ALAN WILSON
ATTORNEY GENERAL

March 23, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Willie Pelzer, III, v. State of South Carolina
Appellate Case No. 2013-000731

Dear Mr. Shearouse:

Enclosed for filing are the original and thirteen (13) copies of Respondent's Brief of Respondent.

Sincerely,

Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar No. 100108

MHJ/sbm
Enclosures

cc: Laura R. Baer, Esquire
Trisha Allen, Victim's Services

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CALHOUN COUNTY
Court of Common Pleas

Carmen T. Mullen, Post-Conviction Relief Court Judge
James C. Williams, Jr., Trial Court Judge

Appellate Case No. 2013-000731

WILLIE PELZER, III,

Petitioner,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

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I. The trial court properly granted the State's Batson motion finding Petitioner's preemptory challenge of juror number 94 (a white male) was not racially neutral, where Petitioner asserted he struck this juror because of possible medical knowledge due to his wife's job in a doctor's office but seated a similarly situated juror of another race - juror number 51, an African American female who was a certified nursing assistant with medical training.

II. The trial court properly denied Petitioner's motion to change venue or in the alternative, to disqualify the jury panel and move the case to a later term, where each juror who remained on panel indicated that they had not formed an opinion regarding the case, could be fair and impartial, and could base their decision solely on the testimony and evidence presented in the courtroom.

III. The trial court properly instructed the jury regarding voluntary intoxication, as it was supported by ample evidence.

STATEMENT OF THE CASE

Petitioner was indicted during the April 2009 term of the Calhoun County Grand Jury for Murder (2009-GS-09-0022). He was represented by Martin Banks, Esquire, and Mark Leiendecker, Esquire, both of the First Circuit Public Defender's Office. On December 1-4, 2009, Petitioner proceeded to a jury trial before the Honorable James C. Williams, Jr., where he was convicted as indicted. Judge Williams sentenced Petitioner to life without parole. No direct appeal was taken.

Petitioner filed an application for post-conviction relief on August 4, 2010, alleging he was being held in custody unlawfully based on various allegations of ineffective assistance of counsel. Respondent made its Return on February 4, 2011, requesting an evidentiary hearing be held. An evidentiary hearing was convened on November 1, 2012, at the Dorchester County Courthouse before the Honorable Carmen T. Mullen. Petitioner was present and represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office.

At the start of the evidentiary hearing, Petitioner advised the court of several additional grounds on which he intended to proceed forward. Petitioner testified on his own behalf, as well as presented testimony from counsel Banks. Respondent presented testimony from co-counsel Leiendecker. At the conclusion of the hearing, the court requested proposed order from both parties. On March 13, 2013, the court denied and dismissed Petitioner's application for post-conviction relief.

Petitioner timely filed and served a notice of appeal on March 28, 2013. Petitioner filed his Petition for Writ of Certiorari on November 18, 2013, arguing in part that the post-conviction relief court erred in finding Petitioner was not entitled to appellate review

pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Respondent submitted its Return to the Petition for Writ of Certiorari on April 1, 2014.

On August 6, 2014, this Court granted certiorari as to whether Petitioner was entitled to appellate review pursuant to White, dispensed with further briefing, and directed each party to brief the issues as set forth in the Statement of Issues on Appeal attached to the Petition; this Court denied certiorari as to Petitioner's remaining issue. On December 5, 2014, Petitioner filed his Brief. This Brief of Respondent follows.

STATEMENT OF THE FACTS

On Thursday, March 5, 2009, Jason Rivenburg, a tractor trailer driver from upstate New York, was driving through South Carolina on his way to deliver a load of milk to Food Lion in Elloree, South Carolina. (App. pp. 139, 141, 150). At approximately 9 p.m., Rivenburg spoke to Jerry Dubin, a fellow trucker and close friend. (App. p. 140). Dubin had to go shortly after the call began, but the two friends made plans to speak later in the evening. (App. pp. 140-41). Shortly thereafter, Rivenburg, nearing his delivery location for the next morning, decided to stop for the evening. Rivenburg pulled off of Interstate 77 on exit 136 into an abandoned gas station in Calhoun County. (App. p. 141-42, 187). The uninhabited station was across the street from Brakefield's Exxon station, which was still operational. (App. pp. 158, 170).

After stopping for the evening, Rivenburg began to clean the inside cab of his tractor trailer. (App. p. 142). At 10:30 p.m., Dubin called Rivenburg, who told Dubin that he had stopped driving for the evening and was near his delivery location for the next morning. (App. p. 142). The two friends talked for approximately twenty minutes, when the call was abruptly cut short. (App. p. 142). Dubin heard Rivenburg exclaim, "Oh my God!" followed by the phone dropping, loud breathing, rustling, and two loud bangs. (App. pp. 142-43, 146-47). Dubin waited on the phone for five minutes and eventually discontinued the call. (App. pp. 143-44, 146). He tried repeatedly to call Rivenburg back to no avail. (App. p. 143-44).

