ORIGINAL

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

THE STATE,

RESPONDENT,

V.

THOMAS STEWART,

APPELLANT

Appellate Case No. 2012-213655

RETURN IN OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Appellant Thomas Stewart hereby files this Return in Opposition to Respondent's Petition for Rehearing for the decision of this Court in *State v. Stewart*, Op. No. 5331, 2015 WL 4269714, (S.C.Ct.App. filed July 15, 2015) (Shearouse Adv.Sh. No. 27 at 125) ("Opinion"). In its unanimous Opinion, this Court correctly reversed and remanded for a new trial, finding that the trial court improperly denied Appellant's *Batson* motion. The Petition for Rehearing by Respondent ("Petition") does not raise any error of law, case, or issue this Court overlooked, misapprehended, or failed to consider. Therefore, Appellant respectfully requests this Court to deny the State's Petition.

In its Petition, the State argues that the Court of Appeals overlooked and misapprehended the facts by failing to (1) give deference to the factual findings of the trial court, (2) consider the totality of the circumstances, and (3) recognize that pretext was not proven to the trial judge. However, this Court did not misapprehend or overlook these arguments because each were raised before this Court, adequately considered, and appropriately and accurately addressed in the Court's Opinion. The State has simply restated arguments in its Petition that it previously made in its briefing and at oral argument. Nevertheless, Appellant addresses them again, each in turn.

I. THE COURT OF APPEALS DID NOT FAIL TO DEFER TO THE FACTUAL FINDINGS OF THE TRIAL COURT BECAUSE THERE WERE NO FINDINGS IN THE RECORD TO DEFER TO

The State argues that this Court failed to give deference to the "factual conclusion" of the trial court. Petition at 1. Significantly, the State does not point to any "factual finding" to which this Court should defer other than the trial court's conclusory ruling that it did not find racial bias. The State's citations to case law for support are unavailing because those cases support the Appellant's position: a reviewing court owes deference to a trial court's factual findings *contained in the record.* These arguments and cases are familiar because they were raised by the

Parties in their briefing and at oral argument. As the Court of Appeals cites in its Opinion, a trial court's findings are given great deference and will not be set aside unless clearly erroneous. Opinion at 130 citing *State v. Evins*, 373 S.C. 404, 416m 645 S.E.2d 904, 909-10 (2007). The Court also notes that "[t]his standard of review, however, is premised on the trial court following the mandated procedure for a *Batson* hearing." *Id.* quoting *State v. Cochran*, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006). Therefore, there is no misapprehension or omission by the Court of Appeals. Clearly, the Court of Appeals is aware that deference should be afforded to factual findings of a trial court, provided that the trial court followed the procedure required for a *Batson* hearing and those findings can be found in the record.

The State cites to *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008), for the proposition that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike."). Appellant agrees. *See* Appellant's Reply Br. at 9-10 (quoting *Snyder* for the same proposition). The problem for the State (and that which animates Appellant's argument), is that the trial court in this case made no such finding, or any factual findings for this Court to rely upon. In *Snyder*, the United States Supreme Court declined to defer to the trial court because the trial court failed to make specific findings on the record. *Snyder*, 552 U.S. at 479. Therefore, the Court of Appeals is not required to afford deference to the trial court in this case because there are no factual findings in the record for which the Court to defer. *See id.*; *United States v. Rutledge*, 648 F.3d 555, 559 (7th Cir. 2011) ("[I]f there is nothing in the record reflecting the trial court's decision, then there is nothing to which we can defer. That is why the third step under *Batson* '*requires* the court to weigh the evidence and determine whether the prosecution's nondiscriminatory reason for the strike is credible or if the defense has shown purposeful discrimination.'" (citing *Snyder*, 552 U.S. at 479 and quoting

Coulter v. McCann, 484 F.3d 459, 465 (7th Cir. 2007) (emphasis in original))). In addition, Appellant argues that the trial court did not comply with the third step in *Batson*; therefore, the Court of Appeals is answering a "question of law," so the "standard of review is plenary." Opinion at 130 (quoting *Cochran*, 369 S.C. at 312, 631 S.E.2d at 297).

