STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Court of General Sessions

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2014-001827

THE STATE,

Respondent,

v.

TYKEEM KALANI MAY,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Tykeem May was indicted at the February 2014 term of the grand jury for Orangeburg County for armed robbery (2014-GS-38-0189) and possession of a weapon during the commission of a violent crime (2014-GS-38-0140). May proceeded to a trial by jury from August 11-15, 2014 in Orangeburg, South Carolina. At the conclusion of trial, May was found guilty as indicted. He was sentenced by the Honorable Deadra L. Jefferson to imprisonment for a term of fifteen years for armed robbery and five years for possession of a weapon during the commission of a violent crime, with all sentences running concurrently. May timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On September 8, 2013, The Keg in Orangeburg, South Carolina was robbed. Tr. pp. 238-239. Quantavious Montgomery was employed as the manager of The Keg. Tr. p. 238. Montgomery was standing outside of the store when he noticed someone walking towards him with a gun. Tr. p. 240. Montgomery initially tried to run, however the individual with the gun told him to stop so he turned around. Tr. p. 240. Montgomery then emptied the cash register and gave the money to the man with the gun. Tr. p. 241. While he was filling a bag with money, the man urged Montgomery to hurry up and put the money in the bag. Tr. p. 243. Montgomery testified the man who robbed the store had dreadlocks, Tr. p. 243. Montgomery also noticed that the gun used in the robbery looked like an AK-47. Tr. p. 241. The amount of money stolen in the robbery was $281.65. Tr. p. 266. Montgomery also testified that there are video cameras that are all around the store. Tr. p. 244. Montgomery did not remember the specific time of the robbery. Tr. p. 240. Lieutenant Anthony Robinson later testified that he received the dispatch saying a robbery just occurred a little before 2:00 PM. Tr. p. 295.

Lieutenant Randall Culler, a lieutenant in the patrol division of the Orangeburg County Sheriff's department, was working on September 14, 2013. Tr. p. 327. Lieutenant Culler had previously received pictures of a vehicle involved in an armed robbery as well as s picture of the suspect involved. Tr. p. 327. Lieutenant Culler spotted a white Dodge Caliber that looked like the vehicle in the picture from the armed robbery. Tr. p. 328. Lieutenant Culler eventually stopped the vehicle and wrote the driver a warning ticket for a window-tint violation. Tr. p. 330. Lieutenant Culler testified the actual reason for the stop was because the vehicle looked like the one used in the robbery. Tr. pp. 330-31. The

driver of the vehicle was Appellant. Tr. p. 331. Appellant stated the car belonged to his girlfriend. Tr. p. 331. After writing the warning ticket, Lieutenant Culler let Appellant leave and informed investigators about the stop. Tr. p. 332.

Law enforcement officers later obtained a search warrant for a home on Wilkinson Street in Orangeburg. Tr. pp. 399-400. Police established Appellant was living at that particular residence by conducting surveillance on the address. Tr. p. 397. Lieutenant John Caddell testified that the police were looking for items spotted in the video recording of the armed robbery. Tr. p. 402. Specifically, in the video, police were able to observe the clothing the perpetrator was wearing, as well as the rifle he was carrying, which was an SKS type assault rifle which a wooden stock and a long banana clip hanging from it, Tr. p. 402. During the search of the home, Investigators found a pair of black and white striped tennis shoes that matched the shoes seen in the video recording. Tr. p. 403. Investigators also found a pair of red framed sunglasses, an SKS type assault rifle with a banana clip magazine, and $50 in U.S. currency. Tr. p. 403.

Following the search of the home, Investigators spoke with Emonie Ford. Tr. p. 441. Ford is Appellant's girlfriend. Tr. p. 439. Investigators showed Ford the video surveillance from the robbery. Tr. p. 441. Ford told Investigators that she recognized the car as one that looked like her 2009 Dodge Caliber. Tr. pp. 441-42. Ford also stated that she recognized a pair of her red-framed glasses and a checkerboard scarf in the video. Tr. p. 442. Ford also recognized the gun in the video as belonging to Appellant. Tr. p. 442.

Ford testified Appellant had her vehicle sometime on September 8th. Tr. p. 446. It was not out of the ordinary for Appellant to drive Ford's vehicle. Tr. p. 445. Ford remembered going to Walmart then going to happy hour at Sonic on the day of the

robbery. Tr. p. 442. Happy hour at Sonic lasts from 2:00 PM until 5:00 PM. Tr. p. 445. Ford initially told Investigators she and Appellant left around 1:40 PM to go to Walmart and Sonic, however she conceded at trial that was an estimate on her part and that the actual time could have been 2:00 PM or 2:15 PM. Tr. pp. 463-64.

