STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Calhoun County
James C. Williams, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

WILLIE PELZER,

APPELLANT.

APPELLATE CASE NO. 2013-000731

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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II. Whether the Trial Court erred in denying Appellant's motion to change venue or motion to disqualify the entire jury panel and move the case to a later term where 31 jurors of the pool of 47 jurors had exposure to the extensive pretrial publicity of the case and where at least six of the jurors from the jury pool had participated in fundraising efforts for the deceased's family?

III. Whether the Trial Court erred in giving a voluntary intoxication charge to the jury where there was no evidence that Appellant was intoxicated on the night of the deceased's murder?

STATEMENT OF THE CASE

On April 27, 2009, Appellant Willie Pelzer was indicted by the Calhoun County Grand Jury for one count of murder. App. 1089-1090.

On December 1-4, 2009, Pelzer was tried before the Honorable James C. Williams, Jr. and a jury. App. 1. Pelzer was represented by Mark A. Leiendecker and Martin Banks. Id. The State was represented by Solicitor David M. Pasco and Assistant Solicitor Donald Sorenson. Id.

The jury found Pelzer guilty of murder on December 4, 2009. App. 935, ll. 21-23. Judge Williams sentenced Pelzer to life without the possibility of parole. App. 960, ll. 8-12; 1091. A direct appeal was not filed on Pelzer's behalf.

On August 4, 2010, Pelzer filed an application requesting post-conviction relief ("PCR"). App. 964-971. In his application, Pelzer asserted, among other things, that his trial attorneys were ineffective for failing to file a direct appeal. App. 965-966, 970. The State filed its Return on February 4, 2011. App. 972-976.

An evidentiary hearing was held on November 1, 2012 before the Honorable Carmen T. Mullen. App. 977-1059. Pelzer was represented by Tara Dawn Shurling, and the State was represented by Assistant Attorney General Megan E. Harrigan. App. 977. Pelzer, and his trial attorneys, Martin Banks and Mark Leiendecker, testified at the hearing. App. 982-1058. On March 13, 2013, Judge Mullen filed her Order of Dismissal denying Pelzer's PCR application. App. 1070-1087.

On November 18, 2013, Pelzer filed a Petition for Writ of Certiorari with this Court, arguing in part that the PCR court erred in finding that Pelzer was not entitled to a belated direct appeal of his life without parole sentence. On August 6, 2014, this Court granted

Pelzer's Petition for Writ of Certiorari with respect to whether he was entitled to a belated direct appeal, dispensed with further briefing, and directed the parties to brief the issues set forth in the Statement of Issues on Appeal attached to the petition pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). This brief now follows[1].

[1] In the Petition for Writ of Certiorari, counsel Pelzer listed five issues for review. Counsel for Pelzer has combined issues number 2 and 4 in this brief and has determined that issue number 3 does not warrant briefing.

STATEMENT OF FACTS

Jason Rivenburg was a tractor trailer driver from New York State. App. 138, l. 8 - 139, l. 18. On Thursday, March 5, 2009, Rivenburg drove to South Carolina because he had a delivery to make at a Food Lion in Elloree, South Carolina. App. 141, ll. 139, l. 19 – 141, l. 11; 150, ll. 14-24. Rivenburg was driving a 1997 tractor trailer that evening. App. 150, l. 25 – 151, l. 3.

Rivenburg called his friend, Jerry Dubin, also a tractor trailer driver from New York State, around 9:00 p.m. that evening. App. 140, ll. 1 – 23. The two spoke for a few minutes, but Dubin told Rivenburg to call him back a little later. Dubin testified that when he spoke to Rivenburg at 9:00 p.m., Rivenburg was still driving his truck at that point. App. 140, l. 24 – 141, l. 14.

Dubin called Rivenburg back around 10:30 p.m. or so that evening. Rivenburg was no longer driving at that point and informed Dubin that he had pulled over for the night but was real close to his second stop. App. 141, ll. 15-25. Dubin testified that he and Rivenburg spoke for a good fifteen to twenty minutes. App. 142, ll. 15-20. At some point, Dubin thought he had lost the call. Dubin said all he heard was silence and then the next thing he heard was an "Oh, my God," and a sound like the phone dropped. App. 142, l. 21 – 143, l. 1. Dubin said he heard rustling and breathing and then a "bang, and another one repeatedly after that." App. 143, ll. 2-7.

