

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

S.C. Court of Appeals
Appellate Case No. 2012-213655

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S.C. Supreme Court

THE STATE,

Petitioner,

v.

THOMAS STEWART,

Respondent

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APPELLANT

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The trial court erred in finding no discrimination in the State's use of peremptory challenges because (a) the trial court failed to comply with the third step in the Batson analysis which requires a court to meaningfully evaluate the persuasiveness of the prosecutor's group neutral explanations and make a deliberate decision whether purposeful discrimination occurred; and (b) Appellant proved the State's proffered reasons were pretextual because they were not applied in a neutral manner.
2. Where the State announced to the jury that malice can be implied from use of a deadly weapon and where the jury was asked to consider a lesser included offense of murder and self defense, the trial court erred in overruling Appellant's objection and failing to issue a correction to the jury.
3. The trial court erred in overruling Appellant's objection to unfairly prejudicial character evidence offered by the State.

STATEMENT OF THE CASE

Appellant is a South Carolina state prisoner currently serving a sentence of life in prison plus five years following his conviction for murder and possession of a weapon during the commission of a violent crime. A Chesterfield County Grand Jury indicted Appellant on the charges of murder and possession of a weapon during the commission of a violent crime. The State of South Carolina, represented by Kernard E. Redmond and Adam Foard, called the case for trial on December 3, 2012 before the Honorable J. Michael Baxley. Appellant was represented by Casey Secor and S. Boyd Young. On December 6, 2012, the jury returned a verdict of guilty as to the charges of murder and possession of a weapon during the commission of a violent crime. (R. p. 563, lines 7-15). Judge Baxley sentenced Appellant to life in prison plus five years to be served consecutively. (R. p. 577, lines 18-24).

Thereafter, Appellant timely filed his notice of appeal.

STATEMENT OF THE FACTS

Appellant was involved in an extra-marital affair with the victim for about eight years. (R. p. 444, lines 21-25). In April of 2009, the victim attacked Appellant's wife with a lug wrench and was convicted of assault and battery of a high and aggravated nature. (R. p. 107, line 25-R. p. 108, line 2; R. p. 416, line 12-R. p. 418, line 16). The victim served a prison sentence and was released in mid-December, 2010. (R. p. 452, lines 4-25). Appellant spent several days with the victim immediately after her release from prison. (R. p. 419, line 24-R. p. 420, line 19; R. p. 423, lines 13-17; R. p. 451, line 19-R. p. 453, line 17). On December 28, police were called in response to an incident involving a dispute between Appellant and the victim at the Pageland gym; however, no arrests were made. (R. p. 215, line 3-R. p. 216, line 3). The victim signed a warrant against the Appellant for trespassing dated December 27, 2009 and an order of protection dated December 29, 2009. (R. p. 319, line 24-R. p. 320, line 8). In the early morning hours of January 1, 2010, Appellant went to the residence of the victim. (R. p. 481, line 19-R. p. 482, line 4). Appellant and the victim began to argue, and a struggle ensued. (R. p. 490, lines 17-24). At some point in the struggle, the victim sprayed Appellant with pepper spray. (R. p. 163, lines 8-25). Appellant testified that he was blinded by the pepper spray and that the victim attacked him with a knife and hit him in the head. (R. p. 490, line 17-R. p. 494, line 18). Appellant testified that he was able to get a knife and that the victim attacked him outside the residence as he was trying to get away. (R. p. 494, line 19-R. p. 496, line 21). Appellant testified that he stabbed the victim several times and then fled to a nearby park where he was arrested by police shortly thereafter. (R. p. 496, line 22-R. p. 497, line 11). Police recovered two knives and a can of pepper spray from the front of the victim's residence. (R. p. 128, lines 3-11). The victim died from multiple stab wounds. (R. p. 304, lines 21-24).

ARGUMENT

The appellate standard of review for questions of law is de novo. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("We are free to decide a question of law with no particular deference to the circuit court."); Fresmire v Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2008) ("This court reviews all questions of law de novo"). The appellate court will not disturb the trial court's findings of fact unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

I. THE TRIAL COURT ERRED IN FINDING THAT THE STATE'S USE OF PEREMPTORY CHALLENGES DID NOT VIOLATE BATSON.

The trial court committed reversible error when it declined to find a Batson violation because (a) the trial court failed to adhere to the third step of the Batson analysis and (2) the Appellant carried its burden to prove that the State's facially race neutral reasons were not applied neutrally. Accordingly, Appellant respectfully requests this Court to reverse the decision of the lower court and remand for a new trial.

During jury selection, the State used all five of its peremptory strikes, four of which to strike African American jurors. (R. p. 80, lines 13-15). Appellant is African American. The racial composition of the impaneled jury was two African Americans and ten Caucasians. (See Jury Rollcall List for Panel at R. pp. 580-92). The two African Americans in the impaneled jury, Juror 95 and Juror 59, were presented by the State only after the State had used four of its five peremptory strikes and the State had only one peremptory challenge remaining. (R. p. 71, lines 10-13; R. p. 72, lines 2-6). The State used its final peremptory strike to strike an African American juror (Juror 33). (R. p. 72 lines 19-25; Jury Rollcall List for Panel at R. p. 582). Appellant objected and the trial court held a Batson hearing. (R. p. 80, line 13-R. p. 92, line 6).

The four African American jurors struck by the State were Jurors 101, 33, 117, and 126. (R. p. 81, lines 19-21). The State excused Juror 101 because he had a prior arrest: "possession of cocaine charge that was nolle prossed." (R. p. 82, lines 4-9). The State excused Juror 33 because local law enforcement told the prosecutor that the juror had "prior incidents involving his . . . girlfriend who is now his wife." (R. p. 83, line 23-R. p. 84, line 12). The State excused Juror 117 because "the main reason, obviously, was the fact that he was unemployed . . ." but also because the juror knew the victim. (R. p. 83, lines 6-19). The State excused Juror 126 because the State observed her disinterested demeanor and that the juror was late returning from a break. (R. p. 82, line 22-R. p. 83, line 4).

Appellant argued that State's strikes of Jurors 101 and 33 were pretextual because there were other similarly situated white jurors with prior arrests that were not stricken by the State. (R. p. 85, lines 1-8; R. p. 90, lines 13-23). Appellant offered Jurors 105 and 131, both white and similarly situated with prior arrest records, (R. p. 90, lines 13-23), that the State did not strike, (R. p. 69, lines 19-22; R. p. 70, lines 11-14).

Appellant argued that the State's strike of Juror 117 was also improper because there was another similarly situated white juror that knew the family of the victim. Appellant offered Juror 128, as a similarly situated white juror who knew the victim's family because they came to her workplace "all the time." (R. p. 15, lines 15-24). Juror 128 was the first juror called and the State did not strike her. (R. p. 67, lines 16-19). With regard to Juror 126, counsel for Appellant noted that he did not notice any jurors come back late from a break. (R. p. 86, lines 11-17).

Regarding Jurors 101 and 33, the trial court found that there had been a previous, "negative relationship with law enforcement, and that has been found by our Court in the case of

[State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)], to be a permissible reason for a strike.” (R. p. 88, lines 13-19). Regarding Juror 117, the trial court found the State’s reason that the juror knew the victim was a valid reason; however, the trial court did not accept the fact that the juror may be unemployed “as a valid reason to impose a strike.” (R. p. 89, lines 2-9). Regarding Juror 126, the trial court found that disinterested demeanor “has been previously permitted by our Supreme Court in the case of [State v. Casey, 325 S.C. 447, 481 S.E.2d 167 (1997)] and “[s]pecifically on the issue of being late, in the case of [State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991)] our Supreme Court has permitted a strike and found that to be a valid reason.” (R. 88, line 19-R. p. 89, line 1).

Purposeful discrimination in the jury selection process constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. See Batson v. Kentucky, 476 U.S. 79 (1986).

A Batson challenge requires a three step process:

First, the [Defendant] must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [State] to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [Defendant] has proved purposeful discrimination.

State v. Giles, Op. No. 27353 (S.C. Sup. Ct. filed Jan 15, 2014) (Shearouse Adv. Sh. No. 2 at 100).

- A. As a matter of law, the trial court failed to comply with the third step in the Batson analysis which requires a court to meaningfully evaluate the persuasiveness of the prosecutor’s explanations and make a deliberate decision as to whether purposeful discrimination occurred.

The trial court must proceed to the third step of the Batson process unless discriminatory intent is inherent in the explanation provided by the proponent of the strike. State v. Rogers, 405 S.C. 520, 526, 748 S.E.2d 247, 251 (Ct. App. 2013) (quoting State v. Cochran, 369 S.C. 308,

314, 631 S.E.2d 294, 298 (Ct.App.2006)). The United States Supreme Court has made clear that “[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake ‘a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.’” Batson, 476 U.S. at 93, 106 S. Ct. at 1721 (1986) (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977)). See also United States v. Alanis, 335 F.3d at 965, 968-969 nn. 2,3 (9th Cir. 2003) (finding that the trial court committed an error of law by failing to “evaluate meaningfully the persuasiveness of the prosecutor’s [group]-neutral explanations,” and to “make a deliberate decision whether purposeful discrimination occurred”); accord, e.g., Lewis v. Lewis, 321 F.3d 824, 832 (9th Cir. 2003) (holding that “the court has a affirmative duty to determine if purposeful discrimination occurred” and the trial court did not fulfill this duty by concluding that a prosecutor’s state-race neutral reason for striking a potential African American juror was “probably . . . reasonable”); Barnes v. Anderson, 202 F.3d 150, 157 (2d Cir. 1999) (finding that the trial court’s “murk[y]” analysis and refusal to rule on the credibility of either attorney’s explanation failed to satisfy “the court’s duty under the third step of Batson”); People v. Fuentes, 818 P.2d 75, 81-83 (Cal. 1991) (finding that the trial court “failed to take the next, necessary step of asking whether the asserted reasons actually applied to the particular jurors whom the prosecutor challenged”).

The trial court heard Appellant’s arguments that the State’s peremptory strikes were pretextual. However, the trial court never addressed Appellant’s arguments, but instead summarily concluded that each of the reasons proffered by the State were ones that were found to be “permissible” in previous cases. (R. p. 88, line 9-R. p. 89, line 16). Just because the State’s proffered reasons for excusing a juror has passed muster in a previous case does not relieve the trial court of its duty under the third step in Batson to meaningfully evaluate whether

that reason was applied neutrally in the case at hand. See State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) ("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."). See also Garrett v. Morris, 815 F.2d 509, 511 (8th Cir. 1987) ("[T]he court has a duty to satisfy itself that the prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination."); Lewis, 321 F.3d at 831 ("[A] court engaging in the third step of Batson has various tools at its disposal in order to fulfill its duty to determine whether purposeful discrimination has occurred. In an ideal setting, a court would use most, if not all, of these tools in evaluating a Batson motion.").

State v. Giles is a recent South Carolina Supreme Court case which held that a race-neutral explanation proffered by the proponent of a preemptory challenge at the second stage of the Batson analysis need not be persuasive or plausible; however, "it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence bearing on it." State v. Giles, Op. No. 27353 (S.C. Sup. Ct. filed Jan 15, 2014) (Shearouse Adv. Sh. No. 2 at 103). Because Appellant concedes that the State offered facially race-neutral reasons at the second step, Giles is applicable to the case at hand only to the extent that it demonstrates the importance of the trial court's duty to meaningfully evaluate the proffered reasons in the context of the specific circumstances to determine if discrimination exists in the third step. As Giles Court noted, "[r]easonable specificity is necessary because comparison to other members of the venire for purposes of a disparate treatment analysis, which is often used at the third step of the Batson

process to determine if purposeful discrimination has occurred, is impossible if the proponent of the challenge provides only a vague or very general explanation.” Id. In the case at hand, Appellant offered comparisons to other members of the venire for a disparate treatment analysis, but the court failed to meaningfully address each of the similarly situated jurors pointed out by Appellant and offer its thoughts on why those similarly situated jurors did not evince pretextual treatment by the State. (R. p. 84, line 13-R. p. 92, line 4).

In United States v. Hill, 146 F.3d 337, 342 (6th Cir. 1998), the Sixth Circuit found that the district court’s “abrupt conclusion” that the prosecutor’s proffered reason outweighed the defendant’s showing under the totality of the circumstances was inadequate. The Sixth Circuit concluded that the record “denies us the district court’s thoughts as to how [the circumstances of the case] weighed on the district court’s conclusion in the third step of the Batson analysis.” Id. at 342-43. Like Hill, the trial court in this case arrived at the “abrupt conclusion” that the State did not treat jurors “distinctly and separately among the races.” (R. p. 89, lines 10-14). Like Hill, the trial court in the instant matter denied us its thoughts on how the evidence of the similarly situated jurors offered by Appellant weighed on the court’s conclusion in the third step of the Batson analysis.

Similarly, in Coulter v. Gilmore, 155 F.3d 912, 921 (7th Cir. 1998), the Seventh Circuit found that the trial court violated Batson because “it never evaluated the differential manner in which the state handled—or rather, failed to handle—nonminority jurors who were similarly situated to the African-Americans the prosecution struck. A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate African-American prospective jurors and not others who also have that characteristic.” Like the trial court in Coulter, the trial court in the instant case failed to evaluate the differential manner in which the

State handled the jurors who were similarly situated to the African Americans jurors that the prosecution struck.

- B. Appellant carried its burden to prove that the State's proffered reasons were pretextual because they were not applied in a neutral manner.

A comparative juror analysis, sometimes called a disparate treatment analysis, is a side-by-side comparison of the characteristics of the challenged jurors to those of the non-challenged jurors. "Comparative juror analysis is an established tool at step three of the Batson analysis for determining whether facially race-neutral reasons are a pretext for discrimination." Crittenden v. Ayers, 624 F.3d 943, 956 (9th Cir. 2010). The United States Supreme Court, the Fourth Circuit, and the South Carolina Supreme Court have endorsed its use. United States v. Barnette, 644 F.3d 192, 205 (4th Cir. 2011) ("[A] proper analysis of a Batson claim requires that a court engage in comparative juror analysis." (quoting Miller-El v. Dretke, 545 U.S. 231, 232 (2005))); State v. Giles, Op. No. 27353 (S.C. Sup. Ct. filed Jan 15, 2014) (Shearouse Adv. Sh. No. 2 at 103) ("[C]omparison to other members of the venire for purposes of a disparate treatment analysis . . . is often used at the third step of the Batson process to determine if purposeful discrimination has occurred . . .").

More powerful than the bare statistics are side-by-side comparisons of some black venire panelists who were struck and white ones who were not. If a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination.

Miller-El, 545 U.S. at 232. See also Boyd v. Newland, 467 F.3d 1139, 1149 (9th Cir. 2006) ("[C]omparative juror analysis is an important tool that courts should use on appeal." (emphasis in original)).

In State v. Oglesby, the South Carolina Supreme Court found that although the State was able to articulate a facially neutral explanation for striking African American jurors, the explanation was in fact pretextual because the State did not apply those reasons neutrally. 298 S.C. at 281, 379 S.E.2d at 892. In Oglesby, the solicitor struck three black females because they were patients of a doctor who was a defense witness. Id. at 280, 379 S.E.2d at 892. The Court found that reason sufficiently neutral. "The solicitor negated his reason, however, when he seated a white female juror who was also a patient of the doctor." Id. at 281, 379 S.E.2d at 892. The facts of Oglesby mirror the case at hand. In both Oglesby and in the instant case, the State offered facially neutral explanations for striking the African American jurors. However, just as in Oglesby, the State negated these reasons by seating similarly situated white jurors.

The State will likely argue that Oglesby can be distinguished because the proffered reason for striking the African American jurors in Oglesby (i.e., that the jurors were struck because they were patients of a defense witness), was exactly the same reason for both the African American jurors and the Caucasian juror; whereas, here, the State could point to small differences in the characteristics between the African American jurors and the similarly situated Caucasian jurors. For example, the State struck Juror 101 because he had a prior arrest; specifically a "possession of cocaine charge that was nolle prossed." (R. p. 82, lines 4-9). The State may argue that Appellant could not produce a similarly situated white juror with a prior arrest specifically for cocaine, therefore his Batson challenge must fail. However, this is a distinction without a difference. Appellant produced two similarly situated white jurors with prior arrests: one with a prior arrest for assault and battery with intent to kill which was nolle prossed (Juror 131) and one with a prior arrest for simple assault and check fraud (Juror 105). (R. p. 90, lines 14-23). The proffered reason is in fact the same: the prior arrests engender a

"negative relationship with law enforcement," as stated by the trial court. (R. p. 88, lines 13-19). A position that would require similarly situated jurors to have a prior arrest for the exact same charge would gut Batson. It would reduce the opportunity for a defendant to show disparate treatment though comparison by allowing attorneys to hide behind immaterial distinctions.

In fact, the only way to truly distinguish Oglesby from the case at hand actually militates in favor of Appellant. In Oglesby, the defendant was able to show only one similarly situated white juror, whereas here, the Appellant is able to point to three similarly situated white jurors to demonstrate pretext and a pattern of disparate treatment.

