ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2018-0001727

THE STATE, Respondent,

v.

TRAVIS LAMONT GATHERS, Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUE ON APPEAL

Whether the argument that the trial judge erred by not granting Appellant's Batson motion because of impermissible gender discrimination in the selection of the jury is not preserved for appeal, when Appellant's motion alleged racial discrimination rather than gender discrimination, and where even if this issue is deemed to be properly preserved for appeal whether the trial judge properly denied Appellant's motion because the State struck Juror #175 because of her age rather than her gender?

STATEMENT OF THE CASE

In November 2017, the York County Grand Jury indicted Appellant for one count of possession with intent to distribute cocaine first offense, one count of armed robbery, and one count of possession of a weapon during the commission of a violent crime. (2017-GS-46-4786, 2017-GS-46-4790, 2017-GS-46-4790 (A)). On August 21-23, 2018 a jury trial was held in the York County Court of General Sessions with the Honorable Daniel D. Hall presiding. Appellant was represented by Bryson J. Barrowclough, Esq., and Phillip Smith, Esq. The State was represented by Assistant Solicitors Misti Shelton and Sharon Ohayon of the Sixteenth Circuit Solicitor's Office. Prior to closing arguments, the State decided to proceed on the lesser included offense of possession of cocaine first offense in indictment 2017-GS-46-4786. (R. 97-98). At the conclusion of trial, the jury convicted Appellant of possession of cocaine first offense but acquitted Appellant on the remaining charges. Following the verdict, the trial judge sentenced Appellant to a term of three years' imprisonment for possession of cocaine first offense. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On March 14, 2017, a black male with an orange bandana covering his face robbed the the Ebenezer location of First Citizens Bank in Rock Hill. (R. 54-56). At approximately 9:00 that night, Investigator Luke Boling of the Rock Hill City Police Department made contact with a black male matching the description of the person who robbed the First Citizens bank earlier that day. (R. 72-73). The black male was identified as Appellant. (R. 75). Boling searched Appellant's car and found a cigarette carton with a small amount of cocaine inside. (R. 77). The sample was subsequently tested and determined to be cocaine. (R. 95-96).

Appellant proceeded to a jury trial to answer the charges of armed robbery and possession with intent to distribute cocaine[1]. After the jury was selected, Appellant moved to strike the jury pursuant to Batson v. Kentucky[2]. Appellant alleged the State had impermissibly used peremptory strikes on Juror #175 and Juror #86, because of their race. Juror #175 and #86 were both African American. (R. 41-43). The solicitor responded to Appellant's motion by explaining she struck Juror #175 because of her young age and Juror #86 because of his previous status as the victim of a crime the Solicitor's office prosecuted. (R. 51). The solicitor further noted that she and Juror #86 had a contentious relationship. (R. 51). Appellant declined to attempt to show that the solicitor's reason for striking the contested jurors was mere pretext when the trial judge gave Appellant the opportunity to do so. (R. 52). The trial judge determined the State's reasons for striking each juror were valid race neutral reasons and denied Appellant's motion. (R. 52). At the conclusion of trial, Appellant was convicted of possession of cocaine.

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[1] The State eventually elected to proceed with the lesser included offense of possession of cocaine. (R. 97-98).

[2] Batson v. Kentucky, 476 U.S. 79 (1986).

STANDARD OF REVIEW

When reviewing a Batson challenge, an appellate court is "limited to determining whether the trial court abused its discretion." State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). "This court will give the trial court's finding great deference on appeal and review the trial court's ruling with a clearly erroneous standard." State v. Taylor, 399 S.C. 51, 57, 731 S.E.2d 596, 600 (Ct. App. 2012).

ARGUMENT

I.

Appellant's argument that the trial judge erred by not granting Appellant's Batson motion because of impermissible gender discrimination in the selection of the jury is not preserved for appeal, because Appellant's motion alleged racial discrimination rather than gender discrimination. However, even if this issue was properly preserved for appeal, the trial judge properly denied Appellant's motion because the State struck Juror #175 because of her age rather than her gender.

