STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Jun 19 2020
SC Court of Appeals

Appeal from Beaufort County
Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOSEPH LEONARD BROWN,

Appellant.

Appellate Case No. 2018-001770

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ISAAC McDUFFIE STONE
Fourteenth Judicial Circuit Solicitor

P.O. Box 1880
Bluffton, South Carolina 29910
(843) 790-6194

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL....................1

STATEMENT OF THE CASE....................1

STATEMENT OF THE FACTS....................2

ARGUMENT

Because the public defender did not challenge the prosecution's race neutral reason for striking a juror and did not offer any evidence or argument to show that the prosecution's stated reason for the preemptory strike was mere pretext, the trial court did not err in denying the Batson motion. The public defender did not take the opportunity to present argument on the third step of the Batson challenge, so the trial court did not make an error of law by not making a finding on whether the prosecution's use of the preemptory strike was pretext because the public defender abandoned the Batson challenge after the prosecution's reasonable explanation for the strike. All of Appellant's arguments for pretextual use of a preemptory strike are presented for the first time on appeal....................4

Voir dire and the Batson challenge: Appellant abandoned the Batson motion without raising a challenge to the explanation offered by the prosecution for the preemptory strike....................6

The argument raised on appeal is not preserved for review because it was not presented to the trial court and Appellant acquiesced to the trial court's ruling....................8

Standard of Review....................10

CONCLUSION....................12

TABLE OF AUTHORITIES

Cases:

Batson v. Kentucky, 476 U.S. 79 (1986) 4

Foster v. Chapman, 136 S.Ct. 1737 (2016)....7

Georgia v. McCollum, 505 U.S. 42 (1992)....4

Hernandez v. New York, 500 U.S. 352 (1991)....5, 10

Miller-El v. Dretke, 545 U.S. 231 (2005) 5

Purkett v. Elem, 514 U.S. 765 (1995)....5

State v. Casey, 325 S.C. 447, 481 S.E.2d 169 (Ct. App. 1997) 5

State v. Cochran, 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006) 5, 8, 9, 10, 11

State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009) 10

State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007) 10

State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005)....9

State v. Giles, 407 S.C.14, 754 S.E.2d 261 (2014)....5

State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) 9

State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995)....5

State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998)....9

State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1992)....9

State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)....9

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001)....10

State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993) 9

APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

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.

RESPONDENT'S STATEMENT OF THE ISSUE ON APPEAL

Because the public defender did not challenge the prosecution's race neutral reason for striking a juror and did not offer any evidence or argument to show that the prosecution's stated reason for the preemptory strike was mere pretext, the trial court did not err in denying the Batson motion. The public defender did not take the opportunity to present argument on the third step of the Batson challenge, so the trial court did not make an error of law by not making a finding on whether the prosecution's use of the preemptory strike was pretext because the public defender abandoned the Batson challenge after the prosecution's reasonable explanation for the strike. All of Appellant's arguments for an alleged pretextual use of a preemptory strike are presented for the first time on appeal.

STATEMENT OF THE CASE

Appellant Brown was indicted for murder of Ronnie Black, attempted murder for shooting Gregory Black, and possession of a weapon during a violent crime. The jury convicted Brown of attempted murder and the weapons charge following trial on September 17-19, 2018. On September 20, 2018, the Honorable Carmen T. Mullen sentenced Brown to concurrent terms of thirty years' imprisonment for attempted murder and five years' imprisonment for the weapons charge.

STATEMENT OF FACTS

Appellant Brown shot his father-in-law, Ronnie Black, four times and hit him over the head with the revolver until it broke. R. pp. 172-73; pp. 236-37. He then shot his brother-in-law, Gregory Black, two times. Ronnie was struck twice in the chest, once on the left side, and once on the left arm. Pathologist Dr. Presnell testified he would have collapsed and gone unconscious in seconds. R. p. 349; p. 352. Gregory was shot in the right thigh and buttocks and lived. R. pp. 341-42. Law enforcement found a pistol close to deceased Ronnie's right hand. R. p. 169.

