16 – 36, l. 12. Chapman told Walters he did not have any money to lend him. R. 36, ll. 12-14.

The two finally pulled up at a trailer where Walters got out and asked Chapman if he could wait on him for a little bit. Walters then came out and asked Chapman for just two

dollars, which Chapman gave him. Chapman said when he pulled out his billfold, Walters would have seen that Chapman was carrying a lot of bills in it, including a $100 bill, six or seven $20 bills, a bunch of $5 bills, and a stack of $1 bills. R. 37, ll. 7 – 25.

After Chapman gave Walters the two dollars, he told Walters he had to leave and was not waiting on him any longer. Chapman thought that must have made Walters mad, mad enough to get even with him "big time" two days later on December 31. R. 38, ll. 3-12.

After the attack, Chapman informed the police that he thought it was Walters who was one of the attackers. R. 38, ll. 13-20.

At trial, two of Tyner's alleged accomplices, Adam Raymond Quick and Bruce Walters, told conflicting stories. Quick testified that after midnight on December 31, 2010, he, Walters, and Tyner were up late drinking when Walters said he needed a ride to his uncle's house to borrow some money. R. 57, l. 1 – 58, l. 10. Walters told Quick, who testified that he was driving the car, to park on the side of the road. R. 58, ll. 21-23.

Quick said Walters asked Tyner to go with him up to the house and Tyner did. Quick said they came back about fifteen minutes later, and since they were not breathing heavy or sweating, he did not think anything of it. R. 59, ll. 7-15. Quick testified that Walters said his uncle had given him some money. R. 59, ll. 21-22.

Walters testified that Tyner said he needed to make some money and Walters told him about seeing Chapman with a "pocket full of money." R. 65, ll. 3-20. Walters said he drove Quick and Tyner to Chapman's house and pulled up on the side of the road. He said Quick and Tyner jumped out of the car and walked around the house. He said Quick and Tyner came back running and yelling that they had the wallet. R. 67, ll. 1 – 24.

At trial, Chapman said that he could not physically or visually put Tyner at the scene of the attack. R. 40, ll. 13-17; 42, ll. 7-11.

Walters pled guilty to strong armed robbery and assault and battery of a high and aggravated nature ("ABHAN"). R. 71, ll. 4-13. He received a ten year sentence on each charge to run concurrent. R. 72, ll. 1 – 11. Quick did not receive any jail time in exchange for his testimony against Tyner. R. 62, ll. 2-3; 63, l. 8 – 64, l. 9. Tyner proceeded to trial where he was convicted of ABHAN and strong armed robbery.

ARGUMENT

I. Petitioner was entitled to a directed verdict on the charge of assault and battery of a high and aggravated nature where the State did not establish that the alleged acts of Petitioner caused "great bodily injury to another person" or used "means likely to produce death or great bodily injury" as required by S.C. CODE ANN. § 16-3-600(B)(1).

In its Opinion, the Court of Appeals held: "The trial court did not err in denying [Tyner's] directed verdict motion [as to the ABHAN charge] because the victim's testimony he was choked and could not breathe and the victim's wife testimony he was a bloody mess and displayed 'a good bit of bruising' around his neck after the attack was some evidence from the jury could conclude the attack posed a substantial risk of death." App. 2.

This holding was erroneous. The offense of ABHAN was codified by the Legislature in 2010 and is the highest level of assault and battery under the assault and battery statute. § 16-3-600. For the ABHAN conviction against Tyner to stand, the injuries to Ralph Chapman must as a matter of law have risen to the level of "great bodily injury" or have been caused by "means likely to produce death or great bodily injury." § 16-3-600(B)(1). "Great bodily injury" is defined as "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." § 16-3-600(A)(1).

Chapman testified that the two attackers grabbed him and started "beating on [his] head pretty good." R. 32, ll. 2-5. He said one of the two attackers was choking him and "had his hand over his mouth and nose where [he] couldn't breathe." R. 32, ll. 5-8. He said they had "whooped on [him] pretty good." R. 32, ll. 21-22. After the attack, Chapman went into his kitchen to sit at the table, but upon realizing that he was bleeding, walked outside to sit on the back door steps to wait for the deputies and the EMT. R. 35, ll. 6-11.

The EMTs arrived and looked over Chapman and told him, "Mr. Chapman, unless you want us to take you to the emergency room, there is really nothing we can do for you." Chapman replied, "No, I don't see any need of that. I mean I'm just beat up. " R. 42, ll. 16-24. Chapman had sustained licks to his head and face and was not hit in his chest area. R. 42, ll. 12-14; 44, ll. 13-16. Chapman did not go to the hospital. R. 42, ll. 15-16.

