No. COA 18-998 THIRTEEN-A JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	**From Columbus County**
v.	)	**(File No. 15 CRS 50590)**
	)	
MR. ANTIWUAN T. CAMPBELL,	)	
Defendant-Appellant.	)	

****

DEFENDANT-APPELLANT'S BRIEF

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DEFENDANT-APPELLANT'S BRIEF

****

QUESTION PRESENTED ON APPEAL

I. WHETHER THE TRIAL COURT ERRED WHEN IT RULED THAT THE DEFENSE HAD FAILED TO MAKE A *PRIMA FACIE* SHOWING THAT THE STATE'S PEREMPTORY CHALLENGE OF AN AFRICAN AMERICAN JUROR WAS EXERCISED ON THE BASIS OF RACE?

STATEMENT OF THE CASE

A grand jury empaneled on April 15, 2015 in Columbus County returned indictments against Mr. Antiwuan Tyrez Campbell charging him with the crimes of second degree kidnapping and first degree murder.

The cases came on for trial during the July 24, 2017 session of Criminal Superior Court before the Honorable Judge Douglas Sasser, Judge Presiding, and lasted for several days from July 24, 2017 until August 2, 2017. During jury selection, the defense raised a *Batson* challenge, which is the sole issue raised by this appeal.

The jury found Mr. Campbell not guilty of second degree kidnapping but guilty of first-degree murder. The trial court sentenced Mr. Campbell to life in prison. Mr. Campbell entered oral notice of appeal from the trial court's judgment.

The Clerk of Superior Court docketed the Appellate Entries on August 7, 2017 and the trial court appointed the Appellate Defender to represent Mr. Campbell on appeal. On August 22, 2017, the Appellate Defender appointed undersigned counsel, Ms. Geeta Kapur, to perfect Mr. Campbell's appeal.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

North Carolina General Statute § 15A-1444 provides in relevant part "a defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered." N.C. GEN. STAT. § 15A-1444 (2011). Moreover, North Carolina General Statute § 7A-27(b) dictates that an appeal, as a matter of right from a final judgment of a superior court, lies with the North Carolina Court of Appeals. N.C. GEN. STAT. § 7A-27(b) (2011). North Carolina General Statute §15A-1442 outlines several errors that only an appellate division can correct – a violation of law is raised in this appeal. N.C. GEN. STAT. § 15A-1442 (2011).

Mr. Campbell entered a plea of not guilty, was found guilty by a jury and the trial court entered its final judgment on August 2, 2017. He entered oral notice of appeal that same day in court. He is entitled to an appeal as a matter of right. Therefore, this Court has proper jurisdiction to review this case.

STATEMENT OF THE FACTS

Jury selection began in Mr. Campbell's case on July 25, 2017. (Transcript Volume II (hereinafter denoted by the abbreviation "TII"), p. 37) It continued the next day. (TIII, p. 68-69) During the selection for alternate juror number 1, the trial court ordered counsel to approach the bench. A sidebar conference took place but was not recorded. The defense did not request complete recordation. (TIII, p. 69, ll. 23-25) Afterwards, the trial court asked defense counsel to state her objection for the record. (TIII, p. 70, ll. 1-5)

"Judge, I am challenging this peremptory based on *Batson.* The State has at this point, this is the fourth peremptory challenge for the State, by my counting." (TIII, p. 70, ll. 6-9) Defense counsel explained that the State had used three of four peremptory challenges to excuse potential African American jurors. She argued "...this violates – our whole process of having a jury of our peers, if the State's aim is to remove African-Americans." (TIII. p. 70, ll. 16-19; p. 71, ll. 2-4)

The State said the trial court would have to first determine if the defense made out a *prima facie* case. (TIII, p. 71, ll. 6-7) Defense counsel told the Judge that the State "stayed on" juror 7 and alternate 1 questioning

them, trying to get them excused for cause before exercising peremptory challenges. (TIII, p. 72, ll. 15-22)

The trial court acknowledged that the prima facie case was "a very low hurdle" but ruled that the State's exercise of peremptory challenges had not "reached that level yet" and denied the *Batson* challenge. (TIII, p. 72, ll. 23-25; p. 73, ll. 1-4) The defense objected for the record. (TIII, p. 73, l. 5)

Probably in anticipation of appellate review, the trial court asked the State to offer a race-neutral basis for its peremptory challenges. The State replied that if it did, it would be viewed as a stipulation of a *prima facie* showing. The trial court ruled there had not been a *prima facie* showing and denied the *Batson* challenge. (TIII, p. 73, ll. 11-19)

After a break, the trial court addressed the matter again. "...[U]pon further reflection, although I do not find that a *prima facie* case has been established for discrimination pursuant to *Batson,* in my discretion, I am still going to order the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges in regards to Ms. Vereen [juror 7], and in regards to Mr. Staton [juror alternate one], and Ms. Holden [juror alternate one]." (TIII, p. 74, ll. 8-15)

