

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
J. Michael Baxley, Circuit Court Judge
2010-GS-13-0192, 2010-GS-13-0263

Appellate Case No. 2012-213655

RECEIVED

JUL 28 2015

SC Court of Appeals

THE STATE,

Respondent,

v.

THOMAS STEWART,

Appellant

PETITION FOR REHEARING BY RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar No. 5758
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-6305

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit
P. O. Box 616
Bennettsville, SC 29512
(843) 479-6516

ATTORNEYS FOR RESPONDENT

The Respondent State of South Carolina makes a petition for rehearing to the Court of Appeals of South Carolina pursuant to South Carolina Appellate Court Rules, Rule 221(a) and Rule 242 to the decision of this Court in State v. Thomas Stewart, Appellate Case No. 2012-213665, 2015 WL 4269714 (S.C. App. July 15, 2015). Respondent respectfully submits that the panel overlooked and misapprehended the facts by failing to consider the totality of the circumstances presented to the trial judge in its conclusion that the Appellant had failed to prove pretext. Respondent submits that the panel's conclusions as to the motivation by the Solicitor's office for striking jurors 33 and 101 and conclusion that the stated reasons were pretextual as well as concern that the reasons for juror 117 117 should have been further reviewed by the trial court, in light of the entirety of the record were in error. Respondent respectfully submits that the prosecution's stated reasons for the peremptory strikes were race-neutral and there was no pretext proven to the trial court or this Court. Rehearing should be granted.

A.

The Court of Appeals failed to give deference to the factual conclusion of the trial court after the Appellant's argument concerning pretext was presented. After concluding that the reasons were race-neutral, Judge Baxley concluded:

Also, I do not find that there is a pattern here of jurors being treated distinctly and separately among the races, one decision for one and another decision for the other. That would be opposite or inappropriate.

And the Court finds that the Batson motion should be denied for these reasons.

R.p. 88, l. 9 – p. 89, l. 16. A court is “bound by the trial court's factual findings unless they are clearly erroneous.” Id. at 6, 545 S.E.2d at 829; see also State v. Edwards, 384 S.C. 504, 508, 509,

682 S.E.2d 820, 822, 823 (2009); State v. Haigler, 334 S.C. 623, 630, 515 S.E.2d 88, 91 (1999) (“The trial court's findings regarding purposeful discrimination are accorded great deference and will be set aside on appeal only if clearly erroneous.”). See Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (“deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike.”); Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (“As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies ‘peculiarly within the trial judge's province.’ ”) (citations omitted). Here, the finding rejecting purposeful discrimination is not clearly erroneous because there is support in the record.

B.

The Court of Appeals further failed to consider the totality of the circumstances presented to the trial judge by a consideration of the entire record. Step three of the above analysis requires the court to carefully evaluate whether the party asserting the Batson challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. State v. Green, 655 So.2d 272, 290 (La.1995); see also Batson, 476 U.S. at 93–94, 106 S.Ct. 1712 (stating that the court must consider “the totality of the relevant facts,” including both direct and circumstantial evidence). During step three, the party asserting the Batson challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. Edwards, 384 S.C. at 508–09, 682 S.E.2d at 822; see also Haigler, 334 S.C. at 629, 515 S.E.2d at 91. In doing so, the party is attempting to show that the “originally neutral

reason was ... a pretext because it was not applied in a neutral manner.” State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989). However, “If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence *tending to prove purposeful discrimination* to be considered at Batson's third step.” Miller–El v. Dretke, 545 U.S. 231, 241 (2005). Contrary to the Appellant’s position, it does not automatically prove purposeful discrimination.¹

Under Batson, the assessment was still based upon a totality of the circumstances test. “[T]he trial court has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination.” United States v. McAllister, 693 F.3d 572, 580 (6th Cir.2012). The answer to the decisive question about whether the race-neutral explanation for a peremptory challenge should be believed will largely turn on an evaluation of credibility and usually will involve an evaluation of the demeanor of the jurors and the attorney who exercises the challenge. See Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). “The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the [defense attorney’s] credibility to such an extent that a court should sustain a Batson challenge.” Lewis v. Lewis, 321 F.3d 824, 831 (9th Cir.2003). “[T]he critical question in determining whether [the State] has proved purposeful discrimination at step three is the persuasiveness of the [defense counsel’s] justification for [its] peremptory strike.” See Miller–El v. Cockrell, 537 U.S. 322, 338–39, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003). And the