Chapman sustained some bruises and bleeding in the attack, but he did not break any bones and never went at any time to see a doctor about his injuries. R. 42, l. 25 – 43, l. 6.

Chapman testified that when the two men were attacking him, he thought he was going to die and could not breathe. He acknowledged, however, that he could get air during the attack. R. 45, ll. 11-19.

Chapman's wife testified that her husband's face was very bloody and that he told her, "Two guys just beat the hell out of me . . . ." R. 51, ll. 8-16. Chapman's wife also testified that bruising showed up on her husband's neck two or three days after the attack and was not immediately present. R. 55, ll. 9-13. Chapman's wife also testified that Chapman bleeds a lot because of certain medication that he was taking. R. 51, ll. 21-24.

The offense of ABHAN requires bodily injury which "causes a substantial risk of death" or which results in "serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." § 16-3-600(A)(1). Chapman did not sustain any injuries rising to that level. Chapman never passed out or blacked out during the attack. He did not suffer any permanent disfigurement or protracted loss of a body part of organ.

Other courts have found that the type of injuries suffered by Chapman did not constitute an injury which created a "substantial risk of death" or resulted in protracted

disfigurement or protracted impairment of any bodily member or organ. In People v. Snipes, 112 A.D.2d 810 (N.Y. App. Div. 1985), the court held that there was insufficient evidence to conclude that the victim suffered serious physical injury so as to support a conviction for assault in the second degree where the victim suffered bruises, swollen eyes and multiple contusions and pain which lasted for two days, but there was no physical injury which created a substantial risk of death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

The Supreme Court, Appellate Division of New York also found no physical injury which "creates a substantial risk of death, or which causes . . . serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" where a victim testified that the defendant "came up behind her, grabbed the phone out of her hand, covered her nose and mouth and dragged her through a fenced-in area and into a bathroom by the horse stalls." The defendant then "threw her to the ground, ripped her pants off, punched her in the face and ribs, and attempted to rape her." Finding no serious physical injury resulting in the above-referenced definition, the court noted the record revealed that the victim was "conscious and communicative when she arrived at the hospital after the attack, with normal vital signs and neurological state, despite extensive bruising, lacerations and pain." The victim also suffered no internal bleeding or bone fractures. The victim's hospital discharge summary indicated that her lacerations would heal without surgical intervention. People v. Felipe, 79 A.D.3d 1454, 1454-56 (N.Y. App. Div. 2010).

The Louisiana Court of Appeal also held that the evidence did not show the victim suffered any "protracted and obvious disfigurement, any protracted loss or impairment of

the function of a bodily member, organ, or mental faculty, or was put at a substantial risk of death" where the defendant came into the victim's bedroom and while she was holding a baby, "grabbed her, slammed her to the ground, and started hitting and kicking her in her face and arms." The victim also testified that the defendant had his hands around her neck and was choking her. The victim had swollen eyes, a busted lip, and a cut on her face. In finding that the evidence was insufficient to sustain the second degree battery conviction, the court noted that the record indicated that the victim never lost consciousness at any time or sought medical attention for her injuries. State v. Vidaurri, 919 So.2d 803, 804-08 (La. Ct. App. 2005).

As in these above-referenced cases, Chapman, while sustaining bruises and bleeding from the attack, did not sustain any bone fractures or any protracted impairment of any bodily member or organ. He never lost consciousness during the attack. Other than the EMTs who looked him over and informed Chapman that there was nothing they could do for him, Chapman never sought any medical attention for his injuries. The State did not present sufficient evidence of great bodily injury to another person" or used "means likely to produce death or great bodily injury" to obtain a conviction of ABHAN against Tyner.

The Court of Appeals held that there was some evidence from which the jury could conclude the attack posed a substantial risk of death. App. 2. In ruling on Tyner's directed verdict motion, the Trial Court stated that in its opinion the State presented sufficient evidence as to whether "means likely to produce death or great bodily injury" were used where Chapman testified that one of the attackers was choking him and had his hand over Chapman's mouth and nose. R. 32, ll. 2-8; 75, ll. 21-25.

Therefore, the issue facing this Court is whether the brief covering of Chapman's

mouth and nose during the incident meets the definition of means likely to produce death or great bodily injury under South Carolina's ABHAN statute. Again, Chapman did not lose consciousness or black out, he testified that he could get air during the attack, and he did not have any marks on his neck until two or three days later when some bruising appeared. In cases from other jurisdictions where choking was found sufficient to support assault and battery convictions under statutes similar to South Carolina's ABHAN statute, there was much more than the brief choking to which Chapman testified.

Courts from other jurisdictions finding that choking or strangling was an action creating a substantial risk of death have pointed to evidence such as unconsciousness and severe bruises and marks on the victim's neck and have even noted physician testimony that the victim was only minutes from death. None of that type of evidence is present in this case.