Miller-El v. Dretke, 545 U.S. 231 (2004), is equally instructive. In Miller-El, the United States Supreme Court conducted a comparative juror analysis of African American jurors struck by the prosecution to show that the prosecution's proffered reasons were pretextual. Id. at 233. The Court found that the reason for striking one of the African American jurors also applied to Caucasian panel members who were selected was evidence of pretext. Id. Moreover, the suggestion of pretext was not mitigated by the prosecutor's explanation that the African American juror was struck when the State had 10 peremptory challenges left and could afford to be liberal in using them. Id. at 249. If that were the explanation for striking the juror, then the prosecutor should have struck a nonblack juror, whom they examined and accepted before they struck the African American juror, despite her similar views. Id. In the instant case, Juror 117 was struck by the State because she had known the victim, (R. p. 89, lines 2-9), yet Juror 128, who was white, was not struck despite the fact that the victim's family came to her workplace "all the time," (R. p. 15, lines 15-24). Like Miller-El, the suggestion of pretext is not mitigated because Juror 117 was struck early in the jury selection at a time when the State could afford to be liberal with its challenges. If that were the case, then the State would have struck white panel

member Juror 128, who was the first juror called and was accepted by the State before Juror 117 despite the fact that she knew the victim's family.

Finally, a common sense review of the State's proffered reasons also reveals pretext. The State struck Juror 101 because of a prior arrest for cocaine possession, yet the state declined to use its third strike on Juror 131, a white juror with a prior arrest for assault and battery with intent to kill. It would be difficult to imagine a worse juror for the State in a murder trial than one that has previously been accused of a violent crime and would be likely more apt to sympathize with the defendant. The next juror called was Juror 117, an African American juror whom the State struck because she knew the victim. 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," (R. p. 89, lines 2-9), yet the State used its third peremptory strike out of a scant five to exclude this juror. It is noteworthy that Juror 131 came up directly before Juror 117, (R. p. 70 lines 11-22), because it shows that instead of using its third strike on the white juror with a previous arrest for assault and battery with intent to kill (Juror 131), the State used that same strike on a black juror who knew the victim and went to school with the victim (Juror 117).

II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND FAILING TO CORRECT THE STATE'S REMARKS TO THE JURY THAT USE OF A DEADLY WEAPON IMPLIED MALICE WHERE THE JURY WAS CHARGED WITH A LESSOR INCLUDED OFFENSE OF MURDER AND SELF DEFENSE.

The trial court instructed the jury on murder, (R. p. 524, line 22-R. p. 526, line 14), voluntary manslaughter, (R. p. 526, line 24-R. p. 528, line 14), and self defense, (R. p. 529, line 20-R. p. 535, line 21). The trial court did not tell the jury that malice can be inferred from use of a deadly weapon; however, the State did so on three occasions. (R. p. 543, line 23-R. p. 544, line 1; R. p. 544, lines 5-6; R. p. 545, lines 12-13). Appellant objected and the trial court overruled.

(R. 544, lines 3-4). After closing arguments and out of the presence of the jury, the trial court acknowledged Appellant's objection but noted that it did not instruct the jury on implied malice by use of a deadly weapon, and "the fact that the Court doesn't charge it the Court does not perceive that that takes away the ability of the State to argue that from a factual standpoint." (R. p. 558, line 24-R. p. 559, line 2).

State v. Belcher is clear that "the 'use of a deadly weapon' implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)." State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009). See also, State v. Stanko, 402 S.C. 252, 263, 741 S.E.2d 708, 714 (2013) ("The language of Belcher is clear, that when this type of evidence is submitted, an instruction regarding inferred malice from the use of a deadly weapon is improper."). Where a solicitor's closing argument misstates the law, "[t]he relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998). "[T]he Due Process Clause of the Fourteenth Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant." Belcher, 385 S.C. at 608, 685 S.E.2d at 808.

It is clear that the Appellant offered evidence which could have reduced, mitigated, or excused murder because the trial court properly charged the jury with the lesser included offense of voluntary manslaughter and self defense. See State v. Miller, 397 S.C. 630, 636, 725 S.E.2d 724, 728 (Ct. App. 2012), reh'g denied (May 25, 2012), cert. granted (Nov. 20, 2013) ("We note that if the trial court properly charged involuntary manslaughter, the evidence supporting that

charge would 'reduce [or] mitigate' the charge of murder and, thus, under Belcher the malice inference charge was improper.").

In Belcher, the South Carolina Supreme Court described the "half-truth" nature of the charge:

Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because 'if one intentionally kills another with a deadly weapon, the implication of malice may arise.' This highlights the 'half-truth' nature of the charge.

Belcher, 385 S.C. at 610, 685 S.E.2d at 809 (quoting State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784), overruled on other grounds by State v. Torrence, 305 S.C. 45, 69 n. 5, 406 S.E.2d 315, 328 n. 5 (1991)) (citation omitted). This "half-truth" is not made whole simply because the jury hears it from the State instead of the court.

Accordingly, Belcher should be extended to include remarks made by the State in closing arguments to prevent the State from effecting the harm that Belcher sought to prevent: a presumption that impermissibly shifts the burden to the defendant. As the trial court instructed the jury, it is the State's burden to "prove[] each and every element of the alleged crime beyond a reasonable doubt." (R. p. 514, lines 17-19). The State's comments infected the trial with unfairness and violated Appellant's right to due process because it relieved the State of its burden to prove malice and shifted it to the Appellant to disprove. See Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that "burden-shifting presumption[s]" or "conclusive presumption[s]" deprive a defendant of the "due process of law" and are therefore unconstitutional); Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding that the "Due Process Clause" forbids a state from placing the burden on the accused to prove his actions reduced the

crime from "murder to manslaughter"); Belcher, 385 S.C. at 608, 685 S.E.2d at 808 (finding that due process is violated by impermissible burden shifting).

The prejudice to the Appellant is particularly acute in this case because (1) the State made the inferred malice remark three times, (R. p. 543, line 23-R. p. 544 line 1; R. p. 544, lines 5-6; R. p. 545, lines 12-13), (2) the State added emphasis by prefacing the remark with "most importantly," (R. p. 543, line 25-R. 544, line 1), (3) the judge had already charged the jury so the solicitor's subsequent remarks perceivably "added" inferred malice from a weapon to the trial court's instruction; (4) the trial court overruled Appellants timely objection, likely giving the jurors the impression that the court adopted or approved of the State's language, (R. 544, lines 3-4); (5) in its closing, the State quoted from the trial court's jury instructions, and then immediately offered the implied malice remark, further suggesting to the jury that it was quoting or endorsed by the court;¹ (6) the State "waived opening" of its closing remarks, requiring the Defense to do their closing remarks first and denying Appellant the opportunity to correct the State's remarks, (R. p. 511, line 22-R. p. 512, line 1); (7) the trial court failed to provide a curative instruction, which again, suggested affirmation from the trial court of the State's closing remarks.²

¹ The relevant passage is as follows:

Now, malice doesn't have to be formed way in advance. The Judge told you that. He said, "Malice aforethought was not required if malice exists for any particular time before the act is committed." Ladies and gentlemen, you can find that malice was formed at any point up until Thomas Jeffery Stewart began striking the fatal blows with a knife to Bellany Clyburn.

It can be express or inferred. That means it can be through spoken words or it can be shown through actions or most importantly it can be inferred from the use of a deadly weapon.

(R. p. 543, line 16-R. p. 544, line 1 (emphasis added)).

² Johnson v. State, 325 S.C. 182, 188, 480 S.E.2d 733, 735-36 (1997) (a solicitor's improper comments may be cured by the judge's instructions to the jury). See also State v. Cooper, 334

The State will likely argue harmless error and rely on State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). In Stanko, the South Carolina Supreme Court found that although the trial court violated Belcher by giving an improper instruction on malice inferred from use of a deadly weapon, the error was harmless because "the evidence of malice presented in the case was not limited to Appellant's use of a deadly weapon." Id. at 264, 741 S.E.2d 708, 714. However, Stanko is easily distinguished from the case at hand. In Stanko,

[t]he State presented uncontested evidence that [Stanko] shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer. [Stanko] then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking. Authorities apprehended [Stanko] in possession of the Victim's vehicle and the gun used in the murder.

Id. In the instant case, testimony at trial demonstrated conflicting versions of the event which are more akin to the facts in Belcher. In Belcher, the victim and another man began arguing at a gathering of friends and family and the defendant intervened and shot the victim who also had a gun. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. Like Belcher, the evidence in the instant case revealed conflicting versions of the events. Like Belcher, both the victim and Appellant were in possession of deadly weapons. Like Belcher, the Appellant offered evidence of self-defense and the court so charged the jury. In Belcher, the Court noted that in many murder cases, there will be other evidence of malice apart from the use of a deadly weapon. "Obviously[,] when a defendant walks into the store [and] shoots and robs the clerk, a charge that the jury may infer

S.C. 540, 514 S.E.2d 584 (1999) (even if solicitor's closing comments referred to defendant's failure to testify or present a defense, any prejudice to defendant was cured when trial judge gave a curative instruction immediately following defense counsel's objection and charged the jury after closing arguments that defendant did not have the burden of proving his innocence and the jury could not consider defendant's failure to testify); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (where solicitor in his closing argument referred to the fact that neither defendant would testify, any prejudice to defendants was cured when solicitor promptly apologized to the jury after defense counsel's objection and the trial judge instructed the jury concerning the right of a defendant to remain silent and the State's burden of proof).

malice is not prejudicial to the defendant.” *Id.* at 609, n. 8, 685 S.E.2d at 611, n. 8. Such a scenario mirrors the facts of Stanko, not the instant case. In the instant case, the fact remains that “evidence was presented that, if believed, would have reduced, mitigated, excused or justified the homicide.” *Id.* at 612, n. 10, 685 S.E.2d at 810. Simply put, if the jury believed the evidence entered by Appellant, then the only source of malice would have been inferred from the use of a deadly weapon.

The State may also argue that other instructions given by the trial court relating to intent and lack of provocation would cure any failure to issue a correction. However, the fact that that the trial court also charged the jury that the unlawful act must be intentional and without just cause or excuse will not cure any errors related to the State’s closing remarks of inferred malice. (R. p. 525, lines 4-7). See also Belcher, 385 S.C. at 611, 685 S.E.2d at 809 (finding that although the trial court had charged the jury that the killing had to be unlawful, deliberate and intentional, and without just cause or excuse, instructing the jury that malice could be inferred by the use of a deadly weapon was nonetheless confusing and prejudicial where evidence was presented that would reduce, mitigate, excuse or justify the homicide).

III. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ENTER UNFAIRLY PREJUDICIAL CHARACTER EVIDENCE

The State offered as evidence a video taped interview of Appellant. State’s Exhibit 7. Appellant filed a motion in limine and also objected at trial to a twenty-four second portion of the video to be redacted.³ (R. p. 96, line 21-R. p. 98, line 10). In the disputed portion of the video, Appellant states that Appellant “used to beat [the victim] up.” (State Exhibit 7 at 47:45 – 48:09). The disputed portion of the video does not contain any references to the victim being

³ The portion that Appellant moved to redact was from forty seven minutes forty five seconds though forty eight minutes nine seconds: a total of 24 seconds.

violent. (R. p. 180, lines 2-4 ("And the part when she beats up on him an all they aren't asking that that be excluded and neither are we.")). The State argued that Appellant had opened the door in its opening statement to allow evidence of the Appellant's character, and that evidence of Appellant's past violence towards the victim goes to the state of mind of the victim and the heart of Appellant's self-defense argument. (R. p. 179, line 23-R. p. 180, line 22). Appellant argued that the evidence violates Rule 404, SCRE as improper character evidence being introduced to show conformity therewith and Rule 403, SCRE because the prejudice to Appellant outweighed its probative value. (R. p. 182, line 7-R. p. 187, line 5). The trial court overruled Appellant's objection and allowed disputed portion of the tape into evidence.

The State later introduced an arrest warrant for trespassing and an order of protection, each signed by the victim against the Appellant. (R. p. 319, line 18-R. p. 320, line 8; State Exhibits 20 and 106 at R. pp. 597-600). The State argued that these documents, like the redacted portion of the video, went to the victim's state of mind. (R. 320, line 22-R. 321, line 4). Appellant objected under Rule 404, SCRE and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). (R. p. 321, lines 7-26).

Rule 404 states that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) *Character of Accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same" Rule 404, SCRE. It is well-settled that a defendant may open the door to what would otherwise be improper evidence. The case of State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), is often cited for the door-opening doctrine, although it never uses the open door language. See, e.g., State v. Young, 364 S.C. 476, 485, 613 S.E.2d

386, 391 (Ct. App. 2005) (citing Allen and noting the case is well known for the door-opening doctrine).

We recognize certain exceptions to the general rule that an accused's bad character may not be offered against him by the State. One exception is where the accused takes the stand and thus becomes subject to impeachment, like any other witness. The accused may thus be cross-examined about any of his past transactions tending to affect his credibility. Secondly, where the accused offers evidence of his good character, thereby putting his reputation in issue, he may be cross-examined on particular acts which manifestly bear reference to the trait of character covered by the charge in the indictment.

Allen, 266 S.C. at 482, 224 S.E.2d at 886.

In the present case, the video, arrest warrant, and restraining order were introduced in the State's case-in-chief and the Defense was not yet sure if Appellant would testify. Therefore, the first exception from Allen does not apply. The second exception from Allen also does not apply because Appellant had not yet offered evidence of his good character for the State to rebut.

The State argued that Appellant somehow opened the door in its opening statement to allow in character evidence. However, nothing in Appellant's opening statement made reference to Appellant's good character or otherwise put Appellant's reputation in issue to open the door to rebuttal by the State. The State argued that Appellant's opening statement suggested that Appellant would be asserting self defense; therefore, the state of mind of the victim would be relevant to the self defense claim. (R. p. 182, line 18-R. p. 183, line 15; R. p. 320, line 17-R. p. 321, line 4). Presumably, although the State never raised it, the State intended that Rule 405(b) would allow the evidence in as pertinent to an essential element to a claim or defense. However, the state of mind of the victim is not an essential element to Appellant's self-defense claim. This is borne out by the language of the trial court's charge to the jury:

Now, evidence of prior difficulties between the Defendant and the victim maybe [sic] considered in deciding whether a threat existed and whether the Defendant had reason to believe that a threat existed and how serious that threat was and the Defendant's state of mind on the particular occasion . . .

Also, the reputation of the victim as a violent person may be considered in deciding whether there was a need for force, whether the Defendant had to believe -- excuse me. Had reason to believe there was a need for force and whether deadly force was reasonably necessary and whether the victim had such a reputation.

And also prior instances of violence by the victim may be considered in deciding whether the Defendant actually believed he was in imminent danger of death or serious bodily injury or was actually in imminent danger."

(R. p. 532, line 16-R. p. 533, line 9 (emphasis added)). Clearly, it is the state of mind of the Defendant that is pertinent to the elements of self defense, not the state of mind of the victim. As Appellant pointed out at trial, "Miss Clyburn is not claiming self-defense." (R. p. 185, lines 21-22). Therefore, the State's assertion that the victim's state of mind "goes right into the heart of possible self-defense issues" is simply incorrect.

The State may argue that any error was harmless because the Appellant testified and entered evidence of good character; therefore, the State would have eventually been able get the disputed evidence in front of the jury. However, once the disputed evidence was entered and shown to the jury, it changed the dynamic of the case and affected strategic decisions, including the decisions to enter evidence of good character and the Appellant's decision to testify. Moreover, there can be little doubt that the redacted portion of the video, the arrest warrant, and the restraining order were extremely prejudicial to the Appellant. It allowed the jury to judge Appellant based on extrapolation and violates the policies that underpin the rule. See Michelson v. U.S., 335 U.S. 469 (1948) ("The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."); Boyd v. U.S., 142 U.S. 450, 458, (1892) (proof of earlier robberies "only

tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value"); 1 McCormick On Evid. § 190 (7th ed.) ("The evidence of or statements about bad character would not be irrelevant, but particularly in the setting of the jury trial, the dangers of prejudice, confusion and time-consumption outweigh the probative value.").

CONCLUSION

Consistent with the foregoing, the trial court committed reversible error when it (1) declined to find a Batson violation where (a) the trial court failed to adhere to the third step of the Batson analysis and (b) Appellant carried his burden to prove that the State's facially race neutral reasons were misapplied; (2) overruled Appellant's objection and failed to correct the State's multiple remarks to the jury that use of a deadly weapon implied malice where the jury was charged with a lesser included offense of murder and with self defense; and (3) allowed the State to enter improper character evidence unfairly prejudicial to the Appellant.

Accordingly, Appellant respectfully requests this Court to reverse the decision of the lower court and remand for a new trial.

Respectfully Submitted,

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This 13th day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

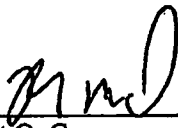
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THOMAS STEWART,

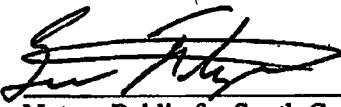
APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certified that a true copy of the Final Brief of Appellant and the Final Reply Brief of Appellant 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 13th day of October, 2014.