¹ See People v. Hudson, 157 Ill.2d 401, 431 (1993) (“[A] venireperson possessing an unfavorable trait may be accepted as a juror while another venireperson possessing that same negative trait, but also possessing other negative traits, may be challenged.”). The fact that a prosecutor accepts other jurors of the same race as the challenged juror on the jury is indicative, albeit not dispositive, of a nondiscriminatory motive. Turner v. Marshall, 121 F.3d 1248, 1254 (9th Cir.1997), cert. denied, 522 U.S. 1153 (1998). The court need not make specific findings on all the evidence, beyond ruling on the objection to the challenge. United States v. Gillam, 167 F.3d 1273, 1278 (9th Cir.), cert. denied, 528 U.S. 900 (1999).

persuasiveness of the State's justification depends heavily on credibility. See *id.* at 339 (“At [step three], ‘implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.’ In that instance the issue comes down to whether the trial court finds the [defense counsel’s] race-neutral explanations to be credible.” (quoting Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam))).

However, the totality of the circumstances supports the trial court's ruling that the prosecutor's explanations were based on the desire for a race-neutral decision based on the evidence, and not on racial animus. In order to properly evaluate the prosecutor's reasoning, this Court failed to conduct a complete comparative juror analysis which includes side-by-side comparisons of minority venire members who were struck and non-minority venire members allowed to serve. See e.g., Jameson v. Runnels, 713 F.3d 1218, 1224 (9th Cir.2013) (federal court must conduct comparative analysis in the first instance if the state court declined to perform it) (citing Briggs v. Grounds, 682 F.3d 1165, 1170 (9th Cir.2012)). “If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.” Miller–El v. Dretke (Miller–El II), 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

C.

Pretext Was not Proven to the Trial Judge

JUROR 101 and 33

In the panel decision, the Court of Appeals concluded that the trial court erred in not finding pretext concerning the trike of juror 101.

As to Jurors 33 and 101, Stewart asserted the State did not strike Juror 131, who had a charge for assault and battery with intent to kill that was nolle prossed, or Juror 105, who had a conviction or an arrest for bad checks and simple assault. Although Stewart showed the State did not strike similarly-situated Caucasian jurors, the court found the State's reasons for striking Jurors 33 and 101 were permissible because case law supports dismissing a juror who had a previous negative relationship with law enforcement. The court seemed to find it relevant that Juror 33 had past domestic issues involving law enforcement. However, even though the State offered a racially-neutral explanation for striking the African American jurors, the State negated the reason by seating similarly-situated Caucasian jurors. See Miller–El v. Dretke, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (“If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson’s third step.”); State v. Ogleby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason when he seated a white female juror who was similarly situated); *id.* (“In this case, an examination of the circumstances shows that the solicitor’s originally neutral reason was proven to be a pretext because it was not applied in a neutral manner.”). Therefore, we find the State’s strikes of Jurors 33 and 101 were not permissible.

State v. Stewart.

However, the Court of Appeals overlooked that there was support in the record for the conclusion the stated reason for the strike was not pretextual as determined by the trial judge and a record basis to support the race-neutral reasons as being valid.

JUROR 101

As to juror 101, the prosecutor stated that he was struck because of the prior arrest for possession of cocaine and the fact that the Solicitor’s Office that was prosecuting the Appellant’s case had been involved in the earlier prosecution of juror 101. R. 80-82. The panel adopted and the Appellant asserted he had shown pretext at the trial by the fact that juror 131, a white male had a rap sheet that included a dismissed charge of assault and battery with intent to kill, although the defense admitted that the same juror had been struck by the defense and he had a

son in law enforcement. R. 84-85, 90. Subsequent to the rejection of the claim, the Appellant added that juror 105, a white female, had a record of either unknown as to arrest or conviction on bad check or simple assault. However, he also acknowledged that juror 105 was the sixth strike by the defense. In denying the Batson claim, the Court found the reason that there had been previous, obviously, from that negative relationship with law enforcement and was a permissible reason for the strike, citing State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)

Jurors 131 and 105 Were not Similarly Situated to Juror 33 and 101

The Court found the stated reason for the strike is a race neutral reason, but rejected its validity. Under Batson, the assessment was still based upon a totality of the circumstances test. “[T]he trial court has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination.” Here, the jurors that the Court of Appeals concluded were similarly situated were clearly not similarly situated to juror 101.