Appellant argues the trial judge erred by denying Appellant's motion to strike the jury selected for Appellant's trial because the State impermissibly struck Juror #175 based on her gender in violation of Batson v. Kentucky. Appellant's argument fails for multiple reasons. As an initial matter, Appellant failed to preserve this issue for appeal. At trial, Appellant objected to the selection of the jury based on racial discrimination, not gender discrimination. (R. 50-51). Therefore, the State was asked by the trial judge to provide a race neutral reason for striking Juror #175 rather than a gender neutral reason. Accordingly, the trial judge's ruling was premised on whether the State provided a race neutral reason for striking Juror #175. However, even if Appellant preserved this issue for appeal, the trial judge nonetheless appropriately denied Appellant's motion because the State did not strike Juror #175 based on her gender. The State articulated a gender neutral reason for striking Juror #175, when the solicitor stated she "ultimately struck [Juror #175] because she is young." (R. 51, lines 15-16). Appellant declined to argue the State's articulated reason was mere pretext. (R. 52). Therefore, the trial judge correctly denied Appellant's motion to strike the jury.

Error Preservation

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). A party

need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). "The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." State v. Freiburger, 366 S.C. 125, 135, 620 S.E. 2d 737, 742 (2005). "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011).

Here, Appellant objected to the selection of the jury based on alleged racial discrimination in the use of peremptory strikes by the State. However, Appellant did not allege gender discrimination in the selection of the jury and the trial judge did not make his ruling based on gender discrimination. The relevant portion of the record reads as follows:

> The Court: All right, anything further from the State as far as jury selection?
>
> Solicitor Shelton: No, sir, your Honor.
>
> The Court: All right. From the Defense?
>
> Mr. Barrowclough: Your Honor, we would make an inquiry under Batson with regards to the State's strikes of in particular No. 175 and No. 86. I note for the record that the State used 3 of their 4 strikes on African Americans. One I think I know why, No. 193. The other two, I kind of wonder why I have any reasons. And as far as, you know, the pool goes, there are only I think really five African Americans called all together. Three of them were struck, so I was just making an inquiry, your Honor.
>
> The Court: All right. This is a Batson hearing. The State's (sic) alleged that the State has struck two members of a cognizable racial group and is requesting a hearing so, Solicitor, I'll be glad to hear your rational.
>
> Solicitor Shelton: Your Honor, [Juror #175] I struck, she is a twenty-year-old full time college student. In my experience I've had two jurors, two jury pools where

a young female has hung my jury or, on one case, and come close to hanging a jury on another case in serious charges. I have concerns that in my experience with young females with serious cases they have a hard time making those decisions, and that was my reason for striking her. I would note for the record that she has a – she stood up to say that she had a friend or family member who was a victim of a robbery. I weighed that in my consideration but ultimately struck her because she is young.

The Court: all right. And tell me about No. 86.

Solicitor Shelton: No. 86 is Davonta Hemphill I believe. Mr. Hemphill was a prior victim with the Solicitor's office who was not compliant and did not care for our office and that was the reason for striking him. He was actually my victim and was not compliant and did not care for me.

The Court: All right. Thank you.

Solicitor Shelton: And I can give my reasons for—

The Court: No. Mr. Barrowclough, any response?

Mr. Barrowclough: No, your Honor.

The Court: All Right. I find that the reason that the State has given for the strike of Juror No. 175 and 86 are not race based related; has a clearly articulable reason for striking those two jurors, and so I'm gonna (sic)[3] any Batson motion as far as qualification to this jury. Anything further?

Mr. Barrowclough: No, sir, your Honor.

