

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Chesterfield County
Hon. Paul M. Burch, Circuit Court Judge
Appellate Case Tracking No. 2014-001988

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S.C. Supreme Court

The State,

Respondent,

v.

James C. Tyner,

Petitioner.

Opinion No. 2014-UP-222 (S.C. Ct. App. filed June 11, 2014)

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion for a directed verdict on the assault and battery of a high and aggravated nature (ABHAN) charge because the State established sufficient evidence demonstrating Petitioner injured the victim and the act was accomplished by means likely to produce death or great bodily injury.

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STATEMENT OF THE CASE

Procedural History

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

Factual Background

Petitioner, 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 Petitioner 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 was an elderly man who has a severe heart condition and emphysema. (T.64; R. p. 44). His testimony indicated he could not breathe and felt he was going to die. (R. p. 45). 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).

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

ARGUMENT

- I. **The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion for a directed verdict on the assault and battery of a high and aggravated nature (ABHAN) charge because the State established sufficient evidence demonstrating Petitioner injured the victim and the act was accomplished by means likely to produce death or great bodily injury.**

The Court of Appeals correctly found the State presented sufficient evidence demonstrating Petitioner injured the victim and the act was accomplished by means likely to produce death or great bodily injury. Further, the issue was not properly preserved for review on appeal and should not have even been addressed on the merits.

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. 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 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, 423 S.W.3d 91 (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 the Court of Appeals should not have addressed the directed verdict issue because it was not sufficiently preserved for review on appeal. Alternatively, this Court should find the Court of Appeals properly denied Petitioner’s motion for a directed verdict 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. This Court should deny the Petition for Writ of Certiorari as to this issue.

II. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's Batson motion when the State presented race neutral reasons for the strikes and Petitioner failed to demonstrate the reasons were mere pretext.

The Court of Appeals correctly affirmed the trial court's denial of Petitioner's Batson² motion to quash the jury panel. First, the specific argument as to the struck juror was never raised to the trial court and is not preserved for review on appeal. Additionally, the State proffered a race-neutral reason as required when conducting a Batson analysis. Petitioner failed to demonstrate the reason was mere pretext. As a result, the trial court properly denied Petitioner's motion to quash the jury panel.

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, Petitioner cannot articulate one ground at trial and raise another ground on appeal. See State v. Freiburger, 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 explanation for the strike, Petitioner'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

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

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. As a result, this argument is 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, this 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)). 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. “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).

This 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)).

In the instant case, the State provided the following reason for striking the juror:

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.

(T.27-28; R. pp. 27-28). On its face, the reason is race neutral and provides 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, Petitioner maintains there is no evidence in the record supporting the State's reason given as to Juror 39. This argument turns the burden of proof in a Batson hearing on its head. 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. Petitioner 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, the Court of Appeals examined a similar 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. In its review of the facts, the Court of Appeals 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. The 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. No one, and no evidence, refuted the State’s assertion at trial. 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 Petitioner 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.

Petitioner also points to this Court’s recent opinion in State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014), to argue the strike violated Batson because it was not clear and reasonably specific. In Giles, counsel’s articulated reason was that he “did not feel the jurors were right for the jury.” Id. at 17, 754 S.E.2D at 262. He provided no reason based on demeanor, attitude, conduct, or anything other than his own gut feeling. Counsel’s gut feeling provides no basis for a finding of pretext or for opposing counsel to challenge the strike. Id. at 22-23, 754 S.E.2d at 265-266.

In the instant case, the State specifically referenced the juror’s attitude as the basis for why she was struck. Based on this attitude, the State articulated its belief she would

not participate in juror discussions. This is quite different from the “gut feeling” in Giles. Opposing counsel could have articulated his belief regarding the juror’s attitude and even provided counter-argument indicating her attitude was not an issue and instead would have been pleasant or actively involved. As in Cochran above, the trial court and opposing counsel could evaluate the strike and if other behavior was seen from the juror, it could have been addressed by the trial court. No such counter-argument was presented and no finding by the trial court of pretext was made. As a result, this Court should deny the Petition for Writ of Certiorari to address the Batson issue.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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October 20, 2014

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This 20th day of October, 2014.



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