STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL LAMAR BURNSIDE,

APPELLANT

APPELLATE CASE NO. 2020-000133

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by failing to quash the jury panel where the state used a peremptory strike in a racially discriminatory manner by striking a black juror due to the juror's age, but did not strike white jurors in the same age bracket, in violation of the Equal Protection Clause of the United States Constitution?

STATEMENT OF THE CASE

During its November 2019 term, a Greenville County grand jury indicted Appellant for murder and possession of a weapon during the commission of a violent crime (2019-GS-23-8759). R. *(indictment). The state, represented by Brian J. Moroney, Jr., and Anthony J. McCollum, Jr., called the case to trial before the Honorable Edward W. Miller and a jury on January 6-8, 2020. Tr. 1. Kenneth C. Gibson represented Appellant. Tr. 1. The jury began deliberating at 10:42 a.m. on January 8, 2020. Tr. 381, ll. 24-25. About two hours later, the jury indicated they had a question regarding evidence presented by the state. Tr. 384, ll. 1-2. Approximately thirty minutes later, the jury had another question about the evidence. Tr. 385, ll. 24-25. At 4:51 p.m., six hours after starting their deliberations, the jurors returned with guilty verdicts. Tr. 387, ll. 17-23. Judge Miller sentenced Appellant to forty-five years imprisonment for murder and five years imprisonment for the weapon. Tr. 392, l. 5; R. *(sentence sheets).

On January 21, 2020, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"In criminal cases, [the appellate court] will review errors of law only." State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." Id. The reviewing court "is limited to determining whether the trial court abused its discretion" and "does not re-evaluate the facts based on its own view of the preponderance of the evidence." Id. The appellate court "simply determines whether the trial court's ruling is supported by an evidence." Id.

ARGUMENT

The trial judge erred by failing to quash the jury panel where the state used a peremptory strike in a racially discriminatory manner by striking a black juror due to the juror's age, but did not strike white jurors in the same age bracket, in violation of the Equal Protection Clause of the United States Constitution.

Relevant facts

At the conclusion of jury selection, defense counsel informed the judge that he objected to the jury selection process. Tr. 24, ll. 22-24. First, the judge heard the objection during a bench conference that was not transcribed. Tr. 25, l. 5. After excusing the jury from the courtroom, defense counsel explained he objected to the jury selection process based upon Batson v. Kentucky, 476 U.S. 79 (1986). Tr. 32, ll. 6-14. Defense counsel noted that Appellant was "a black male" and the prosecutor struck the only two black males who were in the panel. Tr. 32, ll. 6-14. Specifically, the state struck Juror #237 and Juror #139. Tr. 32, l. 23 – Tr. 33, l. 1. He argued the strikes were in violation of Batson. Tr. 32, ll. 6-14.

The solicitor responded that he struck Juror #139 because "the criminal history check prior to this trial revealed that in 2012, Juror #139 had a possession of marijuana in Alabama and carrying a concealed weapon in Alabama, as well as a possession of drug paraphernalia in Alabama. It's showing no disposition for those." Tr. 33, ll. 6-11. According to the solicitor, Juror #139 also had "a possession of marijuana that's currently pending here in magistrate's court in Greenville County, as well as an unlawful carrying of a pistol that's pending with the Thirteenth Circuit Solicitor's Office and has not yet been assigned." Tr. 33, ll. 12-16. The solicitor explained the strike was "[e]xclusively based on that reason." Tr. 33, ll. 17-19. Judge Miller found this was a race-neutral reason for the strike. Tr. 33, ll. 22-23.

Regarding Juror #237, the solicitor noted he was born after 2001. Tr. 33, l. 24 – Tr. 34, l. 1. The solicitor "believe[d] that age, and the gravity of this case, and the many nuances that we'll get into over the next several days, [he] just had concerns that with his young age, he would not be able to appreciate those - - the detailed nature of this case that's to be presented." Tr. 34, ll. 3-7. Additionally, the solicitor explained that "coincidentally," "this juror was, also, unemployed." Tr. 34, ll. 16-17.

Defense counsel argued the state's alleged reasons for striking the jurors were pretexts for underlying discrimination. Tr. 34, ll. 22-23. Regarding Juror #139, whom the state allegedly struck due to his prior criminal history, defense counsel explained that Juror #34, a white female, was not struck despite the fact that she had a prior criminal history. Tr. 34, l. 25 – Tr. 35, l. 3. Defense counsel also objected to the state's claim that Juror #237 was due to age because during the bench conference the state claimed the juror was "not attentive." Tr. 35, ll. 4-7. Having sat through general jury qualifications, defense counsel described Juror #237 as "extremely attentive" during that process. Tr. 35, ll. 7-11. According to defense counsel, Juror #237 was "at the edge of his seat leaning forward listening to what Judge Stilwell was saying." Tr. 35, ll. 11-13. Additionally, defense counsel noted the state failed to strike a "white male juror who appeared of a youthful age." Tr. 37, ll. 4-5. The state also failed to strike a white female juror who was born in 1997. Tr. 38, ll. 9-12.