Dubin stayed on the line for at least five minutes and ultimately hung up with Rivenburg. Dubin tried to call Rivenburg back and sent text messages, but never received a response. He was not able to get in contact with Rivenburg the next Friday morning either.

App. 144, ll. 1-16. Dubin later learned from Rivenburg's wife that Rivenburg never made his second delivery. App. 144, l. 19 – 145, l. 8.

At 4:53 a.m. on Saturday, March 7, 2009, Sergeant Mike Headden with the Calhoun County Sheriff's Office was dispatched to the former and now abandoned Brakefield's BP gas station across from the Brakefield's Exxon gas station on Caw Highway. The complainant said that the dome light of a tractor trailer had been on for two nights in a row. When Sergeant Headden arrived at the scene, he looked through the passenger side door of the tractor trailer and observed a deceased person. App. 157, l. 3 – 158, l. 25; 187, ll. 21-23.

The deceased person was identified as Rivenburg. App. 277, ll. 3-5. He had been shot twice in the head. App. 279, ll. 11-12.

The State's law enforcement witnesses testified that a .45 caliber handgun purchased by a Willie Reed was most likely the weapon used to kill Rivenburg. App. 609, l. 3 – 615, l. 24.

Willie Reed had known Pelzer for approximately thirteen years. They had gone to school and church together. App. 296, ll. 3-9. Willie Reed purchased a .45 caliber handgun from Woody's Pawn Shop in Orangeburg on February 17, 2009. He testified that Pelzer and another individual named Jimmy Haygood were with him when he purchased the gun. App. 303, ll. 9-25. Jimmy Haygood was also supposed to purchase a gun that day but he did not have his State ID. App. 304, ll. 3-8.

The gun Willie Reed purchased was kept at Jimmy Haygood's father's house. Willie Reed said he did not keep the gun where he lived because he had young nephews at his house. App. 304, ll. 15-25. While Willie Reed said the gun belonged to him, others thought that it was Jimmy Haygood's gun since the gun was kept at Jimmy's house. App.

444, l. 21 – 445, l. 7. Jimmy Haygood also carried the gun on his person most of the time. App. 449, l. 15 – 450, l. 11. According to Bryant Haygood, Jimmy's cousin, everybody that it was Jimmy's gun. App. 450, ll. 10-11.

Willie Reed testified at trial against Pelzer. On the day that Rivenburg was killed, March 5, 2009, Willie Reed said that he, Jimmy Haygood, and Bryant Haygood hung out with each other. App. 306, l. 22 – 307, l. 25. Eventually, they all were hanging out at a house on Merrybell Lane. This was around 3:00 in the afternoon. Pelzer stopped by the house around 4:30 p.m. App. 308, l. 18 – 311, l. 24.

Around 10:00 p.m. that night, Willie Reed, Jimmy Haygood, and Bryant Haygood left the Merrybell Lane house to go get gas at the gas station. According to Willie Reed, Pelzer was still at the house when Reed and the Haygoods left the house at 10:00 p.m. App. 313, l. 17 – 315, l. 5.

Willie Reed and the Haygoods first went to get gas at the Brakefield's Exxon right across from the closed BP gas station where Rivenburg had parked his tractor trailer for the night. App. 315, l. 6 – 316, l. 1; 525, ll. 1-3. Willie Reed said that they were unable to get gas at the Exxon because it closed a little early and they were told by the clerk that they could not pay with cash for gas at that time; they would have needed a debit or credit card to pay at the pump instead. Since they were planning to pay for gas with cash, Willie Reed said they went to Shell station on Columbia Road. After that, Willie Reed said they dropped Bryant Haygood off at his home and then went to the house of Jimmy Haygood's uncle. App. 316, l. 2 – 317, l. 21.

Willie Reed and Jimmy Haygood stayed at Jimmy's uncle's house for about five to ten minutes. They left the uncle's house around 10:30 p.m. App. 553, ll. 13-14. Willie

Reed and Jimmy Haygood were heading back to Jimmy's father's Merrybell Lane house when they allegedly received a telephone call from Pelzer asking them to meet him at the end of Bridle Wreath and Murph Mill. App. 318, l. 12 – 319, l. 6; 321, ll. 8-11. Willie Reed said he and Jimmy Haygood received that call from Willie Pelzer at approximately 10:49 p.m. Willie Reed and Jimmy Haygood then went to the location that Pelzer mentioned, but Pelzer did not show up at that location. Willie Reed and Jimmy Haygood were then going to head back to the Merrybell Lane house. App. 322, ll. 2-15.

