ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY

Court of General Sessions

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2015-000170

The State of South Carolina, ... Respondent,

v.

Odom Bryant, ... Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by allowing the State's main witness to reference the status of the case against a conspiracy co-defendant when the evidence was irrelevant and highly prejudicial and when counsel stipulated the evidence would not be admitted, the trial court ruled the evidence would not be admitted, and the defense reasonably relied upon the stipulation and ruling?

2. Did the trial court err by failing to follow the proper *Batson* procedure and shifting the burden to the defense, and thereafter improperly granting the State's *Batson* motion, resulting in a member of the venire struck by the defense being on the jury?

STATEMENT OF THE CASE

This appeal arises from errors of law committed by the trial court in the prosecution and conviction of Appellant Odom Bryant.

The Horry County Grand Jury indicted Mr. Bryant on September 25, 2013 on two counts of murder for the August 19, 2012 deaths of Thomas Hatfield and Amos Hatfield. R. 621. The Solicitor called Mr. Bryant's case to trial before Judge Benjamin H. Culbertson on January 12, 2015. R. 1.

Dean Mureddu and Casey Brown represented Mr. Bryant. (*Id.*). Bradley Richardson and Monica Wooten served as prosecutors. (*Id.*). The State called twelve witnesses in support of its case. Mr. Bryant did not testify. At the close of the State's case, the trial court orally denied Mr. Bryant's motion for directed verdict. R. 454 – 456.

On January 15, 2015, the jury returned a verdict of guilty on both murder counts. R. 520.

Judge Culbertson sentenced Mr. Bryant to concurrent thirty year sentences. R. 521, ll. 18-22. After sentencing, Mr. Bryant moved to set aside the verdict, which motion the trial court orally denied. R. 522, ll. 1-4.

This appeal followed.

STATEMENT OF THE FACTS

On August 19, 2012, law enforcement was dispatched to 1163 Red Bluff Road in Loris, Horry County, South Carolina for a burglary in progress and arrived on the scene about 4:05 a.m. R. 121, l. 20 – 124, l. 4. Amos Hatfield owned the residence at 1163 Red Bluff Road. R. 173, ll. 22-25.

The front door of the mobile home was locked, and the police officers went to the back of the residence where the door was wide open. R. 124, ll. 15-24. The back door had not been damaged or pried open. R. 183, ll. 15-18. Standing in the yard, the police could see into the house through the open back door. R. 125, ll. 14-19.

Upon entering the residence, the police saw two males lying face down on the floor, one in the living room and one in the kitchen. R. 126, ll. 6-12. These men were Amos Hatfield (in the kitchen) and his son Thomas Hatfield (in the living room). R. 174, l. 8; 188, ll. 18-20; 195, ll. 7-22. Both men had been shot in the head. R. 190, ll. 13-17; 197, l. 24 – 198, l. 3; 281, l. 23.

Officer Tindall heard a female voice in distress coming from the master bedroom. R. 127, ll. 20-25. Sandy Locklear was on the master bed in her night clothes. R. 128, ll. 8-18. Ms. Locklear stated she had been attacked, bound, and raped by two men in the master bedroom. R. 135, ll. 7-14; 252, ll. 20-23. When the police arrived, Ms. Locklear was not bound or tied up or restrained in any way. R. 135, l. 15 – 136, l. 1. There was tape on the ground in the bedroom. R. 136, ll. 2-5. Long portions of this black duct tape were found in a clump in the bedroom hallway. R. 207, l. 23 – 208, l. 25. A roll of black duct tape was found on a shelf above the washer and dryer. R. 209, l. 13 – 210, l. 10.

No guns were found in the residence. R. 214, ll. 18-19. In fact, no gun was ever found associated with this case. R. 329, ll. 5-7.

After Ms. Locklear was treated that morning at a local hospital, authorities brought her to the police department to be interviewed. R. 320, l. 8 – 321, l. 25. She told multiple lies and the interview became an interrogation. R. 322, l. 15 – 323, l. 2. The police arrested her and charged her with two counts of murder. R. 324, ll. 2-6. She then blamed her yard man Nehemiah James Evans of Tabor City and another man, Odom Bryant. R. 324, ll. 7-23; 375, ll. 3-5. Mr. Evans was arrested and charged with two counts of murder. R. 327, ll. 18-25. Mr. Bryant was then arrested and also charged with two counts of murder.

