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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

SAMUEL LAMAR BURNSIDE,

APPELLANT

APPELLATE CASE NO. 2020-000133

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# INITIAL REPLY BRIEF OF APPELLANT

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### Introduction

Appellant writes to clarify the facts as presented during the trial regarding the case in general, but also as to the specific legal issue raised. In its statement of facts, Respondent cited to argument of counsel and statements made by individuals during the sentencing proceeding. See e.g., BOR at 3 (citing the prosecutor's opening statement and information provided to the judge during sentencing that the deceased was a mother of five). Generally, these matters are not considered facts because argument of counsel is not evidence and the statements of individuals during sentencing proceedings are not for the jury's consideration.

Other facts stretched the definition of "a reasonable inference" to incredulity. For example, Respondent claimed that "[f]orensic evidence indicated one bullet had gone through her chest, but that after the Appellant saw the round did not kill her, fired another into her cheek, and finally executed her at point-blank range with one more through her skull." BOR at 3. Respondent cited to the testimony of the pathologist for this assertion. BOR at 3. Forensic evidence from the pathologist did *not* support Respondent's claims.

The pathologist found "three separate gunshot wounds." Tr. 100, ll. 13-14. When asked to explain each wound, the pathologist made clear that he did not "know which came first," and therefore, he would discuss them by number, but each wound would be arbitrarily assigned a number. Tr. 100, ll. 18-20. Not once did the pathologist indicate the order of the gunshot wounds, that Appellant inflicted the wounds, or that gunshots were fired upon realization the deceased survived earlier shots. Cf. Tr. 98, l. 1 – Tr. 106, l. 12 with BOR at 3. In fact, the pathologist opined to a reasonable degree of medical certainty that all three of the gunshot wounds would have been fatal. Tr. 104, ll. 8-10.

Respondent's inaccurate quotation of Investigator David Picone's testimony suggests the source of the information contained within the quotation was from more than one individual. However, Picone's testimony was clear – his information on this point was from only one person, Roville Williams, who was also a suspect in the death. According to Picone, Williams "referred to [Appellant] as a pimp." Tr. 299, l. 21 – Tr. 300, l. 3. This contrasts sharply with Respondent's claim that Appellant "was refer[ed] to as a pimp." See BOR at 3. Additionally, Respondent's quotation of Picone's testimony suggests the police confirmed that Appellant was a pimp, that the deceased was working for Appellant, and that the two argued because the deceased refused to work while she was menstruating. See BOR at 3. When the entirety of Picone's statement is examined, it is clear that the only thing "confirmed" was that the deceased was using a maxi pad at the time of her death. Tr. 300, ll. 5-9 ("this argument stemmed from her being on her period and not being able to perform those sexual acts. And we did confirm that by a video at Dollar General. She was buying maxi pads. And, B, at the autopsy when we found a maxi pad in her pants.").

Along these lines, Respondent boldly asserted "[t]he evidence supported that Catherine Clark [the deceased] had been 'working' for the Appellant." BOR at 4. Respondent offered no citation to the record to support this supposition. The only evidence that Appellant was a pimp or that the deceased was "working" for him was the hearsay testimony from Picone. When the state called Roville Williams as a witness, Williams testified only that Appellant wanted the deceased to have sex with other people. Tr. 222, ll. 12-15. The state never even asked Williams if Appellant were a pimp.

Respondent brazenly mischaracterized Williams' actual testimony. Respondent claimed "Williams testified the Appellant then drove them to a desolate area, forced the victim out of the

car, drove past her, stopped the car, got out, kicked her, and then fired at her four times with a black nine-millimeter automatic revolver." BOR at 4. Williams testified that he, Appellant, and the deceased were outside the car near a storage facility. Tr. 223, l. 16 – Tr. 224, l. 18. Appellant and the deceased argued while Williams walked away. Tr. 223, l. 16 – Tr. 224, l. 18. Williams, however, had a change of heart and return to the two in order to mediate. Tr. 224, ll. 23-25. According to Williams, the two returned property to each other, then they "rode on." Tr. 225, ll. 2-18. Williams and Appellant were in the car, while the deceased was outside of the car. Tr. 228, l. 3 – Tr. 231, l. 5. Williams claimed that Appellant "jumped out" of the car with a gun on his side. Tr. 231, ll. 8-19. The gun was a black automatic. Tr. 232, ll. 1-4. Appellant was out of the car for "a couple of minutes." Tr. 232, ll. 14-16. Appellant return to the car with his gun. Tr. 232, ll. 16-20. Williams *did not hear anything* while Appellant was outside of the car. Tr. 233, ll. 17-18. Notably, and in sharp contrast to Respondent's claim, Williams testified unequivocally that he *did not hear any gunshots*. Tr. 233, ll. 19-20. At no point did Williams testify that Appellant kicked the deceased. Cf. BOR at 4. At no point did Williams testify that Appellant fired at her four times – or at all. Cf. BOR at 4. At no point did Williams testify that Appellant had a nine-millimeter. Cf. BOR at 4.

