STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
Op. No. 5038 - Appellate Case No. 2008-111046
Howard P. King, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Petitioner,

v.

JEREMY McMILLAN,

Respondent

APPELLATE CASE No. 2012-213692

PETITION FOR WRIT OF CERTIORARI BY STATE OF SOUTH CAROLINA

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TABLE OF CONTENTS

PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

1. Whether the Court of Appeals properly rejected the trial court's conclusion that McMillan's reason for striking juror number 34 was pretextual under *Batson v. Kentucky* and required a new trial.

2. Whether the Court of Appeals gave proper deference to the trial court's factual conclusion that pretext was found in the defense counsel's reason for striking juror 34.

3. Whether the blind reliance upon a third person's recommendation that a venireperson would not be a good pick as a juror without specificity as to the views is a "reason" under Batson where the trial judge found this stated reason as a pretext.

PETITIONER'S STATEMENT OF THE CASE

The Appellant, Jeremy McMillan, was indicted at the term of the Court of General Sessions for Lee County for murder (two counts), assault and battery with intent to kill (9 counts) and the possession of a weapon during an offense. Indictment 2006-GS-31-100. The crimes concerned an incident on April 26, 2006 that resulted in the deaths of Patrick Hood and Joshua Lee. Toby Fulmore was jointly indicted. The Appellant was represented by Mr. Cezar McKnight.

On December 8, 2008, the indictment was called to trial before the Honorable Howard P. King. At the outset, Assistant Solicitor Paul Fata announced that they were proceeding on count one (murder of Patrick Hood), count two (murder of Joshua Lee) and count twelve (possession of a weapon during the commission of a violent crime. R. 21-22, 48-51, Tr. p. 3-4, 31-34. The Appellant was present and represented by counsel McKnight. The prosecution was represented by Assistant Solicitor Fata. On December 11, 2008, the jury found the Appellant guilty of each count. R. 500-04, Tr. p. 629-633.

After the verdict, counsel McKnight made a motion to set aside the verdict because

"we believe that there was not ample evidence in which the jury could reach a verdict." R. 507, Tr. 636, ll. 6-9. Judge King denied the new trial motion, concluding that it was a jury issue concerning the credibility of the witnesses. R. 507, Tr. p. 636, ll. 10-18. Judge King sentence McMillan to life imprisonment without parole on each murder charge (2) and five (5) years for possession of a weapon during the commission of a violent crime. R. 512-13, Tr. 641-42.

The Appellant, through counsel McKnight, made a timely notice of appeal on December 18, 2008.

The Earlier Appellate Proceedings

McMillan made his Initial Brief of Appellant on March 11, 2011, through appellate counsel Nicole Nicolette Mace of the Horry County Bar. In the brief, the Appellant made the following issues presented:

1. Whether the finding that the appellant's reason for striking certain jurors was pretextual constitutes reversible error when the court failed to require the state to prove purposeful discrimination as mandated under *Batson*.

2. Whether the circuit court's failure to hold a hearing on the appellant's motion to reconstruct the record prejudiced the appellant and is erroneous in light of this court's order which specifically instructed the trial court to hear the matter.

3. Whether the court's failure to make an evidentiary ruling regarding the state's introduction of prior bad acts that inflamed the jury prejudiced the appellant.

The Respondent made its Initial Brief of Respondent on July 27, 2011. An Initial Reply brief was filed. The Final Brief of Appellant was made August 30, 2011, the Final Brief of Respondent on September 19, 2011 and Final Reply Brief of Appellant on August 30, 2011.

The South Carolina Court of Appeals held an oral argument on September 10, 2012. On October 17, 2012, the South Carolina Court of Appeals entered its opinion reversing and remanding the conviction based upon a conclusion that the trial court erred in ruling that the reason for defense counsel for McMillan in striking juror 34 was not a race- neutral reason and in granting the State's motion pursuant to Batson v. Kentucky, 476 U.S. 89 (1986) . The Court of Appeals ordered a new trial. State v. McMillan, Appellate Case No. 2008-11046, 400 S.C. 298, 734 S.E.2d 171 (S.C. Ct. App. 2012).

In vacating the conviction and remanding for a new trial, the Court of Appeals panel concluded, in pertinent part:

> Here, McMillan's stated reason for striking juror 34 was that he had reason to believe the juror would not be unbiased based on his counsel's conversation with members of the Lee County Bar. **We find this reason, although questionable, is race neutral.** See id. [State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)] at 123, 470 S.E.2d at 371 (stating the defendant's reasons for striking a juror do not have to be reasonably specific or legitimate -the reason need only be race neutral); Cochran, 369 S.C. at 321, 631 S.E.2d at 301 ("Because a juror's perceived bias (for whatever reason) lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution."); State v. Short, 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct.App.1997) ("The principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause."). **We also find the State, as the opponent of the strike, failed to prove McMillan's strike was purposeful racial discrimination. Furthermore, the fact that McMillan "used most of his challenges to strike white jurors is not sufficient, in itself, to establish purposeful discrimination."** State v. Ford, 334 S.C. 59, 66, 512 S.E.2d 500, 504 (1999). **Therefore, we find the trial court erred in ruling McMillan's stated reason for striking juror 34 was not race neutral and in granting the State's Batson motion.**

State v. McMillan, supra., p. 7 (emphasis added).

