STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Deadra L. Jefferson, Circuit Court Judge

THE STATE, RESPONDENT,

V.

TYKEEM KALANI MAY, APPELLANT

APPELLATE CASE NO. 2014-001827

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying appellant's Batson challenge to the State's use of all of its peremptory strikes against black males, where the State claimed "unemployment" as the reason for its strikes, but did not strike unemployed white jurors?

STATEMENT OF THE CASE

On February 10, 2014, an Orangeburg County grand jury indicted appellant Tykeem May for armed robbery and possession of a weapon during the commission of a violent crime. R. 577, R. 580. On August 11, 2014, appellant was tried before the Honorable Deadra L. Jefferson and a jury. R. 1. Harrison Bell and Ashley Cornwell represented the State. R. 2. Breen Stevens and Doug Mellard represented appellant. R. 2. The jury convicted appellant on both counts. R. 498, l. 14 – 499, l. 7. Judge Jefferson sentenced appellant to concurrent terms of fifteen years' imprisonment for armed robbery and five years' imprisonment for the weapons charge. R. 517, ll. 12 – 19. Pursuant to an Order of this Court, a reconstruction hearing was held before Judge Jefferson on August 31, 2015. R. 555. This appeal follows.

STATEMENT OF FACTS

Sometime shortly before 2:00 PM on Sunday, September 8, 2013, a man robbed a convenience store called "The Keg" in Orangeburg. R. 131, l. 23 – 133, l. 7. The robber had a rifle and wore a disguise. State's Ex. 23. The store's surveillance cameras showed the robbery. State's Ex. 23. The robber came from around a corner, surprising the clerk who was sitting outside. State's Ex. 23. The clerk noticed the gun and ran. R. 77, l. 10 – 78, l. 4. The clerk heard a noise, turned around, and went back into the store. R. 77, l. 10 – 78, l. 4. State's Ex. 23.

The video shows the robber wearing a cap with a design, red sunglasses, and a red, checkered scarf around his face. State's Ex. 23. The clerk gives the robber the money from the registers and the robber leaves. State's Ex. 23. The clerk waited five minutes, then locked the door. R. 79, ll. 2 – 4. R. 90, ll. 6 – 10. He first called his boss. R. 79, ll. 10 – 11. He then called the police. R. 79, ll. 11 – 12. The clerk did not watch the robber to see where he went after leaving the store. R. 89, ll. 20 – 23.

The video introduced by the State shows a white or silver Dodge Caliber behind the store. State's Ex. 23. The video does not show anyone entering or leaving the car. State's Ex. 23. Despite the video showing the clerk running past where the Dodge Caliber was parked, the clerk did not see the Dodge Caliber at any time during the robbery. R. 91, l. 19 – 92, l. 5. State's Ex. 23. The surveillance videos were taken from two different systems and the time stamps did not match. R. 125, ll. 3 – 13. The security company employee was unable to remember exactly how much the time stamps varied. R. 129, ll. 9 – 16. R. 125, ll. 11 – 13. According to the time stamps, the Dodge Caliber arrived after the robber left the store. State's Ex. 23.

Several days later, a police officer used dark window tint as a pretext to stop a white Dodge Caliber. R. 164, l. 9 – 165, l. 21. Appellant Tykeem May ("May") was the driver. R. 168, ll. 4 – 7. May told the officer the car belonged to his girlfriend. R. 168, ll. 15 – 20. The officer testified that May gave an address on Brandon Street in Orangeburg as his home address. R. 169, ll. 10 – 11. The police surveilled the Brandon Street address, but did not see May. R. 183, l. 8 - 184, l. 7. The police contacted the owner of the apartments on Brandon Street and determined that May did not live at that address. R. 232, l. 16 – 233, l. 2.

The Dodge Caliber that May was driving when he was stopped belonged to Emonie Ford ("Ford"). The police surveilled Ford's house and saw May and the Dodge Caliber. R. 185, l. 11 – 187, l. 20. The county SWAT team executed a search warrant at Ford's house. R. 193, ll. 7 – 18. Ford testified that she "was sleeping and then they bust in the door. Somebody put a gun to the back of my head, put their knee in my back, had me down on the floor. Put me in handcuffs, took me outside, sat me down." R. 276, ll. 19 – 24. May was also "detained" while the police searched Ford's home. R. 238, ll. 1 – 12. During the search, the police found a rifle, red sunglasses, and tennis shoes. R. 239, ll. 7 – 20. The police did not find a scarf or hat. R. 308, ll. 8 – 20.

Ford testified for the State. R. 272, l. 14. She was a senior at South Carolina State University. R. 274, ll. 10 – 18. May was her boyfriend and was living with her. R. 275, ll. 11 – 15. May worked two jobs. R. 289, l. 3 – 290, l. 18.

