STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH LEONARD BROWN,

APPELLANT

APPELLATE CASE NO 2018-001770

FINAL BRIEF OF APPELLANT

TAYLOR D. GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in failing to conduct a full and complete Batson analysis, where the court did not undertake the third step of review and instead prematurely concluded that a race-neutral reason existed to strike an African American juror who lived in the same town as some of the witnesses, where a different juror who knew at least one of the potential witnesses was not struck by the state?

STATEMENT OF THE CASE

Appellant was indicted for murder, attempted murder, and possession of a weapon during a violent crime in March 2017. R. 460. On September 17, 2018, he proceeded to a three-day trial before the Honorable Carmen T. Mullen and a jury. R. 1. Trasi Campbell represented Appellant; Mary Jones and Kimberly Smith appeared on behalf of the state. The jury found Appellant not guilty on the murder charge and guilty of the attempted murder and possession of a weapon charges. Tr. 429, ll. 9 – 18. On September 20, 2018, Judge Mullen sentenced Appellant to thirty years on the attempted murder charge and five years on the weapon charge. Sentencing Transcript 16.[1] The sentences were crafted to run concurrently. Id.

This brief follows.

[1] The sentencing transcript is paginated separately from the trial transcript and does not contain line numbers.

STANDARD OF REVIEW

"In the typical appeal from the granting or denial of a Batson motion, the appellate courts give deference to the findings of the trial court and apply a clearly erroneous standard." State v. Cochran, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006). "This standard of review, however, is premised on the trial court following the mandated procedure for a Batson hearing." Id. "Here, where the assignment of error is the failure to follow the Batson hearing procedure, we must answer a question of law. When a question of law is presented, our standard of review is plenary." Id.

ARGUMENT

The trial court erred in failing to conduct a full and complete Batson analysis, where the court did not undertake the third step of review and instead prematurely concluded that a race-neutral reason existed to strike an African American juror who lived in the same town as some of the witnesses, where a different juror who knew at least one of the potential witnesses was not struck by the state.

Relevant facts

Appellant was arrested after defending his wife and himself following an encounter at the house where he was living with his father-in-law, Ronnie Black, on June 5, 2016. R. 86, ll. 8 – 23. Black had just returned from a trip and was repeatedly questioning why Denise Brown, his daughter and Appellant's wife, had not taken out the trash while he was gone. R. 182, l. 11 – R. 183, l. 3. A storm had knocked the power out at the residence; Black, his son Gregory, Brown, and Appellant moved to the front porch in order to talk in the light of a car's headlights. R. 183, ll. 11 – 24. Black was visibly armed with a handgun, tucked into his waistband. R. 94, ll. 9 – 25; R. 116, ll. 4 – 12. Appellant shot Black and Gregory in self defense. Appellant was charged with murder, attempted murder, and possession of a weapon. R. 285, ll. 5 – 15.

During voir dire, Juror 179 confirmed that she could be fair and impartial if selected to be a juror in Appellant's trial. R. 23, ll. 7 – 25. In response to a question by the trial judge as to whether any of the potential jurors were familiar with the potential witnesses, Juror 179 indicated that Cornillus LaVan, an employee with the Beaufort County Sheriff's Office who did not testify at trial, was her supervisor's husband. Id. Juror 179 served as the bookkeeper at Shanklin

Elementary School. Id. The trial judge did not excuse Juror 179 from the case as a result of the familiarity.

Juror 179 again stood up and noted that her husband was from Sheldon, South Carolina. R. 39, l. 2 – R. 40, l. 3. Five of the witnesses previously listed by the trial judge were from Sheldon: Gregory Black, Denise Brown, Cynthia Thompson, Gregory Black, Jr., and McKenzie Brown. R. 22, l. 18 – R. 23, l. 5. Juror 179 remarked that she had lived in Sheldon for eighteen years. She clarified that she does not "know a lot of people [in Sheldon]," but her husband, who went to school in Sheldon, does. Id. She was unfamiliar with the address where the shootings took place in relation to her own house. Id. Juror 179 asked the trial judge "[i]s there any way if I would know if [any of the witnesses] know me?" Id. In answering in the negative, the trial judge also instructed Juror 179 not to speak about the case with her husband or anyone else. Id. Again, the trial judge did not excuse Juror 179.

Juror 179 was struck by the state. R. 48, ll. 19 – 21. Following jury selection, counsel for Appellant requested a Batson hearing in reference to Juror 179. R. 51, ll. 9 – 14. In turn, the state contended that Juror 179 was struck "because she lived in Sheldon. We were worried that possibly - - she lived in Sheldon." R. 51, l. 16 – R. 52, l. 1. The solicitor continued:

> We questioned her about it. She said she didn't know - - she didn't know if her husband might know somebody, and we were worried once we went to the facts of the case, witnesses got up there, that she might know something about it.

