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 6/11/2014)
10-GS-13-0239, 0240

THE STATE,

RESPONDENT,

V.

JAMES C. TYNER,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James C. Tyner, Appellant.

Appellate Case No. 2012-212324

Appeal From Chesterfield County
Paul M. Burch, Circuit Court Judge

Opinion No. 2014-UP-222
Heard May 7, 2014 – Filed June 11, 2014

AFFIRMED

Appellate Defender Carmen Vaughn Ganjehsani, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of [illegible]

PER CURIAM: James C. Tyner appeals his convictions for assault and battery of a high and aggravated nature (ABHAN) and strong armed robbery. He contends

the trial court erred in denying his directed verdict motion as to the ALBHAN charge and in denying his *Batson*[1] motion to quash the jury. We affirm.

1. The trial court did not err in denying Tyner's directed verdict motion, because the victim's testimony he was choked and could not breathe and the victim's wife's testimony he was a bloody mess and displayed "a good bit of bruising" around his neck after the attack was some evidence from which the jury could conclude the attack posed a substantial risk of death. *See* S.C. Code Ann. § 16-3-600(B)(1) (Supp. 2013) ("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(A)(1) (Supp. 2013) ("'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."); *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 93 (2002) ("On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling."); *id.* ("In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight."); *State v. Butler*, 407 S.C. 376, ___, 755 S.E.2d 457, 460 (2014) ("On appeal from the denial of a directed verdict, [an appellate] court views the evidence and all reasonable inferences in the light most favorable to the State."); *id.* ("'If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [c]ourt must find the case was properly submitted to the jury.'" (quoting *State v. Weston*, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006))).

2. The trial court did not err in ruling the State's striking of Juror #39 and Juror #101 did not constitute a *Batson* violation, because, in the absence of contrary evidence in the record, demeanor is a race-neutral basis for exercising a jury strike. *See State v. Cochran*, 369 S.C. 308, 317, 631 S.E.2d 294, 299 (Ct. App. 2006) ("The demeanor of a prospective juror is generally a race-neutral reason for employing a preemptory challenge."); *State v. Tucker*, 334 S.C. 1, 8, 512 S.E.2d 99, 102 (1999) ("[C]ounsel may strike venire persons based on their demeanor and disposition."); *Cochran*, 369 S.C. at 317, 631 S.E.2d at 299 ("An express finding by the trial court will, unless clearly erroneous, trump counsel's stated perception of a prospective juror's demeanor and disposition."); *State v. Edwards*, 384 S.C.

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

504, 509, 682 S.E.2d 820, 823 (2009) ("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.'" (first alteration by court) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991))). We also find Tyner's argument regarding Juror #101's residence is not preserved for our review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

AFFIRMED.

WILLIAMS, KONDUROS, and LOCKEMY, JJ., concur.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
Paul M. Burch, Circuit Court Judge

Opinion No. 2014-UP-222 (S.C. Court of Appeals filed June 11, 2014)

THE STATE,

RESPONDENT,

V.

JAMES C. TYNER,

APPELLANT.

APPELLATE CASE NO. 2012-212324

PETITION FOR REHEARING

The Appellant, James C. Tyner, respectfully petitions the Court for a rehearing of its Opinion No. 2014-UP-222 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

On June 11 2014, this Court filed its unpublished opinion affirming Appellant's convictions for assault and battery of a high and aggravated nature (ABHAN) and strong armed robbery.

ISSUE NO. 1

As to Appellant's argument that he was entitled to a directed verdict on the ABHAN charge where the State did not establish that the alleged acts of Appellant 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), this Court held: "The trial court did not err in denying [Appellant'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."

Appellant respectfully disagrees with this Court's conclusion. 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 Appellant 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 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.

This Court found that there was some evidence from which the jury could conclude the attack posed a substantial risk of death. 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 Appellant's directed verdict motion on the ABHAN charge.

ISSUE NO. 2

As to Appellant's second issue – that the Trial Court erred in denying Appellant's 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 - this Court held demeanor is a race-neutral basis for exercising a jury strike.

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 permitting strikes based on an assertion that nefarious conduct 'happened' without identifying its nature and without any additional record support, would strip Batson of

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

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 State's Supreme 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.").

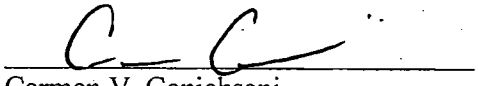
Again, all that is known is that this particular juror was a young black female. Therefore, the record does not demonstrate a legally sufficient racially neutral explanation for the exclusion of Juror No. 39, and the Trial Court erred in denying the

Batson challenge as to Juror No. 39.

CONCLUSION

For the reasons set forth herein, Appellant James C. Tyner respectfully requests that the Opinion of the Court of Appeals be withdrawn and that this Court 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, Appellant also respectfully requests this Court to reverse his remaining convictions and remand the case for a new trial where the Trial Court erred in granting Appellant's Batson motion.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

This 26th day of June, 2014.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
Paul M. Burch, Circuit Court Judge

Opinion No. 2014-UP-222 (S.C. Court of Appeals filed June 11, 2014)

THE STATE,

RESPONDENT,

V.

JAMES C. TYNER,

APPELLANT.

APPELLATE CASE NO. 2012-212324

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. James. C. Tyner, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 26th day of June, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day
of June, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

The South Carolina Court of Appeals

The State, Respondent,

v.

James C. Tyner, Appellant.

Appellate Case No. 2012-212324

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Carmen Vaughn Ganjehsani, Esquire
William M. Blitch, Jr., Esquire
Alan McCrory Wilson, Esquire
The Honorable Paul M. Burch