The State claimed juror 7, Ms. Vereen, had a connection to a potential witness, had been a victim of robbery with a dangerous weapon and had

blood relatives in the same area where Mr. Campbell's relatives were. (TIII, pp. 74-76) As to the first alternate juror, Mr. Staton, the State said he was familiar with an eyewitness, had said he needed to hear from both sides, and he had two friends who had been murdered. (TIII, pp. 77-79)

Regarding the first alternate juror. Ms. Holden, the State said she was from the Tabor City area, was familiar with Olivia and Kizzy Miller, two potential witnesses, and knew Porsha James, an eyewitness. (TIII, p. 79, ll. 9-25) The State added that as a college student, Ms. Holden had participated or organized for Black Lives Matter. The State claimed it had excused her because "implied unstated issues that may arise due to either law enforcement, the State, or other concerns…" (TIII, p. 80, ll. 1-9)

The Court ruled that the defense had not made a *prima facie* showing but then went on to rule that the State had offered a race-neutral justification as to the exercise of each of its peremptory challenges and denied the *Batson* challenge. (TIII, p. 80, ll.21-25; p. 81, ll. 1-4)

However, in its written order, the trial court found only that there was not a *prima facie* showing made to establish any violations by the State for its exercise of peremptory challenges. The trial court's order notes that the defense only objected once the State sought to use a peremptory challenge on the second prospective alternate juror, Ms. Holden. (Record on Appeal 5)

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT RULED THAT THE DEFENSE HAD FAILED TO MAKE A PRIMA FACIE SHOWING THAT THE STATE'S PEREMPTORY CHALLENGE OF AN AFRICAN AMERICAN JUROR WAS EXERCISED ON THE BASIS OF RACE.

STANDARD OF REVIEW

Whether the State intended to discriminate against the members of a race in its selection of a jury is a question of fact, and the trial court's findings will be upheld on appeal unless the appellate court is convinced that the trial court's decision is clearly erroneous. *State v. McCord,* 140 N.C. App. 634, 652, 538 S.E. 2d 633, 644 (2000) (citation omitted). Moreover, when the trial court explicitly rules that a defendant failed to make out a prima facie case, review by this Court is limited to whether the trial court's finding was error. *See State v. Fletcher,* 348 N.C. 548, 552, 500 S.E. 2d 668, 721 (1998), *cert. denied,* 525 U.S. 1180, 143 L. Ed. 2d 113, 191 S. Ct. 1118 (1999).

DISCUSSION

In North Carolina, the State and defense each get six peremptory challenges in a non-capital case such as this. N.C. GEN. STAT. § 15A-1217 (2018). The defense is entitled to rely on the fact that "peremptory challenges constitute a jury selection practice that permits those to

of a mind to discriminate." *Batson v. Kentucky,* 476 U.S. 79, 96, 90 L. Ed. 2d 69, 87, 106 S. Ct. 2376 (1999) (citation omitted). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids the State from using peremptory challenges for a racially discriminatory purpose. *See Batson v. Kentucky,* 476 U.S. 79, 86, 90 L. Ed. 2d 69, 80, 106 S. Ct. 2376 (1999).

In 1970, North Carolina amended its state constitution to explicitly prohibit discrimination in jury selection. Article 1, section 26 of the North Carolina Constitution provides: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. CONST. art I, sec. 26.

In the seminal case of *Batson v. Kentucky,* the United States Supreme Court outlined a three-part test to determine if the State used a peremptory challenge for a discriminatory reason. *Hernandez v. New York,* 500 U.S. 352, 359, 114 L.Ed. 2d 395, 405, 111 S. Ct. 1859 (1991). First, the defendant must establish a *prima facie* case that the prosecutor has exercised a peremptory challenge on the basis of race. *Id.* Once the *prima facie* case has been established by the defendant, the burden then shifts to the State, which, in order to rebut the inference of discrimination, must offer a race-neutral explanation for attempting to strike the juror in question, *Id.* Third

and finally, the trial court must make the ultimate determination as to whether the defendant has carried his burden of proving purposeful discrimination. *Id.* The North Carolina Supreme Court has ruled that the *Batson* test is the same test to be used to prove a violation of article 1, section 26 of the N.C. Constitution. *State v. Augustine,* 359 N.C. 709, 715 (2005).

Several factors are relevant to the first part of the *Batson* test: (1) the defendant's race, (2) the victim's race, (3) the race of key witnesses, (4) questions and statements by the prosecutor which tend to support or refute an inference of discrimination, (5) repeated use of peremptory challenges against African Americans such that it tends to establish a pattern of strikes against blacks in the venire, (6) the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and (7) the State's acceptance rate of potential black jurors. *State v. Hoffman,* 348 N.C. 548, 550, 500 S.E. 2d 718, 720 (1998). "Step one of the *Batson* analysis is not intended to be a high hurdle for defendants to cross. Rather the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge."