Ms. Locklear lived in Tabor City, North Carolina in a house that Amos Hatfield bought for her. R. 292, ll. 1-2; 361, ll. 24-25. She was married to Amos Hatfield around 2011, and Mr. Hatfield was about thirty years her senior. R. 293, ll. 8-19. Despite being very close to Mr. Amos Hatfield, his brother Clayton Hatfield did not know of the marriage. R. 281, l. 24 – 282, l. 1; 285, ll. 1-2. After the marriage, Ms. Locklear continued to live in Tabor City and her husband Mr. Hatfield would visit when it was convenient for Ms. Locklear. R. 293, ll. 20-25.

Despite buying Ms. Locklear the house in Tabor City, Mr. Amos Hatfield remained a resident of Loris, South Carolina. R. 294, ll. 1-11. Mr. Amos Hatfield gave Ms. Locklear a life insurance policy in the presence of her first cousin Faye Hunt. R. 294, ll. 19-25. This significant insurance policy named Ms. Locklear as a beneficiary of Mr. Amos Hatfield's life. R. 365, ll. 9-20. Ms. Locklear's response to receiving this policy was to tell Ms. Hunt "[G]irl, if that son-of-a-bitch died today I'd be a rich bitch

tomorrow." R. 295, ll. 14-18. After the killings, the police located this insurance policy in Ms. Locklear's house. R. 366, ll. 21-22.

Mr. Clayton Hatfield had loaned Mr. Amos Hatfield a small Lorcin .25 caliber automatic pistol that was silver and had white handles that appeared to be pearl-handled. R. 285, l. 17 – 286, l. 16. Ms. Locklear thereafter was in possession of a small pearl-handled handgun. R. 297, ll. 10-25. Both Mr. Amos Hatfield and Mr. Thomas Hatfield were killed by bullets from a .25 caliber automatic pistol, possibly Lorcin. R. 349, ll. 13-25; 350, ll. 13-16; 352, ll. 16-19.

Mr. Bryant first denied having any involvement with the Hatfield residence. R. 410, ll. 21-24. Thereafter, he changed his story. Mr. Bryant met Sandy Locklear through his friend Nehemiah James Evans. R. 418. One day Mr. Evans asked Mr. Bryant for assistance. R. 420. Ms. Locklear then met up with Mr. Evans and Mr. Bryant and told the boys she wanted them to scare Mr. Thomas Hatfield for being doing drugs and spending Mr. Amos Hatfield's money. R. 422 – 423. Mr. Bryant was not being paid and nobody was to be hurt; he was doing Mr. Evans a favor. R. 424 – 425. Mr. Bryant had a wooden baseball bat; he was not armed and he did not think anyone would have a gun. R. 425 – 426.

Mr. Bryant was in the back of the house when he heard Sandy Locklear shoot both Hatfields, which shocked Mr. Bryant and was not part of the plan. R. 428. Mr. Bryant never saw Ms. Locklear bound or raped. R. 430.

ARGUMENT I

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Kirton*, 381 S.C. 7, 23, 671 S.E.2d 107, 114-15 (Ct. App. 2008) (citations omitted). "A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." *Id.* at 23, 115.

The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court whose ruling will not be disturbed on appeal in the absence of an abuse of discretion amounting to an error of law. *State v. Tuckness,* 257 S.C. 295, 185 S.E.2d 607 (1971). "The burden on motion for mistrial because of anything occurring during trial is upon movant to show not only error, but resulting prejudice." *Id.* at 303, 610.

I. The Trial Court Erred By Allowing The State's Main Witness To Reference The Status Of The Case Against A Conspiracy Co-Defendant When The Evidence Was Irrelevant And Highly Prejudicial And When Counsel Stipulated The Evidence Would Not Be Admitted, The Trial Court Ruled The Evidence Would Not Be Admitted, And The Defense Reasonably Relied Upon The Stipulation And Ruling.

The State's case rested upon its allegation that "this is a conspiracy-based crime, hand-of-one-hand-of-all theory, if two or more conspire to commit an act together . . ." , and the conspiracy supposedly included Appellant Mr. Bryant, Mr. Nehemiah James Evans, and Ms. Sandy Locklear.