Gregory testified that his father, and Gregory's wife and kids, arrived home from a trip at night. Appellant and his wife, Denise Brown, and their kids were already home. Denise Brown is Ronnie's daughter and Gregory's sister. As they were unpacking, Ronnie heard something from behind the house, so he went inside and retrieved a gun and flashlight. They continued to unpack but then Ronnie and Denise started arguing over Denise and Appellant having left garbage in the house that smelled. The argument was taken to the porch, at Gregory's insistence, and continued on the porch between Ronnie and Denise, with Gregory present. Appellant came on the porch and in Gregory's view, agitated the situation before he pulled out a gun and shot Ronnie. Gregory testified Ronnie's gun was in the waistband the whole time and he did not pull it out. Appellant then struck Ronnie in the head with the butt of the gun. Appellant turned to Gregory and said, "I got something for you, too," before shooting Gregory from behind. R. pp. 179-85. Afterwards, Appellant yelled as he paced back and forth between the porch and his SUV, "It was justifiable homicide." R. pp. 186-87. It is likely fortunate for Gregory that Appellant broke his gun over Ronnie's head because law enforcement found an abundance of ammunition in a backpack inside Appellant's SUV. R. pp. 246-49.

Denise Brown testified on that evening, she and Appellant returned with their children from dining out that evening. Ronnie, Gregory, and Gregory's family returned shortly afterwards. Ronnie was telling her about the trip when he noticed the garbage smelled and he got in an argument with Denise when he became agitated about the smell. Gregory and Denise went out on the porch, and Ronnie came on the porch after first going out to his car. Appellant came on the porch and started to argue with Ronnie. Denise testified Appellant then said, "Mr. Ronnie, what are you doing with a gun." When Ronnie did not respond, he said again, "Mr. Ronnie, what are you doing with your gun." She testified she saw a gun in Ronnie's hand. As she started to turn to Appellant, she heard gunfire and fled inside. R. pp. 205-07.

Denise noted Appellant always carried a gun. She confirmed Gregory did not have a gun that night and she did not know why Appellant shot Gregory. R. p. 212. She saw the gun in front of Ronnie when she returned to the porch and saw him dead on the ground. Greg was also laying down. Gregory already called 911, but Appellant told her to call 911 also. Appellant never told Denise about hitting Ronnie with a gun, something that bothered her when she found out. R. pp. 213-18. Denise changed her version of events as to how Ronnie was holding the gun in interviews with law enforcement. R. pp. 261-64.

ARGUMENT

Because the public defender did not challenge the prosecution's race neutral reason for striking a juror and did not offer any evidence or argument to show that the prosecution's stated reason for the preemptory strike was mere pretext, the trial court did not err in denying the Batson motion. The public defender did not take the opportunity to present argument on the third step of the Batson challenge, so the trial court did not make an error of law by not making a finding on whether the prosecution's use of the preemptory strike was pretext because the public defender abandoned the Batson challenge after the prosecution's reasonable explanation for the strike. All of Appellant's arguments for pretextual use of a preemptory strike are presented for the first time on appeal.

Appellant argues the trial court made an error of law by not engaging in the third step of the Batson analysis and argues the prosecution's explanation for its preemptory strike was mere pretext. However, Appellant's public defender either declined or failed to raise these arguments to the trial court, possibly in recognition that such a motion would be frivolous because the record fails to show any of the jurors were similarly situated as the juror struck by the prosecution.

The Supreme Court held in Batson v. Kentucky, 476 U.S. 79 (1986) that the equal protection clause prohibits a prosecutor from striking jurors solely on account of their race. Georgia v. McCollum, 505 U.S. 42, 59 (1992). In the instant case, the prosecution used only two of its preemptory strikes to strike Juror 179, who was black, and one other juror, whose race was not identified during the Batson motion.

A three-step procedure should be followed when an opponent raises a claim that a jury strike was exercised in violation of the Equal Protection Clause. First, the moving party must make a prima facie showing the challenge was based on race or gender. Provided an adequate showing was made, the trial court must require the challenged party to provide a race or gender neutral explanation

for the challenge. Last, the trial court must determine if the moving party has proven purposeful discrimination. State v. Giles, 407 S.C.14, 18, 754 S.E.2d 261, 263 (2014).

For the second step of the procedure, the explanation must be "a clear and reasonably specific explanation of [the] legitimate reasons for exercising the [jury strike]." Miller-El v. Dretke, 545 U.S. 231, 239 (2005). However, the explanation need not be persuasive or even plausible. Giles, 407 S.C. at 21, 754 S.E.2d at 265. "Unless a discriminatory intent is inherent in the [State's] explanation, the reason offered will be deemed race neutral." Purkett v. Elem, 514 U.S. 765, 768 (1995) (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991)).

At the third step, the **moving party** must show the facially race or gender neutral reason was actually mere pretext to engage in purposeful discrimination. State v. Cochran, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006). The defendant bears the burden of proving the State's neutral reasons for striking the juror is pretext. State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). This Court explained that for this step, "The opponent of the strike carries the ultimate burden of showing purposeful discrimination and must demonstrate the pretextual nature for the stated reason for the strike. . . . This burden is generally established by showing similarly situated members of another race were seated on the jury." Id. (internal citations and quotation marks omitted). "[T]he uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race or gender neutral explanation for inconsistency." State v. Casey, 325 S.C. 447, 454, 481 S.E.2d 169, 173 (Ct. App. 1997).