Therefore, the Court of Appeals did not fail to defer to the trial court. Rehearing is inappropriate.

II. THE COURT OF APPEALS DID NOT FAIL TO CONSIDER THE TOTALITY OF THE CIRCUMSTANCES.

The State argues that this Court failed to consider the "totality of the circumstances" presented to the trial judge. Again, this argument was made by the Parties in their briefing and is noted in the Opinion of the Court of Appeals. Appellant's Initial Br. at 9; Appellant's Reply Br. At 7; State's Br. at 9, 16-17; Opinion at 129. Therefore, there is no misapprehension or omission by the Court of Appeals. Contrary to the State's position, "totality of the circumstances" does not mean that an appeal court should read into the trial record findings that do not exist. Nor does "totality of the circumstances" mean that the record should be scoured to conjure possible ways to distinguish similarly-situated white jurors from the struck African American jurors. *See Miller-El v. Dretke*, 545 U.S. 231, 247, n.6 (2005) ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters."). *See also State v. Scott*, 406 S.C. 108, 115, 749 S.E.2d 160, 164 (Ct. App. 2013), reh'g denied (June 16, 2014) (quoting *Miller-El*, and noting that potential jurors are not required to be "identical in all respects.").

Instead, "totality of the circumstances" means that a court should look to direct and circumstantial evidence of discrimination. State's Br. at 9 and Pet. For Reh'g at 2 (citing *Batson* for the proposition that "the court must consider 'the totality of the relevant facts,' including both direct and circumstantial evidence"). Appellant showed both direct evidence of discrimination by presenting similarly-situated white jurors, as well as circumstantial statistical evidence of discrimination. *State v. Inman*, 409 S.C. 19, 27, 760 S.E.2d 105, 109 n.6 (2014) ("[T]he statistical evidence must be paired with some other evidence of discrimination, such as direct evidence of other jurors being struck for pretextual reasons."); Appellant's Reply Br. At 7-9 (presenting statistical evidence showing that the State used 80% of its strikes against African Americans who comprised only 31% of the jury pool, and seated the only two African American jurors after using 4 of its 5 strikes). Therefore, the Court of Appeals did not fail to consider the "totality of the circumstances." Rehearing is inappropriate.

III. THE COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S BATSON MOTION

Pages 5 though 12 of the State's Petition come nearly verbatim from its Brief, with the exception of a paragraph setting forth an untimely argument involving Juror 117 and unemployment, discussed below. *Compare* State's Pet. for Reh'g. at 5-12 *with* State's Br. at 15-23. Again, there is no misapprehension or omission by the Court of Appeals. In this section, the State again speculates as to possible characteristics that the State believes distinguish the struck African American jurors from the similarly-situated white jurors, arguing that these characteristics certainly must have been in the contemplation of the solicitor and the judge (the absence of any findings in the record notwithstanding), and therefore, the white jurors must not be sufficiently "similar." This argument is essentially a species of the State's "totality of the circumstances" argument in which the State urges the Court of Appeals to adopt manufactured

findings and superimpose them into the trial record. As Appellant has previously argued, a reviewing court is not at liberty to do so. *Miller-El*, 545 U.S. at 252 ("A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."). Notably, the State still does not cite to any case law to support its argument that a reviewing court should permit such speculation, but instead attempts to shoehorn their argument into the general rule that a court should consider the "totality of the circumstances."

To even reach to the State's argument, one must set aside the fact that the trial court failed to comply with the analysis required in the third step of Batson and the record does not contain any findings by the trial court to substantiate the State's speculative reasons. For the State to succeed, one would have to believe that (1) the solicitor recognized these white jurors as different for the reasons offered by the State, (2) the trial court recognized the same, (3) the trial court also recognized that solicitor recognized the same, and (4) the trial court still decided to decline to engage in any dialogue or questioning to explore or confirm as much, provide any findings, or point to any other evidence demonstrating as much.