ARGUMENT

I.

The trial judge did not err in denying Appellant's Batson motion where Appellant failed to make a showing that the State's reason for the strikes (that two prospective jurors were stuck for being unemployed and single) was mere pretext to engage in purposeful racial discrimination.

Relevant Facts

At the conclusion of jury selection, the Solicitor indicated he had a motion. Tr. p. 202. The trial judge asked counsel to approach. Tr. p. 202. The trial transcript then indicates that an off-the-record bench conference was held. Tr. p. 202. Appellant subsequently filed a motion to reconstruct the record of the arguments made in support of motions by both the State and Appellant pursuant to Batson v. Kentucky, 476 U.S. 79 (1986) and the trial judge's rulings denying both the State and Appellant's motions. R. p. * (Appellant's Motion to Reconstruct the Record). This Court subsequently granted Appellant's motion. R. p. * (Order of the Court of Appeals granting Motion to Reconstruct dated July 16, 2015).

On August 31, 2015, Judge Jefferson held a reconstruction hearing. Recon. Hrg. Tr. p. 1. At the reconstruction hearing, the trial judge consulted her notes and recalled that during the Batson hearing, the State explained that it struck juror number 15, who was a black male, because he was unemployed and single. Recon. Hrg. Tr. p. 9. The State struck juror number 164 because he had a record for shoplifting in Georgia. Recon. Hrg. Tr. p. 9. Finally, the State struck juror number 50, a black male, because he was unemployed and single. Recon. Hrg. Tr. p. 9. The trial judge stated that the burden then shifted to the defense to show that these reasons were pretextual, which the defense failed

to do. Recon. Hrg. Tr. p.9. This led to the denial of the defense's Batson motion. Recon. Hrg. Tr. p.9

At the reconstruction hearing, Defense Counsel testified that he made an argument that the State's strikes were pretextual because there were two housewives on the jury who were unemployed. Recon. Hrg. Tr. p.12. Defense Counsel stated that his argument was based on his belief that "a housewife is not employed officially when it comes to it." Recon. Hrg. Tr. p.14. Defense Counsel elaborated "Well, I think that a person not holding a steady job, they're unemployed. Recon. Hrg. Tr. p.15. Following Defense Counsel's testimony, the trial judge found:

> The Court will stand by the original records given by the State in support of its strike - - that being number 15, a blacks male, unemployed and single; number 164, a black male had a record for shoplifting in Georgia; and number 50, a black male, unemployed, the Court finds as it did at that time, that these were race neutral reasons, that there was no argument that rose to the level of pretext, no harm, no foul. I'll rule on it alternatively, although my records do not reflect the argument was made, but, nonetheless, the Court would find that the arguments raised by defense counsel do not rise to the level of creating a situation where the State's reasons given were pretextual and, therefore, would not have been able to sustain its burden once it shifted to them regarding pretext. . . Number 155 was a black female employed with South Carolina; number 17 was a black female who ran a Methodist program at a church; number 174 was a white female who was a housewife, number 200 was a black female who worked in family health care, number 22 was a black female who worked at the veterans medical center, number 7 was a black male who worked in a trucking occupation, 101 was a white female who worked at Daniel's Pharmacy, 81 was a black female who worked as an administrative assistant in state government, number 14 was a white female employed at Zeus as an accountant; number 121 was a black male employed at Sedexo; number 65 was a black male employed at Husqavana; number 90 was a white female retired teacher; and number 163 was a housewife, white female. In total, there were eight black citizens who served on the jury and five white, five black females and three black males, five white females and no white males. Which, quite frankly, proportionally is very unusual for the makeup of a jury under these circumstances.

Recon. Hrg. Tr. pp. 18-20

The trial judge continued:

> Taking into account Mr. Stevens' argument that there were other similarly situated that being those unemployed, I find that that argument, again, does not shift pretext. I do not believe or find that a housewife falls into the category of being unemployed. Generally, a person who is in the unemployed population is someone who was employed and who is actively seeking employment, who is able bodied and capable of employment, and a man is generally very dissimilarly situated from a woman who is home, acting in a housewife capacity, taking care of her children, and in my estimation, is employed. She's just employed in her house taking care of her kids. . . I find that those reasons given were appropriate and race neutral under those circumstances.

Tr. p. 21.

