STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES R. BYERS,

APPELLANT

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF ISSUES ON APPEAL 3

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 5

ARGUMENT 9

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Hernandez v. New York, 500 U.S. 352 (1991) 10

Powers v. Ohio, 499 U.S. 400 (1991) 9

Purkett v. Elem, 514 U.S. 765 (1995) 10, 11

Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) 12

Snyder v. Louisiana, 552 U.S. 472 .... 10, 13, 14

State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) 10, 11

State v. Cochran, 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006) 11, 12, 13, 14

State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999) 10

State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990) 12

State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989) 13

State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006) 10

State v. Salters, 273 S.C. 501, 257 S.E.2d 502 (1979) 9

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) 13, 14

State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991) 12

United States v. Vasquez-Lopez, 22 F.3d 900 (C.A.9 1994) 10

Statutes

S.C. Code Ann. § 17-25-45 (Supp. 2011) 4

Constitutional Provisions

S.C. Const. art. I, § 14 9

U.S. Const. amend. VI 9

STATEMENT OF ISSUES ON APPEAL

Did the trial court err in refusing to quash the jury panel pursuant to Appellant's *Batson* motion where the State struck three of the four black jurors called: two of whom were improperly struck; one based on incorrect criminal history; and the other for allegedly smiling at the defense table?

STATEMENT OF THE CASE

On October 29, 2009, Appellant James Byers was indicted by the Cherokee County Grand Jury for (1) distribution of crack cocaine and (2) distribution of crack cocaine within one-half mile of school. R. 83.

On April 19, 2011, Appellant proceeded to trial before the Honorable J. Derham Cole and a jury. R. 1. Appellant was represented by William Rhoden, and the State was represented by assistant solicitors Kimberly Leskanic and Matthew Kendall. R. 1.

On April 20, 2011, the jury found Appellant guilty as charged, and Judge Cole sentenced Appellant to life imprisonment without parole (LWOP) pursuant to S.C. Code Ann. § 17-25-45 (Supp. 2011) for being previously convicted of two prior serious offenses.[1] R. 61, l. 14 – 277, l. 24; R. 86-87 (sentencing sheets). After waiving notice for two probation violations, Judge Cole found that Appellant willfully failed to comply with the conditions of his probation and sentenced Appellant to four years imprisonment, to run concurrently with the LWOP sentence. R. 66, l. 7 – 279, l. 8.

On April 21, 2011, Judge Cole addressed a note, which was found by a bailiff in the jury deliberation room post verdict. R. 68 –76. The note stated in pertinent part, "The State did not prove, beyond a reasonable doubt, that James [Appellant] sold crack, which was then handled inappropriately." R. 79. Trial counsel renewed his motion for a new trial, and Judge Cole denied the motion. R, 71, ll. 8-23; 8, ll. 1-2.

This appeal follows.

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[1] There are three transcripts that encompass Appellant's record. The April 20, 2011, transcript continues the pagination from the April 19, 2011 transcript. However, the April 21, 2011 transcript does not continue with the same pagination as the April 19 and 20, 2011 transcripts. Consequently, the April 20, 2011 transcript will be cited as R. (II), and the April 21, 2011 transcript will be cited as R. (III).

STATEMENT OF FACTS

Relevant Facts

At the conclusion of jury selection, defense counsel "object[ed] to this panel being sworn as the jury in this case [pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986)]." R. 44, l. 17 – 45, l. 10. Specifically, defense counsel stated "that the State used three strikes of their five strikes [to strike two black males and one black female]" and that "[e]very single strike [the State] used was to strike . . . a black juror." R. 44, ll. 19-23.

The trial court then asked the solicitor to offer a race-neutral reason for striking Darrius Shippy (juror #83), who is a black male. R. 45, ll. 19-23. The solicitor indicated that juror #83 "has a conviction for driving under the influence, criminal domestic violence, possession of marijuana, and possession of stolen goods. He also has a pending possession with intent to distribute case in our office." R. 46, ll. 4-8.