The following morning, Friday March 6, 2009, Dubin again tried to call Rivenburg without success. (App. p. 144). A few hours later, Dubin received a call from Rivenburg's wife, Hope, inquiring as to whether he had talked to Rivenburg. (App. pp. 144-45). Hope relayed that Rivenburg never arrived at his delivery location and she was

trying to locate him. (App. p. 145). Dubin told Hope he had spoken with Rivenburg the evening, but did not tell her about the disconnected call and the noises he had heard, as Hope was pregnant with twins and had a small child at home and he did not want to cause panic. (App. p. 145).

Rivenburg's family, growing increasingly concerned, contacted authorities in Schoharie County, New York where Rivenburg lived. (App. pp. 149-51). Rivenburg's father-in-law filed a missing person's report and relayed the limited information the family had to the Schoharie County Sheriff's Department. (App. 150). Deputy Nelson Armlin contacted Rivenburg's cellular phone provider, Verizon Wireless, and obtained a copy of his cell phone records. (App. pp. 151-52). From these records, Armlin was able to discern that Rivenburg's last recorded location was in Calhoun County, South Carolina. (App. p. 153). Armlin contacted the Calhoun County Sheriff's Office, to whom he relayed a description of Rivenburg and his tractor trailer and asked if they could look for Rivenburg. (App. p. 153-54).

In the early morning hours of Saturday, March 7, 2009, Sergeant Mike Headden with the Calhoun County Sheriff's Office received a dispatch call regarding a tractor trailer at an abandoned gas station across from Brakefield's Exxon station that had the dome light on for two straight nights. (App. pp. 157-58). Headden arrived at the abandoned station (formerly Brakfield's BP station) before sunrise and saw the truck as reported. (App. p. 158). He approached the tractor trailer and looked inside the passenger window, where he saw a deceased man with two apparent gunshot wounds to the head. (App. pp. 158-59). He immediately called for backup support and secured the scene. (App. p. 159).

South Carolina Law Enforcement Division (SLED) crime scene investigator Renee Strickland arrived at approximately 7 a.m. to process the scene. (App. pp. 187-88). She took photographs, dusted for fingerprints, and scoured the scene for ballistic evidence. (App. p. 188-208, 219-23). She recovered five casings from a .45 caliber firearm that morning, as well as an additional casing a few days later. (App. p. 222-23). She also recovered additional ballistic evidence indicating a .45 caliber weapon had been used, including a bullet lodged in the exhaust. (App. pp. 206-07). Based on this preliminary information indicating a .45 weapon had been used, law enforcement decided to speak with Willie Reed, Jr., and Jimmy Haygood, Jr., who lived nearby and had reported their .45 caliber firearm stolen the previous day. (App. 609-10).

Willie Reed, Jr. (hereinafter "Reed"), Jimmy Haygood, Jr. (hereinafter "Haygood"), and Petitioner grew up together and were close friends that saw each other multiple times a week. (App. p. 296, 466-67). On February 17, 2009, the three friends had purchased the .45 caliber firearm that was later reported stolen from Woody's Pawn Shop in Orangeburg. (App. pp. 303-305, 470-72). Haygood had initially intended to purchase the firearm himself but was unable due to a lack of state-issued identification.[1] (App. p. 304-05,470-72). Reed elected to purchase the weapon for himself, but the two agreed that the weapon would be kept at the home of Haygood's father, as Reed's parents forbade him from keeping a weapon in their home. (App. pp. 304-05, 471-72). All three friends had fired the gun. (App. p. 305, 472).

Reed and Haygood initially denied any knowledge or involvement in the murder and maintained that the weapon had been stolen from the Haygood residence by an

[1] Haygood had return to the Calhoun County area a few months prior following his honorable discharge from the United States Navy due to an injury. (App. p. 465). At the time the weapon was purchased, he only had Navy identification and had not yet obtained any state-issued identification. (App. p. 471).

intruder. (App. pp. 335-39, 348-54, 494-97). However, late Saturday, March 7, 2009 and early March 8, 2009, both men agreed to cooperate with law enforcement and provided information regarding the day leading up to the murder and the events that followed. (App. p. 339, 500-01).

On Thursday, March 5, 2009, Reed, Haygood, and Haygood's cousin Bryant were hanging out at the home of Haygood's father on Merrybell Lane in Calhoun County. (App. p. 306-10, 473-74). Around 4:30 p.m., Petitioner arrived on foot, having jogged over from his mother's home. (App. pp. 310-11, 474). The four friends hung out for the afternoon and evening, all drinking from a bottle of Hennessy Cognac that they had purchased earlier that day. (App. pp. 307-08, 311, 473-75). At some point, Petitioner asked Haygood for twenty dollars and Haygood complied. (App. p. 474). The .45 caliber weapon remained on the couch inside the house for most of the day until Haygood eventually put it in a spare bedroom that evening. (App. p. 476-78). Petitioner asked Haygood if he could borrow the weapon and Haygood said no. (App. p. 478). Petitioner spent most of the day inside on his phone. (App. p. 313, 475).