As discussed further below, Appellant made no attempt to argue the reason for the preemptory strike offered by the prosecution was mere pretext. Appellant did not argue to the trial court that any similarly situated jurors to Juror 179 were not struck by the prosecution. Appellant did

not ask the trial court to proceed to the third step of the Batson analysis.

Voir dire and the Batson challenge: Appellant abandoned the Batson motion without raising a challenge to the explanation offered by the prosecution for the preemptory strike.

The trial court inquired if any of the jurors was related to, a close personal friend of, or had a relationship with any of the named potential witnesses "such that you would give their testimony more weight or credence than you would another person's testimony because you know them?" R. p. 21, lines 6-14. Juror 179 was the first juror to answer, and she indicated she knew Cornelius LaVan, who was her supervisor's husband. She advised the trial court that Ms. LaVan was her supervisor at Shanklin Elementary where Juror 179 was a bookkeeper. R. p. 23, lines 9-24.

Later during voir dire, the trial court asked, "Ladies and gentlemen, does anyone know of any reason whatsoever that you cannot give the State of South Carolina and the defendant, Ms. Brown, a fair and impartial trial in this matter?" R. p. 37, lines 16-19.

In response, Juror 179 explained, "My husband is from Sheldon, and I – we've lived there – well, I've lived **there 18 years**. Now, I didn't know a lot of people, but he does. He went to school up there. Is there any way if I would know if they know me?" The trial court explained there was no way. R. p. 39, lines 5-11 (emphasis added).

The trial court asked if the location of the homicide – on Big Estate Circle – was anywhere near her. She answered she did not know. R. p. 39, lines 13-24. During selection, the State only struck two jurors – jurors 118 and 179. R. pp. 44-49.

After consulting with Appellant, the public defender made a Batson motion "in reference to Juror 179, who was the black person that the State of South Carolina struck." R. p. 51, lines 9-14. The prosecutor explained, "We struck Juror 179 because she lived in Sheldon. . . ." R. p. 51, lines

16-18. The prosecutor further explained:

> [She lived in Sheldon] [w]here this occurred. 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.

R. p. 51, lines 20-24.

The trial court found the prosecution offered a race-neutral reason for striking juror 179. R. p. 51, line 25 – p. 52, line 1. The trial court next asked the public defender if there was anything else, and rather than argue the prosecution's stated reason was pretext or argue the trial court should proceed to the third step of the Batson analysis, the public defender answered, "No Ma'am." R. p. 52, lines 2-3.

The prosecution offered a reason that was clearly race neutral. Even though she said she did not know a lot of people there, Juror 179 told the trial court she lived in Sheldon for eighteen years. Although Juror 179 said she did not know a lot of people in Sheldon, which is a subjective assessment, the prosecution could reasonably believe she underestimated how many people she met over eighteen years. See generally Foster v. Chapman, 136 S.Ct. 1737, 1753 (2016) ("A prosecutor is entitled to disbelieve a juror's voir dire answers, of course."). Also note that this was an answer to a question as to whether or not she could be fair and impartial, and obviously she had some concern or trepidation as evidenced by her making an inquiry. Nonetheless, it was a facially race neutral reason to explain the prosecution's preemptory strike. Cochran, 369 S.C. at 319, 631 S.E.2d at 300 (noting "unless discriminatory intent is inherent in the explanation provided by the proponent of the strike," the striking party does not carry any burden after offering the race-neutral reason for the use of the preemptory strike).

Appellant argues the prosecution's reason provided for the preemptory strike was pretext and claims this was evidenced by the prosecution not moving to strike Juror 26. Juror 26 was a nurse who advised she knew Dr. Stoddard from Beaufort Memorial Hospital. R. pp. 26-27. Dr. Stoddard did not testify at trial. She also indicated she knew someone in the courtroom in response to the trial court's question. However, there was no inquiry as to who that person in the courtroom was. There is no indication in the record that Dr. Stoddard was providing any testimony about the shooting itself as opposed to being someone who treated one of the victims. There is no indication in the record that Dr. Stoddard was from Sheldon. Further, there is no indication that Juror 26 lived in Sheldon for as long as eighteen years or even ever lived in Sheldon. So the record fails to indicate Juror 26 was similarly situated to Juror 179. See Cochran, 369 S.C. at 333, 631 S.E.2d at 308 (J. Anderson, concurring) ("Pretext generally will be established by demonstrating that a similarly situated member of another race was seated on the jury.") (citations omitted).