By: 
Jarrett O. Coco
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 13th day of October, 2014.

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS STEWART,

APPELLANT

Appellate Case No. 2012-213655

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INTRODUCTION

The State responds that the trial court fully complied with its obligations under Batson and that Appellant failed to demonstrate pretext. The State further argues that should this Court find that the trial court failed to apply the third step in Batson, the proper remedy would be remand for a hearing, not new trial. Plainly put, the State used four of its five peremptory strikes to remove African American jurors and the Appellant offered three similarly situated white jurors who were not struck by the State. The trial court then summarily concluded that there was no pretext instead of conducting a careful analysis of whether the State's proffered reasons were applied neutrally. In its Initial Brief, the State spills pages of ink speculating as to possible reasons why the State might have not struck the similarly situated white jurors offered by the Appellant; however, this just goes to prove Appellant's point: such speculation would not be necessary had the trial court properly performed step three of the analysis because it would have been contained in the record. It will not suffice for the State to conjure up possible reasons now nearly two years after the fact. Therefore, as explained more fully below, because the trial record is devoid of specific findings, this Court should not afford deference to the trial court.

The State also argues that footnote nine in Belcher expressly permits the State to argue to the jury that malice can be inferred from use of a deadly weapon. If that is true, then footnote nine would also expressly permit a defendant to rebut that argument; however, the Appellant was denied the opportunity to respond to the State's implied malice argument.

Finally, the State argues that the three disputed pieces evidence were properly admitted because they go to the mental state of the Appellant and victim and they are part of the res gestae. However, the challenged portion of the taped interview is not evidence of the victim's state of mind; it is unfair character evidence and evidence of a prior act. The disputed evidence is not part of the res gestae because the evidence is not so intimately connected with or integral

to the events in the case such that admission would be necessary to provide a full presentation of the case. In addition, the probative value of the evidence is substantially outweighed by the unfair prejudice to the Appellant.

ARGUMENT

I. THE STATE'S USE OF PEREMPTORY STRIKES VIOLATED BATSON.

A. Appellant timely raised his Batson objection at trial; thus, it is properly preserved and before this Court.

The State argues in its Initial Brief that Appellant should be procedurally barred from arguing that the trial court failed to comply with the third step in the Batson analysis because Appellant "did not raise that same claim before Judge Baxley." (State's Initial Brief at 11). However, as the record reflects, Appellant timely raised the issue.

"In order to raise and preserve a Batson issue, the opposing party must move for the hearing after the jury is selected but before it is sworn." State v. Cochran, 369 S.C. 308, 328, 631 S.E.2d 294, 305 (Ct. App. 2006). A Batson issue is properly preserved when "appellant clearly stated his position and the trial judge ruled on the issue, [and] [f]urther objection would have been useless and unnecessary" State v. Ford, 334 S.C. 59, 64, 512 S.E.2d 500, 503 (1999). See also State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999) (citing Ford and finding the Batson issue preserved where the defendant failed to object to the composition of a second jury drawn immediately after the first was quashed on Batson grounds); State v. Johnson, 333 S.C. 62, 64, 508 S.E.2d 29, 30, n.1 (1998) (issue is preserved for review where a party's request to charge was denied on-the-record after an opportunity for discussion, and the party is not required to renew his request at the conclusion of the charge).

As the record reflects, the Appellant timely raised this issue to the trial court. First, there is no question that the Appellant properly raised the Batson issue. (See R. p. 80, lines 13-15 (objecting on the grounds that “[t]he State exercised four [out of five] of it’s [sic] peremptory strikes against African American jurors”)). Appellant then addressed each of the four jurors struck by the State and presented similarly situated white jurors. Appellant clearly stated his position and the trial judge ruled on the issue, so further objections would have been useless and unnecessary. Ford, 334 S.C. at 64, 512 S.E.2d at 503.

The State claims that after the trial court ruled, “Appellant’s only inquiry concerned an expansion of his claim that he learned another potential juror (#105) had evidence of a dismissed charge of bad checks and simple assault.” (State’s Initial Brief at 11). However, the State’s misconstrues the transcript. A fair reading of the transcript reveals that Appellant was trying to ensure that the record was complete and preserved with regard to his Batson motion by clarifying details regarding the prior arrests of the similarly situated jurors. (R. pp. 90-91). Mr. Young, counsel for Appellant, stated “I understand the Court’s ruling and I just want to make sure that my records are complete.” (R. p. 90, lines 14-15). Mr. Young then went on to clarify the prior arrests of Jurors 131 and 105, who were the jurors that were offered as similarly situated to Juror 101. Mr. Young then clarified information relating to Juror 33; specifically that Juror 33 had a “contentious relationship with his wife.” (R. p. 91, lines 9-13). Mr. Young was clearly trying to preserve the Batson objection and ensure the record was clear relating to the similarly-situated jurors.

To support its claim, the State cites State v. Dunbar for the proposition that “a party may not argue one ground at trial and an alternate ground on appeal.” 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). This does not apply here—no party is making inconsistent arguments.

However, Dunbar is instructional, not for the proposition cited by the State, but for the proposition that “a party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.” Id. There is no question that Appellant timely presented his Batson challenge, and it was ruled upon by the trial court; therefore, the issue is preserved for appellate review. Id.

B. Appellant’s request for a new trial is the proper remedy

The State also argues that if this Court finds that trial judge failed to complete its Batson-mandated analysis, the appropriate remedy would be to remand to the trial court for a special finding and not grant a new trial. The State acknowledges that this case cannot be remanded back to Judge Baxley because he has since left the bench. However, the State nevertheless urges this Court to remand the case to another judge for a hearing, and a new trial should be ordered only if that judge finds that there is insufficient evidence. (State’s Initial Brief at 12, n. 5).

However, this is not a practical remedy. Even the State acknowledges the “practical difficulties” that this remedy would present and cites case law from foreign jurisdictions. However, the case law cited by the State recognizes that this remedy is not appropriate if Appellant has shown a prima facie case of discrimination or if the passage of time is such that it would make remand for a hearing impossible. See State v. Donaghy, 769 A.2d 10 (Vt. 2013); State v. Scott, 829 N.W.2d 458, 467 (S.D. 2013). Here, Appellant has made out a prima facie case for discrimination, see supra, § I.C., nearly two years have passed since the trial,¹ and the presiding judge is no longer available. See Barnes v. Anderson, 202 F.3d 150, 157 (2d Cir. 1999) (ordering a new trial where the trial judge was unavailable). Charging the lower court

¹ It is likely that by the time this Court issues its decision, over two years will have passed since the trial.

with the task of determining the mind set and thought processes of the prosecution and the trial judge from years earlier and in the absence of the presiding trial judge is not likely a practical solution.

In addition, the case law in South Carolina weighs in favor of a new trial and not remand for a Batson hearing. For example, in State v. Edwards, , the South Carolina Supreme Court ordered a new trial after determining that the reasons proffered by the defendant were in fact race neutral and the record did not contain evidence that the prosecution demonstrated that the proffered reasons were pretextual. 384 S.C. 504, 510-11, 682 S.E.2d 820, 823 (2009). See also State v. Williams, 379 S.C. 399, 403, 665 S.E.2d 228, 230 (Ct. App. 2008) (finding that the proper remedy is a new trial where the defendant's proffered reason was in fact race-neutral and the record did not show that the prosecution established pretext). If one follows the State's reasoning, the proper remedy for these cases should have been remand for a hearing, not a new trial. In fact, the State does not cite any South Carolina case law to support its argument that the proper remedy under the facts of this case is to remand for a Batson hearing, particularly where the trial judge is now unavailable. Under the facts of this case, it is unlikely that "further proceedings would . . . shed reliable light upon the voir dire" because, practically speaking, there would be significant difficulty recalling the circumstances of the jury selection due to the passage of time and the unavailability of the trial judge. Anderson, 202 F.3d at 157. Therefore, the proper remedy is to grant Appellant a new trial.

C. Appellant carried his burden to prove that the State's proffered reasons were pretextual.

The State argues that Appellant failed to carry his burden to show pretext because the white jurors offered by Appellant were not "similar." (State's Initial Brief at 23). The State goes through great pains to speculate as to why the prosecution may not have struck the similarly

situated white jurors offered by the Appellant. For example, the prosecution struck juror 101 because he had a prior arrest. Appellant then offered Juror 131 as a white juror who also had a prior arrest. The State argues for the first time in its Initial Brief that Juror 131 had a son in law who was in law enforcement, so perhaps that is why the prosecution did not strike Juror 131. However, as held by the Supreme Court of the United States, a similarly situated juror does not have to be identical. 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.”) (emphasis added). 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.”). After all, they are called similarly-situated jurors, not identically-situated jurors. Thus, to succeed in his Batson motion under Miller-El, Appellant is not required to present a white juror exactly identical in every respect except for race. “Rather, the potential jurors need only be alike ‘in all relevant aspects.’” Id. (quoting Startzell v. City of Philadelphia, 533 F.3d 183, 203 (3d Cir.2008)). “All relevant aspects” means those facially neutral reasons given by the State for striking; or, in the case of Jurors 101 and 131, the fact that they both had prior arrests.

“All relevant aspects” does not mean speculation. There is nothing in the record to support the supposition that the occupation of Juror 131’s son-in-law was in the contemplation of either the prosecution or the trial judge. 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.”). See also United States v. Barnette, 644 F.3d 192, 205 (4th Cir. 2011) (quoting Miller-El and finding that a Batson challenge must stand on the prosecution's stated reasons). This is exactly the type of information that could have been borne out on the record and weighed by the trial court if it had properly conducted the third step of the Batson analysis. After having the luxury of time to research and reflect, the State cannot now profit from the trial court's failure to conduct a proper step three inquiry by “thinking up” possible reasons that the prosecutor may not have struck a similarly situated juror almost two years after the fact.

The State also argues that Appellant has abandoned any argument relating to the strike of Juror 126 because “it was not argued in his brief.” (State's Initial Brief at 21). However, Appellant does not abandon any argument regarding Juror 126 and although Appellant did not offer a white juror similarly situated to Juror 126, Appellant's brief does in fact contain argument that relies on Juror 126. (See Initial Brief of Appellant at 4-5 (noting that four out of five of the State's peremptory strikes were used against African American jurors, discussing the composition of the impaneled jury, and discussing proffered reasons for each of the struck jurors)). Therefore, this Court is entitled to consider whether the State struck Juror 126 because of her “disinterested demeanor,” or if that reason proffered by the State was contrived in light of the totality of the circumstances. The State's strike of Juror 126 is significant because Juror 126 was one of the four African American jurors struck by the State and this Court can look to circumstantial evidence of racial discrimination. State v. Inman, __ S.C. __, 760 S.E.2d 105, 109, n.6 (2014), reh'g denied (July 24, 2014) (“The party asserting the Batson challenge may also point to circumstantial evidence of racial discrimination, such as a ‘pattern’ of strikes against jurors of a particular race, particularly when the number of strikes exercised against that race is

disproportionate to the race's representation among the jury pool."').² In this case, the jury pool was 31% African American. (See Jury Rollcall List for Panel at R. pp. 580-92 (showing that 47 out of 150 panel members were African American)). Yet, the State used four out of five of its strikes (or 80% of its strikes) against African Americans who, as a group, comprised only 31% of the jury pool. Therefore, the number of strikes used by the State against African American jurors is heavily disproportionate to the representation of African Americans in the jury pool. Again, this is significant when one considers that only two members of the twelve member jury (16%) were African American (Jurors 95 and 59), and were presented by the State only after the State had already used four of its five peremptory strikes, and the State used its final strike on an African American. (See Initial Brief of Appellant at 4; R. p. 72, lines 19-25). Therefore, the composition of the jury was also disproportionate to the jury pool and under Inman can be considered by this Court as circumstantial evidence of discrimination.

The State may argue that the South Carolina Supreme Court in Inman states that such "statistical evidence, standing alone, is not sufficient to establish purposeful discrimination. Rather, the statistical evidence must be paired with some other evidence of discrimination, such as direct evidence of other jurors being struck for pretextual reasons." Inman, __ S.C. __, 760 S.E.2d 105, 109, n.6 (citations omitted). However, Appellant has offered evidence of pretext as argued above, in his Initial Brief, and at trial, in the form of similarly situated white jurors. Moreover, the Inman Court cited a case called Yancey v. State for the proposition that "the State's use of twelve of its fifteen strikes to strike black jurors, when paired with other direct evidence of discrimination, demonstrated that the trial court's rejection of a Batson challenge was clear error." Id. (citing Yancey v. State, 813 So. 2d 1, 8 (Ala. Crim. App. 2001)). The

² State v. Inman decided June 18, 2014, which was after Appellant filed his Initial Brief on February 3, 2014.

"direct evidence of discrimination" in Yancey was demonstrated by the defendant in the form of similarly situated white jurors, just as was done here. Also, in Yancey, the prosecution used twelve out of fifteen strikes to eliminate African American jurors, which, when reduced to its common denominator, equals four out of five (or 80%)—the same amount in this case. Id.

Inman also reinforces the importance of the third step in Batson and requires (not encourages) the trial court undertake a careful analysis in step three to evaluate whether the facially race-neutral reasons were actually applied neutrally. Inman, __ S.C. __, 760 S.E.2d at 109. (noting that "step three of the [Batson] analysis requires the court to carefully evaluate whether the party asserting the Batson challenge has proven racial discrimination," and the party asserting the Batson challenge should show "that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race.") (emphasis added). As discussed more fully in Appellant's Initial Brief at 7, the trial court failed to undertake such an analysis, and instead summarily concluded that each of the facially-neutral reasons proffered by the State had been found to be "permissible" in previous cases. (R. p. 88, line 9-R. p. 89, line 16). In so doing, the trial court fulfilled its duty under step two of Batson by finding that the reasons were facially neutral; however, the court still had an obligation to evaluate how those reasons were applied by the prosecution.

Appellant agrees that a trial court does not "need [to] make detailed findings addressing all the evidence before it," Miller-El, 537 U.S. at 347; however, contrary to the assertions of the State, a trial court does need to make some factual findings regarding the race-neutral reasons given for each strike. The United States Supreme Court has stated that an appellate court should not defer to the trial court if it did not make "specific finding[s] on the record" regarding each of the prosecutor's explanations for its strikes. See Snyder v. Louisiana, 552 U.S. 472, 479 (2008)

("[D]eference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor. The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation."); see also Gary v. State, 760 So. 2d 743, 748 (Miss. 2000) ("Mere broad conclusions at the end of the Batson process will not suffice."); Pruitt v. State, 986 So. 2d 940, 949 (Miss. 2008) (dissenting, J. Diaz) (quoting Snyder for proposition that an appellate court should not defer to the trial court if it did not make specific findings on the record).

In this case, the trial court simply did not make any findings of fact. The State looks to the following conclusory sentence in the record as evidence that the trial court fulfilled its obligations under step three: "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 another." (State's Initial Brief at 14, citing R. 89, lines 10-14). This is simply ipse dixit. Therefore, this Court should not afford the trial court deference in this case because the record is devoid of specific findings regarding the State's explanations for its strikes. Accordingly, Appellant respectfully requests this Court to reverse the decision of the lower court and remand for a new trial.

- II. THE STATE RELIES ON FOOTNOTE NINE OF BELCHER FOR THE PROPOSITION THAT THE STATE IS ENTITLED TO ARGUE IMPLIED MALICE FROM USE OF A DEADLY WEAPON TO THE JURY; HOWEVER, FOOTNOTE NINE ALSO ENTITLES DEFENDANT THE OPPORTUNITY TO PRESENT HIS ARGUMENT TO THE JURY. THEREFORE, APPELLANT WAS ENTITLED TO BUT DENIED THE OPPORTUNITY TO REBUT THE STATE'S ARGUMENT REGARDING IMPLIED MALICE TO THE JURY.

The State argues that Belcher expressly allows the prosecution to argue that malice can be inferred from use of a deadly weapon. The State looks to footnote nine in Belcher which states that "we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810, n. 9 (2009) (emphasis added). However, Appellant was in fact restricted from "argu[ing] the absence of malice or the presence of reasonable doubt" because Appellant was required to make his closing remarks first which denied Appellant the opportunity address the State's remarks to the jury. (R. p. 511, line 22-R. p. 512, line 1; Initial Brief of Appellant at 16 (item (5))).

At the time of Appellant's closing remarks, he could not have known that the State would argue inferred malice from use of a deadly weapon and therefore could not preempt the State's argument. Appellant timely objected when the State argued for the first time in its closing argument that malice could be inferred from use of a deadly weapon, and the trial court overruled. (R. p. 544, lines 3-4). Out of the presence of the jury, the court acknowledged Appellant's objection but noted that the court did not instruct the jury on implied malice by use of a deadly weapon, "but that doesn't change the factual inference that I believe the State is entitled to argue. Your objection, of course, is preserved, but the Court determine [sic] not to stop the arguments and consider it further or discuss it on the record." (R. p. 559, lines 2-7). Thus, there was little more that Appellant could have done to preserve this argument or to address the jury with his side of the implied malice argument because the trial court assured Appellant that his objection was preserved, and that the court was not inclined to "consider it further or discuss it on the record."