The State of South Carolina made a petition for rehearing on November 1, 2012. The

Appellant made "Appellant's Response In Opposition to Respondent's Petition for Rehearing" on November 20, 2012. On November 30, 2012, the South Carolina Court of Appeals entered its Order denying the petition for rehearing.

This Petition follows.

ARGUMENT ON WHY CERTIORARI SHOULD BE GRANTED

I. The trial court properly concluded that the mandates of Batson v. Kentucky were violated when the defense gave pretextual reason of alleged reliance upon another person's assessment of one juror as "not a good juror" based upon the assessment of another person. The re-striking was proper and the conviction should be affirmed. The Court of Appeals erred in concluding that the trial court erred in concluding that defense counsel did used race as a basis for striking juror 34 because of the failure to give proper deference to the trial judge's conclusion.

How the Issue Was Raised and Decided

Jeremy McMillan is an African American. During the trial, he was represented by counsel Cezar McKnight. The potential jurors were voir dired by the trial judge prior to jury selection. ROA. 51-65, Tr. 34-48. At striking of the petit jury, the parties were advised that the prosecution would have use of five (5) peremptory challenges and the defense would have access to ten (10) peremptory challenges. ROA. 65, Tr. p. 48, ll. 19-15. Counsel McKnight used his strikes in the following pattern:

#34 - James Croft - White Male. ROA. 66, Tr. p. 49, ll. 2-3.
#174 - Bruce Hunnicutt - White Male. ROA. 66, Tr. p. 49, ll. 4-7.
#72 - Charles McCutcheon-White Male. ROA. 68, Tr. p. 51, ll. 16-18.

As to potential alternates, counsel McKnight used the strikes in the following manner:

#27 - Donald Clark - White Male - ROA. 68-69, Tr. p. 51, ll. 25 - p. 52, l. 2.
#138 - Shawn Arrants - White Male - ROA. 69, Tr. p. 52, ll. 7-9.

After the initial selection was completed, Assistant Solicitor Fata made a motion pursuant to Batson v. Kentucky, 476 U.S. 89 (1986) and its progeny. He contended that there were 23 jurors presented and the Appellant struck five (5) white males from the jury. ROA. 70, Tr. p. 53, ll. 1-3.

Judge King concluded that in the Batson motion, the State had identified a racially cognizable group and confined that the struck jurors were all white males. "Under our law when the State has identified the racial cognizant group, the burden shifts to the striking party to show that the reasons for striking the jury were not racially motivated or non-discriminatory so in that connection Mr. [McKnight] the burden shifts back to you to give reasons for striking the jurors." ROA. 70, Tr. p. 53, ll. 15-21.

Counsel McKnight's Reasons for the Peremptory Strikes

Counsel McKnight initially declared his strikes were racially neutral and in complete accord with Batson. ROA. 71, Tr. p. 54, ll. 1-2. His stated reasons for his strikes as to Juror # 34 :

#34 - James Croft

McKnight declared he had consulted with other members of the Lee County Defense Bar and Mr. Severance, another attorney, had indicated to him "that Mr. James Croft, Jr. would not be a good pick for this jury, in that he had some interactions with him and he displayed attitudes that he [Severance] believed to be not consistent with being a good and

fair and unbiased juror in this matter." ROA. 71-72, Tr. p. 54, l. 4 - p. 55, l. 1.[1]

The State's Response

Judge King stated that the striking party having enumerated "race-neutral" reasons, the burden shifted to the State to show that the reasons were "pretextual." ROA. 72, Tr. p. 55, ll. 20-24. [2] As to #34 (James Croft), the State responded to the reason as follows:

1

Counsel McKnight addressed the reasons for the strikes of the other venirepersons as follows:

#174 - James Hunnicutt

Counsel McKnight stated he had received information that Hunnicutt was a member of the Lynchburg County [City] Council and had the potential to have unfair knowledge about the case. Counsel McKnight stated that he might have some matter that he did not disclose to them and would be biased. ROA. 72, Tr. p. 55, ll. 2-7. [During the voir dire, Mr. Hunnicutt did not respond to having any "close personal friend" of any witnesses (ROA. 54-55, Tr. p. 37, l. 22 - p. 38, l. 3), had not formed or expressed an opinion as to guilt or innocence (ROA. 56, Tr. p. 39, ll. 20-24), and did not know interest, bias, or prejudice for or against the State, the local law enforcement, the Defendant, or their representatives. (ROA. 61, Tr. p. 44, ll. 1-9)].