Defense counsel then inquired as to whether juror #83's convictions should have disqualified him from jury service. R. 46, ll. 13-22. This prompted the trial court to ask the solicitor for juror #83's criminal history, and the solicitor informed the trial court that she did not have an official copy of juror #83's criminal record, but she did have the investigator's notes listing juror #83's criminal history. R. 47, l. 13 – 48, l. 2.

After a brief recess, the solicitor informed the trial court that "it appears that the information [juror #83's criminal history] was written down incorrectly. . . . The information that was written down for juror 83 is actually the information for juror 85." R. 48, ll. 7-11. The solicitor also informed the trial court that juror #83 does have "a charge" for criminal domestic violence. R. 48, ll. 22-25. However, the solicitor admitted

that he is unaware of the disposition of that charge. R. 48, ll. 22-23.

The trial court stated, "the saga continues, but it doesn't appear that [the solicitor] has exercised a challenge of [juror #83] in any unconstitutional fashion; that he was a qualified juror, and that she would have had the right to strike [juror #83], if she wished to, based upon the pending charge for criminal domestic violence." R. 49, ll. 13-18. The trial court also stated that the solicitor "exercised the challenge based upon information that she had, even though it might not have been correct information, but it's not a pretext. . . . And it does not appear that the defendant is prejudiced by the fact that [juror #83] was called and striken, since in this case he was qualified to serve as a juror, and the State has not exercised the challenge in an unconstitutional fashion. It might be a mistake, but it's not unconstitutional." R. 49, l. 21 – 50, l. 6. The trial court then ruled "if you have made that motion to quash the panel based on the exercise of that strike, it's denied." R. 50, ll. 6-8.

The solicitor then claimed that Josephine Lyons (Juror #50), who is a black female, was struck because "[s]he was looking at the defense [t]able smiling in that direction. I did not feel that if she could be fair to the State in her disposition of the changes just in the way she was not looking at our table." R. 50, l. 23 – 51, l. 3. Defense counsel responded, "I would move to quash the jury panel on the basis of this, not on the surface . . . that's race neutral, but I think that's pretextual." R. 51, ll. 8-11. Defense counsel emphasized, "we now have a lily-white jury panel of twelve people with no blacks and nobody, other than Caucasians, on the jury, so I would move to quash [the jury panel]." R. 51, ll. 17-20. In response, the trial court explained that Sherida Littlejohn (Juror #48), who is a black female, was initially seated as a juror, but was

ultimately excused for her inability to judge another person and had nothing to do with the solicitor. R. 52, ll. 10-12.

In regards to juror #50, defense counsel reiterated, "I don't think grinning in the direction of the defendant is a sufficient reason to strike a black juror from this potential panel." R. 52, ll. 15-17. The trial court inquired, "So you are saying that [the solicitor] is simply using that reason as a pretext to exercise a peremptory challenge in an unconstitutional way?" Defense counsel replied, "Yes, sir." R. 52, ll. 18-21. The trial court then instructed the solicitor to respond to defense counsel's assertion, and the solicitor maintained:

> When juror number 50 came up, she appeared already to be leaning toward the defense. It did not have to do with her race. It had to do with her demeanor and the fact that she would not look at me when Madam Clerk asked whether or not the State wanted to approve her as a juror, she continued to look at the defense table in a pleasing manner, smiling and keeping her attention focused on them. That is the reason I did not feel that she would give our side a fair opportunity. . . ."

R. 53, ll. 16-24.

The trial court ruled, "I do not think that the demeanor [of a juror] is something that cannot be considered in exercising a peremptory challenge. Now, *whether it's a pretext or not, that's difficult to say*, but in this case I have heard the explanation from both [the solicitor and defense counsel,] and I do not find that [the solicitor] has exercised a challenge in striking [juror #50] that was exercised in an unconstitutional fashion." R. 54, ll. 6-10 (emphasis added). The trial court further held, "I don't have any belief that [the solicitor] did exercise that strike based solely upon the race of [juror #50], and I certainly don't have any experience in [the solicitor] engaging in that type of selection

process, so I find that it's not pretext and it was constitutionally valid." R. 54, ll. 19-24.