Id. The trial court concluded that was a race-neutral reason for striking Juror 179. Id.

Discussion

The husband of Juror 179 was not a prospective juror, Juror 179 was. She was undoubtedly able to be fair and neutral. She was not concerned that she had knowledge of the witnesses, as she was largely unfamiliar with the people of Sheldon. If she had heeded the trial

judge's instructions, her husband would not have had any information about the allegations in Appellant's case. Therefore, she could have been fair.

The jurors were repeatedly instructed not to speak with anyone about the case. R. 50, ll. 15 – 22; R. 188, ll. 22 – 24; R. 189, ll. 14 – 15; R. 251, ll. 1 – 4; R. 251, ll. 20 – 25; R. 348, ll. 12 – 17. Two alternates were selected. R. 49, ll. 2 – 19. The pretextual concern that Juror 179 might know facts or witnesses from the case did not prevent the state from selecting a juror who, rather than possible knowledge of the witnesses, twice admitted to recognizing potential witnesses in the case.

"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) (citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)). In Batson, the Supreme Court of the United States held the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States forbids a prosecutor from challenging **"**potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." Id.

In Georgia v. McCollum, 505 U.S. 42, 59 (1992), the Supreme Court held the Constitution also prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges. When one party strikes a member of a cognizable racial group, the trial court must hold a Batson hearing if the opposing party requests one. State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999). "The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause." State v. Inman,

409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014). In State v. Giles, the South Carolina Supreme Court outlined the steps as follows:

> First, the opponent of the peremptory 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 proponent of the 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 opponent of the challenge has proved purposeful discrimination. The ultimate burden always rests with the opponent of the challenge to prove purposeful discrimination.

State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted). "Step two of the analysis 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. As explained in Giles:

> in order for the explanation provided by the proponent of a peremptory challenge at the second stage of the Batson process to be legally sufficient and not deny the opponent of the challenge, as well as the trial court, the ability to safeguard the right to equal protection, it need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of the evidence bearing on it.

Giles, 407 S.C. at 21-22, 754 S.E.2d at 265.

In contrast, step three of the analysis requires the court to carefully evaluate whether the [opponent of the peremptory challenge] has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for discriminatory intent." Inman, 409 S.C. at 27, 760 S.E.2d at 108. "During step three, [the opponent of the peremptory challenge] should point to direct evidence of racial discrimination, such as showing that the [proponent of the peremptory challenge] struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race." Id. at 27, 760 S.E.2d at 108-09. "In doing so, the party proves that

the 'original reason was pretext because it was not applied in a neutral manner.' " Id. at 27, 760 S.E.2d at 109 (quoting State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989)).“Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." Shuler, 344 S.C. at 615, 545 S.E.2d at 810.

Juror 179 did not stand in response to the following question:

> Ladies and gentlemen, does anyone know anything about this case or have any independent information in regard to this case. I can tell you it hasn't been in the newspaper. It may have been when it first occurred. But again, does anyone have any inside information or maybe something you would have heard on the street, or maybe if you lived in Sheldon you would have heard about it? If so, please stand.

R. 31, l. 23 – R. 32, l. 5. Nobody stood up, and the trial judge moved on to the next question. This question immediately followed specific details about the shooting, including the date, address, city (Sheldon), and name of decedent. R. 31, ll. 13 – 18. Accordingly, Juror 179, who appeared to be exceedingly careful about potential bias, likely had no knowledge of any details of the case.

Other jurors who stood up during voir dire were not struck by the state, even though the state had strikes remaining, including Juror 26, Juror 116, Juror 219, and Juror 369. Juror 26 was a nurse in the emergency room at Beaufort Memorial, knew one of the witnesses, and recognized someone in the courtroom. R. 26, l. 23 – R. 27, l. 5; R. 41, ll. 2 – 9. Juror 26 was not struck by the state. R. 47, ll. 8 – 11. The state exercised two peremptory strikes: Juror 179 and Juror 118.

The trial court erred in failing to conduct a proper analysis under the third step of a Batson review. Rather than considering the state's potential failure to articulate a race neutral reason for its disparate treatment of the jurors, especially considering the similar nature of Juror 26, the court seemingly found only that the reason given in the first place was race neutral. The trial court should have instead undertaken a more detailed analysis which would have resulted in

the conclusion that Juror 179 was struck based on race. After reaching this conclusion, the trial could should have quashed the entire jury panel and initiated another jury selection. State v. Cochran, 369 S.C. 308, 313, 631 S.E.2d 294, 297 (Ct. App. 2006). Accordingly, the trial court erred, and Appellant is entitled to a new trial on the attempted murder and possession of a weapon charges.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this court reverse his convictions and remand for a new trial.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of May, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 8, 2020

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589