At the beginning of the case, outside of the presence of the jury and before any witnesses testified, the defense moved to exclude any reference to the status of the case against the two codefendants, Ms. Locklear and Mr. Evans. R. 45, l. 19 – 46, l. 23.

Specifically to Mr. Evans, defense counsel argued "I don't think it would be appropriate to discuss the lack of an outcome and/or that the status – is a better way to put it – of the Nehemiah James Evans case, that it is pending." R. 46, ll. 10-13. Defense counsel noted that the State was in agreement with keeping out such evidence, stating:

> I think the Solicitor agrees that that information should not come in front of a jury, should not have any weight or bearing on the decision they make as to my client's guilt or innocence surrounding the charge. Any probative value it could have is substantially outweighed by its prejudicial value. The Solicitor said that he would consent and instruct his witnesses that no one is to mention the outcome of Sandy Locklear's case, nor the status pending or no outcome of the Nehemiah James Evans case.

R. 46, ll. 14-23.

Having heard defense counsel's recitation of the stipulation of counsel, the State confirmed this agreement, stating:

> We will not mention anything, and we'll instruct our witnesses not to mention the disposition of . . . Mr. Evans' case. I think the only time they will mention it is typically during the investigation they'll say this person was charged and this person was charged, without going into any other great detail.

R. 46, l. 25 – p. 47, l. 6.

The trial court granted the defense's motion to exclude, and in so ruling the trial court acknowledged "the consent of the State." R. 47, ll. 14-15.

Brandon Strickland of the Horry County Police Department was the State's pivotal law enforcement witness and "lead investigator" and thus he was not sequestered from the courtroom. R. 44, ll. 16-25. At the time of the homicides, he was a detective with the department and is now a sergeant. R. 50, ll. 22-24. Because Sergeant Strickland was present for Mr. Bryant's post-arrest statement to law enforcement, he was the

witness in the *Jackson v. Denno*[1] pretrial hearing before Judge Culbertson, which occurred immediately prior to trial. R. 50.

At that pretrial *Jackson v. Denno* hearing, Sergeant Strickland testified that while speaking with detectives, Mr. Bryant stopped the interview but thereafter began asking questions about what codefendant Nehemiah James Evans had told the police. The police refused to share with him what Mr. Evans said. R. 61, ll. 3-5. Mr. Bryant then "made a comment to the effect of, James couldn't deal with it . . ." and he reinstituted the interview with detectives that led to his statement. R. 61, ll. 3-8 and 19-23. Because Sergeant Strickland's statement about what Mr. Bryant supposedly said about Mr. Evans was outside the presence of the jury, no action was needed or taken by defense counsel regarding his testimony contrary to the stipulation.

Once the trial commenced, the State used Sergeant Strickland to introduce Mr. Bryant's statement. During the direct examination, the following exchange occurred:

> Q (prosecutor): Does there come a time whenever [Mr. Bryant] asked to speak with you all more thoroughly?
>
> A (Strickland): Yes. After cutting off the recorder and gathering up our paperwork, begin walking out the door down the stairs, Mr. Bryant inquired about the - - one of the codefendants, Mr. Evans, and stated something to the effect - -
>
> Defense counsel: Objection. At this time it is not part of the record. It is outside after counsel had - - we may need to be heard on this.
>
> The Court: What was the question?
>
> Prosecutor: I'll move on.
>
> The Court: All right. Sustained.

R. 389, ll. 8-20.

[1] 378 U.S. 368 (1964).

Thus, when the prosecutor asked a yes/no question of Sergeant Strickland about the recommencement of Mr. Bryant's statement, the sergeant responded "yes" and then launched into an explanation that would allow him to reference what Mr. Bryant said about Mr. Evans ("stated something to the effect . . ." tracks his language during the *Jackson v. Denno* hearing of "made a comment to the effect . . ."). The prosecutor instantly realized the problem (stating "I'll move on" as opposed to responding to the objection) and the trial court, consistent with its pretrial ruling, sustained the defense objection.[2]

Defense counsel cross-examined Sergeant Strickland with questions about Mr. Bryant's statement. Specifically, defense counsel asked:

> Q (defense counsel): So when [Mr. Bryant] reinitiated the interview, according to him, basically, he told you all, Okay, I was lying, now I'm going to tell you what really happened, can you sum it up, something like that? Do you want me to say it a different way.
>
> A (Strickland): I'll say exactly what he told me. He said as we're walking out, he said, James cut a deal, didn't he; that is what he said to me.