After the solicitor indicated that Craig Gaffney (juror #27) was struck because of a DUI conviction, defense counsel stated, "I have got no (sic) complaints of that, Your Honor. I accept that." R. 55, ll. 7-8. The trial court again ruled, "[t]he defense [counsel's] motion to quash the panel based upon the unconstitutional exercise of peremptory challenges is denied." R. 55, ll. 9-11. Defense counsel then provided the trial court with another reason to quash the panel:

> The point is the dynamics of the way this played out in these excusals after the panel was picked, I would move to quash this panel, put them back into the pool, start over again, because . . . it changes the dynamics of using peremptory challenges when you have people seated and you are using that dyamics and you are choosing other people to strike, and now off of the panel, then I think the only fair solution for the defendant and the State is to start over again with the jury selection process, knowing that [juror] number 43 and knowing that [juror] number 48 are not even in the potential jury pool of jurors, because they can't properly participate. So I would move to quash this panel and [to] start over again with a new panel altogether with each side having all their strikes.

R. 57, l. 12 – 58, l. 1. In response, the trial court stated that he properly excused both jurors #43[2] and #48 and that Appellant was not prejudiced by the excusal of those jurors. R. 58, l. 2 – 59, l. 6. The trial court again denied defense counsel's motion to quash the jury panel. R. 60, l. 20.

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[2] Juror #43, Shahram Lilianpour (listed as a white male), is a hotel manager, who allowed the police to practice drug busts at the hotel, and after being seated as a juror, maintained that he could not be fair and impartial. R. 31, l. 6 – 35, l. 1. The trial court excused this juror.

ARGUMENT

The trial court erred in refusing to quash the jury panel pursuant to Appellant's *Batson* motion because the State struck three of the four black jurors called: two of whom were improperly struck; one based on incorrect criminal history; and the other for allegedly smiling at the defense table.

At the conclusion of jury selection, defense counsel "object[ed] to this panel being sworn as the jury in this case [pursuant to *Batson v. Kentucky*, 476 U.S. 79]." R. 44, l. 17 – 45, l. 10. Defense counsel stated "that the State used three strikes of their five strikes [to strike two black males and one black female]" and that "[e]very single strike [the State] used was to strike . . . a black juror." R. 44, ll. 19-23. Specifically, the solicitor struck three of the four black jurors called: two of which were improperly struck, one based on incorrect criminal history and the other for allegedly smiling at the defense table. R. 44, l. 19 – 54, l. 24. Therefore, the trial court erred in refusing to quash the jury panel pursuant to Appellant's *Batson* motion, particularly when the only black juror not struck by the solicitor was excused *after* being seated as a juror. R. 28, l. 22 – 29, l. 11; 35, l. 5 – 41, l. 24; R. 55, l. – 60, l. 20.

A criminal defendant is constitutionally guaranteed a fair trial by an impartial jury. *See* U.S. Const. amend. VI; *see also* S.C. Const. art. I, § 14; *State v. Salters*, 273 S.C. 501, 257 S.E.2d 502 (1979). This guarantee includes the right to a selection process that is unbiased and fair to the defendant and the jurors. *See Powers v. Ohio*, 499 U.S. 400, 410-16 (1991). The United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits the prosecution from striking potential jurors on the basis of race. *Batson*, 476 U.S. 79. Additionally, a trial court must hold a *Batson* hearing when members of a cognizable racial group are struck and the opposing party requests a *Batson* hearing. *See State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88,

90 (1999).

Batson and its progeny "protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venire person'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. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006). Therefore, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472 (quotation citation omitted).