#72 - Charles McCutcheon

Counsel McKnight stated McCutcheon indicated at sidebar that his uncle was murdered as a child. Counsel stated he believed that would make him "slightly impartial." ROA. 72, Tr. p. 55, ll. 8-11.

[The record reveals that Mr. McCutcheon stated that he had an uncle murdered in Lee County in 1993. ROA. 60, Tr. p. 43, ll. 2-5. However, he declared it would not prevent him from giving the State and defense a fair and impartial trial and would base his decision on the evidence. ROA. 60, Tr. p. 43, ll. 6-13].

#27 - Donald Clark

Counsel McKnight stated that Clark is a contractor, a business owner. ROA. 72, Tr. p. 55, ll. 11-15. He stated that "makes him tend to be more conservative." ROA. 72, Tr. p. 55, ll. 11-14,

#138 - Shawn Arrants

McKnight stated that juror 138 is an employee at the South Carolina Department of Transportation "which puts him often times in contact with law enforcement agencies throughout the State and we believe that would lead him to be someone who would be more favorable toward law enforcement." ROA. 72, Tr. p. 55, ll. 14-19.

2

Assistant Solicitor Fata stated that #138 (Arrants) concerning his potential

> Number 34, Your Honor, unless he can articulate some reason, other than somebody told me he wouldn't be a good juror. I don't see where that would be pretextual or an excuse. I mean somebody told me wouldn't be a good juror, well a lot of people tell me if people will be a good juror, but I need to know something about that person. He should have said why would he be a good juror. what has he said about this case or what's he said about the defendant or whatever.

ROA. 74, Tr. p. 57, ll. 1-10.

Counsel McKnight's Rebuttal

Counsel McKnight did not make any argument in rebuttal concerning his striking of juror 34. ROA 75.[3]

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connection (contact) with law enforcement was pretextual because the defense put juror 98 (Terry Scarborough), a black male who is Lee County Deputy Sheriff Lyn Blackney's brother. ROA. 73, Tr. p. 56, ll. 1-14. See also ROA. 58-59, Tr. p. 41, l. 6 - p. 42, l. 5 (voir dire of #98 Terry Scarborough concerning impact of his relationship with brother Deputy Sheriff Lyn Blackney). The prosecution confirmed that this showed the reason stated was pretext because he had seated a black male with obvious connection to law enforcement whereas the white jurors' connection to law enforcement were speculative. ROA. 73, Tr. p. 56, ll. 11-15.

Concerning #27 (Donald Clark), the prosecution stated that he did not think "because you own a business makes you more conservative. To me, that is no reason whatsoever." ROA. 73, Tr. p. 56, ll. 20-23.

The prosecution continued that the reason the defense gave for juror #72 (Charles McCutcheon) was true. ROA. 73, Tr. p. 56, ll. 24-25.

Concerning #174 (Bruce Hunnicutt), the prosecution stated that he was a councilman, but had not been a councilman for two years. ROA. 73-74, Tr. 56-57.

3

Counsel McKnight stated his sitting of black juror Terry Scarborough was based upon his notes that juror 98 - James Scarborough - was a brother of the deputy - and that's why he picked Terry Scarborough. ROA. 74, Tr. p. 57, ll. 15-25. Judge King stated his notes reflected juror 98 (Terry Scarborough) was the juror who came forward and explained his brother was a deputy. ROA. 75, Tr. p. 58, ll. 1-2. The prosecution noted that James Scarborough had not shown up for jury duty. ROA. 75, Tr. p. 58, ll. 3-4. Counsel McKnight faulted it on a scrivener's error. ROA. 75, Tr. p. 58, ll. 8-17. He said it was his intent to strike Scarborough after he had learned "Mr. Scarborough was a deputy." ROA. 75, Tr. p. 58, ll. 14-17.

Court Order

In his oral order concerning the Batson issue from the initial jury selection, Judge King concluded that the reasons given by the defense concerning juror 138 (Arrants), Juror 34 (Croft), and juror 27 (Clark) were pretextual. ROA. 76-77, Tr. p. 59-60. The court further found the reasons given for jurors 174 (Hunnicutt) and 72 (McCutcheon) were not pretextual. More specifically, Judge King held:

> THE COURT: I understand. All right. When a Motion is made by the Batson case, the striking of a jury that has been made in this case. The party making the motion must show that the jurors are of a cognizable racial group. This has been done by the State. It must also how that the pre-emptory challenge used to exclude the juror on the grounds of race. The striking party then has the burden of showing racially neutral explanation for striking the juror then the burden shifts back to the opposing party who must show that the race neutral explanation was pretext.
>
> Pretext generally will be established by showing that similarly situated members of another race were seated on the jury, I do find that juror number 138, the reasons given for striking the juror were pretextual. The reason given was that the juror was employed by the South Carolina Department of Transportation, therefore having relation or ties to law enforcement, when in fact, juror number 98, a black male disclosed in voir dire that he had a relative who was related to law enforcement which would be a closer tie then the one that Mr. Arrants, the juror who was seated, I mean who was struck had. So I would therefore find that the Defendant's explanation which reportedly was racially neutral was not in fact mutual but is pretextural [sic] because of a similarly situated juror was seated.
>
> In addition to that, the Court would find that jurors number 174 and 72, for reasons given striking those jurors was racially neutral in that it was