The panel overlooked that alleged pretext juror 131 had a son-in-law in law enforcement - particularly the local Highway Patrol assignment²- is an obvious reason why juror 131 was not shown to be similar to juror 101. R.p. 39, ll. 10-23. [Further, although he had an apparent *nolle pros* of an assault and battery charge, it was not shown that in this record that he had been prosecuted by this Solicitor’s office]. Nevertheless, the breadth of the difference was additionally shown by the fact that the defense struck juror 131. This factor was not addressed by the Court of Appeals in its opinion.

² Juror 131 indicated that he had a son-in-law in law enforcement with the Highway Patrol who was assigned to Chesterfield County which is where this crime occurred.

Similarly, the dissimilarity between juror 101 and juror 105 a white female were readily apparent to any neutral observer of the record. Juror 105 was reported to have a rap sheet showing a bad check and simple assault, but the dispositions were not clear. Nevertheless, juror 105 was also the same juror who indicated that she had been involved as a victim in two separate accident 18 and 20 years before and was involved in the prosecution of those matters. R.p. 40, l. 11 – p. 41, l. 16. She considered herself to be a victim of a violent crime and her response to the court as to whether she anything would prevent her from being fair and impartial gave a response “I don’t think” which caused the trial judge to asked an additional follow-up question as to whether she was certain of it. R.p. 57, ll. 5-12. Again, the evident dissimilarity was shown, and the defense used a peremptory challenge, #6, to have her removed. Under the totality of the circumstances, the Appellant failed to prove pretext by the fact that the prosecutor did not strike juror 105 and 131 before they were struck by the defense. ROA 70-72.

Juror 33

As to juror 33, an African American male who was the prosecution’s 5th strike, the prosecutor asserted that he was struck based upon the advice from the Chief of Police of Pageland that the potential juror had been involved in a tumultuous relationship with his girlfriend/wife. The Court of Appeals overlooked that since this case involved alleged domestic violence between the Appellant, his girlfriend and his wife, the basis of the strike was due to this information about similar activity as the current prosecution. The defense urged that the claim that someone told the prosecutor that the person would not be a good juror was insufficient and left it up to the court – although he noted that juror 33 had not indicated that he had any criminal

domestic violence charges which the venire was questioned. R. 86. The trial judge rejected the claim of pretext for the same reasons as juror 101.

The failing to show the pretext jurors 105 and 131 were similarly situated are weaker here where the dissimilarity between the jurors is even stronger. Juror 33 was struck based upon law enforcement information which revealed a potential bias in the actual prosecution based upon the juror own life experience in his own domestic relationship. Although juror 33 had not been charged with a crime, the information would suggest to any reasonable prosecutor that it could impact upon the juror's treatment of a similar domestic situation. There was no similarity to either juror 131 who had a son in law enforcement or juror 105 who considered herself to be a victim of a violent crime and prosecution witness. As Judge Baxley recounted, this incident arose from a criminal domestic violence situation which is similar to the contentious situation concerning juror 33. The trial court plainly saw the evident difference and credible basis for the prosecutor's use of the strike. R. 91-92. These matters were overlooked in the assessment of the totality of the circumstances. Rehearing is appropriate.