Furthermore, "[w]hether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. *Id.* 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] mind lies peculiarly within a trial [court's] province.'" *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). This court will give the trial court's finding great deference on appeal and review the trial court's ruling under the "clearly erroneous" standard. *Id.*, 384 S.C. at 509, 682 S.E.2d at 822.

In *Purkett v. Elem*, 514 U.S. 765, 767 (1995), the United States Supreme Court set out the procedures for a trial court to follow when a party challenges a peremptory strike. The South Carolina Supreme Court adopted that procedure in *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). Specifically, *Batson* challenges follow a three step process: (1) the opponent of the strike requests a hearing and asserts a *prima facie* case of

racial or gender discrimination; (2) the proponent of the strike must offer a race or gender neutral explanation; and then (3) the opponent must show the race or gender neutral explanation was mere pretext. *See State v. Cochran*, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006).

The "second step of this process does not demand an explanation that is persuasive, or even plausible." *Purkett*, 514 U.S. at 767-68. The South Carolina Supreme Court recognized that the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations for the strikes. *Adams*, 322 S.C. at 123, 470 S.E.2d at 371; *See Purkett*, 514 U.S. at 768 (finding unless discriminatory intent is inherent in the explanation, it is deemed race neutral at step two).

During the third step, the moving party "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 (citing *Adams*, 322 S.C. at 124, 470 S.E.2d at 372). "This burden is generally established by showing similarly situated members of another race were seated on the jury." *Id.* "Unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext." *Id.*

However, "[u]nder some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment." *Edwards*, 384 S.C. at 508-09, 682 S.E.2d at 822. Accordingly, if the trial judge determines the race and gender neutral explanations were mere pretext, then the trial court must quash the jury panel and select a

new jury. *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298; *See Riddle v. State*, 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994) (finding courts will examine the totality of the facts and circumstances in the record to determine if a *Batson* violation has occurred); *see also State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990) (finding the composition of the jury panel is also a factor that may be considered when determining whether a party engaged in purposeful discrimination).

In this case, the totality of the facts and circumstances surrounding the selection of the jury demonstrates that a *Batson* violation occurred and that the jury panel should have been quashed. *See generally State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009) (finding "[w]hether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record"). First, the solicitor admitted that he struck juror #83 based on his incorrect belief of juror #83's criminal history. R. 48, l. 7 – 48, l. 23. Thus, the trial court erred in failing to quash the jury panel by not finding in favor of Appellant when the solicitor made the mistake. R. 49, l. 13 – 50, l. 8.

Second, although demeanor can be considered race neutral,[3] the trial court failed to fulfill its "important gatekeeping role" by admitting "*whether* [the solicitor's race-neutral reason for striking juror #50 was] *prext[ual] or not, that's difficult to say*," and yet still found the strike constitutional without any indication of whether juror #50 actually smiled at the defense table. R. 54, ll. 6-24 (emphasis added); *Cf. Cochran*, 369 S.C. at 318, 631 S.E.2d at 300 (finding "if a party were able to overcome every *Batson* challenge by merely claiming that a prospective juror's demeanor and disposition were somehow inappropriate, the equal protection principles underlying *Batson* would be weakened. The

[3] *See State v. Wilder*, 306 S.C. 535, 413 S.E.2d 323 (1991).

trial court serves an important gatekeeping role in this regard. . . . In the absence of an express and contrary finding by the trial court, a party's striking of a juror based on demeanor and disposition should be upheld by the trial court"). Accordingly, the trial court erred in finding that Appellant failed to prove that the solicitor's purported reason for the strike was pretextual. R. 50, l. 23 – 54, l. 24; *See Snyder v. Louisiana*, 552 U.S. 472 (finding "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose") (quotation citation omitted).