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Concerning the "business owner" strike, counsel McKnight stated "often times it is, well isn't a business owner conservative, Your Honor. They are definitely conservative with regard to taxes, they tend to have undue reverence for law enforcement and often times that in itself makes them conservative." ROA. 75-76, Tr. p. 58, l. 22 - p. 59, l. 2. Counsel McKnight also noted that there was one white male - Steven Ciotti - on the selected jury. ROA. 76, Tr. p. 59, ll. 4-5.

not pretextural [sic] so there was no problem with either one of those two jurors.

However I do find that the reason given for the striking of juror number 34, that someone told me that he would not be a good juror is pretextural [sic] and I would think that is an improper strike [sic]. And finally in regard to juror number 27, simply that a business owner as being conservative is also prefectural and I will not allow that strike.

The jury will therefore be re-struck and defense will not be allowed to strike jurors 34, 27 and 138. . .

ROA. 76-77, Tr. p. 59, l. 7 - p. 60, l. 21.

Re-Striking the Jury

The petit jury was re-struck. Included in the petit jury as the third juror selected was juror 34 (James Croft). ROA. 78, Tr. p. 61, ll. 12-13. The second alternate selected was juror 27 (Donald Clark). ROA. 80-81, Tr. p. 63, l. 24 - p. 64, l. 2.

No further motions were pursued in this matter. Alternate juror Donald Clark, juror number 27 did not deliberate on the verdict. ROA. 501-04, Tr. p. 630-633.

STANDARD OF REVIEW

In criminal cases, the appellate court will review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). On review, it is limited to determining whether the trial court abused its discretion. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). State v. Edwards 384

S.C. 504, 508, 682 S.E.2d 820, 822 (S.C.,2009).

Batson v. Kentucky Analysis

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. Hicks, 330 S.C. 207, 211, 499 S.E.2d 209, 211 (1998). When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one. See State v. Haigler, 334 S.C. 623, 629-30, 515 S.E.2d 88, 90-91 (1999) (explaining the proper procedure for a Batson hearing). The proponent of the strike must offer a race or gender neutral explanation. Id. The opponent must show the race or gender neutral explanation was mere pretext, which is generally established by showing the party did not strike a similarly situated member of another race or gender. Id. Under 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. Id.

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). The opponent of the strike carries the ultimate burden of persuading the trial court that the challenged party exercised strikes in a discriminatory manner. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). Appellate courts give the trial judge's finding great deference on appeal and review the trial judge's ruling with a clearly erroneous standard. State v. Dyar, 317 S.C. 77, 79, 452 S.E.2d 603, 604 (1994).

The trial judge's findings of purposeful discrimination rest largely on his evaluation

of demeanor and credibility. Sumpter v. State, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994). 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 judge's province." Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). Furthermore, a strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. State v. Oglesby, 298 S.C. 279, 280, 379 S.E.2d 891, 892 (1989).

If a trial court improperly grants the State's Batson motion, but none of the disputed jurors serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to the jury of her choice. State v. Rayfield, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006). However, if one of the disputed jurors 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." Id. at 114, 631 S.E.2d at 248. The proper remedy in such cases is the granting of a new trial. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 - 823 (S.C. 2009).

ANALYSIS

A. THE COURT OF APPEALS DECISION FAILED TO GIVE PROPER DEFERENCE TO THE TRIAL COURT'S FACTUAL CONCLUSION THAT PRETEXT WAS FOUND.

The Court of Appeals rejected Judge King's conclusion that the stated reason for the striking of juror 34 was pretextual. Judge King found: " I do find that the reason given for

the striking of juror number 34, that someone told me that he would not be a good juror is pretextual [sic] and I would think that is an improper strike." The trial judge's findings of purposeful discrimination rested upon his evaluation of demeanor and credibility. Sumpter v. State, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994). This was a credibility based finding by the trial court. The Court of Appeals failed to give this conclusion the deference that it was entitled.

1. De Novo Review Was Not Proper or Necessary in this Setting.

The Court of Appeals misapprehended the decision in Batson as removing deference to fact-finding and credibility determinations by the trial judge and establishing review as de novo review. To the contrary, the Supreme Court of the United States has stated at the conclusion of the Batson procedure, "the trial court must determine if the party challenging the strike has proven purposeful racial discrimination, **and the trial court may believe or not believe the explanation offered by the party who exercised the peremptory challenge**." Purkett v. Elem , 514 U.S. 765, at 768, 115 S.Ct. at 1771 (1995). The persuasiveness of the justification for the peremptory strike is critical. E.g., Purkett, 514 U.S. at 768, 115 S.Ct. at 1771. "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." Purkett, 514 U.S. at 768, 115 S.Ct. at 1771. However, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Id. Throughout the Batson process, including any appeal, the party exercising the strike must rely on the explanation originally proffered in response to the prima facie case. As explained by the Supreme Court:

> A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El v. Dredke, 545 U.S. at 252, 125 S.Ct. at 2332.

> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding 'largely will turn on evaluation of credibility.' 476 U.S., at 98, n. 21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' Wainwright v. Witt, 469 U.S. 412, 428 (1985), citing Patton v. Yount, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)."

Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Plausibility is reviewed *but not reweighed* in light of the entire record. Miller-El v. Dretke, supra, 545 U.S. at pp. 265–266. "We review the trial court's finding for substantial evidence, giving " 'great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. '" See Snyder v. Louisiana, 552 U.S. 472, 477 (2008). In assessing credibility, the trial court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. " 'As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) Absent " 'exceptional circumstances,' " we defer to the

credibility findings of the trial court." Snyder, supra, 552 U.S. at p. 477.

In Snyder, the Supreme Court emphasized that the plausibility of the prosecutor's explanation for a peremptory strike is to be carefully scrutinized by the trial judge under the third step of the Batson inquiry, and noted that implausible reasons will fail a Batson challenge. The Supreme Court further noted that "[t]he trial court has a pivotal role in evaluating Batson claims," and that, "in the absence of exceptional circumstances, we would defer to [the trial court]." Snyder, 552 U.S. at 477, 128 S.Ct. at 1208 (citing Hernandez, 500 U.S. at 366, 111 S.Ct. at 1859). Pursuant to Snyder, step three of the Batson inquiry involves an evaluation of the prosecutor's credibility to determine "not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." Snyder, 552 U.S. at 477, 128 S.Ct. at 1208).

Citing Miller-El, the Snyder court reiterated that, in considering a Batson objection, "all of the circumstances that bear upon the issue of racial animosity must be consulted." Snyder, 552 U.S. at 478, 128 S.Ct. at 1208. If the record does not support the prosecutor's proffered explanation or if it evidences that the proffered explanation is implausible, "there is an inference of discriminatory intent that sufficiently demonstrates a Batson violation." Snyder, 552 U.S. at 485, 128 S.Ct. at 1212.

2. The Error in the Court of Appeals Assessment.

The Court of Appeals conflated the analysis under Purkett and Snyder and essentially ignored the relevant point that the Judge King found as a fact that the reason given - albeit race neutral on its face - was pretext. ROA 77. Under the Court of Appeals assessment, even

when the trial court believes that the particular asserted reason given was false - based upon his conclusion of trial counsel's demeanor and actions - it should reject the Batson challenge - even when there is evidence that he used his strikes to remove members of the class. This conclusion flies in the face of this Court's prior decision regarding its rejection of dual motivation in Batson cases, because it is actually the same assessment, albeit unspoken. The Supreme Court of South Carolina's rejected the "dual motivation doctrine in the Batson context." See Payton v. Kearse, 329 S.C. 51, 59, 495 S.E.2d 205, 210 (1998) (noting that South Carolina follows the "tainted" approach whereby a discriminatory explanation for the exercise of a peremptory challenge will vitiate other nondiscriminatory explanations for the strike). [4]

Here, the Court of Appeals determined in step three of the analysis that Judge King's finding that "*that the reason given for the striking of juror number 34, that someone told me that he would not be a good juror is pretextual and I would think that is an improper strike*"

4

Courts have not limited the showing of pretext to similarly situated jurors. For example it has been held to meet this standard, the party challenging the strike "must present evidence or specific analysis" showing that the proffered reason was pretextual. State v. Johnson, 930 S.W.2d 456, 460 (Mo.App.1996). The party "cannot simply rely on conclusory allegations that the real motivation for the strike was racial in nature." Id. Factors that may be relevant to the determination of pretext include: (1) "the presence of 'similarly situated white jurors who were not struck,' " State v. Strong, 142 S.W.3d 702, 712 (Mo. banc 2004) (citation omitted); (2) "the degree of logical relevance between the explanation and the case to be tried in terms of the nature of the case and the types of evidence adduced," State v. Kesler-Ferguson, 271 S.W.3d at 559; (3) "the striking attorney's demeanor or statements during voir dire, " id.; and (4) the circuit court's past experience with the striking attorney. Id. Because the circuit court is in a better position to observe trial counsel's sincerity and credibility and to observe the racial makeup of the jury panel, we rely on the circuit court "to consider the plausibility of the striking party's explanations in light of the totality of the facts and circumstances surrounding the case." Id.

was without any value under the Batson analysis. Pretext is a step three determination - not a step two determination under Batson. Pretext is defined as a "made-up excuse: a misleading or untrue reason given for doing something in an attempt to conceal the real reason." *Encarta World English Dictionary* (2009). Under the Court of Appeals determination, the trial judge can only determine the issue of pretext if similarly situated individuals are seated. Under this assessment, the prosecution would have to show that there were African American jurors seated that Mr. Severance also opined to defense counsel that "had views controversial to the defense" and/or attended church with members of the Bar. Thus, it is clear that the finding by Judge King was one of non-belief that it was the real reason based upon the demeanor of the proponent of the strike - here the defense counsel. The Court of Appeals ignored the fact that Judge King's determination that the reason was pretext was that defense counsel had essentially given no reason at all for his strike - since a false reason is not a reason - thusly unable to satisfy Batson.