Juror 117

The Prosecutor stated that he struck potential juror 117, an African American female primarily as being unemployed, but noted that she had also gone to school with the victim. R. 83, citing R. 14-15. Solicitor Redmond declared that unemployed had been found to be a race-neutral reason by the courts. R. 83. Rollcall List for Panel, p. 10.³ The prosecutor also noted

³ As the Court of Appeals concluded, Solicitor Redmond made a correct statement of law in support of his use of the strike. See State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991) (unemployment is a race-neutral reason). In State v. Williams, 379 S.C. 399, 403, 665 S.E.2d 228 (S.C. App. 2008), the Court of Appeals unequivocally stated "employment, or lack of it, is a well-understood and recognized consideration in the exercise of peremptory

that while knowing the victim may work both ways, since it was shown that the defense had struck juror 128 who asserted she knew the victim's family as seeing them "all the time" where she works. Although he saw that the juror had known the victim in school as a matter that raised concerns, he stated the main reason for the strike was the unemployment. R. 83. It was not contested that the potential juror 117 was unemployed. **Solicitor Redmond unequivocally declared: "but the main reason, obviously, was the fact that [she] was unemployed, and actually, that was in our discussions. That's the first thing that was brought to our attention that fact that [she] was unemployed."** R.p. 83, ll. 14-19.

The Court of Appeals recognized that the trial court erred in concluding that the prosecution's stated reason for the strike of unemployment was a race-neutral reason. Opinion, ft. 5. More importantly, the Appellant below ignored the prosecution's stated reason of unemployment and focused upon the collateral reason that the struck juror acknowledged of knowing the victim. However, this was not the claimed reason by the state for its strike. At no point did the Court of Appeals or the defense at trial show a similarly situated person was unemployed. Absent any showing of pretext to that stated reason, the assertion of pretext must fail.

Juror 128 Not Similarly Situated

challenges. State v. Haigler, 334 S.C. 623, 632, 515 S.E.2d 88, 92 (1999) (stating unemployment is a race-neutral reason for a strike); State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (holding place of employment is a race-neutral reason for a strike); see State v. Adams, 322 S.C. 114, 125, 470 S.E.2d 366, 372 (1996) (finding type of employment is a race-neutral reason for a strike." In Williams, the Court found pretext was not shown where "Jurors 78 and 81 are both white and they are not "similarly situated," as Juror 81 is unemployed and the spouse of Juror 78 is unemployed." In State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987), and State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988). In Martinez the court found racially neutral reasons stated for strikes against black jurors of the same age and sex as the defendant who had possible criminal records and against a black juror who was unemployed. Martinez, 294 S.C. at 73, 362 S.E.2d at 642.

However, the defense asserted that he had shown pretext with juror 128 because she knew the victim's family, but did not address the stated reason of unemployment and made no showing that any unemployed white potential jurors were not struck by the state. The trial court, however, found the reason the State struck the juror was because she knew the victim and had gone to school with her and concluded that it was "valid and non-racial reason for the strike." R.p. 89, ll. 2-9.

Assuming *arguendo* that the main reason for the strike was knowing the victim and having gone to school with her, the situation with juror 128 is dissimilar. Juror 117 stated that she had gone to school with the victim, but had not seen her for some time. However, the motivating reason stated by the prosecution was the juror's unemployment. In contrast, the alleged pretext juror #128 was not only employed, but stated that she "knows the victim's family" [but did not state that she knew the victim] and that "they come into where I work all the time." This reflected present contact with the grieving family members, but no response about knowing the victim herself. The Appellant contended that juror 128 was the first juror addressed and the state did not strike her. However, he ignores the evident differences between knowing the victim in school and that she had not seen her for some time,⁴ in contrast to seeing the members of victim's family where she works "all the time" including the present time after the death. There was no information that juror 128 actually knew the victim, only the victim's family, unlike 117. In addition, juror 117 did not state that she was friends with the victim, a

⁴ According to the Rollcall, p. 10, ROA 589, juror 117 was born in 1983. The crime occurred on January 1, 2010. The juror was 27 years old at the time of the crime. The victim was 25 when she died, two years younger than juror 117. R. 501. It was not presented when the last time juror 117 she saw the victim other than it being some time. It should be noted that the victim had been convicted previously of a violent crime against the Appellant's wife in 2009. R. 447-49. As the prosecution feared, the prior knowledge about the victim was potentially dangerous to the state's case where the defense was claiming the victim was the aggressor.