Willie Reed testified that he and Jimmy then received another telephone call from Pelzer asking Willie Reed to come pick up Pelzer from Pelzer's trailer on Merrybell Lane. App. 323, ll. 10-24. They received this telephone call from Pelzer around 11:07 p.m. App. 323, l. 25 – 324, l. 2. Willie Reed and Jimmy Haygood did not head over to Pelzer's trailer right away, and they received another telephone call from Pelzer at about 11:13 p.m. wanting to know why they had not arrived. Willie Reed and Jimmy Haygood then went over to Pelzer's place shortly after 11:13 p.m. App. 324, ll. 3-24.

Willie Reed testified that when he arrived at Pelzer's trailer, he saw Pelzer place the .45 caliber gun purchased by Willie Reed on the car. Willie Reed claimed that Pelzer said he had killed someone. App. 325, ll. 3 – 14. Willie Reed also claimed Pelzer was no longer wearing a shirt that he was wearing earlier in the evening and that Pelzer was burning something in his backyard. App. 325, l. 20 – 326, l. 12.

Willie Reed then contended that Pelzer wanted to drive to Charleston that night. Willie Reed, Jimmy Haygood, and Pelzer took Jimmy Haygood's uncle's car to Charleston. Jimmy Haygood drove to Charleston. App. 330, l. 16 – 332, l. 3. The three arrived at an apartment complex in Charleston where Pelzer knew someone. Willie Reed alleged he

believed that Pelzer got rid of the gun while in Charleston. Willie Reed just assumed that Pelzer threw the gun in a dumpster, although Willie Reed admitted that he did not see that happen. App. 332, l. 18 – 333, l. 12.

The three arrived back at Jimmy Haygood's uncle's house in Calhoun County around 4:00 a.m. in the morning on March 6, 2009. App. 335, ll. 1-5. Willie Reed went to Jimmy Haygood's house at 10:00 a.m. in the morning on March 6, 2009, and the two falsely reported to the police that the .45 caliber handgun had been stolen to help them not be connected to a murder. App. 335, l. 13 – 336, l.8; 353, ll. 5 – 12; 353, l. 25 – 354, l. 4. Willie Reed did not tell the police anything about Pelzer allegedly saying that he killed someone or allegedly getting rid of the weapon in Charleston. App. 336, ll. 12-17.

Willie Reed met with the Calhoun County Sheriff's Office at about 4:30 p.m. on Saturday, March 7, 2009. Willie Reed again lied to the police about the gun being stolen and still did not tell the police that he knew anything about a murder. App. 337, l. 3 – 338, l. 6.

Willie Reed went back to the Sheriff's Office on Sunday, March 8, 2009 where he was then arrested for accessory after the fact of murder. App. 338, l. 12 – 339, l. 13.

Jimmy Haygood also testified at trial. He said that on the night of the incident, he had put the gun in his spare bedroom at his father's house on Merrybell Lane. He admitted that anybody who was at the house that night had access to the gun. App. 477, l. 21 – 478, l. 2. Jimmy Haygood claimed that Pelzer asked to borrow the gun that night but that he said no. App. 478, ll. 3-9.

Jimmy Haygood gave a similar account at trial as Willie Reed about Reed, Jimmy, and Bryant going to try to get gas at the Brakefield's Exxon across from the former BP

station where Rivenburg had parked his truck for the night. App. 478, l. 13 – 479, l. 24; 525, ll. 1-3. Jimmy Haygood said at 10:28 p.m. he received a call from Pelzer but did not answer the call. App. 480, l. 21 – 481, l. 8. Jimmy Haygood said he received a call from Pelzer at 10:49 p.m. asking him and Willie Reed to meet him at Bridal Wreath and Murph Hill. App. 481, ll. 9-18.

Jimmy Haygood testified that he tried to call Pelzer at 10:56 p.m. on March 5, 2009 but that his call went to Pelzer's voice mail. The State alleged that Jimmy Haygood's telephone call to Pelzer at 10:56 p.m. that went to Pelzer's voice mail was the exact time that Rivenburg was being murdered. App. 483, l. 24 – 484, l. 14.