In People v. Perron, 172 A.D.2d 879 (N.Y. App. Div. 1991), the court held the defendant's actions created a substantial risk of death where the victim testified that after the defendant raped her, he told her, "I'm not going to let you go back there. I'm not going to let you tell them," and thereafter "strangled her into unconsciousness." The physician who examined the victim testified "that the pressure applied to the victim's windpipe, which cut off her oxygen supply, was significant in time and quantity as to be 'life threatening.'" The physician also testified that the victim had severe bruises on her neck and was "choked to an extent sufficient to cause unconsciousness and that 'it's just a matter of minutes between someone whose going to be unconscious to someone who's going to be dead.'" See also State v. Sorrell, 568 A.2d 376, 378 (Vt. 1989) (finding defendant's actions constituted a substantial risk of death to the victim where defendant choked his victim while

swearing he would kill her and the victim passed out twice).

The Texas Court of Appeals also held that a defendant's actions created a substantial risk of death where the defendant choked the victim with a towel, a belt, and his hands and told the victim that he was trying to kill her. The victim testified she nearly blacked out. The investigating police officer testified that the victim sustained large bruises and red marks around her neck and that he could see fingerprints on her throat and marks where some object had been around her throat. The office observed that these injuries were consistent with injuries suffered by those who have been strangled. Akbar v. State, 660 S.W.2d 834, 835-87 (Tex. Ct. App. 1983).

In People v. Brown, 243 A.D.2d 749, 749-50 (N.Y. App. Div. 1997), the court also sustained the assault conviction where the defendant choked the victim to the point where her tongue hung out of her mouth, she could not breathe, and almost passed out. After the incident, the victim also had visible marks on both sides of her neck and had a hard time swallowing.

The cases cited in the State's brief are also distinguishable. See State v. Young, 800 So.2d 847 (La. 2001) (victim choked hard enough that his throat burned and he had difficulty talking; physician also noted injuries to victim's vocal chords and opined the choking could have resulted in a substantial risk of death); Cooper v. Com., 569 S.W.2d 668 (Ky. 1978) (seventy-four year old female victim blacked out and had no memory of what took place until she woke up in the hospital; physician found pressure areas on her throat); Sellers v. State, 108 So.3d 456 (Miss. App. 2012) (victim turned blue, nearly passed out and had red marks on neck); People v. Miller, 736 N.Y.S.2d 773 (N.Y. App. Div. 2002) (victim's vision became fuzzy during the attack, throat was sore, neck was bruised;

physician testified that if the defendant had continued to strangle victim, permanent brain damage or death was only thirty to sixty seconds away); Mathias v. State, 2012 Ark. App. 285 (2012) (victim had visible bruising on her neck after attack and choking); State v. Carpenter, 580 A.2d 497 (Vt. 1990) (victim's head was forced in bucket of water three times; during choking, victim lost consciousness; victim vomited blood, suffered contusion of her neck, had red marks on her face from ruptured blood vessels; hemorrhaging of blood vessels in her eyes; physician testified that lapsing into unconsciousness from chocking results in oxygen depletion which can result in death).

Unlike the evidence in these above-cited cases, Chapman only testified that he was briefly choked when one of the assailants had his hand over Chapman's nose and mouth. Chapman could get air during the attack, did not become unconscious or come even close to passing out, he did not have any marks on this neck immediately after the attack, and he never indicated that he had any pain in his neck or throat area. He was conscious and communicative after the attack.

The means used on Chapman were not likely to cause death or great bodily injury. While Chapman may have subjectively though he was going to die in the moment, an objective look at the injuries he ultimately sustained show that he was in fact not facing any substantial risk of death. Where there were no physical manifestations in this case that Chapman was facing a risk of death, the evidence is simply not sufficient to support a conviction for ABHAN. The Trial Court therefore erred in refusing to grant Tyner's directed verdict motion on the ABHAN charge.

II. The Court of Appeals erred in affirming the Trial Court's refusal to quash the jury panel pursuant to Petitioner's Batson motion where the State struck a young female black juror based on her alleged general demeanor and appearance without any corroborating factors other than the fact that she was a young female black juror.

As to Tyner's second issue on appeal – that the Trial Court erred in denying his Batson[1] motion when the State struck a young female black juror based on her alleged general demeanor and appearance without any corroborating factors other than the fact that she was a young female black juror - the Court of Appeals held demeanor is a race-neutral basis for exercising a jury strike. App. 2-3.