Finally, Respondent claimed "[t]here was a Facebook post that named him as the killer." BOR at 5. For this proposition, Respondent cited to Williams' testimony. BOR at 5. Williams claimed that he heard Appellant "arguing with somebody about something, about a poster, something." Tr. 235, ll. 16-18. When asked to be more specific, Williams responded, "Something was posted on Facebook about he supposed to have done - - I guess something to - - to the victim." Tr. 235, ll. 19-22. The following exchange then occurred:

> Q Are you testifying that he was talking about a post that he had seen about him being involved with the murder of the victim?

A Yes.

Q And what was [Appellant] saying?

A He was, like, basically, saying, like, that was some BS. He didn't do it. I know what they've got going on.

Q And he was talking to you about this or you overheard?

A I just heard it.

Q And do you - -

A And once he got off, he had told me.

Q I'm sorry.

A Once he got off, he was saying, like, That's some bull, BS.

Tr. 235, l. 23 – Tr. 236, l. 12. Williams' testimony was that Appellant mentioned a Facebook post that claimed Appellant was *involved* in the death of the deceased. Nowhere did Williams claim the Facebook post named Appellant as the killer. Being involved in a death does not equate to being a killer. According to the solicitor, Williams was *involved* as he was charged and pled guilty to misprision of a felony concerning the death. Tr. 237, l. 14 – Tr. 238, l. 3. Despite this involvement, the state never accused Williams of being the killer, and in fact, the lead investigator went to great lengths to remove suspicion from Williams. Tr. 299, ll. 7-20. Furthermore, despite the state's vast resources, the state never presented this alleged Facebook post or a witness who actually saw the post or created the post.

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.

Just as Respondent took considerable liberties with its statement of facts, Respondent did so as well with the "relevant facts" portion of its brief concerning the issue presented. According to Respondent, "238 jurors were noticed, 76 appeared and were qualified, and 40 were placed on the panel for selection." BOR at 8. For this proposition, Respondent cited to a single line of the transcript, which provides the judge stating, "We've got 40 coming up." Tr. 9, l. 4. Nowhere does the transcript list the number of jurors who were noticed or how many appeared. Furthermore, Respondent claimed "[t]he first venireperson presented by the state as a potential alternate, #60, a white male (born 1973), was excused by the defense." BOR at 9. However, according to the transcript, the *solicitor* stuck Juror #60, William Davis. Tr. 23, l. 23 – Tr. 24, l. 1. Specifically, the transcript identified "Mr. Moroney" as the attorney who struck Mr. Davis. Tr. 24, l. 1.

Additionally, Respondent asserted "the solicitor only exercised two of his *ten* strikes and the defense only exercised eight of his ten." BOR at 10 (emphasis added). To the contrary, the solicitor exercised two of his *five* strikes when selecting the main jury, but exercised a third strike when selecting the alternates. Tr. 17, l. 22 – Tr. 24, l. 21; Tr. 9, ll. 24-25 (the judge remarking, "Well, 10 and five" presumably in reference to the number of strikes); S.C. Code Ann. § 14-7-110 (providing the prosecution is entitled to peremptory challenges not exceeding five in murder cases). In listing the years of birth for the white female jurors seated for the petit jury, Respondent listed "1975, 1976, 1961, 1965, and 1998." BOR at 9. The fourth white

female juror selected was Carol Mullan and her year of birth was 1964, *not* 1965. R. *(Roll Call List for Jurors Present).

Turning to the merits of the issue presented, on appeal, Respondent focused its analysis on the solicitor's stated reasons for striking Juror #237 of unemployment and demeanor, instead of what the solicitor initially said regarding the juror's age. Not once did Respondent address Appellant's argument that the solicitor's alternative reasoning could not save the strike from discriminatory intent. As Appellant explained in his opening brief, 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).[1] BOA at 10. "Once 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)). "Batson is only effective against the most obvious examples of racial and gender prejudices." Id. "To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the preemptory strike would

[1] South Carolina is one of many jurisdictions that have adopted the "tainted" approach. See e.g., United States v. Greene, 36 M.J. 274, 280 (C.M.A. 1993) (holding that "all reasons proffered by trial counsel be untainted by any inherently discriminatory motives"); State v. Lucas, 18 P.3d 160, 163 (Ariz. Ct. App. 2001) (explaining that "[r]egardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose Batson and taints the entire jury selection process"); McCormick v. State, 803 N.E.2d 1108, 1113 (Ind. 2004) (adopting the "tainted" approach).