Jimmy Haygood then received a call from Pelzer at 11:07 p.m. asking Reed and Haygood to pick him up from his trailer on Merrybell Lane. App. 485, ll. 7-20. Jimmy Haygood testified that Pelzer sounded calm in this call and did not sound agitated or scared. App. 548, l. 17 – 549, l. 5. Pelzer called them back at 11:13 p.m., and Willie Reed and Jimmy Haygood went over to Pelzer's. App. 486, ll. 4-24. Jimmy Haygood also claimed that Pelzer told him that he had killed someone. App. 487, l. 12.

The three then drove to Charleston, with Jimmy Haygood driving. Haygood claimed that Pelzer had the gun on him on the way down to Charleston and that he saw Pelzer throw away the gun in a trash can. App. 490, l. 20 – 493, l. 13.

After arriving back to Calhoun County, Haygood with Willie Reed falsely reported the gun stolen to the Calhoun County Sheriff's Office. App. 494, l. 2 – 495, l. 11.

Around 9:30 p.m. the evening of Saturday, March 7, 2009, Jimmy Haygood told the police that Willie Pelzer had killed Rivenburg. App. 501, ll. 9-16. Jimmy Haygood, like Reed, was also arrested for accessory after the fact of murder. App. 501, ll. 20-22.

Detective Stanley Graham picked up Pelzer during the early morning hours of Sunday, March 8, 2009. App. 679, ll. 10-18. In a verbal statement, Pelzer stated that he had not killed anyone. He also stated that he had not killed a white man, which the detective thought was significant because law enforcement had not disclosed the race of the victim. App. 685, ll. 1 – 11. However, Pelzer's mother, Carolyn Murph worked at the Wilco Hess Travel Plaza, and she had already heard the gossip from co-workers that there was a white trucker who had been killed. Carolyn Murph spoke to Pelzer around 3:30 in the afternoon on Saturday, March 7, 2009 and relayed to him that news. App. 801, l. 11 – 802, l. 22.

Pelzer's mother, Carolyn Murph, further testified that on the evening of March 5, 2009 when Rivenburg was killed, Pelzer came home to her house at 10:15 that night. She eventually went to bed and last saw her son around 10:45 p.m. that evening. App. 803, l. 9 – 805, l. 24. After she went into her bedroom at 10:45, she could hear Pelzer making noises with pots and pans like he was fixing himself something to eat. App. 806, ll. 3 – 23. Murph did not know what time Pelzer left the house, but she testified that he arrived back home around 4:00 a.m. the next morning. App. 807, ll. 4-5; 808, ll. 18-23.

Pelzer was ultimately placed under arrest for the murder of Rivenburg. App. 745, ll. 5-7. There was no physical evidence linking Pelzer to the murder of Rivenburg – no fingerprints, no footwear impressions, no DNA, no blood evidence, and no gunshot residue linking Pelzer to the scene on either Pelzer's person or clothes. App. 191, l. 25 – 192, l. 2; 207, ll. 13-21; 225; 13-17; 226, ll. 18-19; 230; ll. 8-15; 764, l. 14 – 765, l. 9; 767; 1 – 25; 768, ll. 1-5; 779; 16-17.

Pelzer's arrest for the murder of Rivenburg was based on the statements of Willie Reed and Jimmy Haygood, the two individuals connected to the gun used to kill Rivenburg, and the fact that Pelzer did not answer a call from Jimmy Haygood at 10:56 p.m. on March 5, 2009, the time the State alleged Rivenburg was killed.

ARGUMENT

I. The Trial Court erred by granting the State's Batson motion finding defense counsel's peremptory challenge of juror # 94 was not racially neutral where defense counsel struck this juror because this juror's wife was employed at a doctor's office and therefore he was privy to the nature of injuries and medical conditions due to his association with his wife and her co-workers.

Following the selection of the initial jury, the State challenged Pelzer's peremptory strike of juror # 94, a white male. App. 72, ll. 12-16; 75, l. 11 – 76, l. 23; 80, ll. 1-4. Pelzer's counsel explained that he struck juror # 94 for the following reason:

> Defense counsel: That one dealt strictly with the fact concerning his wife's employment in Dr. Williams' office here in town, and because of the nature of the injuries and medical conditions contained therein, I'm uncomfortable and avoid seating anyone if they have medical knowledge or think they have medical knowledge because of who they hang out with and who they talk to.
>
> The Court: His wife is employed at a doctor's office?
>
> Defense counsel: Yes, sir. Dr. Ed Williams' office. And also his answer to questions concerning that process - - he didn't say anything other than that, Your Honor, that just gave us cause to try to eliminate the medical personnel.