At approximately 10 p.m. that evening, Reed and Haygood left the house on Merrybell Lane to take Bryant home. (App. pp. 313-15, 478). The three stopped to get gas at Brakefield's Exxon but were turned away because the register already been closed for the evening. (App. pp. 315-16, 478-79). The three proceeded to another gas station before dropping Bryant off at his home in Orangeburg. (App. pp. 316-17, 479). Reed and Haygood then stopped by to see Haygood's uncle, Willie Clay Haygood, who also lived in Orangeburg, for around ten minutes. (App. pp. 317-18, 479-81). Reed and Haygood then then left Haygood's uncle's home and headed back to Merrybell Lane at approximately 10:45 p.m. (App. pp. 318, 321, 481).

While on their way back to Merrybell Lane, Haygood received a call from Petitioner asking them to pick him up at the intersection of Bridal Wreath and Murph Mill. (App. pp. 318-19, 321-22, 481). Reed and Haygood proceeded to the intersection, but returned to Merrybell Lane after waiting for Petitioner for ten minutes. (App. pp. 321-23, 481-85). Haygood called Petitioner at 10:56 p.m. to ask where he was, but Petitioner's phone went directly to voicemail. (App. p. 483-84). At 11:07 p.m., Petitioner called Haygood again and asked if Reed would pick him up at a trailer where he used to live on Merrybell Lane. (App. pp. 323-24, 485). At 11:13 p.m., Petitioner called again, asking where Reed was and instructing him to pull behind the trailer when he arrived. (App. pp. 324-25, 485-86). Reed then left the house on Merrybell Lane to get Petitioner at his trailer on Merrybell Lane. (App. pp. 324-25, 486).

When Reed arrived at Petitioner's trailer on Merrybell Lane, he pulled behind the trailer as Petitioner requested. (App. p. 325). He saw Petitioner in the backyard tending to a fire in a fire pit, where Petitioner appeared to be burning his shirt. (App. pp. 326-28). Petitioner was only wearing his undershirt tank top, not the shirt he had on previously. (App. pp. 325-26, 328). Petitioner approached the car, placed the .45 caliber weapon Reed owned on the car, and told Reed he had just killed someone. (App. p. 325).

Reed took Petitioner back to the Haygood home on Merrybell Lane. (App. p. 328-29, 486). Petitioner pulled Haygood aside, told Haygood that he had murdered someone, and stated that Haygood had better get Reed to help or there would be two dead bodies instead of one. (App. pp. 328-29, 486-87). Reed was upset that Petitioner had used the weapon without his permission. (App. pp. 329). Petitioner wanted to go to Charleston. (App. p. 330). Haygood wanted to get Petitioner out of the house and away from his family, so he and Reed took Petitioner to his uncle Willie Clay's house. (App. p. 329-30,

488). Once at Willie Clay's house, Haygood borrowed his uncle's car so the three could take Petitioner to Charleston. (App. p. 331, 488-89).

On the way to Charleston, Haygood drove, Petitioner was in the front passenger seat, and Reed was in the backseat. (App. pp. 331-32, 490-91). The three stopped and got gas for Willie Clay's car, which was confirmed by surveillance video at the gas station. (App. pp. 331-32, 490, 754). Petitioner instructed Haygood to drive to Bridgeview Apartments in Charleston, where he said he was going to meet a girl and spend the night. (App. pp. 332-33, 491-93). On the way, Petitioner was on the phone arguing with someone. (App. p. 333). When they arrived at Bridgeview Apartments, the girl Petitioner knew did not answer his calls. (App. pp. 333, 492-93). Petitioner discarded the gun in a dumpster and the three left. (App. pp. 333-34, 493). Petitioner drove Willie Clay's car to his mother's house, arriving in ear early morning hours of Friday, March 6, 2009. (App. pp. 334-35, 493). After he exited the car, Haygood and Reed proceeded back to Willie Clay's to drop off the car around 4 a.m. (App. p. 334-35, 493). Reed and Haygood separated at this point. (App. pp. 335, 493).

Around 10 a.m. Friday morning, Reed returned to Haygood's father's house and the two called law enforcement to report the weapon as stolen. (App. pp. 335, 494-95). Both later admitted they claimed someone broke into the Haygood home and stole the weapon because they were scared and did not want to be involved in the murder. (App. pp. 335). Later that day and early the following morning, both men admitted their police report was false and began assisting law enforcement in the Rivenburg murder investigation. (App. pp. 339, 500-02). Reed and Haygood were arrested and charged with accessory after the fact to murder. (App. pp. 339, 502-03).

Both men accompanied Calhoun County Sheriff's Deputies to Bridgeview Apartments to try to retrieve the firearm. (App. pp. 746-47). However, law enforcement was unable to recover the weapon because the dumpsters had been emptied the day prior. (App. pp. 687, 747). A subsequent search of the landfill was also unsuccessful. (App. pp. 747-48).