R. 412, ll. 2-9.

Despite the parties' stipulation, as confirmed by the trial court's ruling, Sergeant Strickland used a simple question as a springboard to specifically told the jury what Mr. Bryant said about Mr. Evans when he knew the trial court had previously ordered that such comment not be made. Moreover, what he said to the jury was different – and much worse – than his previous testimony.

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[2] This was the second time the trial court had to sustain such an objection. Previously, the State wanted to offer testimony that Mr. Evans had run away when he encountered law enforcement. The judge rejected that request by stating "I understand the hand of one is hand of all, but that fact doesn't imply that Mr. Bryant would have."

- *Jackson v. Denno* hearing (outside presence of jury):

  Mr. Bryant "made a comment to the effect of, James **couldn't deal** with it . . ." R. 61, ll. 3-8 (emphasis added).

- Trial (presence of jury):

  Mr. Bryant said "James **cut a deal**, didn't he . . . R. 412, l. 8 (emphasis added).

Sergeant Strickland sandbagged the defense during the *Jackson v. Denno* hearing, and despite being in the courtroom for: (a) the trial court's initial ruling approving the stipulation and excluding reference to the status of the cases against the codefendants Locklear and Evans and (b) hearing the trial court sustain the defense's objection to the beginnings of a similar answer in his direct examination, he created his own opportunity during cross-examination to blurt out the information about Mr. Evans before the jury – and, the supposed statement about "cutting a deal" was much worse than his original testimony on the matter.

Defense counsel asked the court to excuse the jury, objected to the answer and pointed to the court's previous ruling, and moved for a mistrial. The prosecutor defended the answer by stating "this is what was testified to during the Jackson v. Denno when it was asked to show the voluntariness of what transpired while the recording was off." R. 414, ll. 4-7. As shown above, the *Jackson v. Denno* testimony and the trial testimony have a critical distinction.

The prosecutor also argued that the testimony was admissible because it shows why Mr. Bryant reinstituted the interview, apparently forgetting that just a few moments earlier the prosecutor himself had asked the question "Does there come a time whenever

[Mr. Bryant] asked to speak with you all more thoroughly?" Sergeant Strickland's attempt to answer that question by referring to Mr. Evans was improper and would have violated the stipulation, just as his answer to the defense question about the reinstituting of the interview.

Despite having prohibited any reference to the status of Mr. Evans' case before the trial began, the trial court denied the motion for a mistrial by stating "[y]ou asked the question." R. 414, ll. 23-24. This was error.

A. The trial court's allowing Sergeant Strickland to tell the jury Mr. Bryant thought Mr. Evans had "cut a deal" improperly allowed an irrelevant matter into evidence, and was highly prejudicial.

In *State v. Brown*, a conspiracy case against a "middleman" in a drug deal, the prosecution sought to enter into evidence at the middleman's trial the fact that the individual who was the source of the drugs pled guilty to distribution. 306 S.C. 448, 449, 412 S.E.2d 440, 441 (Ct. App. 1991). The defense objected to the evidence as being irrelevant, highly prejudicial, and hearsay. The trial court overruled the objection.

An undivided Court of Appeals, including retired Chief Justice Littlejohn, held the ruling was error, stating "[s]uch evidence is irrelevant and highly prejudicial." *Id.* The Court of Appeals continued by stating:

> Whether or not [distributor] *pleaded guilty* to distribution does not tend to establish [middleman's] guilt. Further, even if [distributor's] guilty plea were relevant, it should have been excluded since its probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice means an undue tendency to suggest decision on an improper basis.

Id. The Court of Appeals found the admission of evidence unduly prejudicial reversed the conviction and remanded for a new trial. *Id.*

The instant matter is highly similar to *Brown*. Both cases involved conspiracy prosecutions, and in both cases the State attempted to use the status of the legal case against another member of the alleged conspiracy to convict the first member. However, the situation here is even more egregious because at the time of Mr. Bryant's trial, Mr. Evans had not yet proceeded to trial. The trial court improperly allowed the State to stain Mr. Bryant with the supposed guilty plea of an alleged co-conspirator whose case had not reached final disposition. This was error.