The solicitor admitted to seating a white juror with "a prior conviction for fraud check from … 1984." Tr. 35, ll. 18-20. Yet, the solicitor sought to distinguish the white juror from the black juror, whom the solicitor struck. The solicitor claimed this distinction was "there's charges in the Thirteenth Circuit Solicitor's Office currently." Tr. 35, ll. 21-23.

Further, the solicitor admitted to seating a white juror who was born in 1995. Tr. 37, ll. 7-8. Yet again, the solicitor tried to distinguish the white juror from the black juror, whom the solicitor struck, by explaining the black juror was six years younger than the white juror. Tr. 37, ll. 7-10. The solicitor called this a "meaningful" difference because the black juror was "essentially, a teenager, almost 20 years old." Tr. 37, ll. 10-13; Tr. 38, ll. 13-16. The solicitor admitted the juror was not "twiddling his thumbs looking at the ceiling," but the solicitor claimed "he did not appear … to be as focused and appreciate the gravity of the situation that he was about to undertake potentially, if selected." Tr. 37, ll. 18-22. "To be blunt," the strike was "simply about whether he would appreciate and have the life experiences necessary for … deciding this case." Tr. 38, ll. 4-8.

Without explanation, the judge denied the motion to challenge the jury. Tr. 38, ll. 17-18.

Discussion

The United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the prosecution from striking potential jurors on the basis of race. Batson v. Kentucky, 476 U.S. 79 (1986). In a subsequent opinion, the United States Supreme Court held that a criminal defendant may not engage in racial discrimination in exercising peremptory strikes. Georgia v. McCollum, 505 U.S. 42, 59 (1992). Two years later, the United States Supreme Court recognized that the Fourteenth Amendment also prohibits the striking of a juror on the basis of gender. J.E.B. v. Alabama, 511 U.S. 127, 146 (1994).

The Supreme Court has long recognized "that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror." Georgia v. McCollum, 505 U.S. 42, 48 (1992). The Court devised Batson and its procedures "to remedy the harm done to the dignity of persons and to the integrity of the courts." Id. (internal quotation

omitted). When a party strikes a juror based on race, "there can be no doubt that the harm is the same – in all cases, the juror is subjected to open and public racial discrimination." Id. at 49.

When jury selection procedures purposefully exclude African-Americans, public confidence in the criminal justice system is undermined. Id. "Be it at the hands of the state or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it." Id. at 49-50 (internal quotation omitted).

In Purkett v. Elem, 514 U.S. 765, 767 (1995), the United States Supreme Court set out the procedures for a trial court to follow when a party challenges a peremptory strike. This Court adopted that procedure in State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). The first step requires the moving party to make out a prima facie case of racial or gender discrimination.[1] At the second step, the burden of production shifts to the proponent of the strike to present a race or gender neutral explanation for the challenged strike. If a race or gender neutral explanation is provided, then the third step requires the trial judge to decide whether the moving party has proven purposeful racial or gender discrimination. Purkett, 514 U.S. at 767; see also State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007).

According to the United States Supreme Court, the "second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett, 514 U.S. at 767-68; see also State v. Inman, 409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014). This Court recognized that the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations" for the strikes. Adams, 322 S.C. at 123, 470 S.E.2d at 371. Unless discriminatory

[1] This Court has determined that "requesting a Batson hearing in effect sets out a prima facie case of discrimination." State v. Chapman, 317 S.C. 302, 305-306, 454 S.E.2d 317, 319-320 (1995) overruled on other grounds by State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998).

intent is inherent in the explanation, it is deemed race neutral at step two. Purkett, 514 U.S. at 768. However, the Supreme Court explained that while

> the explanation provided by the proponent of a peremptory challenge at the second stage of the Batson process … need not be persuasive, or even plausible, … 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 all the evidence bearing on it.

State v. Giles, 407 S.C. 14, 21-22, 754 S.E.2d 261, 264 (2014). Otherwise, the opponent of the challenge and the trial court would not have the ability to safeguard the right to equal protection. Id. "Reasonably specific is necessary because comparison to other members of the venire for purposes of a disparate treatment analysis, which is often used at the third step of the Batson process to determine if purposeful discrimination has occurred, is impossible if the proponent of the challenge provides only vague or very general explanation." Id. at 22, 754 S.E.2d at 263. The explanation given "may not be so general or vague that it deprives the opponent of the challenge the ability to meet the burden to show, or the trial court of the ability to determine whether, the reason given is pretextual." Id. "The proponent of the challenge must provide an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it." Id.