In addition, and as Appellant argued more fully in his Initial Brief at 16, the prejudice to the Appellant is particularly acute because of the context in which the State presented its argument. The State was quoting from the trial court's instructions and then immediately followed with the implied malice argument, which likely suggested to the jury that it was quoting from or endorsed by the trial court. In addition, the trial court failed to provide a curative instruction which likely suggested affirmation of the State's closing remarks by the trial court.³ The State's response was that "learned defense counsel" would have "not made an objection." (State's Initial Brief at 31). However, Appellant stands by his objection and his argument that footnote nine in Belcher is based on parity; thus, if one party argues implied malice, then the other should have an opportunity to be heard.⁴ Therefore, Appellant was entitled to but denied the opportunity to present his side of the implied malice argument to the jury.

III. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ENTER UNFAIRLY PREJUDICIAL CHARACTER EVIDENCE

- A. The disputed portion of the video tape interview is not evidence of the victim's state of mind, but rather improper character evidence and evidence relating to a prior bad act under Rule 404.

Despite the State's assertions to the contrary, evidence the Appellant "used to beat [the victim] up" is not evidence of the victim's state of mind, it is character evidence and evidence of a prior act under Rule 404, SCRE. This is not hearsay evidence that revealed that the victim was afraid of Appellant and thus would clearly be probative of the victim's state of mind. The cases

³ The trial court did, however, provide what it deemed to be a curative instruction with regard to the State's remark that "Thomas Stewart doesn't deserve anything," (R. p. 554 line 11-R. p. 555, line 4; R. p. 558, lines 16-18), but declined to provide any curative instruction on the State's implied malice remark.

⁴ For example, once the State made the argument that malice could be implied by use of a deadly weapon, Appellant, if given the opportunity, would have argued that the victim was also armed with a knife and if malice can be inferred from the defendant's use of the knife, then it can also be inferred from the victim's use of a deadly weapon.

that the State relies on (again, all from foreign jurisdictions), all relate to the hearsay exception for state of mind. Hearsay is different from this situation because in hearsay cases, the evidence in question involves a witness repeating something the victim said, typically a statement that indicates that the victim feared the defendant. There is no hearsay issue here and the State does not know the victim's state of mind but speculates that Appellant's statement that he "used to beat [the victim] up" meant that the victim feared Appellant. Under such logic, any character evidence or prior bad act under Rule 404 would be admissible if a party could come up with a plausible reason that it might affect the victim's state of mind.

The law in South Carolina weighs in favor of excluding this from evidence. In State v. Garcia, the South Carolina Supreme Court found that although a victim's state of mind was relevant where it was used to disprove the appellant's contention that the shooting was an accident, the exception does not permit evidence that "reveals the reason for [the victim's] state of mind (i.e., evidence that [the defendant] 'had kicked and threatened to kill her')." 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999) (emphasis added). The Supreme Court discussed at length that the hearsay state of mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind. "If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition—'I'm scared'—and not belief—'I'm scared because [someone] threatened me'." Id. quoting United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir.1980). See also State v. Weston, 367 S.C. 279, 287, 625 S.E.2d 641, 646 (2006) (finding that the testimony was properly admitted under Garcia because it did not give the reason for the victim's fear, rather the testimony only reflected that the victim was afraid of the defendant.).

Understanding that there are no hearsay issues here, Garcia is applicable nevertheless because it demonstrates that evidence of a victim's state of mind should not include the "why" or the "reason" for the purported state of mind. Here, the State intends to introduce Appellant's statement that he "used to beat [the victim] up" as the "why" or the "reason" for the victim's purported state of mind.

- B. The disputed portion of the tape and the arrest warrant for trespassing and the restraining order were not part of the res gestae of the case.

The State also argues that the disputed portion of the tape as well as the arrest warrant for trespassing and the restraining order were admissible as part of the res gestae of the case. Under the res gestae doctrine, evidence of other crimes is admissible

when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

State v. King, 334 S.C. 504, 512-13, 514 S.E.2d 578, 582-83 (1999) (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 371 (1996) overruled on other grounds by State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). In a criminal case, the State cannot attack the character of the defendant unless the defendant himself first places his character in issue. Rule 404(a), SCRE. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person. King, 334 S.C. at 512, 514 S.E.2d at 582. South Carolina law precludes evidence of a defendant's

prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCORE; Adams, 322 S.C. 114, 470 S.E.2d 366; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The evidence of the prior bad acts must be clear and convincing to be admissible. The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. Adams, 322 S.C. 114, 470 S.E.2d 366; State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992); State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Cl.App.1998). Further, even though the evidence is clear and convincing and falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCORE; King, 334 S.C. at 512, 514 S.E.2d at 582.

The State argues that the "evidence supported the bigger and more accurate picture" because it was probative of the Appellant and victim's state of mind. State's Initial Brief at 49. While it is true that the disputed portion of the tape, the arrest warrant, and the restraining order are related to the charges and may provide context, contrary to the assertions of the State, the evidence is not so intimately connected with or integral to the events in the case such that admission would be necessary to provide a full presentation of the case. In addition, the probative value of the evidence is substantially outweighed by the unfair prejudice to the Appellant. Appellant does not dispute that there is some probative value to the evidence; however, the arrest warrant and restraining order were circumstantial evidence of bad acts of the Appellant, and it is noteworthy that these were not convictions. Admittedly, the arrest warrant and restraining order may be probative for the victim's state of mind; however, as discussed above, the disputed portion of the taped interview does not reveal the state of mind of the victim

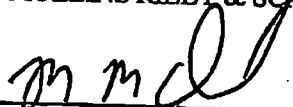
without also revealing the "why" or the "reason" for the victim's state of mind and is therefore not properly admissible. However, all the evidence is extremely prejudicial to the Appellant because it allows the jury judge the Appellant based on extrapolation and violates the policies that underpin the rule against character evidence and prior acts. (See Initial Brief of Appellant at 21-22). Therefore, the probative value of the evidence is outweighed by its prejudice to the Appellant.

CONCLUSION

Consistent with the foregoing, Appellant respectfully requests this Court to reverse the decision of the lower court and remand for a new trial.

Respectfully Submitted,

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This 13th day of October, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

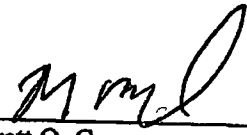
THOMAS STEWART,

APPELLANT

Appellate Case No. 2012-213655

CERTIFICATE OF SERVICE

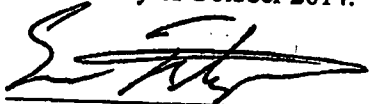
The undersigned attorney hereby certified that a true copy of the Final Reply Brief of Appellant in the above referenced case have been served upon Donald J. Zelenka, Esquire, State of South Carolina, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201, this 13th day of October 2014.

By: 

Jarrett O. Coco

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of October 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

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

THE STATE,

Respondent,

v.

THOMAS STEWART,

Appellant

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. The trial court erred in finding no discrimination in the State's use of peremptory challenges because (a) the trial court failed to comply with the third step in the Batson analysis which requires a court to meaningfully evaluate the persuasiveness of the prosecutor's group neutral explanations and make a deliberate decision whether purposeful discrimination occurred; and (b) Appellant proved the State's proffered reasons were pretextual because they were not applied in a neutral manner.
2. Where the State announced to the jury that malice can be implied from use of a deadly weapon and where the jury was asked to consider a lesser included offense of murder and self-defense, the trial court erred in overruling Appellant's objection and failing to issue a correction to the jury.
3. The trial court erred in overruling Appellant's objection to unfairly prejudicial character evidence offered by the State.

RESPONDENT'S STATEMENT OF THE CASE

Appellant, Thomas Stewart was indicted by the Chesterfield County Court of General Sessions for murder and possession of a weapon during the commission of a violent crime. The Appellant was represented by Casey Secor, S. Boyd Young and William McGuire of the South Carolina Office of Indigent Defense. The State of South Carolina, represented by Kernard E. Redmond, Adam Foard and Christopher Jones of the Fourth Circuit Solicitor's Office. The indictments were called to trial on December 3, 2012 before the Honorable J. Michael Baxley. On December 6, 2012, the jury returned a verdict of guilty as to the charges of murder and possession of a weapon during the commission of a violent crime. R. 563, lines 7-15. A motion for a new trial was made and denied the same date. Judge Baxley sentenced Appellant to life in prison and five years to be served consecutively. R. 577, lines 18-24. The Appellant timely filed his notice of appeal.

STATEMENT OF THE STATE'S VERSION

"My daddy's stabbing my momma." Supp ROA 2-4. The Appellant declared: "I'm going to kill you." Supp R. 7. The victim was not seen stabbing back. Supp R. 13-14. This case involves the death of Bellany Clyburn at the hands of the Appellant as the conclusion of a violent relationship. The victim was murdered on January 1, 2010 after suffering 39 stab wounds (R. 303-04) after being confronted at her own apartment by a knife-wielding Appellant. The State's evidence revealed that the victim, who had made a restraining order against the Appellant within days before the incident and arrest warrants concerning a trespassing and assault and battery. R. 289, 365-68. In a statement to police, the Appellant admitted that he had arrived in the early morning hours. He confronted the victim with her two children as she left the apartment. She

returned to the apartment where she attempted to defend herself and used mace on the Appellant. She ran out of the apartment, where she was chased down by the Appellant, resulting in 39 stab wounds. She died as a result of the attack. The Appellant was found away from the scene covered in blood. R. 160-61, 163. He declared that he had "lost it in love." R. 163-65. The Appellant further stated that he carried the knife into the apartment. R. 164-65. See also, State Exhibit 7. He stated that the only reason why he stopped stabbing the victim because he felt threatened by others who had come to the scene. In his initial statements the Appellant made no claim about self-defense. R. 165-66.

ARGUMENT

- I. **The trial court properly applied the mandates of Batson v. Kentucky in rejecting the defense motion. The Solicitor gave valid race-neutral reasons for each of the four peremptory strikes which were not pretextual. The defense failed in Step 3 of the Batson test to show pretext where the Caucasian jurors not struck were not similarly situated to the challenged African American juror. Purposeful discrimination was not proved.**

In his argument, the Appellant contends that he was able to prove pretext on the part of the Solicitor in his use of peremptory strikes against potential African American jurors. Alternately, he contends that Judge Baxley failed to resolve whether pretext was shown and only addressed whether the reasons given by the prosecution under Batson v. Kentucky, 476 U.S. 79 (1986) were race-neutral. In addressing the reasons for using four of its five strikes on African Americans, the prosecution expressed valid race neutral reasons which were accepted against the defense's protest that the reasons were pretextual. A review of the reasons, in the context of this record, reveals a sound basis for Judge Baxley's denial of the motion. A new trial is not warranted.

How the Issue Was Raised

The record before the court reveals that the State used four (4) of its five (5) peremptory challenges against African American potential jurors. R. 67-75, Roll call list for panel, R. 580-592. The jury was made of ten Caucasian jurors and two African American jurors. The defense objected to the State's use of the preemptory challenges after an off-the-record discussion with the prosecution. R.p. 80, ll. 11-19.

The State's Reasons

The trial judge requested the Solicitor to explain his reasons for the strikes against the four potential African American jurors. In describing the manner he would use, Judge Baxley stated:

THE COURT: Let's do it this way. Mr. Young, you give me the four jurors whom you object. I first determine whether they are cognitive as a group, whether that be a racial group, gender group, whatever it and which I think that will determine if they're acceptable. Then I'll hear from the State as to what their purpose or reason in for striking and then hear from you as to why you believe that would be invalid reason. That fair enough reason?

R.p. 81, ll. 10-17.

Solicitor Redmond stated earlier that his basis for striking juror 101 was that he had been charged with "possession of cocaine" and that it was later nolle prossed. R.p. 80, ll. 13-20.

Solicitor Redmond stated that it was a prior arrest handled by the Solicitor's Office. Although he stated he did not know the particular reasons for the dismissal, "based on that interaction with law enforcement, especially with it being a drug charge, we feel that gives enough to [raise] concerns..." R.p. 82, ll. 10-16. He stated this occurred in 2009. R.p. 82, ll. 4-20.

As to juror 126, it was proffered that this juror was late in returning to court after a break

and there were additional concerns about her demeanor appearing disinterested. Solicitor Redmond stated that her lateness raised concerns about her ability to be [conscientious] in a serious murder trial. R.p. 82, l. 22 – p. 83, l. 4.

Concerning juror 117, Solicitor Redmond stated that she was unemployed, which he noted had been upheld as a race neutral reason. However, he further stated that in their discussions that it was pointed out that she knew the victim. R.p. 83, ll. 5-10. See R. 14-15 (“I went to school with her,” but that she had not seen her in some time). He also stated that knowing the victim sometimes works both ways stating there was another juror that the defense struck.¹ Because juror 117 knew the victim, but not in what context she knew her raised concerns, but Solicitor Redmond unequivocally declared the reason for the use of the strike was the fact that juror 117 was unemployed. R.p. 83, ll. 6-19.

As to Juror 33, Solicitor Redmond stated they had no information about him, but law enforcement were present and they had one strike left at the time. Solicitor Redmond stated law enforcement made them aware that juror 33 had prior incidents involving his girlfriend who is now his wife. Although they did not result in criminal charges, the reported incidents revealed the juror and his wife engaged in a “tumultuous” relationship. He stated that given the nature of the case before them (a girlfriend being killed by her boyfriend after violence toward the boyfriend’s wife) it raised concerns. Solicitor Redmond stated this information about the incidents was given to him by the Chief of Police of Pageland. R.p. 83, l. 23 – p. 84, l. 12.

The Defense Claims that the Reasons for the Strikes Were Pretextual

Judge Baxley then inquired of the defense why they thought these reasons were

¹ The defense struck Juror 128 who stated that she knew the victim’s family because “they come to where I work all the time.” R.p. 15, l. 15 – p. 16, l. 6.

pretextual. Concerning the strike of juror 101 on the basis of the nolle prossed possession of cocaine charge, he stated he had no way of knowing if other jurors had "some other nolle prossed charges in some other clerk's office." R.p. 84, ll. 17-23. However, he stated that juror 131 was struck by the defense because he had a son in law enforcement, but had on his rap sheet a nolle prossed assault and battery with intent to kill charge. R. 84-85. The defense opined that they were similarly situated and his charge was for a violent crime, as opposed to a drug charge.

As to juror 117, who the prosecution stated was unemployed and went to school with the victim, the defense noted the first juror called was juror 128 but who was struck by the defense because the victim's family comes in and out of the store all the time. R.p. 85, ll. 10-14. The defense stated juror 128 was not struck for knowing the victim's family. He opined this was similarly situated and therefore the reason for juror 117 was not race neutral. R.p. 85, l. 16-18.

As to juror 33, the defense argued the basis was that someone told them this person would not be a good juror. R. 85. The defense said "I don't know. I mean I'll leave that up to the Court." He said he did not have law enforcement assistance but noted that the court asked the juror about criminal domestic violence charges and he did not answer. R. 86.

Judge Baxley inquired of the defense concerning juror 126 who the State asserted was late and "had something of an attitude." R.p. 86, ll. 7-10. Counsel Young responded that he did not recall the court admonishing any juror for being late and claimed he viewed the jury and did not know what they were talking about (concerning the attitude). R.p. 86, ll. 11-17.

The Trial Court's Findings and Conclusions

Judge Baxley however noted whether it is a valid issue was a separate question, but

confirmed that there were two jurors who were 10 minutes late after a break, noting that he was a few minutes late himself. He stated at that time to make sure other jurors were not outside. He confirmed that juror 126 was one of the two jurors. R.p. 86, l. 18 – p. 87, l. 4.²

The trial judge then ruled on the defense Batson motion. In particular, Judge Baxley stated:

THE COURT: All right. Just a moment. All right. The Court is prepared to rule at this time, and what I have before me is four jurors that the Defense complains about. They are Juror 101, 126, 117 and 33.

With regards to 101 the reason given for the strike is that this juror had a nolle prossed cocaine charge; that there had been previous, obviously, from that negative relationship with law enforcement, that that has been found by our Court in the case of the State v. Johnson at 302 SC 243, to be a permissible reasons for a strike.

This same reason will apply to Juror 33. With regards to the juror who may have been late or who may have a demeanor that is - - seems to be disinterested, the Court finds that has been previously permitted by our Supreme Court in the case of the State v. Casey, 325 SC 447. Specifically on the issue of being late, in the case of State v. Wilder, 306 SC 535 our Supreme Court has permitted a strike and found that to be a valid reasons.

In regard to Juror 117, the Court finds that the State [main] reason that this witness had known the victim and had been to school with the victim is a valid and non-racial reason for the strike. Court does not accept the fact that the juror may be "unemployed" particularly in this environment. That is not, in this Court's opinion, and in this [locale] a valid reason to impose a strike.

And I do find that reason that the victim was known to the juror. 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.