B. The trial court's ruling ignored the stipulation of the parties and its own consistent prior rulings, and eviscerated Mr. Bryant's reliance on the stipulation and prior rulings.

"The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial." *Hall v. Benefit Ass'n of Ry. Employees*, 164 S.C. 80, 83, 161 S.E. 867, 868 (1932). "A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys." *Kirkland v. Allcraft Steel Co., Inc.*, 329 S.C. 389, 392, 496 S.E.2d 624, 626 (S.C. 1998) (citing *State v. Anderson*, 318 S.C. 395, 458 S.E.2d 56 (Ct. App. 1995)). "Stipulations, of course, are binding upon those who make them." *Kirkland*, 329 S.C. at 392-393, 496 S.E.2d at 626 (citing 73 *Am.Jur.2d* Stipulations § 8, at 543 (1974)); *Shelton v. Bressant*, 312 S.C. 183, 184, 439 S.E.2d 833, 834 (1993) ("Acts of an attorney are directly attributable to and binding upon a client.")

In this case, counsel stipulated – and the trial court confirmed – that Sergeant Strickland would not testify to the status of the case against Mr. Evans. However, by telling the jury that Mr. Bryant rhetorically asked the interviewing officers that "James

cut a deal didn't he . . .", Sergeant Strickland violated this binding stipulation. Thereafter, the trial court erred by ignoring the stipulation and its own prior rulings.

In *State v. Jones*, neither party objected during the charge conference to the judge's proposed jury instructions regarding reasonable doubt. 343 S.C. 562, 576, 541 S.E.2d 813, 820 (2001). Thereafter, the defendant made reference to the reasonable doubt charge during his closing. The prosecutor did not object during the closing, but after the jury was excused he asked the judge to change the reasonable doubt charge. The judge granted the request. *Id.* at 577, 821.

An undivided Supreme Court reversed the matter and remanded for a new trial, holding that the defendant "reasonably relied upon the judge's representation that he intended to give that charge to the jury. The decision to alter the charge, after the argument, was fundamentally unfair." *Id.* at 578, 821. The Supreme Court went on to "remind prosecutors that they are 'ministers of justice and not mere advocates' and their special 'responsibility carries with it specific obligations to see the defendant is accorded procedural justice" before concluding "[i]t does not serve justice nor instill public confidence when we are required to reverse convictions because of errors such as these." *Id.* at 578, 822 (internal citations omitted).

In *State v. Woomer*, an undivided Supreme Court reversed the conviction and remanded for a new trial when the trial judge agreed to a limited cross-examination but thereafter turned turtle and allowed the solicitor to exceed the limitation. 277 S.C. 170, 173, 284 S.E.2d 357, 358 (1981).

In this case, the error is even more egregious than *Jones* because here the judge actually ruled (as opposed stating an intention to take an action). The State called ten

witnesses subsequent to the trial court excluding the reference to Mr. Evans' case and prior to Sergeant Strickland. Throughout this day and a half of trial, the defense reasonably relied that the stipulation would hold and the trial court's ruling enforced, all of which impacted trial strategy. However, at the end of the trial and a critical juncture, the prosecution's main witness abandoned the stipulation and the trial court reversed its prior orders. This was fundamentally unfair.

C. The trial court's errors were prejudicial.

"To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) (quotation omitted). "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 omitted).

The trial court's ruling is prejudicial to Mr. Bryant because of the nature of the evidence admitted, and because of its fundamental unfairness since Mr. Bryant reasonably relied on the stipulation and the prior ruling.

Whether another member of a conspiracy is found guilty does not tend to establish the guilt of another member of the conspiracy, and as such the admission of such irrelevant and highly prejudicial evidence requires reversal. *Brown*, 306 S.C. at 449, 412 S.E.2d at 441.