In State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009), this Court held the defense counsel's stated reasons on a reverse-Batson challenge were sufficiently race-neutral to survive a Batson challenge. As this Court confirmed in Edwards, often the demeanor of the challenged attorney on a Batson motion will be the best and only evidence of race or gender discrimination. Edwards, 384 S.C. at 509, 682 S.E.2d at 823. Therein, the court rejected the finding that the reasons given by the defense lawyer were not race neutral. Here, however, the trial judge did not reject the reason because it was not race neutral, but because it was pretextual - not the true reason. This conclusion recognizes the unique credibility assessment that the judge must make.

In demanding more, the Court of Appeals has created a situation where the truth of the basis of a strike has no function in a Batson assessment. While the conclusion was harsh as any finding of pretext would be, Judge King's conclusions taken to its terms was just that - he did not believe the proponent had expressed his true reasons for striking juror . This is all the more confusing when the Court of Appeals acknowledged in the step two assessment that : " We find this reason, although questionable, is race neutral." State v. McMillan, supra. What appeared questionable to this Court in the step two assessment was resolved by the Circuit Court in step three after questioning the proponent. The Court of Appeals in its panel misapprehended this finding and its effect in the step three Batson assessment. Respondents note that the conclusion by the Judge King was supported by the defense counsel's actions in striking two other jurors - jurors 74 and 138 were also pretextual. R. 77.

The Court is reminded that in the reverse Batson scenario, the assessments are turned on their head because there is a finding of discriminatory intent by the factual determination of pretext. While Respondent agrees that the fact that McMillan used his challenges to strike white jurors is not sufficient in and of itself to establish racial discrimination, the fact that he did is a factor in the trial judge's reasoned determination of whether the reason given was the truth or pretext for juror 34. The Court of Appeals misapprehended the law in failing to give adequate or any deference to the trial court's assessment of pretext.

In his brief, Appellant claims that the trial court erred under Purkett v. Elem, 514 U.S. 765 (1995) and State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) because the second step of Batson "does not demand an explanation that is persuasive, or even plausible." 514 U.S. at 767-68. Therefore, unless discriminatory intent is inherent in the reasoning given by

the supporter of the strike, the reason will be deemed race-neutral.

The Appellant asserts the prosecution argument that the reason was inadequate was itself inadequate and complains that the State had to show that the defense seated "similarly situated" members of another race when discussing juror 34.

The fallacy with the Appellant's assessment is that he fails to take into account the stated reason found by the trial judge - that someone told me he would not a good juror - was in fact no reason at all in a Batson assessment. Under Appellant's theory, to show pretext, the State would have to show that Appellant allowed a member of another race to be seated when the defense was told by "someone that he would not be a good juror." This logic would and could only enhance the risks of juror discrimination, not prevent it. By merely adopting another person's suggestion that a person should be struck does not provide any race neutral reason at all nor provide sanctuary for that person's discriminatory intent.

B. The Trial Court's Conclusion of Pretext Is Supported by the Record Where the Alleged Reliance under Third Party Information Was Not Clear and Reasonably Specific.

In State v. Adams, 307 S.C. 368, 415 S.E.2d 402 (1992), the Court stated that the State may not meet its burden under Batson by merely asserting that a third person made the decision to strike and communicated this to the Solicitor. Accord, State v. Marble, 311 S.C. 23, 24, 426 S.E.2d 744, 745 (1992) Adams says that the clear and reasonably specific explanation offered by the third person must be provided. Id. 415 S.E.2d at 403. Without this requirement, there would be no assurance that the third person did not make the decision based on the juror's race. Id. Here, the Appellant asserted that he was not selecting juror 34 because a member of the Lee County Bar had told him he was not going to be a good juror

and had explained that the reason was because he had controversial views - without explaining what those particular views were. For an alternative reason, Respondent submits that this reason was insufficient to satisfy the requirements of analysis under Batson because it did not explain what the controversial view was that the juror allegedly possessed in order to make an adequate assessment. The reason given was no reason at all, as argued by the prosecutor at trial.