(R. 50-52, lines 12-9). The objection alleged racial discrimination on behalf of the State. Appellant alleged the State used "3 of their 4 strikes on African Americans." (R. 50, lines 19-20). Appellant never referenced the gender of either juror or otherwise made any indication he objected based on gender discrimination. Furthermore, the trial judge understood Appellant's objection to be based on racial discrimination and specifically stated that the hearing was being requested because "the State has truck two members of a cognizable racial group." (R. 51, lines

[3] Presumably, the trial judge intended to say that he denied Appellant's Batson motion.

1-2). Accordingly, in responding to Appellant's objection, the Solicitor offered race neutral reasons for her strikes of Juror #175 and Juror #86. (R. 51, lines 4-23).

Appellant did not object to the selection of the jury based on impermissible gender discrimination, and therefore he has not preserved this issue for appeal. Appellant is attempting to argue one ground at trial and a separate ground on appeal. Our appellate courts have consistently stated that such an argument is not properly preserved for appellate review. In the context of a Batson motion, error preservation rules are particularly important. Here, Appellant is asking this Court to determine whether the trial judge erred in not quashing a jury based on improper gender discrimination by the State when that question was never posed to the trial judge. A trial judge is unable to provide a ruling to a question he is not asked. Likewise, the State cannot provide a gender neutral explanation for a peremptory strike if they are only asked to provide a race neutral explanation for the strike. Accordingly, a trial judge cannot employ the correct three step Batson analysis unless the trial judge knows what ground the Batson motion is based on. Here, Appellant's objection to the selection of the jury was based on alleged racial discrimination. Therefore, Appellant's challenge to the selection of the jury based on gender discrimination is not preserved for appeal.

No Gender Discrimination

"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." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). In criminal cases, both the State and the defendant are prohibited from striking jurors on the basis of race. Georgia v. McCollum, 505 U.S. 42 (1992); Batson v. Kentucky, 476 U.S. 79 (1986). "[G]ender, like race, is an

unconstitutional proxy for juror competence and impartiality." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 217, 129 (1994).

A trial judge should employ a three step analysis to determine whether a Batson violation has occurred. "First, the opponent of a peremptory challenge must make a prima facie showing that the challenge was based on race." State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014). If a prima facie showing is made, the trial court must then require "the proponent of the challenge to provide a race neutral explanation for the challenge." Id. "Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment." State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007).

Here, Appellant's Batson challenge was made on the basis of racial discrimination and denied by the trial judge. However, even if Appellant's challenge was based on gender discrimination, the trial judge would have correctly denied Appellant's motion on that basis as well. Appellant claims the solicitor "did not say [she] struck Juror 175 because she was simply a young person, [the solicitor] said [she] struck [Juror 175] because [Juror 175] was a young female." (Initial Brief of Appellant 9). However, Appellant's argument is contradicted by the record. The solicitor initially described Juror #175 as a full time college student and noted, "I have concerns that in my experience with young females with serious cases they have a hard time making those decisions, and that was my reason for striking her." (R. 51, lines 9-11). However, immediately thereafter, the solicitor clarified her reasoning for striking Juror #175

when she stated that she "ultimately struck [Juror 175] because she is young." (R. 51, lines 15-16). The State thus provided a sufficient race and gender neutral reason for striking Juror #175.

After the Solicitor provided a race and gender neutral reason for striking Juror #175, the burden in the Batson analysis then shifted to Appellant to show the State's explanation was mere pretext. Rather than attempting to prove the State's explanation was pretext, when Appellant was asked by the trial judge if he had any response to the solicitor's reasons for striking the contested jurors, Appellant simply said "No, your Honor." (R. 52, line 2). By not attempting to show the State's explanation was mere pretext, Appellant waived his Batson challenge and conceded that the solicitor's reasons for striking the jurors were proper race and gender neutral reasons. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (holding that defense counsel waives an issue on appeal when they specifically state they have no objection to the admission of evidence at trial). Therefore, the trial judge did not abuse his discretion in denying Appellant's Batson motion. Appellant's conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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