App. 80, ll. 5-18.

The State argued in response that juror # 94 was a welder and did not have any medical background himself. The State also argued that Pelzer sat a black female who worked as a certified nursing assistant at a nursing home. App. 80, l. 20 – 81, l. 12. Defense counsel responded that he did not realize the female juror worked as a nursing assistant because his notes only reflected that she worked at a nursing home. App. 81, ll. 10-12.

The Trial Court rejected Pelzer's reason for striking juror # 94 and ordered a new jury drawn. App. 86, l. 21 – 87, l. 22. Juror # 94 was then seated on the jury during the second jury selection. App. 114, ll. 10-15.

The Trial Court erred in rejecting the racially neutral explanation for the strike of juror # 94 and consequently granting the State's Batson motion and quashing the first jury selected. A criminal defendant is constitutionally guaranteed a fair trial by an impartial jury. U.S. CONST. amend. VI; S.C. CONST. art. I, § 14; State v. Salters, 273 S.C. 501, 257 S.E.2d 502 (1979). This guarantee includes the right to a selection process that is unbiased and fair to himself and the jurors. See, e.g., Powers v. Ohio, 499 U.S. 400, 410-16 (1991).

A party "ordinarily is entitled to exercise permitted preemptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried . . . ." Batson v. Kentucky, 476 U.S. 79, 89 (1986). "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." State v. Hicks, 330 S.C. 207, 211, 499 S.E.2d 209, 211 (1998) (citing Batson); see also State v. Edwards, 384 S.C. 504, 508, 682 SS.E.2d 820, 822 (2009).

Batson challenges follow a three step process: (1) the opponent of the strike requests a hearing and asserts a prima facie case of racial or gender discrimination; (2) the proponent of the strike must offer a race or gender neutral explanation; and then (3) the opponent must show the race or gender neutral explanation was mere pretext. See, e.g., State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 90-91 (1999); see also State v. Cochran, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006).

The "second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett v. Elem, 514 U.S. 765, 767-68 (1995). This Court has recognized that the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations for the strikes. State v. Adams, 322 S.C. 114, 123, 470 S.E.2d 366, 371 (1996); see Purkett, 514 U.S. at 768 (finding unless discriminatory intent is inherent in the explanation, it is deemed race neutral at step two).

During the third step, the moving party "must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." Cochran, 369 S.C. at 315, 631 S.E.2d at 298 (citing Adams, 322 S.C. at 124, 470 S.E.2d at 372). "This burden is generally established by showing similarly situated members of another race were seated on the jury." Id. "Unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext." Id. In determining whether potential jurors are similarly situated, the courts have focused their inquiry on whether there are meaningful distinctions between the individuals compared. State v. Scott, 406 S.C. 108, 115, 749 S.E.2d 160, 164 (Ct. App. 2013).

In the present case, Pelzer offered a racially neutral explanation for striking juror # 94 – that his wife was employed at a doctor's office and because of the injuries involved in the case, defense counsel did not like to seat medical personnel or individuals closely associated with medical personnel. App. 80, ll. 5-18. That Pelzer sat on the jury a black female who worked at a nursing home does not establish that his facially race-neutral reason for striking juror # 94 was mere pretext to engage in purposeful racial discrimination. There

are distinctions between doctor's offices and nursing homes. Those working in a doctor's office, such as juror # 94's spouse, are treating sick and injured individuals. On the other hand, a nursing home is generally thought of as a place that provides residential care for mostly elderly individuals.

In addition, defense counsel explained that his notes only reflected that the black female juror worked at a nursing home and he did not realize that she worked as a nurse's assistant when he sat her on the jury. App. 81, ll. 10-12. This shows that defense counsel for Pelzer did not engage in any purposeful racial discrimination. See State v. Casey, 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct. App. 1997) (stating that "the uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race or gender neutral explanation for the inconsistency"); id. (holding that although the solicitor did not challenge a female juror with prior jury service yet struck a male juror with prior service, and thus the reason for striking the juror was applied inconsistently, the solicitor's explanation that it was merely an omission and mistake on his part was gender-neutral).