The argument raised on appeal is not preserved for review because it was not presented to the trial court and Appellant acquiesced to the trial court's ruling.

As discussed above, the likely reason that the public defender did not argue that the prosecution's stated reason was pretext was the public defender recognized as a matter of professional judgment that such an argument was frivolous. Regardless, the public defender did not argue to the trial court that the stated reason was mere pretext and did not claim Juror 26 was similarly situated to Juror 179.

Despite the opportunity to argue pretext following the trial court's determination that the reason offered was race neutral, the public defender did not argue, as the moving party, that the facially race neutral explanation was pretext to purposeful discrimination. At the third step,

Appellant as the moving party was required to show the facially race or gender neutral reason was actually mere pretext to engage in purposeful discrimination. Cochran, 369 S.C. at 315, 631 S.E.2d at 298. When a trial attorney accepts a trial court's ruling without objection, the issue is not preserved for review. See State v. Morris, 307 S.C. 480, 486, 415 S.E.2d 819, 823 (Ct. App. 1992); State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998) (stating a defendant cannot acquiesce in an issue at trial and then complain about it on appeal).

It was incumbent upon Appellant to present the argument to the trial court that he now makes on appeal. State v. Silver, 314 S.C. 483, 486, 431 S.E.2d 250, 251 (1993) (The ground asserted on appeal must be supported by the objection raised at trial.); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (The argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review.). "The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error." State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). The exact name of the legal doctrine employed does not need to be used to preserve an argument, 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).

Appellant never argued to the trial court that the stated reason for the strike was pretext and never argued that Juror 26 was similarly situated to Juror 179. Appellant never asked the trial court to proceed to the third step of the Batson analysis. Appellant's failure to present an argument of pretext to the trial court precludes this Court's consideration of the issue on appeal.

Standard of Review

Further, under the applicable standard of review, the trial court acted within its discretion to deny the Batson motion. "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).

Evaluation of a prosecutor's credibility lies within the trial court's province. See State v. Shuler, 344 S.C. 604, 615-616, 545 S.E.2d 805, 810-11 (2001) ("often the demeanor of the challenged attorney will be the best and only evidence of discrimination and 'evaluation of the prosecutor's mind lies peculiarly within a trial judge's province'" (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991)). The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). As our Supreme Court has explained:

> Typically the decisive question becomes whether counsel's race-neutral explanation for a peremptory challenge should be believed. . . . [T]here is seldom much evidence in the record bearing on that issue, and the trial court's findings regarding purposeful discrimination necessarily will rest largely on the evaluation of demeanor and credibility of counsel. Therefore, those findings are given great deference and will not be set aside unless clearly erroneous.

State v. Evins, 373 S.C. 404, 415-16, 645 S.E.2d 904, 909-10 (2007) (quoting Cochran). The trial court reasonably determined that Appellant failed to carry his burden of persuasion in making his Batson challenge.

Appellant argues that the trial court made an error of law by not proceeding to the third stage of Batson. However, after finding the prosecution's stated reason was a race neutral reason, the trial court provided the public defender the opportunity to provide further argument on the motion and the public defender declined. It was incumbent on the public defender to ask the trial court to proceed to the third step of the analysis and to provide argument to support the public defender's motion. Cochran, 369 S.C. at 316, 631 S.E.2d at 299 (finding that because defense counsel provided a race-

neutral reason for striking a juror with the same last name as a law enforcement officer, "the State was required to prove [defense counsel] engaged in purposeful racial discrimination to satisfy step three"). The trial court likely determined the public defender's lack of any further challenge following the prosecution's offer of a race-neutral explanation for the preemptory strike meant that the public defender accepted the prosecution's explanation as genuine.

The trial court did not make an error of law, and this Court should apply the clearly erroneous standard of review. Under this standard, the trial court did not abuse its discretion because the prosecution's stated reason for the preemptory strike was facially race-neutral and Appellant did not meet his burden of showing the reason was merely pretext. This Court should affirm the convictions and sentences.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

ISAAC McDUFFIE STONE
Fourteenth Judicial Circuit Solicitor

P.O. Box 1880
Bluffton, South Carolina 29910
(843) 790-6194

BY: s/David Spencer
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 19, 2020.

RECEIVED
Jun 19 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOSEPH LEONARD BROWN,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

ISAAC McDUFFIE STONE
Fourteenth Judicial Circuit Solicitor

By:___s/David Spencer_______________
DAVID SPENCER

Office of Attorney General
Post Office Box 11549

Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 19, 2020