Petitioner was arrested in the early morning of Sunday, March 8, 2009, at his mother's home. (App. pp. 734-37). He gave a verbal statement to law enforcement that he had not killed a white man. (App. pp. 684-85, 742-43). Law enforcement found this statement particularly revealing, as neither the identity nor race of Rivenburg had been reported. (App. p.p. 685, 743).

Petitioner proceeded to trial December 1-5, 2009. Reed and Haygood testified for the State consistently as to the day leading up to the murder and the aftermath. (App. pp. 293-400, 463-548). The State also introduced cellular phone records for both Petitioner and Haygood, which further corroborated Reed and Haygood's version of events. (App. pp. 247-66). A SLED firearms technician testified that the bullets and casings found at the scene, as well as the bullets removed from Rivenburg, were consistent with the test bullet that accompanied the gun Reed and Haygood had purchased. (App. pp. 574-582).

The State also called Dana Brown, the woman from Bridgeview Apartments in Charleston that knew Petitioner. Brown testified that she had met Petitioner in a chat room in late 2008 and had met him once in January 2009. (App. pp. 404-08). She testified as to the extensive text messages the two exchanged on March 5-6, 2009, where Petitioner asks her for money and marijuana, indicates he is planning on robbing someone, asks if he can stay with her in Charleston, then asks for her to tell law enforcement they were together on the evening of March 5, 2009. (App. pp. 408-426).

The State also called Greg Mack, a neighbor and acquaintance of Petitioner. (App. pp. 565-574). Mack testified that he received a call from Petitioner at 11:10 p.m., during which Petitioner hold Mack that he "messed up" and asked if they could speak in person. (Ap. pp. 568-570). Petitioner also asked Mack for a ride, but Mack was unable to assist him because he did not have a car. (App. pp. 569-70).

Petitioner presented his mother, Carolyn Murph, as his sole witness. (App. pp. 796-827). Murph testified she worked at the Wilco Hess Travel Plaza, which was frequented by truckers and deputies alike. (App. pp. 798-801). She testified she had learned the victim was white while at work on the afternoon of Saturday, March 7, 2009, and called her son to tell him. (App. pp. 801-803). She also testified that Petitioner was at her home around 10:15 p.m. on the evening of Rivenburg's murder and she last saw him at 10:45 p.m., when she went to bed. (App. pp. 803-07). Although other family members lived at her residence and were home that evening, she is the only one who testified she saw Petitioner. (App. p. 822). She testified she later saw Petitioner at 4:00 a.m. on Friday, March 6, 2009, when he returned home. (App. pp. 808, 823).

After deliberating for approximately four and a half hours, the jury convicted Petitioner of murder. (App. pp. 934-35). During his sentencing proceeding, Petitioner addressed the Rivenburg family and apologized repeatedly for his actions and for putting the family through the stress of a trial rather than him pleading guilty. (App. p. 957-58). Petitioner also stated, "I admit what I did was wrong. I admit to it." (App. p. 957). He elaborated that his actions were "senseless" and "selfish." (App. p. 957-58).

ARGUMENT

I. The trial court properly granted the State's Batson motion finding Petitioner's preemptory challenge of juror number 94 (a white male) was not racially neutral, where Petitioner asserted he struck this juror because of possible medical knowledge due to his wife's job in a doctor's office but seated a similarly situated juror of another race - juror number 51, an African American female who was a certified nursing assistant with medical training.

Petitioner contends the trial court erred in finding his strike of juror number 94 (a white male) violated Batson v. Kentucky, 476 U.S. 79 (1986). Petitioner maintains that he provided a racially neutral reason for striking juror number 94 –his 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. However, the trial court properly ruled the explanation given by counsel for the strike of juror number 94 was mere pretext, as a similarly situated African American juror was seated on the jury. The trial court did not abuse its discretion in finding Petitioner's strike of juror number 94 violated Batson. As a result, the juror number 94 was properly reinstated into the jury pool and could not be struck during the subsequent jury draw.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5 6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. On review, this Court is limited to determining whether the trial court abused its discretion. State v. Edwards, 384 S.C. 504, 682 S.E.2d 820, 822 (2009).

When determining whether a Batson violation has occurred, the reviewing court must examine the totality of the facts and circumstances in the record. State v. Rogers,

405 S.C. 520, 524, 748 S.E.2d 247, 250 (Ct. App. 2013) (citing State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)). "Appellate courts give the trial judge's finding great deference on appeal, and review the trial judge's ruling with a clearly erroneous standard." Shuler, 344 S.C. at 615, 545 S.E.2d at 810. "A finding is clearly erroneous if it is not supported by the record." Id. at 620, 545 S.E.2d at 813.

Analysis / Discussion

"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." Shuler, 344 S.C. at 615, 545 S.E.2d at 810. "The purposes of Batson and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." State v. Haigler, 334 S.C. 623, 628–29, 515 S.E.2d 88, 90 (1999) (internal citations omitted). "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one." Shuler, 344 S.C. at 615, 545 S.E.2d at 810.