The State struck Juror No. 39, a young black female, and stated the victim said this juror had an attitude and did not think she would participate in jury discussions. The solicitor also stated it was just the juror's overall demeanor. R. 27, ll. 2, 23 - 28, l. 2, 13-23. The solicitor made no mention of her body language or any actions the juror made in court that day, like eye rolling or the like. Defense counsel objected, arguing "just general demeanor of a potential juror" is not a "valid reason to strike a person." Tr. 28, l. 25 – 29, l. 6. The Trial Court only credited the juror's appearance in upholding the strike. R. 29, l. 12. However, all that is really known about this juror is that she is a young black female. The record does not indicate that the Trial Court observed anything about her demeanor that would warrant striking her as a juror.

Although demeanor can be considered race neutral, "reliance upon non-verbal conduct or demeanor may mask a racially motivated strike" and the courts should carefully examine such explanations. Haynes v. Union Pac. R.R. Co., 395 S.W.3d 192, 200 (Tex. Ct. App. 2012). "Peremptory strikes may legitimately be based on nonverbal conduct, but

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

permitting strikes based on an assertion that nefarious conduct 'happened' without identifying its nature and without any additional record support, would strip Batson of meaning. Verification of the occurrence may come from the bench if the court observed it; it may be proved by the juror's acknowledgement; or, it may be otherwise borne out by the record as, for example, by the detailed explanations of counsel." Id.; see also State v. Cochran, 369 S.C. 308, 318, 631 S.E.2d 294, 300 (Ct. App. 2006) (finding "if a party were able to overcome every Batson challenge by merely claiming that a prospective juror's demeanor and disposition were somehow inappropriate, the equal protection principles underlying Batson would be weakened. The trial court serves an important gatekeeping role in this regard. . . .)

While the State said that Juror No. 39 just looked like she had an attitude and would not participate in jury discussions, nothing in the record supports the State's assertions. The record demonstrates that the Trial Court did not observe such behavior of Juror No. 39. R. 28, ll. 13-19. In ruling against defense counsel's assertion that the State's reason was pre-textural, the Trial Court did not even credit Juror No. 39's attitude in rejecting the Batson challenge and rather ruled that "appearance in Court" was not enough for the Trial Court to set the jury aside. R. 29, ll. 12-14. See Haynes, 395 S.W.2d at 201 ("[T]he record does not show that the trial court credited the non-verbal conduct explanation in rejecting the Batson challenge. Although [the defendant']s lawyer described Juror No. 3's "pleasant smile," the trial court made no express findings to confirm this account, and the record contains no other indication of Juror No. 3's demeanor.").

In addition, in other cases upholding a strike based on demeanor, there was something more in the record that just a general allegation of overall demeanor. See

State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991) (juror was late); State v. Rogers, 405 S.C. 520, 748 S.E.2d 247 (Ct. App. 2013) (noted conservative appearance); State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1997) (juror inappropriately dressed); State v. Wright, 304 S.C. 529, 405 S.E.2d 825 (1991) (able to observe juror for three days and noted that juror did not want to be there); Lockett v. State, 517 So.2d 1346 (Miss. 1987) (juror was wearing hat and showing contempt of court proceedings); State v. Guess, 318 S.C. 269, 457 S.E.2d 6 (Ct. App. 1995) (juror seemed like he did not know what was going on, was hesitant in answering voir dire questions, and did not have a good grasp on what was going on); United State v. Forbes, 816 F.2d 1006 (5th Cir. 1987) (juror had arms crossed and was hostile).

This Court recently held in State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014) that the reason for the strike "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." Here, the State did not say what it was about the juror's attitude and demeanor that made her look like she would not participate in jury discussions. See Alex v. Rayne Concrete Svc., 951 So.2d 138, 153 (La. 2007) (holding that a "gut feeling" explanation standing alone, does not constitute a race neutral explanation because it is ambiguous and "falls far short of an articulable reason that enables the trial judge to assess the plausibility of the proffered reason for striking a potential juror. Whatever is causing the 'gut feeling' should be explained for proper evaluation of the proffered reason.").

Again, all that is known is that this particular juror was a young black female.

Therefore, the record does not demonstrate a legally sufficient racially neutral explanation for the exclusion of Juror No. 39, and the Trial Court erred in denying the Batson challenge as to Juror No. 39.

CONCLUSION

For the reasons set forth herein, Petitioner James C. Tyner respectfully requests this Court to grant his Petition and issue a writ of certiorari to the Court of Appeal to review the decision, reverse the Opinion of the Court of Appeals, and grant his directed verdict motion on the offense of assault and battery of a high and aggravated nature under S.C. CODE ANN. § 16-3-600(B)(1). In addition, Petitioner Tyner also respectfully requests this Court to reverse his remaining convictions and remand the case for a new trial where the Trial Court erred in denying his Batson motion.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Chesterfield County
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THE STATE,

RESPONDENT,

V.

JAMES C. TYNER,

PETITIONER.

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 19th day of September, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of September, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021