Moreover, when a court's ruling is fundamentally unfair to the defendant, it is prejudicial to the defendant. *See Humphries v. State*, 351 S.C. 362, 375, 570 S.E.2d 160,

167 (2002) ("we must consider whether any of the solicitor's comments in his closing argument were so unduly prejudicial as to render his sentencing fundamentally unfair"). Allowing for a ruling to be changed at the end of trial when the defense relied upon the ruling is fundamentally unfair. *Jones*, 343 S.C. at 578, 541 S.E.2d at 821; *see State v. Perry*, 410 S.C. 191, 198, 763 S.E.2d 603, 606 (Ct. App. 2014) ("*Jones* requires a defendant to reasonably rely on the trial court's ruling to his or her detriment in order for a subsequent change to impact the fundamental unfairness of the defendant's trial"); *Woomer*, 277 S.C. at 173, 284 S.E.2d at 358 ("Once the trial court induced appellant to testify by limiting the scope of the testimony, Woomer had a right to rely on that assurance, and the solicitor's violation of the limited scope of cross examination was fundamentally unfair. Such a fundamental unfairness warrants reversal . . .")

ARGUMENT II

Standard of Review

Appellate courts give the trial judge's decision on a *Batson* motion great deference on appeal, and review the trial judge's ruling with a clearly erroneous standard. *State v. Dyar,* 317 S.C. 77, 452 S.E.2d 603 (1994). Critically, this standard of review 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). When the error is the failure to follow the *Batson* hearing procedure, the appellate court must answer a question of law and thus the standard of review is plenary. *Id.* at 313, 297.

I. The Trial Court Erred By Failing To Follow The Proper *Batson* Procedure And Shifting The Burden To The Defense, And Thereafter Improperly Granting The *Batson* Motion, Resulting In A Member Of The Venire Struck By The Defense Being On The Jury.

On January 12, 2015, Judge Culbertson commenced jury selection after disposing of preliminary matters. R. 27. After twelve jurors and two alternates were selected, the State made a motion pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986).[3]

"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." *McCrea v. Gheraibeh*, 380 S.C. 183, 186, 669 S.E.2d 333, 334 (2008). "In *Batson*, the United States Supreme Court outlined a three-step process for evaluating claims that peremptory challenges have been exercised in a manner violative of the Equal Protection Clause." *State v. Giles*, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014). The United States

[3] *Batson* applies to criminal defendants through *Georgia v. McCollum*, 505 U.S. 42 (1992).

Supreme Court refined the test to be used for evaluation of the appropriateness of a preemptory strike in *Purkett v. Elem*, 514 U.S. 765 (1995).

"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). When on party strikes a member of a cognizable gender or race, the opposing party may request a *Batson* hearing and the trial court is obligated to conduct a hearing on the request. *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001).

South Carolina appellate courts have had several opportunities to address *Batson* motions on appeal, two recent opinions being *State v. Inman*, 409 S.C. 19, 760 S.E.2d 105 (2014) and *Giles*.

In *Giles*, the Supreme Court laid out the following procedure for addressing the motion, which starts with the moving party:

> 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.

407 S.C. at 18, 754 S.E.2d at 263 (internal citations omitted) (spacing added).

All steps in the analysis are not created equal, and the trial court only moves to each step if the previous step is met.

Step one requires the moving party must first make a prima facie showing that a strike was based on race or gender. *Id.* Only if such a showing is made does the matter proceed to step two. *Purkett*, 514 U.S. at 767 ("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)").

Step two – the provision of a race or gender neutral explanation by the non-moving party – is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible." *Inman*, 409 S.C. at 26, 760 S.E.2d at 108. In fact, the reason does not even have to make sense, and even a silly or superstitious reason may suffice because it is not until the third step of the *Batson* process that the persuasiveness of the explanation becomes relevant. *Purkett,* 514 U.S. at 765. The non-moving party must only give an explanation that is "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 21-22, 754 S.E.2d 261, 265.

Step three "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." *Inman*, 409 S.C. at 27, 760 S.E.2d at 108. During the third step, the party opposing the strike must show direct

evidence of discrimination. *Id.* "The trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility. Often the demeanor of the challenged attorney will be the best and only evidence of discrimination." *Shuler*, 344 S.C. at 615-16, 545 S.E.2d at 810 (citations omitted).

Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record. *Riddle v. State,* 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994). Again, the ultimate burden is always on the moving party. *Giles*, 407 S.C. at 18, 754 S.E.2d at 263.