In Purkett v. Elem, 514 U.S. 765, 767(1995), the Supreme Court of the United States explained the proper procedure for a Batson hearing as follows:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

514 U.S. at 767.

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). In step two, "the proponent of the strike does not carry 'any burden of presenting reasonably specific, legitimate explanations for the strikes.'" Id. (internal citations omitted). "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).

"At step three, the opponent of the strike 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 (internal citation omitted). "The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike." Haigler, 334 S.C. at 629, 515 S.E.2d at 91. "This burden is generally established by showing similarly situated members of another race were seated on the jury." Cochran, 369 S.C. at 315, 631 S.E.2d at 298. However, 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. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (finding the State provided a racially neutral explanation for why the solicitor did not strike a juror with similar characteristics to one previously stricken); see Purkett, 514 U.S. at 768, (during step three, "persuasiveness of the justification becomes relevant."); see also State v. Geddis, 313 S.C. 37, 437 S.E.2d 31 (1993); State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991).

The ultimate question which the trial court resolves under the third step is whether the movant has met his burden in demonstrating purposeful discrimination. State v. Casey, 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct. App. 1997) (internal citations omitted). The trial court's determination is flexible of whether minimum quantum of evidence has been produced that facially neutral explanation for peremptory strike was mere pretext, as ruling turns on examination of totality of facts and circumstances in record, including credibility and demeanor of strike's proponent and plausibility of neutral but otherwise unpersuasive reason. Id. The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. Edwards, 384 S.C. 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)). The trial court must often base its decision on credibility determinations, and its rulings on discrimination are accorded great deference on appeal. State v. Casey, 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct. App. 1997) (citing State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991) (finding that absent showing that solicitor intentionally exercised strike because of discriminatory reasons, trial court's findings that strike was not racially motivated should be given great deference on appeal)). However, where the trial court's findings are not supported by evidence in the record, such findings will be overturned. Casey, 325 S.C. at 454, 481 S.E.2d at 173 (citing State v. Grate, 310 S.C. 240, 423 S.E.2d 119 (1991)). When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo." Cochran, 369 S.C. at 315, 631 S.E.2d at 298.

"If a trial court improperly grants the State's Batson motion, but none of the disputed jurors serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to the jury of her choice." State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009). "However, if one of the disputed jurors is seated on the jury, then the erroneous Batson ruling has tainted the jury and prejudice is presumed in such cases 'because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged.'" Id. (quoting State v. Rayfield, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006)). "The proper remedy in such cases is the granting of a new trial." Id.

In the case at bar, Petitioner used all ten of his preemptory strikes to eliminate white potential jurors. The State challenged six of those ten, including the juror subject to this appeal, juror number 94. In response to the State's challenge to juror number 94, Petitioner's counsel provided the following explanation:

> That one dealt strictly with the fact concerning his wife's employment in Dr. Williams office hear 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 talk to . . . that just gave us cause to try to eliminate the medical personnel.

(App. p. 80). In reply, the State asserted that this explanation was merely pretext, as juror number 94 is a welder without any personal medical background and the first juror sat by Petitioner, juror number 51, is an African American female nurse. (App. pp. 80-81). Petitioner's counsel replied that this was an "oversight" and that his notes only reflected that she worked in a nursing home. (App. p. 81).

The trial court determined that Petitioner's explanation for striking juror number 94 was pretext, noting that Petitioner sat an African American female with medical background and training. The trial court elaborated:

> And it's obvious [juror number 94], the 10th juror seated -- no, he was the 10 strike exercised, not seated. He was the 10th strike to exercise. He would have been the 11th juror. Then three out of the next four people on the list according to the list printed, were black individuals. So it was pretty obvious that by striking [juror number 94], he was going to be replaced by a black juror, and, in fact, he was. So I reject that reason given by the defense. So I will order a new jury drawn.

(App. p. 87).

The trial court did not abuse its discretion in granting the State's Batson motion in reference to juror number 94 and Petitioner is not entitled to a new trial on this ground. The trial court's ruling is supported by evidence in the record. The opponent's burden of pretext is generally established by showing similarly situated members of another race were seated on the jury. Cochran, 369 S.C. at 315, 631 S.E.2d at 298. The State met its burden of showing that Petitioner's purported racially neutral explanation for striking juror number 94 was pretext, as Petitioner sat juror number 51, an African American female with more extensive medial background, knowledge, and connections, on the jury despite his insistence that he was seeking to eliminate anyone with medical knowledge or those who knew or associated with medical personnel.

Petitioner argues that the trial court erred in determining his racially neutral explanation was pretext, as his counsel informed the court that his notes only reflected that she worked in a nursing home, not that she was a certified nursing assistant or had any medical training. Petitioner also argues that there is a significant difference between a doctor's office and a nursing home and the level of medical care provided. However, the

trial court, after having an opportunity to observe counsel's demeanor and credibility and in light of the totality of the circumstances, determined that his reasoning was pretext and ordered a new jury drawn. The trial court's ruling was based on the totality of the circumstances, including that all of Petitioner's preemptory strikes were used to eliminate white jurors and that Petitioner knew the next jurors to be selected would be African American. Furthermore, the trial court's determinations regarding counsel's demeanor and credibility should not be disturbed, as there is no evidence that it abused its discretion. See Edwards, 384 S.C. at 509, 682 S.E.2d at 823 (finding the trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility); Casey, 325 S.C. at 454, 481 S.E.2d at 173 (holding that the trial court must often base its decision on credibility determinations, and its rulings on discrimination are accorded great deference on appeal).