For example, the State argues that Juror 101, a black juror who was struck because of a prior arrest, is not similar to Juror 131, a white juror who was not struck but also had a prior arrest, because Juror 131 had a son in law in law enforcement. Yet nothing in the record supports the State's supposition that the occupation of Juror 131's son-in-law was in the contemplation of the trial court and the solicitor. The State is forced to engage in this type of speculation over and over, which illustrates that the trial court failed to comply with the third step of the *Batson* analysis. This is exactly the type of information that would have be been

reviewed and weighed by the trial court on the record had the third step of the *Batson* analysis been properly conducted. The State, after enjoying the benefit of time to comb through the record, research, and reflect, cannot be allowed to "think up" reasons post hoc in an attempt to distinguish the similarly-situated white jurors. *See Miller-El*, 545 U.S. at 247 n.6, 252 (noting that similarly-situated jurors need not be identical and a *Batson* challenge is not an exercise in "thinking up any rational basis"). As argued more fully in briefing and at oral argument, it remains that the trial court did not conduct a proper analysis in the third step of *Batson*, and instead summarily concluded that the race-neutral reasons offered by the solicitor had been found to be permissible in previous cases in South Carolina. Doing so fulfilled the second step in the Batson analysis, but fell short of the analysis required in the third step of *Batson* which *requires* the court to undertake a careful analysis to evaluate whether the facially-neutral reasons were actually applied neutrally. *Inman*, 409 S.C. at 27, 709 S.E.2d at 109; *Rutledge*, 648 F.3d at 559.

Equally unavailing is the argument that Appellant's strike of a similarly-situated white juror somehow validates the prosecution's decision to not strike the same juror. Observers cannot ascribe the same meaning for adverse parties' respective decisions to strike or seat jurors because adverse parties do not necessarily strike or seat the same juror for the same reason. In other words, just because one party strikes a juror and the other party does not, does not mean that they did so for the same reason; therefore, it does not demonstrate, affirm, or validate the State's speculation that the similarly-situated white jurors were not sufficiently similar.

In its Petition, the State improperly argues for the first time that Appellants' showing of pretext for Juror 117 must fail because the trial judge incorrectly held that unemployment was an invalid reason to strike, and the Court of Appeals and the defense at trial failed to show a

similarly-situated white juror who was unemployed. Petition at 9. First, this argument is untimely because the State never argued that Appellant's argument with regard to Juror 117 must fail because Appellant failed to present a similarly-situated white juror who was also unemployed. The State simply added a footnote asserting that unemployment is a valid reason in South Carolina and noted that Appellant did not present an unemployed white juror who was not struck by the State. State's Brief at 18-19. Second, the State argues that knowing the victim "was not the claimed reason by the state for its strike." Petition at 9. If that were true and the trial court should have only considered unemployment as a reason as the State asserts, then the trial court would have ruled, correctly or not, that unemployment was not a race-neutral reason and Appellant would have prevailed on his Batson motion. This issue would have never been brought up on appeal. It is unclear how that would be helpful for the State's argument. Third, the trial court ruled that unemployment was not a race-neutral reason and the Parties accepted that ruling. There was no objection from the Solicitor that unemployment was in fact a race-neutral reason in South Carolina. Fourth, the State's argument ignores the fact that the solicitor gave two reasons for the strike of Juror 117: unemployment and knowing the victim. Each reason must be independently race-neutral. Appellant presented a similarly-situated white juror with regards to knowing the victim; therefore, his argument does not fail simply because a similarly-situated white juror was not presented for both reasons. In addition, Appellant recognizes that it would be improper to go back now to try to identify similarly-situated white jurors who were unemployed, just as it is improper for the State to go back now to speculate as to possible reasons why the solicitor might have presented the similarly-situated white jurors.

Therefore, the Court of Appeals correctly determined that the trial court inappropriately denied Appellant's *Batson* motion. Thus, rehearing is unwarranted.

CONCLUSION

Consistent with the foregoing, Appellant respectfully requests this Court to deny the Petition for Rehearing by Respondent.

Respectfully Submitted,

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By: _____

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This 6th day of August, 2015.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certified that a true copy of the Return in Opposition to the Respondent's petition for rehearing in the above referenced case have been served upon Donald J. Zelenka, Esquire, State of South Carolina, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201, this 6th day of August, 2015.

By: _____
Jarrett O. Coco
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 6th day
of August, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.