Prior to the excusal of two seated jurors, the solicitor used three strikes on three black jurors, which proves a "pattern" of solely striking jurors from a single racial group. R. 7, l. 1 – 30, l. 24; *Cf. Cochran*, 369 S.C. at 315, 631 S.E.2d at 298 (finding "we disagree with the State's argument that Appellants embarked on a "pattern" of striking jurors because of their race. Appellants did not use their peremptory challenges solely on jurors from a single racial group"). The final composition of the jury panel, including the alternate, was clearly not diverse: eight white females and four white males. R. 86-87 (sentencing sheet); *See State v. Shuler*, 344 S.C. 604, 621, 545 S.E.2d 805, 813 (2001) (finding "the composition of the jury panel is a factor that may be considered when determining whether a party engaged in purposeful discrimination pursuant to a *Batson* challenge"); *Cf. State v. Oglesby*, 298 S.C. 279, 379 S.E.2d 891 (1989) (finding a prosecutor's asserted reason for excluding prospective jurors of one race is a pretext for racial discrimination in light of a failure to strike jurors of another race who differed in no significant way from the jurors who were excused).

Furthermore, additional prejudice to Appellant exists in this case because a note was found by a bailiff in the jury deliberation room post verdict, which stated in pertinent part,

"*The State did* <u>*not*</u> *prove, beyond a reasonable doubt, that James [Appellant] sold crack, which was then handled inappropriately.*" R. 79 (emphasis added). This note is particularly important because the jury sent out a different note during deliberation, which stated, "11 people have made up their mind and 1 person has made up theirs. We are hung. What do we do?" R. 80-81 (recreated jury note and letter from court reporter).[4] In response, the trial court wrote on the note, "continue deliberating." R. 80 (recreated jury note).

The day after the verdict, a hearing was held to address this note. R. 68 –76. At the hearing, defense counsel renewed his motion for a new trial based on the "very unusual jury selection in this case" and the note "reflect[ing] that at least somebody in the jury room had some concerns about guilt." R. 71, ll. 8-23. The solicitor noted that the jury reached a unanimous verdict and was polled at defense counsel's request. R. 72, ll. 15-24. The trial court stated that "the note does not in anyway indicate that the defendant has been denied any fundamental fairness or that the jury had failed to follow the law" and denied defense counsel's motion for a new trial. R. 73, l. 18 – 8, ll. 2.

Therefore, the trial court erred in refusing to quash the jury panel pursuant to Appellant's *Batson* motion and the final composition of the jury. *See Snyder*, 552 U.S. 472; *see also Shuler*, 344 S.C. at 621, 545 S.E.2d at 813; *Cf. Cochran*, 369 S.C. at 315, 631 S.E.2d at 298.

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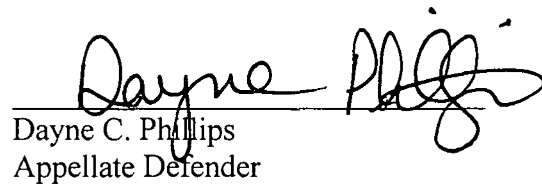
[4] This note was discussed in chambers and was never placed on the record. R. 81. This note was also never entered into evidence and could not be found on April 21, 2011, so it was recreated and signed by Judge Cole, defense counsel, and the solicitor.

CONCLUSION

For the foregoing reasons, Appellant James Byers requests that this Court reverse his convictions and remand this case to the Cherokee County Court of General Sessions for a new trial.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

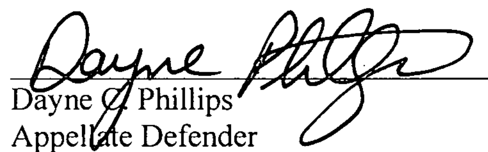
ATTORNEY FOR APPELLANT

This 17th day of September, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 17, 2012



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THE STATE,

RESPONDENT,

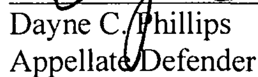
V.

JAMES R. BYERS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Christina J. Catoe Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of September, 2012.



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of September, 2012.

______________________(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013