The State did not meet its required burden of establishing that Pelzer's race-neutral reason for striking juror # 94 was mere pretext to engage in purposeful racial discrimination. Therefore, the Trial Court improperly granted the State's Batson motion as to juror # 94. Because juror # 94 was seated on the second jury, Pelzer was denied his right to exercise his preemptory challenges and the case should be remanded for a new trial. Scott, 406 S.C. at 117, 749 S.E.2d at 165.

II. The Trial Court erred in denying Appellant's motion to change venue or motion to disqualify the entire jury panel and move the case to a later term where 31 jurors of the pool of 47 jurors had exposure to the extensive pretrial publicity of the case and where at least six of the jurors from the jury pool had participated in fundraising efforts for the deceased's family.

Defense counsel for Pelzer moved to either change venue or disqualify the entire jury panel and move the case to later term where 31 jurors of the pool of 47 jurors had exposure to the extensive pretrial publicity about the case and where at least six of the jurors from the jury pool had participated in and contributed to fundraising efforts to assist Rivenburg's family. App. 45, l. 12 – 64, l.15; 94, l. 25 – 97, l. 13; 98, ll. 13-18; 103, ll. 13-16.

Jurors made references to the fact that the case "was all over the newspaper and TV" and that people at the Food Lion talked about the case since Rivenburg was headed there. App. 52, l. 25 – 53, l. 1; 53, ll. 12-13; During argument on the motion, defense counsel pointed out that a number of jurors had indicated not just exposure to pre-trial publicity but that they had actually discussed the case with other people. 51, ll. 15-16; 53, ll. 12-13, 24-25; 56, ll. 9-10; 57, ll. 22-24; 60, ll. 22-25; 62, ll. 15-16; 96, ll. 21-25.

Defense counsel also raised the concern that it would be very hard for jurors who had raised money for Rivenburg's family – his widow had children and was pregnant at the time of his death – to be fair after they had "poured their money and their heart[s] into this victim's family." App. 102, l. 20 – 103, l. 5.

After lengthy discussion and argument, the Trial Court denied Pelzer's motion to change venue or disqualify the entire jury panel and move the case to a later term. App. 108, ll. 9-11.

A criminal defendant is entitled to an impartial jury, "free of prejudice, passion, excitement, and tyrannical power." Chambers v. Florida, 309 U.S. 227, 236-237 (1940); Ristaino v. Ross, 424 U.S. 589 (1976); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). It is the trial judge's duty to ensure that the jury is fair and unbiased. State v. Gaskins, supra. The failure to ensure juror impartiality "violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961).

The denial of a motion to change venue based on pretrial publicity may violate due process. Patton v. Yount, 467 U.S. 1025 (1984); Murphy v. Florida, 421 U.S. 794 (1975); Irvin v. Dowd, supra; Rideau v. Louisiana, 373 U.S. 723 (1963). To establish such a violation, the defendant must either demonstrate "identifiable prejudice" or circumstances that involved "such a probability that prejudice will result that that [the trial] is deemed inherently lacking in due process." Estes v. Texas, 381 U.S. 532, 542-543 (1965); Rideau, supra.

A motion to change venue is within the sound discretion of the trial court. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997); Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004). There is no error if the jurors "had the ability to set aside any impressions or opinions" created by the publicity and to make their decision based on the evidence presented at trial. Sheppard; Manning. However, the jurors' own assurances that they are "equal to the task cannot be dispositive of the accused's rights." Murphy v. Florida, supra, 421 U.S. at 800. In certain cases, exposure to inflammatory pretrial publicity creates such a presumption of prejudice "the jurors' claims that they can be impartial should not be believed." Patton v. Yount, supra, 476 U.S. at 1031.

In this case, as indicated by the potential jurors, the local community talked about this crime and supported the deceased's family through fundraising efforts. The crime had garnered lots of attention in the local community as it involved a father traveling from New York State to Calhoun County for work as a tractor trailer driver who was killed while waiting to make his delivery to the local Food Lion. His wife was pregnant when he was killed, and understandably, the community was very sympathetic to the deceased's family. Over half of the jury pool knew about this case, and there were at least five jurors seated on the jury who had been exposed to the facts of the case. App. 54, ll. 10-11; 57, ll. 13-14; 60, ll. 11-25; 63, ll. 1-2; 111, l. 13 – 118, l. 3 (Juror #s 58, 116, 75, 78, and 89). Pelzer used all of his peremptory challenges but given the sheer number of jurors in the pool who had been exposed to the case, all of those jurors could not be struck. App. 111, l. 13 – 118, l. 3.