A. The trial court erred by failing to follow the proper *Batson* procedure and improperly shifting the burden to the defense.

During the first selection, the defense exercised six preemptory strikes, on individuals with juror numbers 259, 199, 26, 42, 49, and 121. R. 27 – 31. In making the *Batson* motion, the State claimed "that all of the defense's strikes struck white jurors, and all but one were male . . ." R. 32, l. 24 – 34, l. 33. However, the State acknowledged that one white male was placed on the jury and "several" white females. R. 33, ll. 3-4.

The trial court then conducted a *Batson* hearing. R. 32 – 41. Instead of following the well-defined procedure that begins with a requirement that the State to put forth a prima facie case of bias, immediately upon the State making the motion Judge Culbertson looked at defense counsel and said "[l]et's go down the list". R. 33, ll. 5-8. The trial court then made defense counsel give his reasons for striking the individuals with juror numbers 259, 199, 26, 42, 49, and 121. R. 33, l. 8 – 35, l. 21. Instead of defense counsel merely having to respond to the prosecution's initial burden of a prima facie case, the trial court put the onus on defense counsel to first justify each strike. This was improper under *Purkett*, a case in which the United States Supreme Court reversed the Eighth

Circuit Court of Appeals for combining *Batson's* second and third steps into one and requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive. 524 U.S. at 768. The United States Supreme Court held that it is not until the third step of the *Batson* process, at which the trial court determines whether the opponent of the strike has carried the burden of proving purposeful discrimination, that the *persuasiveness* of the justification becomes relevant. *Id.*

After hearing from defense counsel, the judge then turned to the prosecutor and stated "those are the reasons for [defense counsel's] striking. I think the burden now shifts to the State to show that those are not valid reasons . . ." R. 35, ll. 23-25. The prosecutor was then given the opportunity to rebut the defense strikes. R. 36, ll. 2-22.

Thus, instead of the prosecutor being required to make a prima facie showing at the commencement of the hearing as to which each preemptory strike was based on bias, the trial court merely required the prosecutor to state that he wanted a *Batson* hearing and reference some of the juror's race and gender and then immediately required defense counsel to articulate reasons to justify the strikes. This procedure is in violation of *Inman*, *Giles*, and the many other appellate cases discussed above. It improperly shifted the burden to the defense, which is reversible error. *See Cochran*, 369 S.C. at 313, 631 S.E.2d at 297 ("The reversal here comes not from second-guessing, but as a result of a legal error in not adhering to the mandated *Batson* procedure, specifically the failure to require the opponent of the strike to prove purposeful discrimination").

B. Even if the trial court did not improperly shift the burden to the defense, the trial court erred by granting the Batson motion as to Juror 49.

The defense exercised a preemptory strike on Juror 49 (Andrew Chandler) with a preemptory strike. R 29, ll. 7-13. When forced to give a reason for the strike before the State made a prima facie case of bias, defense counsel stated:

> We have his affiliation in the Army National Guard. I don't know how the National Guard, whether you say it is active in the guard or not, but we have it in our notes as him being somehow affiliated with the military . . .

R 34, l. 20 – 35, l. 1.

The State countered by arguing that a female, Juror 13 (Reebekah Austin), was not struck by the defense and "she is retired [sic] military pilot" and her husband was in the Navy for eight years but is now retired. R. 36, ll. 11-15. The State did not put forth any other argument about Juror 49.

It is incumbent upon the trial judge to focus on whether there are meaningful distinctions between the individuals compared, *State v. Scott*, 406 S.C. 108, 115, 749 S.E.2d 160, 164 (Ct. App. 2013) (citation omitted); there is no appropriate distinction if the jurors are alike "in all relevant aspects." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added).

"Employment is a well-understood and recognized consideration in the exercise of peremptory challenges." *State v. Edwards*, 384 S.C. 504, 510, 682 S.E.2d 820, 823 (2009); *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); *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). Individuals with seemingly similar positions can still be distinct. *United States v. Davis,* 154 F.3d 772, 781 (8th Cir. 1998) (finding there was a sufficient distinction between the

challenged juror who worked as a drug counselor and several seated jurors who worked as drug prevention volunteers to defeat a *Batson* challenge).