concept that underlies their present argument. The Appellant speculates in their Initial Brief of Appellant that: “it would be difficult to imagine a better juror for the State than one that had known the victim and been to school with the victim.”⁵ *Initial Brief of Appellant*, p. 13. To the contrary, where the victim had a history of violent conduct against others and the Appellant’s theory was that he feared for his own life and that she assaulted him the night of her death, juror 117 could be the worst juror for the prosecution! R. 489-497. Further, the defense used its first peremptory strike against juror 128, reflecting his concern about that jurors potential leanings in the State’s favor. Plainly, these jurors situations are dissimilar.

SUMMARY

The Court of Appeals panel relies upon State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891(1989) to suggest that merely showing a non-struck white juror with a similar characteristic is sufficient to prove pretext. However, the Court of Appeals misapprehended the case as applied to the circumstances presented here and the strength of his statement fails when it is shown that the non-struck jurors are not “similar.” The Court of Appeals overlooked that these differences between the struck and non-struck jurors revealed exactly why those particular non-struck jurors would be a qualified but favorable juror to the prosecution theory of the case against Appellant. These prosecution-desired jurors and struck by the defense were:

- a juror whose son-in-law was a local highway patrolman (juror 131),
- a female juror who considered herself a victim of a violent crime who had testified for the prosecution previously (juror 105);

⁵ This speculation was never raised to the trial judge by the defense.

- a female juror who saw the grieving victim’s family at her work “all the time” (juror 128).

The basis for the prosecution to seek to have these jurors on their panel was self-evident to the prosecution, the defense (who were each struck by the defense) and the trial court, yet overlooked by the Court of Appeals. Similar pro-prosecution traits were not shared with the prosecution struck jurors. This was not a question of a pattern of disparate treatment by the Solicitor, but reasoned decision-making. The defense recognized the soundness of the prosecution decision in striking each of the jurors themselves. The trial court reasonably found no pattern of discrimination in the strikes. The Court of Appeals erred in concluding otherwise and failing to assess the entire record.

The issue was whether purposeful discrimination was proven in the use of any of the strikes. The trial judge concluded that it was not and that a pattern was not proven. R. 86-91. This assessment was based upon the totality of the circumstances, including the demeanor of the prosecutor contrasted against the record of information provided for each of the jurors and that type of case being tried. His claim otherwise is without merit. Rehearing should be granted.

CONCLUSION

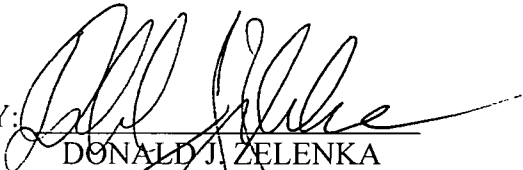
For all the foregoing reasons, Respondent, the State, submits that petition for rehearing should be granted and the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BY: 
DONALD J. ZELENKA
S.C. Bar No. 5758

Office of the Attorney General
Post office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

ATTORNEYS FOR RESPONDENT

July 28, 2015.

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the Petition for Rehearing in the foregoing action by depositing copies in the United States mail, postage prepaid to:

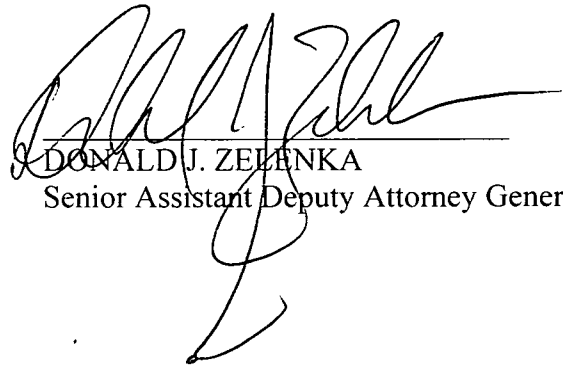
Jarrett O. Coco, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, SC 29211-1070

and by InterAgency Mail to

Robert M. Dudek
Chief Attorney
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

RECEIVED
JUL 28 2015
SC Court of Appeals

This 28th day of July, 2015.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General