During the third step, the moving party "must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." State v. Cochran, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006) (citing Adams, 322 S.C. at 124, 470 S.E.2d at 372). "This burden is generally established by showing similarly situated members of another race were seated on the jury." Id. "Unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext." Id. If the trial judge determines the race and gender neutral

explanations were mere pretext, then the trial court must quash the jury panel and select a new jury. Id. "The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike." Evins, 373 S.C. at 415, 645 S.E.2d at 909. The trial judge must examine the totality of the facts and circumstances in the record to determine whether a Batson violation occurred. State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009).

This Court previously addressed an exercise of a jury strike based upon age. State v. Easler, 322 S.C. 333, 344, 471 S.E.2d 745, 752 (Ct. App. 1996) aff'd as modified State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). Easler's counsel struck a juror because "[h]e was young" and "not within the sort … of profile that [the defense was] looking for in a juror." Id. The defense's profile "was a middle aged person, someone that's had some experience that … would be willing to stand, listen to the evidence, had the maturity of foresight to listen to the evidence, determine what was true and what's not true." Id. The juror who was struck was twenty years old. Id. The trial judge determined the reason of age to strike was not race-neutral because "[t]he next person that sat was twenty-two, a white male. [Another juror] was twenty-seven, white female. [Another juror] was twenty-one. [Another juror] was twenty, [another juror] is twenty-nine." Id. at 345, 471 S.E.2d at 752. The judge determined those jurors were "in that same age bracket." Id. This Court held "[t]he trial judge did not err in finding that [Easler] was unable to articulate a racially neutral explanation for his peremptory challenges against black venire persons." Id. at 348, 471 S.E.2d at 754. This Court explained "age cannot be considered a racially neutral explanation for the striking of [the juror] since [Easler] failed to strike several white venire persons in the same age bracket." Id.

Similarly, here, the solicitor struck a juror who was born in 2001, or who was nineteen-years old at the time of the trial, but did not strike a juror who was born in 1997, or who was twenty-three years old at the time of the trial, and a juror who was born in 1995, or who was twenty-five years

old at the time of the trial. Just like in Easler, the juror who was struck by the state was in the same age bracket as at least two jurors who were seated and participated in the trial. The trial judge erred in denying defense counsel's motion to quash the jury panel based upon the state's discriminatory exercise of peremptory strikes.

The solicitor's remark that Juror #237 was unemployed cannot save the strike from discriminatory intent. South Carolina uses the "tainted approach" where multiple explanations are offered to explain a jury strike. Payton v. Kearse, 329 S.C. 51, 59-60, 495 S.E.2d 205, 210 (1998). The Supreme Court explained that "[o]nce a discriminatory reason has been uncovered – either inherent or pretextual – this reason taints the entire jury selection procedure." Id. at 59, 495 S.E.2d at 210. "[A]ny consideration of discriminatory factors in this decision is in direct contravention of the purpose of Batson which is to ensure peremptory strikes are executed in a nondiscriminatory manner." Id. at 59-60, 495 S.E.2d at 210. "'Active discrimination … during th[e] process [of jury selection] condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.'" Id. at 60, 495 S.E.2d at 210 (quoting Powers v. Ohio, 499 U.S. 400, 412 (1991)). Noting "Batson is only effective against the most obvious examples of racial and gender prejudices," the Court explained that "[t]o excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the preemptory strike would erode what little protection Batson provides against discrimination in jury selection." Id. "The challenged party should not have an opportunity to convince the judge that he would have struck the juror regardless of discriminatory reason." Id.

Here, the state may not rely upon Juror #237's unemployment or demeanor as a reason for its strike to cleanse the taint of racial discrimination in light of South Carolina's adoption of the

"taint approach." The solicitor's strike of Juror #237 based on age was a fundamentally pretextual reason in light of the white jurors who were not struck and were in the same age bracket as Juror #237. Furthermore, the exchange between the judge and the solicitor demonstrated that the solicitor's reason for striking Juror #237 was completely unrelated to his unemployment. Notably, the solicitor remarked that Juror #237 was also unemployed when citing a case to argue that "a lack of life experience" based on age is "a credible reason for the same reason that unemployment is a sufficient reason for a strike." Tr. 34, ll. 12-17. It was only when the solicitor read this portion of the case did the solicitor note that "coincidentally," Juror #237 was "also" unemployed. The language used by the solicitor easily demonstrates that the solicitor did not exercise his strike against Juror #237 because he was unemployed.

The solicitor exercised his peremptory strike against Juror #237 in a racially discriminatory manner. Although the solicitor initially articulated a race neutral explanation for the strike, which was Juror #237s age, defense counsel and the judge noted that at least two other jurors, who were white and not struck, were in the same age bracket. The white jurors were similarly situated the black juror; thus, defense counsel, the opponent of the strike, carried his burden of showing the state reason for strike was a pretext for racial discrimination. The trial judge erred by denying defense counsel's motion to quash the jury panel in light of the state's exercise of its strike against Juror #237 in a discriminatory manner.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of January, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Jan 12 2021
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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is mbrown@scag.gov; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Samuel Lamar Burnside, #382128, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 12th day of January, 2021.

s/*Susan B. Hackett*
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