² At that time of the proceedings, the State withdrew its Batson motion. R. 87-88.

R.p. 88, l. 9 – p. 89, l. 16.

At that point, defense counsel Young sought to clarify Judge Baxley's ruling. He stated he was provided with a rap sheet which included the juror 131 was passed over and had a *nolle prossed* assault and battery with intent to kill charge. R.p. 90, ll. 12-19. However, counsel Young also added that juror 105 (a white female that the defense struck) had something listed on the rap sheets as either arrest or conviction on bad check and simple assault. R.p. 90, ll. 20-23.

Judge Baxley stated the Solicitor states this case arises from a criminal domestic violence situation and the Court found the *nolle pros* was a valid reason of juror 101. R. 90-91.

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). 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.").

BATSON STANDARDS

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a [juror] on the basis of race or gender." McCrea v. Gheraibeh, 380 S.C. 183, 186, 669 S.E.2d 333, 334 (2008) (citing State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)); see also Batson, 476 U.S. at 89, 106 S.Ct. 1712. The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. See Purkett v.

Elem. 514 U.S. 765, 767–68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

First, the [party asserting the Batson] challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the Batson] challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination. The ultimate burden always rests with the [party asserting the Batson challenge] to prove purposeful discrimination.

State v. Giles, 407 S.C. 14, ___, 754 S.E.2d 261, 263 (2014) (internal citations omitted); see also Snyder v. Louisiana, 552 U.S. 472, 476–77, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (quoting Miller-El v. Dretke, 545 U.S. 231, 277, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005)).

Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible. Purkett, 514 U.S. at 768, 115 S.Ct. 1769; State v. Inman, 2014 Westlaw 2765674 (S.Ct.S.C. 2014). The explanation must only be “clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it.” Giles, 407 S.C. at ___, 754 S.E.2d at 265; see, e.g., *id.* at ___, 754 S.E.2d at 262, 265–66 (finding that a defendant's explanation that he “did not feel the [struck] jurors were right for the jury,” while “technically, semantically and intellectually racially neutral,” would not allow the circuit court to “assess the plausibility of the proffered reason for striking the potential jurors”).

In contrast, 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.³

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

³ 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.”).

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 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))).

Thus, the credibility of the prosecutor justifications are at issue, but credibility is not based solely on the demeanor of the lawyer when she offered the justifications. While "[c]redibility can be measured by, among other factors, the [lawyer's demeanor,]" it can also be measured "by how reasonable, or how improbable, the explanations are[] and by whether the proffered rationale has some basis in accepted trial strategy." *Id.*; see also Miller-El v. Dretke, 545 U.S. 231, 241, 253, 125 S.Ct. 2317, 2325, 2332, 162 L.Ed.2d 196 (2005). "Determining whether the reason offered is an honest one turns on in-person credibility assessments which clearly the district court is in the best position to make." United States v. Montgomery, 210 F.3d 446, 453 (5th Cir.2000); see also Felkner v. Jackson, __ U.S. __, 131 S.Ct. 1305, 1307, 179 L.Ed.2d 374 (2011) (noting that a Batson claim "turns largely on an evaluation of credibility" (internal quotation marks omitted)). Deference to the trial court's findings is particularly appropriate in a

Batson challenge because it requires an assessment of credibility.⁴

ANALYSIS

In his brief before this Court – for the first time – the Appellant contends that the trial judge completely failed to apply the third step of Batson which 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. He essentially argues that Judge Baxley stopped his assessment at Step two. This new assertion does not entitle Appellant to the requested relief.

The New Failure to Complete Step 3 Issue Is Procedurally Barred

First, Respondent questions whether that precise claim is properly before the Court because he did not raise that same claim before Judge Baxley. See State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999) (finding where a defendant failed to call an alleged error to the trial judge's attention at the first opportunity to do so, the defendant is procedurally barred from raising the issue on appeal). After the trial court's ruling, the Appellant's only inquiry concerned an expansion of his claim that he learned another potential juror (#105) had evidence of a

⁴ In State v. McMillan, 400 S.C. 298, 734 S.E.2d 171 (S.C.Ct.App. 2012), the Court of Appeals in a reverse Batson scenario concluded that the trial court erred when it concluded that the defense counsel's justification was not race-neutral. The Court of Appeals found McMillan's stated reason for striking juror 34 was that he had reason to believe the juror would not be unbiased based on his counsel's conversation with members of the Lee County Bar. The Court found that this reason, although questionable, is race neutral. See *id.* at 123, 470 S.E.2d at 371 (stating the defendant's reasons for striking a juror do not have to be reasonably specific or legitimate—the reason need only be race neutral); State v. Cochran, 369 S.C. at 321, 631 S.E.2d at 301 (“Because a juror's perceived bias (for whatever reason) lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution.”); State v. Short, 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct.App.1997) (“The principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause.”). The Court also found the State, as the opponent of the strike, failed to prove McMillan's strike was purposeful racial discrimination. Furthermore, the fact that McMillan “used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination.” State v. Ford, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999).

dismissed charge of bad checks and simple assault. R. 106-107. However, there was no assertion below that the trial court completely failed to do a "step three" assessment as he now claims. His new complaint must be rejected on that initial basis. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."). See People v. Jackson, 357 Ill.App.3d 313, 328 (2005) (finding that defendant forfeited his claim that "the trial court improperly collapsed the three stages of the Batson hearing" by failing to raise it at trial). See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

The Requested Remedy of A New Trial Would Be Improper And Should Be Limited To Remand if Step Three Was Not Done.

Second, the remedy that he suggests for this belated assertion is too broad. If in fact the trial judge failed to do a step three assessment, the appropriate remedy would only be for a remand to the Court of General Sessions for a special finding on that issue.⁵ In fact, the case the Appellant relies upon, U.S. v. Hill, 146 F.3d 337 (6th Cir. 1998) supports that proposition. In Hill, the 6th Circuit concluded that a remand to the trial court was required with regard to the

⁵ Respondent recognizes that the Court cannot remand to Circuit Court Judge Baxley, who presided here, because he has since left the bench to take another non-judicial position. In similar circumstances, other courts have remanded to a new judge to complete the required Batson analysis. See People v. Davis, 368 Ill.App.3d 17, 305 Ill.Dec. 848, 856 N.E.2d 653, 655 (2006); State v. Scott, 829 N.W.2d 458, 467 (S.D., 2013). We are well aware of the "practical difficulties" this may present. See State v. Cannon, 41 P.3d 1153, 1158 (Utah Ct.App.2002). If the remand is done and a newly assigned judge determines that insufficient evidence exists to make the necessary findings, then and only then a new trial must be ordered. Nevertheless, the Appellant should not be entitled to the windfall of a new trial when purposeful discrimination was not proven when an appropriate remedy may exist to resolve it.

Batson issue because the record lacked information necessary for appellate review, including the District Courts thought as to the weight it gave such factors in concluding that the strike was not made with discriminatory intent. The Vermont Supreme Court has observed:

The decisions are uniform that unless the passage of time makes it impossible, the appropriate remedy where the trial court fails to follow Batson, and does not make a finding that the challenger has made out a prima facie case of discrimination, is a new Batson hearing in which the trial court must go through the three-step process mandated by that decision.

State v. Donaghy, 171 Vt. 435, 442; 769 A.2d 10 (2000) (collecting cases).

The Mississippi Supreme Court has recently addressed a similar scenario in Corrothers v. State, __ So.3d __, 2014 Westlaw 2894310 (Miss. 2014). The Mississippi court stated:

In Pruitt v. State, 986 So.2d 940, 946 (Miss.2008), the Court stated:

[I]n addressing a Batson claim, the Supreme Court has stated, “[w]e adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it.” Miller-El v. Cockrell, 537 U.S. 322, 347, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). A number of courts have used this statement to reject the argument that a trial court must make specific findings of fact regarding the proffered race-neutral reasons. See [,] e.g., State v. Frazier, 115 Ohio St.3d 139, 152, 873 N.E.2d 1263 (2007) (while more thorough findings would have been helpful, “the trial court is not compelled to make detailed factual findings to comply with Batson”); Lamon v. Boatwright, 467 F.3d 1097, 1101 (7th Cir.2006) (where a trial court failed to make findings on each proffered reason, it is sufficient if the appellate court can infer from the record that the trial judge engaged in the step-three inquiry); Messiah v. Duncan, 435 F.3d 186, 198 (2d Cir.2006) (“As long as a trial judge affords the parties a reasonable opportunity to make their respective records, he may express his Batson ruling on the credibility of a proffered race-neutral explanation in the form of a clear rejection or acceptance of a Batson challenge.”)

We stated that, while the trial court should make on-the-record findings on each race-neutral reason provided by the State, as long as the record provides a basis in fact for the trial court's ruling, reversal is not required. *Id.* Further,

[w]here a trial judge fails to elucidate such a specific explanation for each race-neutral reason given, we will not remand the case for that Batson-related purpose

alone. This Court is fully capable of balancing the Batson factors in cases such as this one. Continued remand of such cases only wastes the trial court's limited resources and acts to further delay justice.

Id. at 946-47 (quoting Burnett v. Fulton, 854 So.2d 1010, 1016 (Miss.2003)).

Corrothers v. State, supra.

Therefore, if this Court is of the opinion that Judge Baxley failed to address the claims of pretext that were argued to him, a remand would be proper, rather than assuming arguendo that the prosecutor acted with discriminatory intent where the Appellant initially asserts that the trial court never addressed his claims when the finding was to the contrary.

Pretext Was not Proven to the Trial Judge

Alternately, Respondent submits that the trial judge concluded that the Appellant had failed to show that the prosecutor's race neutral reasons for the four peremptory strikes were pretextual and that he had proven purposeful discrimination. Within the order denying the Batson conclusion, Judge Baxley rejected that pretext was proven. In particular, he found: "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." R.p. 89, ll. 10-14. In making an assessment comparing jurors, the potential jurors need only be alike " 'in all relevant aspects.' " State v. Scott, 406 S.C. 108, 749 S.E.2d 160 (S.C. App. 2013)⁶, citing Startzell v. City of Philadelphia, 533 F.3d 183, 203 (3d Cir.2008) (quoting Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992)). Therefore, in determining whether potential jurors are similarly situated, our courts have focused their

⁶ In Scott, the Court of Appeals found that a white warehouse manager was not similarly situated to black teachers, and thus defendant's strike from jury of warehouse manager as a person whose "employment related to supervising and overseeing" was not purposeful racial discrimination so as to support state's Batson motion, since duties of teachers in general did not involve the same supervisory aspects as duties of warehouse manager, namely ability to hire, fire, or demote adult co-workers.

inquiry on whether there are meaningful distinctions between the individuals compared. See State v. McCray, 332 S.C. 536, 540–41, 506 S.E.2d 301, 302–03 (1998) (finding three white jurors who were seated on the jury were not similarly situated to four black jurors who were struck from the jury because “[t]he white jurors did not have the same relationship to law enforcement as the black jurors” when the black jurors had relatives or friends who, at the time of the trial, were employed in law enforcement, and the relatives or friends of the white jurors were no longer employed in law enforcement); State v. Williams, 379 S.C. 399, 401–02, 665 S.E.2d 228, 230 (Ct.App.2008) (holding the trial court erred in finding an unemployed juror was similarly situated to an employed juror whose spouse was unemployed). An apparent uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a neutral explanation for the inconsistency State v. Cochran, 369 S.C. 308, 334, 631 S.E.2d 294, 308 (Ct.App.2006). See also State v. Casey, 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct.App.1997) (holding, although the State applied its facially valid reason inconsistently in permitting a like-situated female juror to be seated, the State's explanation of mistake for the omission was gender-neutral).

JUROR 101

Further, there was a record basis to support the race-neutral reasons as being valid. 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 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)

The Appellant concedes that the reason for the strike is a race neutral reason, but questions 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 h claims were similarly situated were clearly not similarly situated to juror 101. Alleged pretext juror 131 had a son- in-law in law enforcement - particularly the local Highway Patrol assignment⁷ - 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.

Similarly, the dissimilarity between juror 101 and juror 105 a white female were readily apparent. 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

⁷ 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.

indicated that she had been involved as a victim in two separate accident 18 and 20 years before and were 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.

Juror 33

As to juror 33, an African American male who was the prosecution 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. 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. 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 were the dissimilarity 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.

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. Rollicall List for Panel, p. 10.⁸ The prosecutor also noted that 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

⁸ 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 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.

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. 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 main 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. However, the trial judge cautioned that using unemployed should not be a reason for a strike in this locale. R.p. 89, ll. 6-9.

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,⁹ in contrast to seeing the

⁹ 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 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.

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 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."¹⁰ *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.

Juror 126

Juror 126 was struck by the State based upon his reason that the juror was late and concerns about a disinterested demeanor when she returned late. R. 82-83. The state asserted that this questioned their confidence that she would be a conscientious juror in this serious case. *Id.* Although the defense asserted that it did not notice any jurors being late or admonished, the trial court corrected him and found that juror 126 was at least 10 minutes late after a break. R. 86-87. The trial judge found that the reason and demeanor and being disinterested was a valid reason, citing State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (1997). In addition, Judge Baxley found that being late to court was also a valid reason, citing State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991).

¹⁰ This speculation was never raised to the trial judge by the defense.

In the *Initial Brief of Appellant*, the Appellant does not argue that pretext was shown for the stated reasons for the strike of juror 126. *Initial Brief of Appellant*, p. 12-13. Since it was not argued in his brief, Respondent submits that he has abandoned any claim related to the strike of juror 126. An issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal. Rule 208(b)(1)(D), SCACR; Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000)(Department of Revenue stated it was not waiving issue but failed to make any argument on the issue); State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000)(it is error for an appellate court to consider issues not raised to it); State v. Duell, 329 S.C. 503, 494 S.E.2d 639 (Ct. App. 1997); State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995). An issue is also deemed abandoned if the argument in the brief is not supported by authority or is only conclusory. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001); State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001); State v. Cutro, 332 S.C. 100, 504 S.E.2d 324 (1998)(a one sentence argument is too conclusory to present any issue on appeal).

Here, the abandonment was reasonable, because there is no merit to a claim that it was pretext. Essentially, the defense argument in the trial court was the defense did not notice any juror being late so that state's stated reason must be pretext. However, the trial judge corrected the defense and found that two jurors were 10 minutes late after a break and one of the jurors was juror 126, consistent with the stated reason. R. 86-87. This finding of fact has deference in the appeal on a Batson issue. See State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822-23 (2009) (noting, in determining whether a Batson violation has occurred, appellate courts give the trial court's findings great deference on appeal; the trial court's determination concerning whether

purposeful discrimination has occurred rests largely on the court's evaluation of demeanor and credibility; the demeanor of the challenged attorney will often be the best and only evidence of discrimination, and an evaluation of the attorney's mind lies peculiarly within a trial court's province); State v. Garris, 394 S.C. 336, 353, 714 S.E.2d 888, 897 (Ct.App.2011) ("The trial court's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous.").

The trial court assessment that the reasons were race neutral was also supported by the caselaw. In the absence of contrary evidence in the record, demeanor is a race-neutral basis for exercising a jury strike. See State v. Cochran, 369 S.C. 308, 317, 631 S.E.2d 294, 299 (Ct.App.2006) ("The demeanor of a prospective juror is generally a race-neutral reason for employing a preemptory challenge."); State v. Tucker, 334 S.C. 1, 8, 512 S.E.2d 99, 102 (1999) ("[C]ounsel may strike venire persons based on their demeanor and disposition."); Cochran, 369 S.C. at 317, 631 S.E.2d at 299 ("An express finding by the trial court will, unless clearly erroneous, trump counsel's stated perception of a prospective juror's demeanor and disposition."); State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009) ("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.' " (first alteration by court) (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991))). See also, State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991) (two black males struck because they were late); State v. Wright, 304 S.C. 529, 405 S.E.2d 825 (1991) (struck juror had disinterested attitude and demeanor).

The Appellant 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 strength of his statement fails when it is shown that the non-struck jurors are not "similar." While the Appellant may assert that there were only small difference in the non-struck jurors, these differences revealed exactly why those particular juror would be a qualified but favorable juror to the prosecution theory of the case against Appellant. These prosecution-desired jurors 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); 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 and the court. Similar traits were not shared with the 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 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.

ARGUMENT II

II. The trial court properly denied an objection to the prosecution closing argument when it argued that malice can be inferred through the use of a deadly weapon. This action was consistent with the opinion in State v. Belcher which did not restrict prosecutorial argument concerning reasonable inferences from the evidence concerning malice.

In his second argument, Stewart contends that that the mandates of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 were violated when the prosecution in its closing argument made reference on three occasions that malice may be inferred through the use of a deadly weapon. R.p. 593, l. 23- p. 594, l. 1; p. 594, ll. 5-6; p. 595, ll. 12-13. In his argument, the Appellant equates the prosecution closing argument with the instructions on inferred malice through the use of a deadly weapon which the Court abolished under certain circumstances in Belcher. However, the Appellant completely failed to recognize that Belcher expressly allowed prosecution argument concerning inferences of malice through the use of deadly weapon. His claim must be rejected.