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.

In support of the state's strike on the purported basis of age, Respondent cited Sumpter v. State, 312 S.C. 221, 439 S.E.2d 842 (1994). BOR at 16. Sumpter, as apparently acknowledged by Respondent, offers little help to Respondent. BOR at 16. The Supreme Court explained the prosecutor expressed that his strike of the black male juror was because of the juror's young age. Sumpter v. State, 312 S.C. 221, 223, 439 S.E.2d 842, 843 (1994). However, the defense failed to carry its burden of showing the strike was not exercised in a race neutral way because the age of the juror did not appear in the record. Id. at 223, 439 S.E.2d at 843-844. In essence, the Supreme Court declared it did not have a sufficient record to determine if the prosecutor exercised the strike in a racially discriminatory manner. Id. Thus, this case offers no help to Respondent because the record before this Court provides ample evidence that the prosecutor struck Juror #237 in a discriminatory manner.

Important for this Court's analysis, the trial judge expressed disbelief that the solicitor exercised his strike against Juror #237 in a race-neutral way, specifically, his age. Reviewing State v. Easler, 322 S.C. 333, 344, 471 S.E.2d 745 (Ct. App. 1996) aff'd as modified State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997), the judge noted that in Easler, the Court held that age was not considered a racially neutral explanation because the party failed to strike several white venire persons in the same age bracket. Tr. 36, l. 19 – Tr. 37, l. 2. Then, the judge noted the defense in this case pointed to "another white male juror who appeared of a youthful age." Tr. 37, ll. 3-5. The judge asked the solicitor to distinguish his strike of Juror #237 from Easler. Tr. 37, l. 6. At this point, the solicitor tried to argue that there was a "meaningful" distinction between Juror #237's age

of "almost 20 years old" and the white juror who was born in 1995. Tr. 37, ll. 7-13. Notably, Juror #110, Alex Humphrey, a white male who was born in 1996, and was not struck by the solicitor. R. *(Roll call list for jurors present). Thus, this juror was only five years older than Juror #237. Furthermore, Juror #90, Allison Gregg, who was born in 1998, was not struck by the solicitor. R. *(Roll call list for jurors present). Thus, this juror was only three years older than Juror #237. The first alternate, Juror #38, Ashley Carlson, was born in 1997, and she was not struck by the solicitor. Tr. 38, ll. 9-12; R. *(Roll call list for jurors present). All three jurors were white. Perhaps realizing his dilemma, the solicitor switched course and told the judge that he struck Juror #237 because "he did not appear … to have - - be as focused and appreciate the gravity of the situation that he was about to undertake potentially, if selected." Tr. 37, ll. 14-22. As previously explained, the solicitor's alternate reason cannot save this strike because it was exercised in a racially discriminatory manner based upon the reason initially provided by the solicitor – Juror #237's age.

Respondent appears to request this Court overrule the "tainted" approach adopted by our Supreme Court under the guise of arguing for an examination of the "totality of all of the facts and circumstances." See BOR at 15. This Court must reject Respondent's invitation. The employment status and demeanor of Juror #237 are not part of the "facts and circumstances." Rather, those observations were offered as alternative reasons for the solicitor's exercise of his peremptory strike. However, Appellant agrees with Respondent that determining whether a strike was exercised in a race-neutral and gender-neutral way includes consideration of the circumstances under which the strike was exercised. See State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999).

Here, there were only two black males in the pool of forty that were used for jury selection. R. *(Random strike sheet). The solicitor struck both. While there were four males selected for the jury, all were white. Further, there were two black individuals on the jury, but they were both

female. The jury consisted of *no* black males, the racial and gender group within which Appellant belonged as trial counsel made clear, due to the solicitor's exercise of his peremptory strikes. The solicitor's use of his peremptory strikes to eliminate the racial and gender group to which Appellant belonged from the jury also supports Appellant's argument on appeal that the trial court erred in failing to grant Appellant's motion to quash the jury panel.

## 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 24th day of June, 2021.

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CERTIFICATE OF SERVICE

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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 Reply Brief of Appellant and Designation of Matter in the above referenced case has been served upon Julianna E. Battenfield, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is juliannabattenfield@scag.gov; and a copy of the Initial Reply Brief of Appellant and Designation of Matter have been served on Samuel Lamar Burnside, #382128, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 24th day of June, 2021.

s/*Susan B. Hackett*
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