The Court of Appeals erred in its assessment because it concluded that the neutral reason was because McMillan's counsel had communicated with a member of the Bar - the claimed neutral reason was not based upon what the potential juror's views were. This misdirects the assessment and fails under Adams and Marble. Under Adams, the mere fact that the proponent relied upon a third party is insufficient -the clear and reasonably specific explanation offered by the third person must be provided and this must withstand independent analysis as a neutral reason. Id. 415 S.E.2d at 403. Here, the reasons was inadequate to support a race-neutral reason because the particular juror's views were never presented nor assessed. The Court of Appeals misapprehended Adams in its assessment.

Further, an attorney's discriminatory intent to strike jurors of a certain race is not shielded by merely asserting someone else's suggestion to strike the juror. Here, counsel McKnight ultimately asserted that Mr. Severance, another Lee County attorney, had indicated to him that Croft would "not be a good pick for this jury, in that Severance had some interactions with him [in church] and he displayed attitudes that he [Severance] believed to be not consistent with being a good and fair and unbiased juror in this matter." ROA. 71-72, Tr. p. 54, l. 4 - p. 55, l. 1. This general feeling about a third party contact should not be

adequate as a "neutral reason" under Batson where the trial judge - assessing the demeanor of the attorney giving the reason - found pretext.

The added problem with the approach by Appellant at trial was that it put counsel's credibility, as well as the real proponent for the strike [Mr. Severance] in addition to the potential juror's credibility [as to the unstated views] at issue. If the reason was not Mr. Severance's assessment, but the juror's "displayed attitudes" to Severance, there is nothing in the record to suggest what those "displayed attitudes" were [or further why those particular "attitudes" would suggest impartiality. While Batson "does not demand an explanation that is persuasive, or even plausible," it does demand "a reason." cf, State v. Edwards,682 S.E.2d 820 (S.C. 2009) (defendants' proffered reasons for striking prospective jurors, one because he was newspaper editor who may have knowledge of or have written story about case, and second because she was employee of Department of Motor Vehicles and interacted with law enforcement on regular basis, were sufficiently race-neutral to survive Batson challenge, in trial for murder); State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999) (An attorney's personal knowledge of and relationship with a prospective juror is a race-neutral reason for exercising a peremptory strike; a potential juror's relationship with a law enforcement official, or a potential juror's pro-law enforcement attitude, is a race-neutral reason for exercising a peremptory strike).

The trial court properly concluded that the reason given was pretext. Contrary to the claim, Judge King followed the procedures established for Batson matters. Before the appellate court, the Appellant attempted to equate this with the court's decision in State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (S.C. Ct. App. 1999). In Smalls, after the

defendant had struck 9 of 10 white jurors and claimed they had looked at him "in a mean, stern and accusatory manner," the trial court found as a matter of fact this was a pretextual reason. In Smalls the Court cited to Purkett noting that:

> In Purkett, the Court stated as follows:
>
> > The second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the [proponent's] explanation.'
> >
> > * * *
> >
> > It is not until the third step that the persuasiveness of the justification becomes relevant-the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
>
> Purkett, 514 U.S. at 767-768, 115 S.Ct. at 1771 (emphasis added) (citations omitted).
>
> > We discern no discriminatory intent inherent in the defendant's explanation. We therefore find the reason asserted by Smalls for his peremptory strikes, that the jurors were either refusing to look or looking in a "mean," "stern" or "accusatory" manner, was facially race-neutral, even if perhaps suspect. See State v. Tucker, supra; State v. Wilder, 306 S.C. 535, 413 S.E.2d 323 (1991) (counsel may strike venire persons based on their demeanor and disposition).

State v. Smalls, 336 S.C. 301, 308-309, 519 S.E.2d 793, 797 (S.C.App.,1999). The court reversed concluding that the State was never required to carry its burden to present evidence of pretext.

However, unlike Smalls, which supplied a demonstrated race neutral reason of demeanor, the Court of Appeals accepted Appellant's assertion which presented no reason other than someone else suggested he was not a good juror for him. As the appellate courts

have stated - "*[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.*" State v. Adams, supra. 322 S.C. at 124, 470 S.E.2d at 372. See, Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (implausible or fantastic justifications for prosecutor's peremptory strikes of racial minorities may be found to be pretexts for purposeful discrimination under Batson; in that instance, issue comes down to whether trial court finds prosecutor's race-neutral explanations to be credible). Judge King did not abandon the process mandated by Adams and Purkett, but followed it rejecting the existence of the reason as a race-neutral reason concluding the comment was a pretext.[5] The claim otherwise is without merit. [6]

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[5] See also Annotation, *Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury - post-Batson cases*, 47 A.L.R. 5th 259 (1997).

[6] **Alternate Juror Number 27 - Donald Clark.**

The Appellant below alternately argued that the trial court erred in concluding that the reasons for the strike of juror number 27 Donald Clark was a pretext. Counsel McKnight had declared that Clark was business owner and that "makes him tend to be more conservative" and "often times it is, well isn't a business owner conservative, Your Honor. They are definitely conservative with regard to taxes, they tend to have undue reverence for law enforcement and often times that in itself makes them conservative." ROA. 72, 75-76, Tr. p. 55, ll. 11-14, p. 58, l. 22 - p. 59, l. 2. Judge King found simply that a business owner as being conservative was pretextural. ROA. 76-77, Tr. p. 59, l. 7 - p. 60, l. 21.