Ford provided an alibi for May. R. 280, l. 18 – 282, l. 11. During the time of the robbery, May and Ford went to Wal-Mart and then to Sonic. R. 293, l. 18 – 294, l. 20. Ford knew the time because they went to "happy hour" at Sonic, which starts at 2:00 PM. R. 293,

ll. 22 – 24. R. 281, ll. 1 – 2. She said they left her house at approximately 1:40 PM. R. 293, ll. 20 – 21. The call from the store clerk about the robbery came into dispatch "around about almost two o'clock." R. 131, l. 23 – 133, l. 7.

ARGUMENT

The trial court erred in denying appellant's Batson challenge to the State's use of all of its peremptory strikes against black males, where the State claimed "unemployment" as the reason for its strikes, but did not strike unemployed white jurors.

Jury Selection and the Reconstruction Hearing

Following jury selection, the trial judge asked if the State had any motions. R. 39, ll. 5 – 6. The solicitor stated he had a motion and the court asked the attorneys to approach. R. 39, ll. 7 – 8. The trial transcript then indicates: "[Whereupon, an off-the-record bench conference is held]." R. 39, ll. 9 – 10. Appellant filed a motion to reconstruct the record regarding motions made at the bench pursuant to Batson v. Kentucky, 476 U.S. 79 (1986) which the State did not oppose.[1] R. 523; R. 553. This Court granted appellant's motion. R. 554.

On August 31, 2015, Judge Jefferson held a reconstruction hearing. R. 555. Using her notes, Judge Jefferson found that the State made a Batson motion first. R. 562, ll. 12 – 17. The State withdrew its Batson motion after appellant gave race-neutral reasons for his strikes. R. 563, ll. 5 – 7.

[1] In appellant's reconstruction motion, appellant related trial counsel's recollection that Judge Jefferson placed a recording device on the bench to hear the motion. Attempts to obtain this recording from the court reporter were unsuccessful. R. 523. Judge Jefferson explained at the reconstruction hearing that her usual court reporter would have known to "automatically" transcribe the bench conferences. R. 558, l. 18 – 559, l. 2.

Appellant then made a Batson motion. R. 563, ll. 8 – 13. The State used three strikes, all against black males.[2] R. 563, ll. 8 – 13. R. 520. These jurors were: (1) Aaron Briggman, number 15; (2) Xavier Stephens, number 164; and (3) Stephen Eaddy, number 50. R. 563, ll. 8 – 13. R. 520.

According to Judge Jefferson's notes, the solicitor stated he struck Juror Briggman "because he was unemployed and single." R. 563, ll. 8 – 13. He struck Juror Stephens "because he had a record for shoplifting in Georgia." R. 563, ll. 8 – 13. He struck Juror Eaddy "because he was unemployed and single." R. 563, ll. 8 – 13. The solicitor, who represented the State at the reconstruction hearing, agreed with Judge Jefferson that her notes accurately reflected the reasons he gave for striking these three black male jurors. R. 564, l. 24 – 11, l. 5.

Judge Jefferson stated:

> The burden then shifted to the defense to show that these reasons were not race neutral and they were pretext, and my records reflect that there was no representation regarding pretext, and, therefore, the motion was denied, as they could not meet that burden of showing that the State's strikes were anything other than race neutral and were not pretextual.

R. 563, ll. 14 – 21. Counsel for appellant then asked Judge Jefferson whether her records reflected whether trial counsel made any argument about pretext. R. 563, ll. 22 – 24. Judge Jefferson replied, "He could not meet the burden on pretext. He could not show that there were similarly-laterally situated people on the panel. And so once he could not, the burden shifted to him at that point. And once he could not show that there were similarly jurors, the inquiry ends." R. 563, l. 25 – 564, l. 6.

[2] Appellant is a black male.

At the beginning of the hearing, the trial judge indicated she did not think testimony would be needed because of her notes. R. 560, l. 24 – 561, l. 3. After Judge Jefferson's statement regarding arguments concerning pretext, appellant indicated he wanted to call trial counsel as a witness. R. 564, ll. 7 – 10. Before hearing trial counsel's testimony, the trial judge questioned his credibility, stating that she would "be glad to hear his testimony, but, you know, hindsight is 20/20. I don't know how much weight I can give that in light of hindsight and the fact now that he's had a chance to study the venire." R. 564, ll. 11 – 17. The trial judge added that she takes "meticulous notes" and that if trial counsel "had made an argument, I would have noted it." R. 564, ll. 11 – 17. Appellant then called trial counsel. R. 565, l. 8.

Trial counsel agreed that Judge Jefferson's recitation of the bench conference matched his recollection up until the point of his pretext argument. R. 566, ll. 4 – 7. Trial counsel then testified:

> Q. What can you tell me about the argument you made concerning pretext?
>
> A. What I did was, I just pointed out that there were two—at least two white females that were also on the jury that were unemployed, to which my recollection was the Judge said, well, they're not—she found that they weren't similarly situated and ruled, and I asked to be noted.
>
> She's really good about making sure that all of our conversations at the bench are typically recorded for judicial economy to make sure that the case keeps rolling. She's usually really good about that, not just from the trials I've been in with her, but also from many transcripts I've seen. She's very efficient.
>
> Q. Do you remember which two white females that you made an argument about?
>
> A. Let's see, I think one was an unemployed housewife and—let's see here, Ms. Sweatman, I think was one and Ms. Jeffcoat was the other, 174 and 190.