The Holding in State v. Belcher Expressly Allows Inference of Malice Arguments

A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009). In Belcher, the jury convicted the defendant of murder and possession of a firearm during the commission of a violent crime. *Id.* at 600, 685 S.E.2d at 803. During a gathering of family and friends, the victim and another man began arguing. The defendant intervened, and later shot and killed the victim. *Id.* at 601, 685 S.E.2d at 805.

Testimony at trial demonstrated conflicting versions of the event. *Id.* The State's evidence tended to show that after the defendant confronted the victim, the defendant retrieved a gun and without justification, fatally shot the victim. *Id.* The defendant presented evidence that the victim confronted him without provocation, and with a gun, following the apparent resolution of the argument. *Id.* The defendant claimed he subsequently retrieved a gun and fired on the victim as he approached. *Id.* In accordance with long-standing practice, the trial court instructed the jury that "malice may be inferred by the use of a deadly weapon," and the jury convicted the defendant of murder. *Id.*

The Supreme Court reversed, and rejected the traditional jury instruction as inconsistent with our policy-making role in the common law:

The use of the term "intentional" is instructive. Say for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because "if one intentionally kills another with a deadly weapon, the implication of malice may arise."

Id. at 610, 685 S.E.2d at 809. Importantly, the Supreme Court concluded:

Today we return to the rationale underlying Hopkins, Levelle and Jackson and hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. [FN 9] The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

FN9. The standard implied malice charge remains valid, as does the general permissive inference instruction: "If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." In addition, we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard. It is axiomatic that some matters appropriate for jury argument are not proper for charging. "Do jurors need the court's

permission to infer something? The answer is, of course not." Bruce A. Antkowiak, *The Art of Malice*, 60 Rutgers L. Rev. 435, 476 (2008).

State v. Belcher 385 S.C. 597, 612, 685 S.E.2d 802, 810 (S.C., 2009) (emphasis added).

Therefore, the inference of malice assertions may be appropriate for argument after Belcher. His claim must fail.

HOW THE ISSUE WAS RAISED AT TRIAL

At the close of the State's case, in response to the motion for a directed verdict, the prosecution noted that it had presented evidence of motive, based upon the victim taking out a warrant and order of protection against the defendant two days before her death, the prosecution noted that while the court cannot instruction the inference of malice by use of a deadly weapon, he was still entitled to argue the use of the weapon was evidence of malice. Supp R. 24.

Subsequently, the trial judge instructed the jury on criminal intent, noting that "criminal intent may be inferred from the circumstances shown to have existed both before and after the fact." R.p. 522, ll. 4-10. The trial judge charged on murder and the element of malice. As to malice that court noted that malice may be expressed or inferred. R. 525-26. As to infer malice, Judge Baxley instructed:

Malice is hatred or ill will or hostility toward another person. It is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under circumstances that the la will infer an evil intent . . .

Malice aforethought may be either expressed or it may be inferred The terms expressed and inferred don't mean different kinds of malice, but they merely mean the manner in which malice may be shown to exist; that is either by direct evidence or by inference from the facts and circumstances shown to have existed malice may also be inferred from conduct showing a total disregard for human life."

R.p. 525, l. 3 - p. 526, l. 3.

The Solicitor's Closing Argument

During Solicitor Foard's closing argument, he asserted that malice existed as follows:

... you can find that malice formed at any point up until Thomas Jeffrey Stewart began striking the fatal blows with a knife to Bellany Clyburn.

It can be expressed or inferred. That means it can be through spoken words or it can be shown through actions or most importantly it can be inferred from the use of a deadly weapon. And that is what we have here. We have the use -

--

Mr. Young : Your Honor, we object to that.

The Court: Objection noted.

Mr. Foard: It can be inferred from the use of a deadly weapon. Now we have multiple instances of malice in this case. ...

R. 543-44.

Solicitor Foard then describes what he perceives as evidence of malice including the statement he gave indicating that he made a slitting throat motion as he approached the victim; that he laid in wait armed with a knife as signs of malice. R. 544-45. He then states:

That's just the expressed malice. Let's talk about inferred malice. Inferred malice is shown by a total disregard for human life or by use of a deadly weapon. We've already covered that. He armed himself. And by disregard for human life we're talking about all this. By the fact he didn't stop. He kept stabbing and stabbing and stabbing. You see it in the video. He makes a motion when he talks about it ladies and gentleman. Thirty-nine times.

A complete and total disregard for human life. We can stop there. He killed a human being. We've got instances of malice. He's guilty of murder. Said and done ...

R.p. 545, l. 11- 23.

The Trial Court's Denial of the Objection

After the completion of the argument, Judge Baxley addressed the objection during the state's argument:

But the first one was an objection over counsel's reference to the fact that the malice may be inferred from the use of a deadly weapon. The Court did not charge that. I deleted it from my charge. You may have had it in your printed version, but it was removed. But that does not mean – the fact that the Court doesn't charge it the Court does not perceive that that takes away the ability of the State to argue from a factual standpoint. We simply did not provide that law, but nevertheless that doesn't change the factual inference that I believe the State is entitled to argue.

R.p. 558, l. 19- p. 559, l. 7.

STANDARD OF REVIEW

The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). The appellate tribunal will not disturb the trial court's ruling regarding closing argument unless there is an abuse of that discretion. State v. Penland, 275 S.C. 537, 273 S.E.2d 765 (1981).

A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Further, the argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997); State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990); see also State v. Brisbon, 323 S.C. 324, 474 S.E.2d 433 (1996) (ruling test of granting new trial for alleged

improper closing argument of counsel is whether defendant was prejudiced to extent that he was denied a fair trial).

In State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975), our Supreme Court set forth the parameters of permissible prosecutorial argument:

In 23A C.J.S. Criminal Law § 1107, closing arguments, similar to that of the solicitor in this case, are discussed as follows:

"So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider."

Durden, 264 S.C. at 92, 212 S.E.2d at 590.

If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. *Id.* Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony. See State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995); State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976).

Recently a California court addressed a similar argument concerning the inference of malice:

And even if he had preserved the claim, we would reject it on its merits. The prosecutor's statements accurately reflect the principles that "[a] defendant's specific intent to commit a crime may be inferred from all of the facts and circumstances disclosed by the evidence" (*People v. Scott* (2011) 52 Cal.4th 452, 488, 129 Cal.Rptr.3d 91, 257 P.3d 703) and that, in particular, "the act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice." (*People v. Smith*, supra, 37 Cal.4th at p. 742, 37 Cal.Rptr.3d 163, 124 P.3d 730.) The jury was expressly instructed that to find Millbrook guilty of attempted murder it had to find that he intended to kill Manoa. There was no misconduct.

People v. Millbrook, 222 Cal.App.4th 1122, 1151, 166 Cal.Rptr.3d 217, 241 (Cal.App. 1 Dist.2014).

ANALYSIS

The trial judge did not abuse his discretion in denying the defense motion to the prosecutor's argument that the inference of malice existed by the use of a deadly weapon in this case. The decision was in complete compliance with the footnote 9 in the decision in State v. Belcher which expressly allowed prosecution argument concerning the inference of malice through the use of a deadly weapon. The inference was particularly noteworthy here because it is wholly supported by the evidence where there was evidence of thirty-nine stab wounds to the victim. R. 303-04 (the autopsy revealed Miss Clyburn was she had at least 39 sharp force injuries identified in the body; and sharp force injuries he would define as stab wounds or an incise wound).

The focus of the Appellant's argument before this Court is an assertion that Belcher¹¹ should be extended to include inference of malice remarks that would be error if included in instructions after the Belcher decision. The point of Belcher, however, as recognized by footnote 9 was the sanctioning in the jury instructions of the inference. Here, the trial court did not include it. The Appellant essentially suggest that the inference of malice cannot rise by the use of a deadly weapon. This is folly and this case reflects why. Accepting the State's theory Stewart was the aggressor and armed with the knife laid in wait and use the weapon in a malicious manner resulting in the victim's death and 39 stab wounds. It is extraordinary to suggest that the State would be precluded from arguing the most reasonable inference that malice existed by the use of the weapon, but that is what the Appellant naively suggests. Simply put, there was no error in the State's argument and to suggest otherwise is without merit.

The Appellant suggests that because the improper objection (under footnote 9) was sustained by the trial court, it gave an impression that the comment was endorsed by the trial court. This logic is dangerous because it ignores that the argument itself was within the bounds of the law. If the court were to accept this logic – something that was never asserted to the lower court by any argument or request for a curative instruction - it would allow defendants a windfall anytime reasonable inferences from the record were argued. This is not an endorsement by the court of the validity of the inference and evidence being argued. To the contrary, learned defense counsel should have been aware of the limitation in the Belcher decision and not made an objection rendered frivolous by the express terms of the decision. The footnote was a shot across

¹¹ Respondent do not dispute that under Belcher, the trial court was correct in not instructing on the inference of malice through the use of a deadly weapon. Under a version of the Appellant's statements, there was some evidence, albeit not credible, that would "reduce, mitigate, excuse or justify the killing" under Belcher to preclude the instruction. Respondent notes that the jury was instructed on the lesser offense of voluntary manslaughter and self-defense. R. 526-28, 530-35.

the bow to criminal law practitioners of the effect of Belcher. The prosecution acted within its mandates in arguing that Stewart's actions satisfied the element of malice. His claim is without merit for a new trial.¹²

III. Since the state of mind of a victim is relevant evidence when the defense of self-defense is offered, the trial judge did not abuse his discretion in admitting evidence from the Appellant's statement that he had been violent against the victim previously. The admission of other evidence of the fact that an arrest warrant for trespassing and a restraining order by the victim against the Appellant within days prior to the crime was admissible as relevant evidence and part of the res gestae where it was argued that knowledge of the matters may have been a motive for the assault and reflected both the state of mind of the Appellant as well as the victim. The admission of other evidence concerning the conduct of the Appellant to the victim made the admission of the challenged evidence harmless error.

The Appellant challenges the admission of three separate items of evidence: the challenged portion of the Appellant's videotaped statement where he stated that he used to beat up the victim a lot "nine months back" (State Exhibit 7, 47:45-48:09), the December 27, 2009 arrest warrant for trespassing (State Exhibit 106), and the December 29, 2009 restraining order of protection (State Exhibit 20). The Appellant contends that the evidence was improperly introduced as evidence of the Appellant's character and propensity under S.C. Rule of Evidence, Rule 404. He claims that at the time of the introduction of the evidence that he had not put his character in issue and therefore the admissions were improper.

Respondent submits that the trial judge did not abuse his discretion in admitting the particular evidence. First, the prosecution was not admitting the Appellant's statement about

¹² In his brief, he speculated that the State would rely upon the harmless error assessment in State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013). As stated above, there was no error in the prosecutor's actions under Belcher. However, like in Stanko, there was overwhelming evidence by the extraordinary number of stab wounds to the victim. However, unlike Stanko, the instructions did not include the inference of malice by use of a deadly weapon instruction. Also, a one point in the deliberations that jury was provided with a written version of the murder and malice instructions which did not include the inference. R. 561. Plainly, there was overwhelming evidence to show the evil intent supportive of the existence of malice.

having beaten the victim a lot previously to show his character or propensity under Rule 404, but to show the victim's state of mind to rebut the existing claim of self-defense. Second, the admission of the trespassing warrant and restraining order were initially introduced as part of the res gestae of the crime where the Appellant acknowledged in his statement that he had learned from his wife about papers and revealed why he claimed he was avoiding the police after he was at the victim's home hiding in a closet when the police had arrived earlier¹³ and further shows a motive for the subsequent assault on the victim after he had laid in wait. R. 334, Supp R. 24, State Exhibit 7; 50:00 – 52:00.¹⁴ Additionally, the Appellant opened the door to the admission of these documents during his cross-examination of Chief Larry Brown concerning the basis for the warrants and order. R. 366-67, 376.

Finally, any errors in the admission of these items were harmless error. Under the facts of the case, the prejudicial effect of the items were slight and similar evidence of bad conduct was introduced by the defense on cross-examination of Chief Brown concerning an earlier order of protection in September 2008 and the acknowledgement that the problems between the Appellant and victim had gone on back to 2005 or "a lot longer" which opened the door to further admission of an assault and battery warrant of December 29, 2009. R. 368, 371-72, 377-78. In

¹³ In his testimony, the Appellant described being in the victim's apartment, hiding in a closet when Crystal came over. R. 473. When he looked out to see if Crystal had left, he saw two police officers get out of their car, the Appellant stated he went down stairs and told Bellany that there were "two cops there" and "I'll see you later. I don't know what you did" and left. R. 474-75. When he returned the door was locked. After that he went to Marshville, North Carolina, claiming to go gambling. R. 476. During Chief Brown's testimony, he stated that police were at the apartment complex that night, but were at a different apartment. R. 342-43.

¹⁴ In his testimony, Appellant denied that he said on the tape that he was aware that there were some papers (i.e., warrants) when he described trying to avoid the police. Contrary to the tape, he denied anything about knowing about papers, only claiming that his wife told him not to go to the victim's apartment. R. 505-06. But see Exhibit 7 at 50:00-52:00.

addition, any error in the admission was mooted when the Appellant testified and directly put his character in evidence in his claim of self-defense and being in fear of the victim.¹⁵

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id. "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

HOW THE ISSUE WAS RAISED BELOW

1. *Videotaped Statement of Thomas Stewart – State Exhibit 7*

At the outset of the trial, defense counsel Young stated that they had served a motion in limine regarding the videotaped statement of Thomas Stewart. Counsel stated that on the videotape at 47 minutes 45 seconds through 48 minutes 9 seconds the Appellant made comments regarding prior assaults on him by Bellany Clyburn and assaults by him on Bellany Clyburn. R.p. 97, ll. 5-12. In particular, this portion of the videotape of the Appellant's statement

¹⁵ During Appellant's testimony, he tried to minimize and explain the challenged portion of State Exhibit 7 in addressing whether he had fault in his relationship with the victim. R. 449.

I had fault a few times, Nine months again, but when I said "nine months ago" on the tape I was talking about when I said I used to hit her bad I wasn't meaning it that way. What I was meaning was this here: when she went to do that to my wife my son was in the car. My son was in the car. She took pictures. She had him take pictures of her trying to kill my wife. . .

R.p. 449, ll. 8-14.

describes initially a discussion he had with an admission that he got into a heated argument with her. In this portion he stated that used to hit her lot years ago, "probably the last nine months," "I used to beat her up real bad" "from nine months back." State Exhibit 7, 47:45 - 48:08.

Counsel Young stated that he had been advised that the State did not intend to use the videotape as evidence under South Carolina Rule of Evidence Rule 404(b) or State v. Lyle, 1245 S.C. 406, 118S.E. 803 (1923) unless and until the defense puts Appellant's character in issue. Counsel Young asserted that the Appellant's statements would qualify as character evidence under Rule 404(b) and requested that it be redacted. R.p. 97, ll. 13-18.

Solicitor Redmond responded clarified that he intended to introduce the evidence if the door was opened for him to respond, not that they intended to put in the evidence unless character was put in. He stated that it was his understanding that the defense, based upon comments Stewart made on the videotaped statements, present a defense of self-defense. R.p. 98, ll. 13-20. He stated that if that defense is proffered, either through cross-examination or whatever, it might open the door for this and other evidence it has concerning other incidents. R.p. 98, l. 21- p. 99, l. 1. He stated that they were reserving the right, depending upon the nature of the defense to be able to respond in kind. He stated that when considering the defense of self-defense, given the prongs involved, some of the prior incidents may be relevant in the issue of self-defense. R.p. 99, ll. 19-23. The trial court reserved ruling on the admissibility until the appropriate time when the tape is offered. R.p. 99, ll. 20-24.

OPENING STATEMENTS

The State's Opening

In the state's opening, Solicitor Jones stated that they were there because Thomas Stewart murdered the victim; victim is the Defendant's mistress of 8 years and that in December of 2009 victim wanted to end the relationship. R. 102-03. He argued that the defendant couldn't let her go. He declared that he went to a friend and asked to borrow his car; took the car and parked it in the victim's apartment complex and laid in wait. He stated Appellant waited until the morning of January 1, 2010 when victim and her two sons were walking out of their apartment. He stated that Stewart approached victim carrying a knife, went back into her apartment complex and attacked her. R. 103. Solicitor Jones stated that the victim defended herself using mace and then ran out of the apartment. He stated that the defendant chased her where he continued and completed the murder. R. 103. He stated the victim's 10 year old and 6 year old sons there witnessing the attack; one son ran to neighbor's asking for help and victim was able to walk herself over to that doorstep where she was laying waiting for law enforcement to arrive. R. 103-04.

Solicitor Jones stated that:

Our victim is not a saint. She made mistakes in her life. One, mistake that she made was in 2009 she got in an altercation with the Defendant's wife. Not hard to imagine. But she pled guilty to an assault, and she was on actually probation at the time of this incident...

R.p. 104, l. 20 - p. 105, l. 4.