The trial court did not abuse its discretion in determining that Petitioner's strike of juror number 94 violated Batson and ordering a new jury drawn. The trial should be affirmed and Petitioner is not entitled to a new trial on this ground.

II. The trial court properly denied Petitioner's motion to change venue or in the alternative, to disqualify the jury panel and move the case to a later term, where each juror who remained on panel indicated that they had not formed an opinion regarding the case, could be fair and impartial, and could base their decision solely on the testimony and evidence presented in the courtroom.

Petitioner contends the trial court erred in denying his motion to change venue or disqualify the jury panel and continue the case to a later term. Petitioner alleges that "31[2] jurors of the pool of 47 jurors had exposure to extensive pre-trial publicity" and that several members of the jury pool had participated in some form of fundraising for the Rivenburg family. (PWC p. 19). During his motion before the trial court, Petitioner argued that it would be hard for jurors to be fair to Petitioner when they had exposure to and had discussed the case, as well as raised money for Petitioner's family. (App. pp. 94-98, 100-103). In support of this motion, Petitioner provided the court with an email compilation of various articles from a local newspaper discussing the case. (App. p. 94; Supp. App. pp. 1-5). However, the trial court properly denied Petitioner's motions, as Petitioner failed to present any actual prejudice from the pre-trial publicity surrounding the case. Furthermore, Petitioner failed to present any evidence that the jurors that remained on the panel for selection could not be fair and impartial or had any possible bias against him. The trial court did not abuse its discretion in denying Petitioner's motions and Petitioner is not entitled to a new trial on this ground.

[2] Petitioner states that thirty-one members of the jury panel had exposure to pre-trial publicity surrounding the case, which appears to be the number that Petitioner's counsel used at trial during his motion. (App. p. 95). However, a review of the record reveals that only twenty-seven jurors indicated that had heard any news about the case in response to the trial court's questioning. (App. pp. 47-64). One member of the jury panel, juror number 39, indicated that she did not believe she would be able to be fair and impartial and she was excused by the court. (App. p. 58).

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829; Butler, 353 S.C. at 388, 577 S.E.2d at 500. The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. On review, this Court is limited to determining whether the trial court abused its discretion. Edwards, 384 S.C. 504, 682 S.E.2d 820.

A motion to change venue is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Stanko, 402 S.C. 252, 276-77, 741 S.E.2d 708, 721, reh'g denied (Apr. 3, 2013), cert. denied (Oct. 7, 2013), cert. denied, 134 S. Ct. 247 (U.S.S.C. 2013) (citing Sheppard v. State, 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004)). When a trial court bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, its decision will not be disturbed absent extraordinary circumstances. Stanko, 402 S.C. at 276-77, 741 S.E.2d at 721 (citing State v. Caldwell, 300 S.C. 494, 502, 388 S.E.2d 816, 821 (1990), overruled on other grounds by State v. Evans, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006)). A denial of a change of venue is not error if the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. State v. Tucker, 334 S.C. 1, 14, 512 S.E.2d 99, 106 (1999).

Analysis / Discussion

"In essence, the right to a fair trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). A venireman must be indifferent as he stands unsworn and his verdict must be based upon the evidence developed at the trial. Id. at 722. However, there is no requirement that the

jurors be totally ignorant of the facts and issues involved in a case, particularly in light of the "swift, widespread, and diverse methods of communication" existing in the modern world. Id. "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." Id. at 723. Neither the United States Supreme Court nor this Court had ever adopted such an unrealistic or stringent standard that mere exposure to pre-trial publicity disqualifies potential jurors.

Rather, this Court has held that "[m]ere exposure to pretrial publicity does not automatically disqualify a prospective juror. Instead, the revenant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilty of the defendant." State v. Evins, 373 S.C. 404, 414, 645 S.E.2d 904, 909-10 (2007) (quoting Sheppard, 357 S.C. at 655, 594 S.E.2d at 468)). The moving party bears the burden of establishing actual juror prejudice as a result of such pre-trial publicity. State v. Manning, 329 S.C. 1, 8, 495 S.E.2d 191, 194 (1997). When a motion for a change in venue is made based on pre-trial publicity, the preferred practice is to postpone ruling on the motion until the jury panel is voir dired to determine what prejudice, if any, exists. Id. (citing State v. Easler, 322 S.C. 333, 417 S.E.2d 745 (Ct. App. 1996), affirmed as modified, 327 S.C. 121, 489 S.E.2d 617 (1997)).