Discussion

Appellant asserts the trial court erred in denying Appellant's Batson motion because the State claimed "unemployment" as the reason for its strikes, but did not strike unemployed white jurors. Appellant's argument is predicated on his assertion that the trial judge drew an "artificial distinction" in separating housewives from the class of unemployed people in general. On the contrary, the trial judge properly concluded that the State's strikes were not pretextual because the two "housewives" seated on the jury were not similarly situated to the two men who were "unemployed and single" who were stricken from the jury.

When determining whether a Batson violation has occurred, the reviewing court must examine the totality of the facts and circumstances in the record. State v. Rogers, 405 S.C. 520, 524, 748 S.E.2d 247, 250 (Ct. App. 2013) (citing State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)). "Appellate courts give the trial judge's finding great deference on appeal, and review the trial judge's ruling with a

clearly erroneous standard." Shuler, 344 S.C. at 615, 545 S.E.2d at 810. "A finding is clearly erroneous if it is not supported by the record." Id. at 620, 545 S.E.2d at 813.

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

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

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

514 U.S. at 767.

Step two of this process does not demand an explanation that is persuasive or even plausible. State v. Cochran, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006) (quoting Purkett, 514 U.S. at 767–68). In step two, "the proponent of the strike does not carry 'any burden of presenting reasonably specific, legitimate explanations for the

strikes.'" Id. (internal citations omitted). "Therefore, '[u]nless a discriminatory intent is inherent' in the explanation provided by the proponent of the strike, 'the reason offered will be deemed race neutral' and the trial court must proceed to the third step of the Batson process." Id. (quoting Purkett, 514 U.S. at 768).

"At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." Cochran, 369 S.C. at 315, 631 S.E.2d at 298 (internal citation omitted). "The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike." Haigler, 334 S.C. at 629, 515 S.E.2d at 91. "This burden is generally established by showing similarly situated members of another race were seated on the jury." Cochran, 369 S.C. at 315, 631 S.E.2d at 298. However, the uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race or gender neutral explanation for the inconsistency. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (finding the State provided a racially neutral explanation for why the solicitor did not strike a juror with similar characteristics to one previously stricken); see Purkett, 514 U.S. at 768, (during step three, "persuasiveness of the justification becomes relevant."); see also State v. Geddis, 313 S.C. 37, 437 S.E.2d 31 (1993); State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991).

Appellant's assertions that the reasons offered for the strike were mere pretext are without merit. The trial judge correctly found that the two white females who listed their occupation as "housewife" were not similarly situated to two black males who listed their occupation as "unemployed." Appellant's attempt to classify housewives as

"unemployed" is illogical, offensive, and contrary to the definition of "unemployment." The Bureau of Labor Statistics of the U.S. Department of Labor defines unemployed persons as those who "do not have a job, have actively looked for work in the prior four weeks, and are currently available for work."[1] One who is a housewife is distinguishable from one who is unemployed because they are not actively looking for outside employment; they are working full-time within their home. The class of persons who claim employment as a "housewife" are thus not similarly situated to those who claim "unemployment." The trial judge's determination that the State's stated reasons for the strikes were race-neutral and appropriate is thus not clearly erroneous, and should not be disturbed on appeal.

[1] How the Government Measures Unemployment, Bureau of Labor Statistics, http://www.bls.gov/cps/cps_htgm.htm.

CONCLUSION

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

Respectfully submitted,

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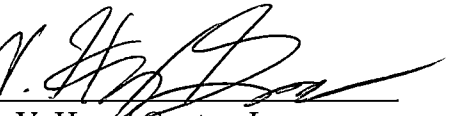
BY: 
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February 24, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal From Orangeburg County
Deadre L. Jefferson, Circuit Court Judge

STATE OF SOUTH CAROLINA, Respondent

v.

TYKEEM K. MAY, Appellant.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within **Initial Brief of Respondent and Designation of Matter** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: David Alexander, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 24th day of February, 2016.

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ALAN WILSON
ATTORNEY GENERAL

February 24, 2016

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **State v. Eric Tykeem K. May**
Appellate Case No: 2014-001827

Dear Ms. Kitchings:

Enclosed please find the original of the **Initial Brief of Respondent and Designation of Matter** in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this brief today.

Sincerely,

V. Henry Gunter, Jr.
Assistant Attorney General
Bar No: 102259

VHG/nb
Enclosures

cc: David Alexander, Esquire (2 copies enclosed)
Trisha Allen, Victim Services (1 copy enclosed)