Moreover, the distinction between active employment and retirement is a legitimate distinction. This specific issue was addressed by the Supreme Court in *State v. McCray*, 332 S.C. 536, 506 S.E.2d 301 (1998). In that case, the defendant requested a *Batson* hearing due to the striking of black jurors and the presence on the jury of allegedly similarly situated white jurors "who had similar connections to law enforcement." *Id.* at 540, 303. The trial judge disagreed and a unanimous Supreme Court concurred:

> The record from the jury voir dire indicates the three white jurors who were seated on the jury were not similarly situated to the four black jurors who were struck from the jury. While the black jurors had relatives or friends who, at the time of trial, were employed in law enforcement, the relatives or friends of the white jurors were no longer employed in law enforcement. The white jurors did not have the same relationship to law enforcement as the black jurors. Accordingly, appellant failed to meet his burden of establishing the co-defendants' stated reasons for striking the black jurors were pretextual.

Id. at 541, 303. *See also Edwards*, 384 S.C. at 510, 682 S.E.2d at 823 (regular interaction with law enforcement is race neutral reason to strike; a retired person does not have regular interaction with former employment).

The Supreme Court thus approved the distinction between a black prospective juror who has relatives or friends currently in law enforcement from a white prospective juror who has relatives or friends that were previously in law enforcement. This opinion is controlling in the instant case, where Juror 49 is currently in the Army National Guard and Juror 13 and her husband were previously in the military and are now retired. The trial court ruled incorrectly in stating "I don't really see a reason as to why you seated

females that have military ties and didn't seat males that had military ties, so I am going to grant the [*Batson*] motion." R. 39, ll. 1-4. *McCray* says otherwise.

Whether someone is "retired" or simply no longer working in a field is of no import, as the same analysis applies for active employment and unemployment. *State v. Williams*, 379 S.C. 399, 402, 665 S.E.2d 228, 230 (Ct. App. 2008) (upholding the distinction between an unemployed juror and an employed juror whose spouse is unemployed by stating "we do not view as 'fundamentally implausible' the idea that counsel may draw a distinction between the employment status of a prospective juror and the employment status of the spouse of a prospective juror"). "[L]ack of [employment] is a well-understood and recognized consideration in the exercise of peremptory challenges." *Id.* at 402-403, 230; *State v. Haigler*, 334 S.C. 623, 632, 515 S.E.2d 88, 92 (1999) (unemployment is a race-neutral reason for a strike).

The State's curious behavior during the jury selection is notable. During the first selection before the *Batson* motion, the State presented Juror 42 (Dawn Carter), who was struck by the defense. R. 28, ll. 21-25. During the second selection after the *Batson* ruling, the State struck Juror 42 from being an alternate. R. 126, ll. 10-12. This otherwise inexplicable action corroborates the defense's position that the demeanor of a prospective juror during selection matters.

C. The trial court's errors were prejudicial.

The trial court's error is not harmless. The Supreme Court has held that if a *Batson* motion is granted and thereafter one of the jurors who is the subject of the motion is seated on the jury, "then the erroneous *Batson* ruling has tainted the jury and prejudice is presumed in such cases because there is no way to determine with any degree of

certainty whether a defendant's right to a fair trial by an impartial jury was abridged." *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009) (quotation omitted). The proper remedy in such cases is the granting of a new trial. *Id.*

Here, Mr. Bryant's counsel struck Juror 49 with a preemptory strike. R. 29, ll. 7-13. Thereafter, the trial court erroneously granted the State's *Batson* motion, and pulled a new jury. This time, Mr. Chandler made it onto the jury. R. 123, ll. 11-16. Prejudice is presumed and the remedy is a new trial.

CONCLUSION

Judge Culbertson erred by changing the stipulation of the parties and his own prior rulings to admit irrelevant and highly prejudicial evidence about the status of the case against a codefendant, which formed an improper basis for the jury's decision. Further, Judge Culbertson erred by improperly conducting the *Batson* hearing which allowed a juror challenged by the defense to be seated on the jury.

As a result of either or both of these errors of law, this Court should reverse Mr. Bryant's conviction and remand the case to the Horry County Court of General Sessions for a new trial.

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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."

May 17th, 2016

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