In the present case, the trial court conducted a thorough voir dire of the venire to insure that a fair and impartial jury could be selected. (App. pp. 5-68). The court specifically asked the venire if they had exposure to any pre-trial publicity:

> Now, ladies and gentlemen, obviously the case has received some publicity in Calhoun County. If you have heard anything about this case from any source whatsoever, I

> want you to stand at this time. Whether that was in the newspaper, radio, television, beauty shop, barber shop. Any source whatsoever.
>
> I want to know, ladies and gentlemen, if there's anything that you've heard about this case – of course, the first thing I need is your name. and number, and I want to know if you have formed an opinion in this case about the guilt or innocence of the defendant. If you have formed an opinion I want to know that. If you have heard anything about this case. If you have not formed an opinion and you have heard anything about this case whatsoever that might effect [sic] your ability to be a fair and impartial juror in this case I want you to tell me that. There's nothing wrong with that whatsoever, but it's very important that we know that. That is you have any information that you cannot put out of your mind and forget about it so that you can make a decision in this case solely on the testimony and the evidence that you hear in this courtroom, that you would not be influenced by anything else that you have heard outside of this courtroom or any knowledge that you gained outside of this courtroom that is very important, ladies and gentlemen. I think you can understand how important that is.

(App. pp. 47-48). Twenty-seven veniremen stood up in in response and indicated they had heard about the case from an outside source. (App. p. 48-64). The trial court individually questioned each prospective juror as to the source of their knowledge, whether he or she had formed an opinion about the case, and whether he or she could put aside everything that he or she had heard about this case and base his or her decision solely on the testimony and evidence heard in the courtroom. (App. p. 48-64). Out of the twenty-seven jurors questioned, twenty-five indicated they had formed no opinion whatsoever on the case. (App. p. 48-64). Most of the jurors indicated that they had heard about the case through local media outlets, either television or newspaper. (App. pp. 48-64). None of the jurors indicated that they had been saturated with information regarding the case or that they had any knowledge of the facts of the case other than background information as reported by local news outlets. (App. pp. 48-64).

One juror, number 115, stated that he was "perhaps leaning in one direction" but that he had not formed a definite opinion and did not think he had been influenced by any pretrial publicity. (App. p. 56). Juror number 115 assured the court that he could base his decision solely on the testimony and evidence presented in the courtroom and could be fair and impartial. (App. p. 56). After evaluating his response, the trial court kept juror number 115 on the venire; he was not seated on Petitioner's jury.

In contrast, juror number 39 indicated that she heard about the case and had several family members that were truck drivers. (App. p. 58). She expressed concerns as to whether she could be impartial in light of her background. (App. p. 58). The trial court excused her from the panel after considering her responses to questioning. (App. pp. 58-59).

Of the twenty-seven jurors that indicated they had some level of exposure, five indicated that they had donated to or participated in fundraising efforts for Rivenburg's family; one additional juror who had not been exposed to pretrial publicity also indicated that he had participated in assisting Rivenburg's family, for a total of six veniremen. (App. pp. 45-46). None of these six jurors indicated any opinion regarding the case or that they were inclined to side with the State based on their assistance to the Rivenburg family. In contrast, all six jurors indicated that this activity would have no impact on his or her ability to be a fair and impartial juror. (App. p. 45-46).

Following jury selection, Petitioner made a motion for a change of venue or in the alternative, to disqualify the entire jury panel and continue the matter to another term of court based on pretrial publicity. (App. pp. 94-98). In support of this motion, Petitioner presented an email compilation of various articles from a local newspaper discussing the case, which was entered as Court's Ex. No. 2. (App. p. 94; Supp. App. pp. 1-5). Petitioner

averred that the article showed there was extensive pretrial publicity surrounding the case and requested that venue be changed or the panel be disqualified. (App. pp. 94-98). The State responded that Petitioner had failed demonstrate any actual prejudice and that the court's voir dire of the jury panel had insured a qualified, fair, and impartial jury panel. (App. pp. 98-100). The trial court denied Petitioner's motions, noting that it had no hesitation that the remaining panel was fair and impartial after closely observing all jurors and their responses to its questions. (App. pp. 103-107). The trial court concluded:

> If there was any question in my mind as to whether or not we had a, jury that could make the decision under the proper basis of the law I would grant that, but there is no question in my mind based on, not only the answers but the demeanor of the jury, my personal observation. So for that reason I will deny your motion to change venue. I will deny your motion to set the panel aside and start over.

(App. p. 108).

The trial court's denial of Petitioner's motions was based upon a thorough voir dire of the jurors and does not amount to an abuse of discretion. The trial court did not err in its denial, as the jurors that remained on the panel were all found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. See Tucker, 334 S.C. at 14, 512 S.E.2d at 106 (holding that when jurors have been exposed to pretrial publicity, a denial of a change of venue is not error where jurors are found to have the ability to lay aside any impressions or opinions and render a verdict based on the evidence presented at trial).