The Defense Opening

Defense counsel Secor at the outset of his opening argument declared that Stewart had said: "I thought I was fixing to die. I was scared, and I wanted to get away. I lost it over love" R.p. 105, ll. 7-10. He stated the issue was whether it was murder, manslaughter or self-defense.

R.p. 105, ll. 17-24. He stated "Bellany and Thomas had problems for a long, long time. They were trying to carry on an impossible relationship. He point out also that that the State had told them that in April 2009 the victim had attacked the Appellant's wife with a lug wrench. "You think if stuff like that happened between two people they stay away from each other, but they didn't." R.p. 108, ll. 14. He stay that they didn't stay away from each other after the victim got out of jail for attacking the wife. He noted the victim died two weeks after she got out of jail.

Counsel Secor attempted to summarize the case. He noted Bellany and Thomas were together on New Year's Eve at Bellany's apartment. R. 109. He stated that they were arguing about something. R.p. 109, ll. 7-9. When some family came by, he hid in the upstairs closet. Id. He looked out the window and saw two police cars in front of the apartment. He felt because of the jealousy and dishonesty that existed between them that she was trying to get him in trouble. Counsel stated he snuck out of her house and left. In a telephone call that evening, he stated that she told him don't come back until he divorces his wife. However, that morning, he went back and "continued that stupid argument and try to clear things up."

Counsel argued that Stewart went back but Bellany and her boys were still sleep; door was locked so he just waited so he could talk to Bellany, disagreeing with the state's assessment that he was lying in wait. R. 110. He argued that when she woke up, she came outside with her sons, he said he wanted to talk, but she told him don't come back any more. However, he said that they went inside and had an argument and in his jealousy demanded to see her telephone. R. 110. And then he did something really stupid. He picked up a knife that was in her apartment and demanded to see the phone. When he reached in her purse and she grabbed his hand and sprayed him in the face with pepper spray and they began a struggle over the knife. He claimed

that he was blinded by the pepper spray and she got the knife away from him, cutting herself badly in the struggle. R.p. 111, ll. 1-6. He stated that when she got the knife from him, he was doing whatever he could to defend himself cause he could barely see. R.p. 111, ll. 7-14. He claimed she cut his ear when she swung the knife at him and his hands were cut.

Counsel argued that Bellany ran outside and Thomas was trying to wipe the pepper spray out of his eyes; he heard her yelling to him and other people to "get him out of my house." R.p. 111, ll. 20-23. Thomas could barely see; he heard Bellany say "When you come outside you're going to get it." R.p. 111, ll. 22-24. He claimed he saw a man at the door.

The defense stated that Stewart thought he was fixing to die and grabbed another knife in the apartment to try to get away. He ran out the door to try to get to his car; Bellany was between him and his car and she still had a knife too. R.p. 112, ll. 13-19. "In that moment of fear and agony from the pepper spray Thomas reacted," and stabbed her and ran for his car. R.p. 112, ll. 20-25. At that point, something came through the window and glass went everywhere; he drove off. Counsel stated that the jury was going to have to decide whether it was murder, manslaughter or self-defense. R.p. 112, ll. 1-4.

OPENING THE DOOR

Prior to the presentation in front of the jury, the Appellant's statement from State Exhibit 7 was played for the court. R.p. 178, ll. 8-9. Solicitor Redmond stated that the defense was not asking that the part where Stewart talks about the victim beating up on him to be redacted and the State agreed that was admissible. The State claimed that the defense in the opening statement and made an allusion to the way the Appellant and the victim were toward each other. Solicitor

Redmond stated that the door was open to the admission on the defense that was proffered in the opening statement. While conceding that the defense opening statement was not evidence, it can open the door and that the disputed portion of the tape should be played. R. 178-79.

The defense stated that the State mentioned the victim's assault and battery of a high and aggravated nature in their opening and that she was on probation for it and claimed that the State was suggesting that he opened the door by commenting on what the State had said in its opening. R. 179.

Solicitor Redmond clarified for Judge Baxley that he understood that the challenged portion of the tape concerning a comment from Stewart that within the last nine months that "yeah, I used to beat up on her and she would beat up on me." R. 180. He asserted that based upon the statements made in the opening and the proffered defense of self-defense that the portion goes to the issue to rebut self-defense. He opined that in addition to the opening statement, he stated that this incident had begun in the victim's home and that he indicated violence towards her in the past would give her reason to feel apprehension and goes to the heart of self-defense. R. 180.

Judge Baxley stated that the incident cannot be viewed in isolation, but was a tragic culmination of a history of interaction between the two. He found that while the defense mentioned the fact that there was a charge against the victim, Judge Baxley saw it as sanitizing the jury, but not a comment on character. Judge Baxley noted that the event was going to come out in the evidence. Where some of the event happened inside the victim's apartment, the trial court concluded that the better course of action was to permit the evidence because it goes to the

core and heart of the case. He found that while the State mentioned it first, the defense argued on the point sufficiently and that the door had been opened to permit this evidence in the case in chief. He refused to redact the portion. R.p. 181, l. 20 - p. 182, l. 2.

The defense urged that the evidence did not satisfy either Rule 404(b) or Lyle because he claimed it was offered specifically for propensity and to try and demonstrate that Stewart was violent in the past and inevitably in this incident.

The State argued that the door was opened and that the evidence was relevant to show the victim's state of mind as it relates to the incident because in opening statement they were talking about self-defense and how Stewart felt that he was in danger at that time. He stated that because the argument began in her home that she had a right to protect herself under the Castle Doctrine. He stated that since the victim is not here, they were allowed to gauge her state of mind and based upon what Stewart said she knew he had a propensity for violence. Here, he was in her home and the evidence should be allowed to rebut what has been put out there on self-defense. He stated he did not consider this as Lyle evidence.

The defense responded that rebuttal evidence is allowed if they tried to show Stewart's good character for peace, but eliciting evidence about the victim's ABHAN on Melissa Stewart does not call the Appellant's character into question when he was not present nor allow the admission of evidence of his bad character. The Appellant also question whether the comment on the tape met the threshold for admissibility because there was no evidence other than the comment to show its admissibility and therefore not clear and convincing evidence. The defense note that the ABHAN by the victim against the Appellant's wife was admissible under Rule

405(b) and State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). The defense asserted that the state's argument about self-defense must be based on the imminent threat. He disputed under self-defense that the victim had a right to judge him because she did not have the burden. R. 185. The defense further urged that the similarities between the bad act conduct alleged and the conduct charged increases the prejudice under Rule 403. R. 186.

The State noted that the evidence was relevant and should come in as *res gestae*. He stated it was relevant because it goes to what was personally perceived as danger. He suggested its heightened relevance under the self-defense elements and whether the victim had a reason to believe that she was in danger made it relevant.

Judge Baxley re-affirmed his ruling and permitted the evidence. He further opined under Rule 403 that it was not more prejudicial than probative. R.p. 187, ll. 6-10.

OTHER CHALLENGED EVIDENCE

The Appellant also challenged the admission of evidence of an arrest warrant for trespassing dated December 27, 2009 (State Exhibit 106) and a restraining order of protection signed by the victim December 29, 2009 (State Exhibit 20). R. 319-20. The prosecution asserted that the trespassing warrant was stated in the context of the paper he found out about through his wife that the police were looking for him. The state stated that Appellant was using this warrant to explain his actions when the police arrived at the complex in Pageland that night. The state asserted the order of protection was admissible because of the same reasons as the earlier argument that it was part of the *res gestae* where the defense was claiming that he was acting in self-defense. The prosecution noted that the incident occurred in the victim's apartment and this

would go to her state of mind as it relates to what Appellant has said and why the victim had trepidation at that time when he showed up at her residence. R. 320-21.

The defense stated that he objected to the admission. He stated that the evidence was being presented in rebuttal to the Appellant's videotaped statement that the State had also introduced. R.p. 321, ll. 7-15. He asserted that being allowed to rebut the evidence that they presented as a ground for its admission did not make sense. R. 321. He stated that they had not shown how it could be admitted under Rule 404.

Order Limiting Admission to the Existence of the Documents

Judge Baxley admitted the evidence as to the fact that the documents existed at the time the event occurred, but was not going to allow the admission about who may have been involved in causing the issuance of the warrant or what the incident was that caused the issuance. He stated that goes beyond what is necessary as to the state of mind of the Appellant. He further concluded the evidence would be more appropriately in rebuttal after we hear the self-defense position taken in the case. He determined that the existence of the two documents goes not only to the state of mind of the Appellant, but that the state of mind and intent of the Appellant is a necessary part of the state's proof. R.p. 322, ll. 13-22.

Admission of Evidence and Order of Protection and Warrant

During the direct examination of Pageland Police Chief Larry Brown he identified (for identification only) State Exhibit 106 as an arrest warrant for trespassing signed by the victim on December 29. He also identified State Exhibit 20 as a Fourth Judicial Circuit Order of Protection signed by Bellany Clyburn against Thomas Stewart on December 29 at 2:30 P.M. R.

332-33. Chief Brown stated that he was aware of the documents because the victim had brought the order to the Police Department and he knew he had a warrant on him so they could arrest him. R. 334. Chief Brown confirmed that during the Appellant's statement he made an allusion that the police were trying to find him on some papers that they were trying to locate him to serve the papers on him. R. 334.

On cross-examination, counsel for the defense question Chief Brown about the fact that the victim had requested a protective order and a hearing on it. R.p. 366, ll. 11-17. He questioned him as to the basis of it was an allegation of trespassing, but the witness responded that it was something about him approaching her at the Community Center and that he pulled her arm and wrists. R.p. 366, ll. 18-22. When asked what day she reported the trespassing and when she said it happened, Chief Brown responded that she reported it on the 29th and that it happened on the 27th. The defense pointed at the on the 28th she was at the gym with three law enforcement officers and the Appellant and apparently had not reported the trespassing the occurred the day before. R.p. 367, ll. 6-25.

The defense also asked Chief Brown whether her allegations of things that Stewart did to her go back to 2005 and Chief Brown responded "probably longer than that." R.p. 368, ll. 15-20. When asked if he knew that the order of protection she requested on December 29 2009 was not the first time she had requested one, Chief Brown stated he was not aware of that. The defense then stated that she had received an order of protection in September 2008 before Melissa Stewart's head was split open with a lug wrench. R. 370. The September 2008 Order was admitted as Defendant's Exhibit 89. R. 371-72.

On re-direct examination, the State then introduce State Exhibit 20, the petition for an order of protection. R.p. 376, ll. 6-19, p.382, ll. 6-20.¹⁶ The defense objected asserting it was based on their prior objection. Judge Baxley, however, ruled that the objection was overruled because the Appellant "opened the door on cross-examination as to these issues." R.p. 376, ll. 12-19.

On re-direct examination, the State further introduced evidence of another warrant signed by the victim based on the cross-examination. Chief Brown stated that this item State Exhibit 107, was an arrest warrant for assault and battery that on December 28 Stewart grabbed Bellany by the shoulder and continued to assault her by holding her by the wrist in the parking lot of Pageland Apartments signed on December 29th before the order of protection was taken out. R. 377. Chief Brown stated that the order of protection was not served on Stewart because they could not locate him. He stated the case was not heard in court "because he stabbed her to death before the warrant was served." R.p. 378, ll. 10-12.

ANALYSIS

The Appellant claims that the evidence of the Appellant's admission that he used to beat up the victim "nine months back" was inadmissible because it was character evidence and he had not put his character at issue yet and had not decided on whether he would testify. He further claimed that evidence of the victim's state of mind is not relevant in a self-defense case because the defendant's state of mind is an element of the crime and self-defense, not the victim's state of mind.

¹⁶ The Solicitor mistakenly referred to the order of protection as State Exhibit 20 when it was actually State Exhibit 106. The order of protection was the document introduced, not the trespassing warrant.

Respondent submit that the Appellant is in error on both counts. As stated above, the Appellant in their opening statement plainly asserted that the Appellant was raising a defense of self-defense. In the opening, they declared that the Appellant was in fear of the victim and was seeking a manner of escape. Though these claims dramatically contrasted to the state's theory that the Appellant was lying in wait and the sole aggressor in the incident while warrants and restraining orders were present and the victim was defending herself in self-defense as aided by the Castle Doctrine, the Appellant fails to recognize that the victim's state of mind may be relevant to rebut the claim of self-defense concerning who was the aggressor. While it may not be an "element," like "motive" evidence of the victim's state of mind is relevant and probative when a claim of self-defense is made.

A victim's fear of a defendant can be relevant to the defendant's guilt if the defendant raises a defense that turns on the victim's behavior. See State v. Blanchard, 315 N.W.2d 427, 432 (Minn.1982). For example, if the defendant claims to have acted in self-defense, the fact that the victim was afraid of the defendant might bear on whether the defendant's account is believable. *Id.* In the absence of such a defense, however, "[o]rdinarily, a homicide victim's state of mind is not relevant to whether the defendant committed the crime." State v. Rossberg, __ N.W.2d __, 2014 Westlaw 3844203 (Minn. 2014), citing State v. DeRosier, 695 N.W.2d 97, 105 (Minn.2005). In Stoll v. State, 762 So.2d 870 (Fla.,2000), the Florida court recognized that a statement by a murder victim may be admissible under the state-of-mind exception to the hearsay rule if the state of mind of the victim is relevant to an element of the crime, if defendant claims self-defense, that victim committed suicide, or that death was accidental, or if victim's state of mind is relevant to rebut a defense. Missouri law recognizes that a deceased's state of mind may be

admitted when it is relevant. Specifically, where an accused argues self-defense, suicide, or accidental death of the deceased, state of mind hearsay evidence is admissible. See, e.g., State v. Ford, 639 S.W.2d 573 (Mo.1982), State v. Singh, 586 S.W.2d 410 (Mo.App.1979). A "victim's state of mind is relevant where it has been put in issue by the defendant." Angleton v. State, 686 N.E.2d 803, 809 (Ind.1997) (citing Taylor v. State, 659 N.E.2d 535, 543 (Ind.1995)); see also Lock v. State, 567 N.E.2d 1155, 1159-60 (Ind.1991) (hearsay statements admissible to show the victim's state of mind, in part, because the relationship between the victim and defendant "was one of the contested issues at trial"); 13 Robert L. Miller, Jr., *Indiana Practice* § 803.103A at 613 (2d ed.1995) (admissibility under Rule 803(3) requires, among other things, that "the declarant's state of mind must be relevant to an issue in the case") (citing United States v. Neely, 980 F.2d 1074, 1083 (7th Cir.1992)). In People v. Smelley, 775 N.W.2d 350 (Mich.App.2009), the court recognized that a victim's state of mind is usually only relevant in homicide cases when self-defense, suicide, or accidental death are raised as defenses to the crime. The most common of these relates to a defendant's claim of self-defense as justification for the killing. When such a defense is asserted, it has been held to be proper to permit rebuttal by admission of the victim's extrajudicial statements concerning his fear of the defendant, thus, rendering it unlikely that the deceased was the aggressor in the first instance. See, e.g., People v. Atchley, 53 Cal.2d 160, 171-172, 346 P.2d 764, 770 (Sup.Ct.1959), cert. dismissed, 366 U.S. 207, 81 S.Ct. 1051, 6 L.Ed.2d 233 (1961); State v. Singh, 586 S.W.2d 410, 418 (Mo.App.Ct.1979). In Ernst v. Commonwealth, 160 S.W.3d 744 (Ky.2005), the Court held several statements by different witnesses regarding the victim's state of mind were relevant where the defendant claimed self-defense. *Id.* at 753. See Commonwealth v. Magraw, 426 Mass. 589, 593-594, 690 N.E.2d 400 (1998) ("A murder

victim's state of mind becomes a material issue if the defendant opens the door by claiming that the death was a suicide or a result of self-defense, that the victim would voluntarily meet with or go someplace with the defendant, or that the defendant was on friendly terms with the victim").¹⁷

In Georgia, evidence which tends to show the victim's state of mind in regard to the defendant may be relevant in instances in which the defendant claims self-defense. See Massey v. State, 272 Ga. 50, 51(3), 525 S.E.2d 694 (2000); Dixon v. State, 256 Ga. 658, 660(2), 352 S.E.2d 572 (1987).