Any concerns about the qualification of the strike and the ultimate prohibition about the striking of alternate juror Clark need not be addressed because he was never involved in the deliberation of Mr. McMillan. If a trial court improperly grants the State's Batson motion, but none of the disputed jurors thereafter serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to a particular jury. State v. Williams, 379 S.C. 399, 402, 665 S.E.2d 228, 230 (S.C.App.,2008); State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006). Since the alternate did not serve on the jury, he is not entitled to a new trial - even if there was error in the conclusion of pretext.

Nevertheless, the trial court did not violate the mandate of Batson wherein the stated reason was that he was a "business owner" and therefore " conservative" and "they tend to

To rebut a prima facie case of discrimination in the use of peremptory strikes, the explanation need not rise to the level justifying exercise of a challenge for cause, but it must be neutral, related to the case to be tried, and a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges. Importantly, however, a "rubber stamp" approval of all nonracial explanations, no matter how whimsical or fanciful, would cripple Batson's commitment to ensure that no citizen is disqualified from jury service because of his race.

While these explanations were facially neutral, they were neither reasonably specific nor related to the case to be tried. Appellant did not show that being a "business owner" had any bearing on a prosecution for murder. Moreover, these characteristics are so general as to be common to many members of the jury pool. Significantly, the trial court did allow other peremptory strikes by Appellant when his counsel articulated a reason that was both specific

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have undue reverence for law enforcement and often times that in itself makes them conservative." The State had argued this was no reason whatsoever.

The trial judge found the reason of "business owner" as a pretext based upon the argument that it was no reason at all. The Appellant seeks to equate the broad and general reason of "business owner" with the series of specific employment cases found to be race-neutral reasons. However, and obviously, the mere factor of "employment" is not a supportable race neutral reason, but the more particularized employment of an individual. The state appellate court have found race-neutral reasons in the striking of a journalist, a worker at the Department of Motor Vehicles with contact with law enforcement [State v. Edwards, supra.]; and "Head Start Director" [State v. Flynn, 368 S.C. 83, 627 S.E.2d 763 (S.C. Ct. App. 2006). Employment is a well-understood and recognized consideration in the exercise of peremptory challenges. State v. Williams, 379 S.C. 399, 402–03, 665 S.E.2d 228, 230 (Ct.App.2008); 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). Here, the reason was neither to a particular type of employment or particular place of employment.

and related to the case to be tried. These strikes were accepted by the State and the trial court.

The trial court's finding of pretext and purposeful discrimination is a finding of fact which ordinarily must be given great deference by an appellate court, since it largely will turn on evaluation of credibility. Moreover, the trial court can visually and auditorially observe the demeanor of both prospective jurors and counsel. The Court should only reverse the trial judge's determination that appellant's peremptory challenge was motivated by intentional discrimination if that determination is clearly erroneous. [7] Here, it was not.

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[7] See, Shelton v. State, 572 S.E.2d 401 (Ga. Ct. App. 2002) (trial court's finding that defendant's peremptory strikes of three white male veniremen were motivated by intentional discrimination was not clearly erroneous, although defendant's explanations that one worked for county, second served in the military and worked as corporate executive, and third was involved in collection case, were facially neutral, where explanations were not reasonably specific or related to prosecution for selling cocaine, challenged characteristics were so general as to be common to many members of jury pool, and court allowed other strikes for specific case–related reasons).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted and judgment of convictions must be affirmed.

Respectfully submitted,

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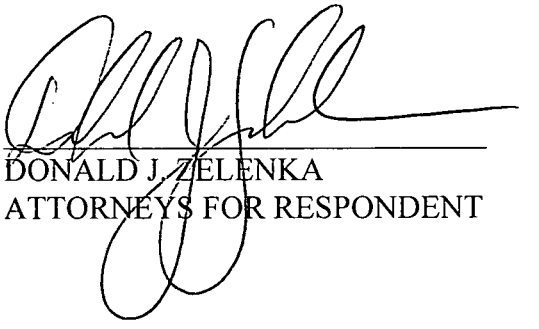
By: 
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ATTORNEYS FOR RESPONDENT

March 1, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lee County
Howard P. King, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Petitioner,

v.

JEREMY McMILLAN,

Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that the South Carolina Court of Appeals denied the State of South Carolina's petition for rehearing on November 30, 2012.

This 1st day of March, 2013.

DONALD J. ZELENKA

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Petition for Writ of Certiorari*** in the foregoing action by depositing copies in the United States mail, postage prepaid to the following:

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This 1st day of March, 2013.

DONALD J. ZELENKA
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