Despite the trial court's ruling that the jurors could be fair and impartial despite pretrial publicity exposure based on his observations of each juror during voir dire, Petitioner asserts that inherent prejudice should be presumed because the case is easily

remembered. (PWC p. 21). However, this argument is without merit and does not warrant reversal of the lower court.

The presumption of prejudice from pretrial publicity is "rarely applicable." State v. Parker, 381 S.C. 68, 99, 671 S.E.2d 619, 635 (Ct. App. 2008) (internal citations omitted). It is "confined to those instances where the petitioner can demonstrate an 'extreme situation' of inflammatory pretrial publicity that literally saturated the community in which his trial was held." Id.; see, e.g., Rideau v. State of Louisiana, 373 U.S. 723, (1963) (holding prejudice could be presumed and the conviction reversed after confession filmed with police cooperation and broadcast on television for three days while defendant awaited trial, saying "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.").

The present case is not one of the rare cases where prejudice can be presumed. There is no evidence of any "inflammatory pretrial publicity." The only evidence of pretrial publicity provided by Petitioner, Court's Ex. No 2, does not mention Petitioner's name once. Rather, one of the articles states that the Calhoun County Sheriff's office would not divulge any information regarding those arrested other than that they were from Calhoun County. To characterize this case as an extreme situation of inflammatory pretrial publicity (the standard by which prejudice can be presumed and the standard Petitioner requests this Court use) is a gross mischaracterization of the record and the actual publicity surrounding this case.

The trial court's denials of Petitioner's motions do not amount to errors of law or an abuse of discretion. Petitioner is not entitled to a new trial on this ground.

II. The trial court properly instructed the jury regarding voluntary intoxication, as it was supported by ample evidence in record.

Petitioner contends the trial court erred in charging the jury on voluntary intoxication. Petitioner argues that no evidence was presented at Petitioner's trial that he had "been drinking or doing drugs or was in any way intoxicated on the night of the deceased's murder." (PWC p. 22). However, this argument is without merit, as there is ample evidence in regard regarding Petitioner's consumption of alcohol on the afternoon and evening of the murder.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5 6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. On review, this Court is limited to determining whether the trial court abused its discretion. State v. Edwards, 384 S.C. 504, 682 S.E.2d 820, 822 (2009). When reviewing jury instructions for error, the reviewing court must consider the trial court's charge as a while in light of the evidence and issues presented at trial. State v. Miller, 397 S.C. 630, 635, 725 S.E.2d 724, 727 (Ct. App. 2012) (citing State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct., Ap. 2003)). "Errors, including erroneous jury instructions, are subject to a harmless error analysis." Miller, 397 S.C. at 639, 725 S.E.2d at729.

Analysis / Discussion

The law to be charged is determined by the evidence present at trial. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986) (citing State v. Damon, 285 SC 125, 328 S.E.2d 628 (1985)). In Todd, this Court determined that the trial court did not commit

reversible error in deciding to charge the jury on the law of voluntary intoxication, even though intoxication was not a defense, as there was some evidence showing the appellant had been drinking prior to the shooting.

The present case is similar to Todd. The record is replete with references to Petitioner drinking Hennessy, a type of Cognac liquor, on the afternoon and evening of the murder. (App. pp. 368, 440, 451, 475, 515, 637, 683). There were also several references to illicit drug use at the Merrybell Lane home Petitioner was visiting the afternoon and evening of the murder. (App. pp. 390, 470). Furthermore, the State presented evidence that Petitioner was trying to get marijuana on the day of the murder, was a habitual user of marijuana, and often times was so high he could not remember things. (App. pp. 418, 639, 684). The evidence presented at Petitioner's trial warranted a jury instruction on voluntary intoxication. The trial court did not err or abuse his discretion in charging the jury on involuntary intoxication. Petitioner is not entitled to a new trial on this ground.

Assuming arguendo that the trial court erred in charging the jury on voluntary intoxication, Petitioner is still not entitled to a new trial as it had no impact whatsoever on the verdict. See State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) ("Error without prejudice does not warrant reversal."); see also State v. Rogers, 263 S.C. 373, 382, 210 S.E.2d 604, 609 (1974) ("[T]he general principle that error must be prejudicial in order to be ground for reversal applies to rulings on excusing a juror."). The trial court's brief instruction on voluntary intoxication was a correct statement of law, which Petitioner does not challenge. Petitioner merely asserts that the trial court abused its discretion in giving the charge. Petitioner suffered no prejudice and is entitled to a new trial on this ground.

CONCLUSION

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

Respectfully submitted,

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March 23, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Carmen T. Mullen, Post-Conviction Relief Court Judge
James C. Williams, Jr., Trial Court Judge

Appellate Case No. 2013-2013-000731

Willie Pelzer, III,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Respondent** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia SC 29211

This 23rd day of March, 2015.

Megan Harrigan Jameson
MEGAN HARRIGAN JAMESON
ATTORNEY FOR RESPONDENT

SWORN to before me this 23rd day of March, 2015.

Ashley Haverty
Notary Public for South Carolina.
My Commission Expires: 3-18-23