Respondent submits by stating that the defense would be self-defense, the State was placed in a position that he had to defeat the claim in its case in chief. The defense recognized this when he made a motion at the conclusion of the state's case for a directed verdict in favor of self-defense, citing State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011). Supp. R. 21-22. Tr. p. 490-491. Cf. State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014) (the issue of whether

¹⁷ Where the defendant in a murder case admits killing the victim but has asserted a complete defense such as accident or self-defense, "the victim's mind is of particular concern to the jury." (David Clark v. United States, 412 A.2d 21, 25 (D.C.1980) (citations omitted); see also, 500 A.2d 994, 997-98 (D.C.1985) (concluding, in a case where defendant sought to introduce testimony to Hairston v. United States corroborate his claim that the decedent attacked him and that he killed the decedent in self-defense, that the trial judge erred in refusing to permit a witness to testify that a month before the shooting the decedent had told the witness: "Well, either I am going to kill [the defendant] or he is going to kill me," because the threat fell within the state-of-mind exception to the hearsay rule and was more probative than prejudicial); Hill v. United States, 600 A.2d 58, 61 n. 3 (D.C.1991) ("It has long been recognized that where hostile emotion is to be proved, evidence that the same emotion existed in the same person at another time is admissible.") (citations omitted). As appellant also correctly notes, we have upheld trial court rulings permitting the government to introduce against a defendant evidence of the defendant's state of mind toward the victim at a time long prior to the offense for which the defendant is being tried (and this notwithstanding that the evidence involves so-called other-crimes evidence, the admission of which generally is prohibited). See, e.g., Garibay v. United States, 634 A.2d 946, 948 & n. 5 (D.C.1993) (concluding that the trial court did not err in admitting evidence that the defendant, who was charged with assaulting his wife, had assaulted his wife fifteen months earlier, since it "show[ed] that appellant's malice toward his wife, rather than fear of harm, prompted his acts," and recognizing that we had "held admissible prior assaults involving the same defendant and victim that have taken place as much as ten years before the crime charged" (citations omitted)); United States v. Bobbitt, 450 F.2d 685, 687, 689 (D.C.Cir.1971) (concluding that the trial court did not abuse its discretion in admitting evidence that defendant had threatened the decedent twelve years earlier with a shotgun, reasoning that "a criminal incident twelve years previous does not necessarily make the evidence too remote," and therefore was not necessarily too stale as proof of motive)

defendant acted in self-defense when she stabbed the victim was for the jury where evidence was susceptible to more than one inference).

The state further urged the admission of the evidence was part of the *res gestae*. Under the *res gestae* theory, "evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. Dennis, 402 S.C. 627, 742 S.E.2d 21 (S.C. App. 2013); State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001); State v. Gilmore, 396 S.C. 72, 83 n. 9, 719 S.E.2d 688, 694 n. 9 (Ct.App.2011) (discussing the significance of *res gestae* in South Carolina law and its relation to Rule 404(b)). The Supreme Court adopted the reasoning set forth by the Fourth Circuit Court of Appeals:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate*636 context.... And where evidence is admissible to provide this full presentation of the offense, (t)here is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*. As the Court said in United States v. Roberts, 548 F.2d 665, 667 [(6th Cir.1977)], cert. denied, 431 U.S. 920, 97 S.Ct. 2188, 53 L.Ed.2d 232[.] "(t)he jury is entitled to know the 'setting' of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge."

United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (internal citations, some quotation marks, and footnotes omitted); see, e.g., State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 371 (1996). Evidence considered for admission under the *res gestae* theory must satisfy the requirements of Rule 403 of the South Carolina Rules of Evidence. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed

by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). “Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (quotation marks and citations omitted). “All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403].” State v. Lee, 399 S.C. 521, at 529, 732 S.E.2d 225, at 229 (2012) (alteration and emphasis in original; quotation marks and citations omitted).

Here, as the trial judge recognized the evidence of the turbulent relationship that existed between the victim and the Appellant was a part of the big picture in the case and revealed the importance of the state of mind the victim would have had in either defending herself from the Appellant as an unlawful intruder or the actions of the Appellant in whether he was reacting to an assault or defense. The brief reference to the earlier concession that he assaulted the victim before, put into context the portion of his statement where he claimed that she then began assaulting him, yet continued in their relationship. It was not a one-sided setting. The evidence supported the bigger and more accurate picture. Further, the comment had minimal prejudicial impact in light of the more recent evidence of the aggressive behavior by the Appellant toward the victim in the days leading up to the crime which the Appellant admitted. Those events were more probative of both the Appellant and victim's state of mind and minimized the impact – both probative and prejudicial of the evidence of the Appellant's statement. The judge did not abuse his discretion in the admission of the challenged portion of State Exhibit 7.

Similarly, the evidence of the trespassing warrant and December 29, 2009 order were properly admitted as part of the *res gestae* of the crime. The state's theory was that the Appellant was lying in wait on the day of the deadly assault motivated by her actions concerning the pending warrant and order. Additionally, the evidence was also relevant from the Appellant's statement to give context to the reason he may have been hiding and then seeking flight from the Appellant's apartment earlier. Although the Appellant disputed in his testimony that he was aware of the "papers," he declared that he had learned about them from his wife in his statement. Again, the relevance and probative value of the existence of the document was reasonably determined by the trial judge when he admitted the limited portions of the exhibits without the basis for the documents. It was not until the Appellant opened the door on the substance and reasons for the documents that basis for the restraining order was admitted. Nevertheless, the prejudicial effect of the documents was minimized where the defense admitted additional evidence of conflict before 2005 and an additional restraining order from 2008. His claim otherwise must be rejected.

CONCLUSION

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

Respectfully submitted,

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October 29, 2014.

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

THE STATE,

Respondent,

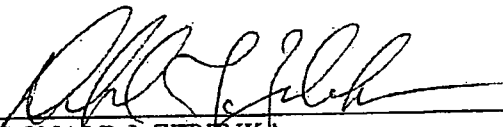
v.

THOMAS STEWART,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled A Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.


DONALD J. ZEDENKA
Senior Assistant Deputy Attorney General

October 29, 2014

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing copies in the United States mail, postage prepaid to:

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This 29th day of October, 2014.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Thomas Stewart, Appellant.

Appellate Case No. 2012-213655

Appeal From Chesterfield County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5331
Heard April 14, 2015 – Filed July 15, 2015

REVERSED AND REMANDED

Jarrett O'Connor Coco, of Nelson Mullins Riley &
Scarborough, LLP, and Chief Appellate Defender Robert
Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, all of
Columbia, and Solicitor William Benjamin Rogers, Jr., of
Bennettsville, for Respondent.

SHORT, J.: Thomas Stewart appeals his convictions for murder and possession of a weapon during the commission of a violent crime. He argues the trial court erred in (1) finding the State's use of preemptory challenges did not violate *Batson*

*v. Kentucky*¹; (2) overruling his objection and failing to correct the State's remarks to the jury that use of a deadly weapon implied malice because the jury was charged with the lesser included offenses of murder and self-defense; and (3) allowing the State to enter unfairly prejudicial character evidence. We reverse and remand.

FACTS

Stewart was involved in an extra-marital affair with Bellanie Clyburn for eight years.² In April 2009, Clyburn violently attacked Stewart's wife, Melissa, with a lug wrench. Clyburn pleaded guilty to assault and served several weeks of jail time. She was released from jail mid-December 2009, and Stewart spent several days with Clyburn after her release. On December 29, 2009, Clyburn filed a petition for a restraining order against Stewart and signed an affidavit for an arrest warrant for Stewart for trespassing.

During the morning of January 1, 2010, Stewart went to Clyburn's house. Stewart testified he and Clyburn argued, and she stabbed him with a knife.³ Stewart also said Clyburn sprayed him with pepper spray. Stewart testified he was able to get a knife, and Clyburn attacked him outside the house as he was trying to get away.⁴ As a result of the struggle, Clyburn was stabbed 39 times and later died from her injuries. After the fight, Stewart fled to a nearby park, and police arrested him there shortly afterwards. Police found two knives and a can of pepper spray in Clyburn's yard.

¹ 476 U.S. 79 (1986).

² The trial transcript and the State's brief spelled her name "Bellany," but the indictments and the petition for a restraining order that she signed, spelled her name "Bellanie."

³ The arresting officer testified Stewart told him he entered Clyburn's house with a knife; Clyburn pepper sprayed him after they had an argument; Clyburn managed to get the knife from him and run outside; and he ran outside after her and attacked her again. Stewart told the officer he "lost it over love," and wanted to know how much "time he was looking at."

⁴ A witness testified she saw Stewart stabbing Clyburn, and Clyburn was trying to get away from Stewart but he kept pulling her back. The witness did not see Clyburn attacking Stewart. She heard Stewart say, "I'm going to kill you," while he was stabbing Clyburn.

A trial was held December 3-6, 2012. The jury found Stewart guilty of murder and possession of a weapon during the commission of a violent crime. The court sentenced him to life in prison plus five years to be served consecutively. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only, and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, the court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

LAW/ANALYSIS

I. Preemptory Challenges

Stewart argues the trial court erred in finding the State's use of preemptory challenges did not violate *Batson v. Kentucky*, 476 U.S. 79 (1986). We agree.

In *Batson*, 476 U.S. at 89, the Supreme Court of the United States held the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that African American jurors as a group will be unable to impartially consider the State's case against an African American defendant. In *Georgia v. McCollum*, 505 U.S. 42, 59 (1992), the Supreme Court held the Constitution also prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of preemptory challenges. Additionally, the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States prohibits the striking of a potential juror based on race or gender. *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). 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. *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999).

In *State v. Giles*, our supreme court explained the proper procedure for a *Batson* hearing:

First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination.

407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted).

Merely denying a discriminatory motive is insufficient; however, the proponent of the strike need only present a race or gender neutral reason. *State v. Casey*, 325 S.C. 447, 451-52, 481 S.E.2d 169, 171-72 (Ct. App. 1997). "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett v. Elem*, 514 U.S. 765, 769 (1995). The explanation "need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence with a bearing on it." *Giles*, 407 S.C. at 21-22, 754 S.E.2d at 265. "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." *Evins*, 373 S.C. at 415, 645 S.E.2d at 909. The opponent of the strike must show the race or gender-neutral explanation was mere pretext, which generally is established by showing the party did not strike a similarly-situated member of another race or gender. *Haigler*, 334 S.C. at 629, 515 S.E.2d at 91.

During jury selection, the State used all five of its peremptory strikes, four of which were to strike African American jurors. The impaneled jury was composed of two African Americans and ten Caucasians. Stewart objected, and the court held a *Batson* hearing. The four African American jurors struck by the State were Jurors 33, 101, 117, and 126.

The State gave its reasons for striking the jurors. The State asserted it struck Juror 33 because law enforcement informed the State he had prior domestic issues involving his then girlfriend, who was now his wife. The State excused Juror 101 because he had a prior arrest for possession of cocaine and, although the charge was nolle prossed, it was prosecuted by the Solicitor's Office. The State dismissed Juror number 117 because she was unemployed and knew Clyburn. Juror number 126 was excused because she was late and appeared disinterested.

Stewart argued the State's reasons for striking the four jurors were pretextual. He asserted the court asked the jury panel if any of them had any charges against them, and Juror 33 did not answer. As to Juror 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. Therefore, Stewart maintained Jurors 131 and 105, both Caucasians, were similarly-situated to Jurors 33 and 101. Stewart argued the State struck Juror 117 for being unemployed and having gone to school with Clyburn, yet the State did not strike Juror 128 even though Clyburn's family frequented her workplace. Finally, Stewart argued he was not aware Juror 126 was late to court. However, the Court stated it observed Juror 126 was late returning from a break.

The court denied Stewart's *Batson* motion. It ruled the State's reason for striking Juror 101 was permissible because case law supports dismissing a juror who had a previous negative relationship with law enforcement. The court applied the same reasoning to Juror 33, considering his past domestic issues involving law enforcement. As to Juror 126, who was late and appeared disinterested, the court ruled this was a valid reason and a permissible strike. Further, as to Juror 117, although the court ruled the fact that the juror was unemployed was not a valid reason, it found the State's reason, the juror had gone to school with Clyburn, was a valid reason for the strike.

Stewart argues the trial court did not comply with the third step in *Batson*. He asserts the court was required to proceed to the third step unless discriminatory intent was inherent in the explanation provided by the State, which it was not.

"Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *Edwards*, 384 S.C. at 509, 682 S.E.2d at 822. Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge can find the explanation was mere pretext, even without a showing of disparate treatment.

Haigler, 334 S.C. at 629, 515 S.E.2d at 91. "The trial judge's findings of purposeful discrimination rest largely on his 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] state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.'" *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). The judge's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous. *Evins*, 373 S.C. at 416, 645 S.E.2d at 909-10. "This standard of review, however, is premised on the trial court following the mandated procedure for a *Batson* hearing." *State v. Cochran*, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006). "[W]here the assignment of error is the failure to follow the *Batson* hearing procedure, we must answer a question of law. When a question of law is presented, our standard of review is plenary." *Id.* at 312-13, 631 S.E.2d at 297.

In *State v. Wilder*, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991), our supreme court held a solicitor may strike a juror based on their demeanor and disposition. The court found the State's explanation that it struck two African Americans from the jury because they reported late for jury duty was racially neutral, even though a Caucasian juror, who also reported late, was seated and was appointed as the foreperson. *Id.* Here, Stewart did not allege there was a similarly-situated juror to Juror 126, who was late and appeared disinterested, that the State did not strike. Therefore, we find the State's strike of Juror 126 was permissible.

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 (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.*

Oglesby, 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.

Likewise, as to Juror 117, Stewart asserted the State struck Juror 117, but did not strike Juror 128 even though Clyburn's family frequented her workplace. The trial court found the State's reason that the juror had gone to school with Clyburn was a valid reason for the strike.⁵ Although we find a difference between a juror having attended school with Clyburn and Clyburn's family frequenting a juror's workplace, we note they are similar enough to have warranted further review by the court. *See State v. Scott*, 406 S.C. 108, 115, 749 S.E.2d 160, 164 (Ct. App. 2013) ("For the purpose of demonstrating potential jurors are similarly situated under *Batson*, potential jurors are not required to be 'identical in all respects.'" (quoting *Miller-El*, 545 U.S. at 247 n.6)); *id.* ("[I]n determining whether potential jurors are similarly situated, our courts have focused their inquiry on whether there are meaningful distinctions between the individuals compared."). Therefore, we find the trial court should have further reviewed the State's strike of Juror 117.

Because we find the trial court improperly denied Stewart's *Batson* motion, we reverse and remand for a new trial.

II. Remaining Issues

Stewart argues the trial court erred in overruling his objection and failing to correct the State's remarks to the jury that use of a deadly weapon implied malice because the jury was charged with the lesser-included offenses of murder and self-defense. Stewart also argues the trial court erred in allowing the State to enter unfairly prejudicial character evidence. Because we find the trial court erred in denying Stewart's *Batson* motion and reverse and remand on that issue, the court need not

⁵ The State's reason for striking Juror 117 was two-fold: she was unemployed and she knew Clyburn. The trial court ruled that the fact that Juror 117 was unemployed was not a valid reason to strike her. We find this was error because our courts have held unemployment is a race-neutral reason for striking a juror. *See Haigler*, 334 S.C. at 632, 515 S.E.2d at 92 (finding unemployment is a race-neutral reason for a strike).

consider Stewart's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, we find the trial court erred in denying Stewart's *Batson* motion and reverse and remand this case for a new trial.

REVERSED AND REMANDED.

LOCKEMY and MCDONALD, JJ., concur.

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

THE STATE,

Respondent,

v.

THOMAS STEWART,

Appellant

PETITION FOR REHEARING BY RESPONDENT

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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. Oglesby, 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 assignment ² - 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 Rollicall, 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,

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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:

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This 28th day of July, 2015.


DONALD J. ZELENIKA
Senior Assistant Deputy Attorney General

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
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ATTORNEYS FOR APPELLANT

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 through 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 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.

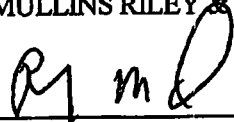
Therefore, the Court of Appeals correctly determined that the trial court inappropriately denied Appellant's *Batson* motion. Thus, rehearing is unwarranted.

CONCLUSION

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

Respectfully Submitted,

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This 6th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

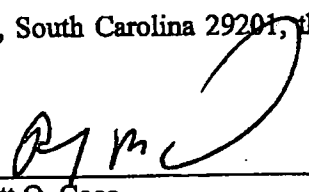
THOMAS STEWART,

APPELLANT

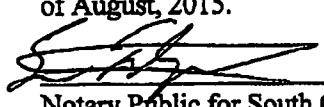
Appellate Case No. 2012-213655

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.

The South Carolina Court of Appeals

The State, Respondent,

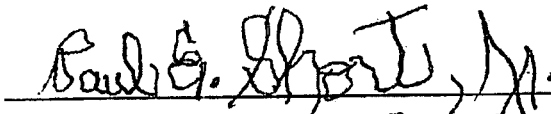
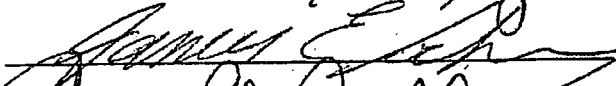
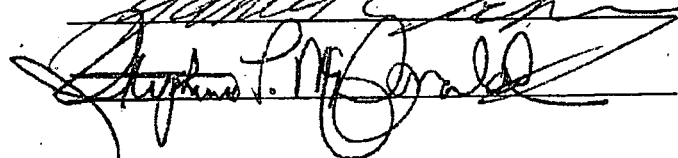
v.

Thomas Stewart, Appellant.

Appellate Case No. 2012-213655

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.
 J.
 J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
Jarrett O'Connor Coco, Esquire
John W. McIntosh, Esquire
William Benjamin Rogers, Jr., Esquire

FILED

August 20, 2015