Q. Do you remember any response from Mr. Bell?

A. Not that I can recall.

Q. Did Judge Jefferson rule immediately after that argument?

A. Yeah. I mean, she was quite clear about her ruling, that they weren't similarly situated. And once Judge Jefferson makes the ruling, she's—she means it; Rule 18 is in full force and effect in Judge Jefferson's court, and I respect that.

Again, it's how she moves cases along very efficiently.

R. 566, l. 9 – 567, l. 18.

The State then asked trial counsel about whether the juror had used the term "unemployed housewife" or whether he had only argued at the bench that she "was a housewife." R. 567, l. 25 – 568, l. 3. Trial counsel replied that "when we were at the bench I remember, you know, saying that my wife might disagree with me, but I don't think a housewife is employed officially when it comes to it." R. 568, ll. 4 – 8. After the solicitor completed his cross-examination, appellant asked for the trial judge to find that the record had been adequately constructed for this Court's review. R. 570, ll. 2 – 5.

The trial judge stated:

The Court will stand by the original records regarding the hearing, which is that the reasons given by the State in support of its strikes—that being number 15, a black male, unemployed and single; number 164, 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—and I don't have a record 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.

R. 572, l. 9 – 573, l. 2. The trial judge stated that a housewife does not fall "into the category of being unemployed." R. 574, ll. 19 – 575. The court defined "unemployed" as someone who was "actively seeking employment" and also stated that "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." R. 574, l. 19 – 575, l. 4. The court found that because a housewife was not similarly situated, the burden regarding pretext did not shift back to the State. R. 575, ll. 5 – 16.

Discussion

The trial judge erred in finding appellant did not prove pretext and racial discrimination. A defendant has "the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Batson v. Kentucky, 476 U.S. 79, 85-86 (1986). "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . ." Id. at 86 (internal citation omitted). The Equal Protection Clause "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." Id. at 89.

Courts use a three-step inquiry "for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause." State v. Inman, 409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014). First, the party making the challenge must make a prima facie showing of racial discrimination. Appellant did so in this case. Appellant showed that the State used its strikes only against black males.

The trial court followed the next step in the Batson analysis and required the State to give its reasons for its strikes. If the State gives race-neutral reasons, the defendant must then prove purposeful discrimination. Id. at 26, 760 S.E.2d at 108 (*quoting* State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014). The State's explanation for its strikes "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." Id. (internal quotations omitted).

While the State gave the superficially race-neutral reason of unemployment as its reason for striking Jurors Briggman and Eaddy, the use of unemployment is "highly suspect" because strikes based solely on unemployment "are especially subject to abuse." Carter v. State, 603 So.2d 1137, 1139 (Ala. Crim. App. 1992). In Carter, much like in this case, the prosecutor made two strikes based on unemployment. Id. The court examined the prosecutor's other strikes and found that two white unemployed jurors were not struck. Id. Importantly, the court noted that one of these unemployed jurors was a housewife. Id. Using this evidence of disparate treatment between unemployed blacks and an unemployed white (albeit, a housewife), the Carter court held that the defendant proved discriminatory intent and reversed. Id. 603 So.2d at 1139-40. See also Berry v. State, 728 So.2d 568, 571-73 (Miss. 1999) (upholding Batson challenge where prosecutor struck black female because she was an unemployed housewife, but did not strike a white female who was an unemployed housewife).

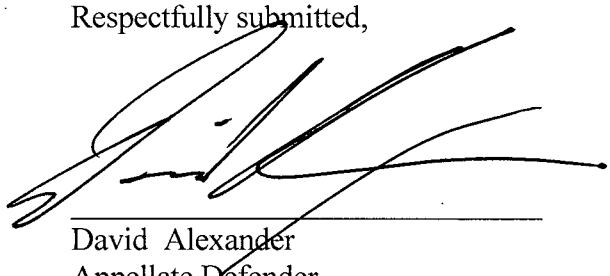
In this case, the trial judge erred in finding that the State's strikes—all against black males—were not pretextual. The defense showed that two unemployed white jurors were

not struck by the State. Jurors Sweatman and Jeffcoat were white and unemployed. The trial judge drew an artificial distinction in separating housewives from the class of unemployed people in general. As in Carter, the use of unemployment as a factor is subject to abuse. In this case where the State only struck jurors who were of the identical race and sex of the defendant, its explanation of "unemployment" was pretext. Prejudice is presumed and the proper remedy is a new trial. Inman at 29-30, 760 S.E.2d at 110. This Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and grant him a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of April, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 12, 2016

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of April, 2016.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of April, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.