Due to the nature of this case and the large percentage of venirepersons who were aware of media coverage and who discussed the case with others, Pelzer certainly established an inherent prejudice (case easily remembered) that would result in actual prejudice as a result of pretrial publicity. Therefore, the Trial Court erred in denying Pelzer's motions to change venue or to disqualify the entire jury panel and move the case to a later term.

III. The Trial Court erred in giving a voluntary intoxication charge to the jury where there was no evidence that Appellant was intoxicated on the night of the deceased's murder.

The State requested the Trial Court to give the jury a voluntary intoxication charge based on Detective Graham's testimony that Pelzer made a statement to him that sometimes he gets so high he cannot remember anything. App. 684, l. 24 – 685, l. 1; 832, ll. 5-9. Pelzer's counsel objected: "[Pelzer] never said that in at any relation to this case, that night, or in statements to anyone. That was a general statement made about times in the past and we object." App. 832, ll. 11-14. The Trial Court ruled that the voluntary intoxication charge would be given, finding "that evidence entitled the state to that charge." App. 832, ll. 15-17. The Trial Court thereafter charged the jury:

> "[V]oluntary intoxication is never an excuse for or a defense to a crime. A person who voluntarily renders himself intoxicated by the use of alcohol or drugs or a combination thereof is no less responsible for his acts while in such a condition. If one voluntarily drinks intoxicating liquor or wine or beer or is under the influence of drugs and becomes intoxicated to whatever degree, and if while in that condition commits an act which would be a crime if it had been committed by a sober person the fact of drunkenness would not relieve the intoxicated person from responsibility.

App. 927, l. 22 – 928, l. 7.

The Trial Court erred in charging the jury on voluntary intoxication because there was no evidence presented at trial that Pelzer had been drinking or doing drugs or was in any way intoxicated on the night of the deceased's murder. "In criminal cases, appellate courts review only errors of law and will not reverse a trial court's decision concerning jury instructions unless the trial court abused its discretion." State v. Miller, 397 S.C. 630, 634-35, 725 S.E.2d 724, 727 (Ct. App. 2012). "An abuse of discretion occurs when the [trial] court's decision is unsupported by the evidence or controlled by an error of law." State v. Garris, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011).

Here, the Trial Court abused its discretion in giving the jury a charge on a voluntary intoxication where the charge was not warranted or supported by the evidence presented at trial. No witness testified that Pelzer was intoxicated on the night of Rivenburg's murder, and no witness testified to seeing Pelzer drink or take any kind of drugs that night. The State argued the charge was appropriate based on Detective Graham's testimony that Pelzer made a statement that he got high sometimes and could not remember anything. This alleged statement, however, did not specifically refer to the evening in question and is not evidence that Pelzer was intoxicated at the time Rivenburg was killed. App. 684, l. 24 – 685, l. 1. See State v. Drayton, 293 S.C. 417, 429-30, 361 S.E.2d 329, 336 (1987) (finding defendant not entitled to the charge of voluntary intoxication as a mitigating circumstance in a capital case where there was no evidence defendant was intoxicated at the time the crime was committed).

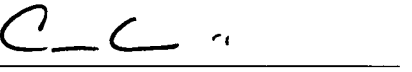
The voluntary intoxication charge was prejudicial because it could lead a jury to believe that perhaps Pelzer committed the crime because he was so drunk or high despite there being no evidence of either. The Solicitor highlighted this charge in his closing argument to the jury: "And let me tell you something else that's not in evidence. Voluntary intoxication is not a defense to a crime. Getting drunk or getting high on drugs is never a defense to a crime in South Carolina or anywhere else. Now it may be evidence as to why somebody did that or why somebody committed a crime, but it is never a defense to a crime." App. 844, ll. 13-19

Where the charge on voluntary intoxicated was not applicable in this case, Pelzer is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Willie Pelzer respectfully requests this Court to reverse his conviction for murder and remand for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Calhoun County
James C. Williams, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

WILLIE PELZER,

APPELLANT.

APPELLATE CASE NO. 2013-000731

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Megan E. Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 5th day of December, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 5th day
of December, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.