In this case, once the State used a peremptory challenge to excuse Ms. Staton, the second prospective juror for the first alternate juror position, the

defense objected based on *Batson*. Defense counsel explained that the State had used three of the four peremptory challenges to excuse potential African American jurors. She argued "...this violates – our whole process of having a jury of our peers, if the State's aim is to remove African-Americans." Thus in this case, the defense established the following *Hoffman* factors: (1) that the defendant's race was African American (the indictments in the record of this case denote "B" for his race); *Hoffman* factor (6) that the State had used a disproportionate number of its peremptory challenges against African Americans, which established *Hoffman* factor (5) a pattern of striking African American jurors. *Hoffman,* 348 N.C. at 550, 500 S.E. 2d at 720.

The trial court acknowledged that the *prima facie* case was "a very low hurdle" but then ruled that the State's exercise of peremptory challenges had not "reached that level yet" and ruled the defense had not made out a *prima facie* case.

The North Carolina Supreme Court has determined what constitutes a *prima facie* showing. In *Smith,* where the defendant showed he was black and the State peremptorily struck one black prospective juror, the Court held this was insufficient to establish a *prima facie* case of racial discrimination. *State v. Smith,* 347 N.C. 453, 462, 496 S.E. 2d 357, 362 (1998). Likewise in

Quick, the Supreme Court held that the State's use of two of four peremptory challenges against black prospective jurors was insufficient to establish a *prima facie* case. *State v. Quick,* 341 N.C. 141, 146, 462 S.E. 2d 186, 189 (1995). However, where the State had used three peremptory challenges against black prospective jurors, the North Carolina Supreme Court has held that the trial court erred as a matter of law when it ruled that defendant had failed to make a *prima facie* showing. *Hoffman,* 348 N.C. at 554, 500 S.E. 2d at 722. Thus under *Hoffman,* the trial court erred in this case because the State had used three out of four peremptory challenges to excuse prospective African American jurors.

This case is analogous to *Barden.* In *Barden,* the State used 71.4% of its peremptory challenges against African Americans but the trial court found this did not constitute a *prima facie* case. *State v. Barden,* 356 N.C. 316, 344, 572 S.E. 2d 108, 127 (2002). Upon review, the North Carolina Supreme Court ruled the trial court erred. *Id* at 345. In this case, the prosecutor used 75% of its peremptory challenges against African Americans. The strike rate of 75% is higher than that of 71.5% in *Barden.* Therefore, the trial court's ruling that the defense did not make out a *prima facie* case constitutes error.

The trial court erred for another critical reason. In reaching its conclusion that the defense did not make out a *prima facie* case, it failed to consider whether the State had accepted any black jurors. Indeed, the trial court did not outline the race of the chosen jurors. The North Carolina Supreme Court has been clear that "one of the factors which a court *must* consider in determining whether intentional discrimination is present in a particular peremptory strike is whether the State has accepted any black jurors." *State v. Fletcher,* 348 N.C. 292, 318, 500 S.E. 2d 668, 683 (1998) (citation omitted) emphasis added.

Perhaps in anticipation of appellate review, the trial court asked the State to offer race neutral reasons for its peremptory challenges. The North Carolina Supreme Court has been clear that after the State articulates its race-neutral reasons, the defendant must be accorded the opportunity to show that the explanations are pretextual. *State v. Spruill,* 338 N.C. 612, 631, 452 S.E. 2d 279, 288 (1994). In this case, after the State offered its race-neutral reasons, the trial court immediately ruled and did not allow the defense an opportunity to respond. This constitutes error under *Spruill.* Further, the fact that the State offered its race-neutral reasons does not obviate the need for a remand. *Hoffman,* 348 N.C. at 554, 500 S.E. 2d at 722.

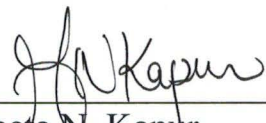
For all of these reasons, the trial court's finding that Mr. Campbell did not make a prima facie case was clearly erroneous and constitutes prejudicial and reversible error.

The United States Supreme Court made clear in *Batson* that "the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson,* 476 U.S. 79, 87. Indeed when the jury selection process is "tainted with racial bias, that overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication." *Miller-El vs. Dretke,* 545 U.S. 231, 238 (1995) (internal citations omitted). In the interest of maintaining the public confidence and in safeguarding the guarantees of the United States constitution and North Carolina constitution, this Court should protect every defendant's right to jury selection by finding that the showing made in this case constituted a *prima facie* case sufficient to shift the burden to the State to outline its race-neutral reasons for excusing three African American jurors.

CONCLUSION

For all the foregoing reasons, Mr. Campbell respectfully petitions the North Carolina Court of Appeals to reverse and remand his case to the trial court for a new trial.

Respectfully submitted to the Honorable Court of Appeals, this the 15th day of March, 2019.



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CERTIFICATE OF COMPLIANCE WITH NORTH CAROLINA RULE OF APPELLATE PROCEDURE 28(j)(2)

Undersigned counsel hereby certifies that this brief is in compliance with N.C. Rule of Appellate Procedure 28(j)(2) in that it is printed in 14-point Times New Roman Font and contains no more than 8,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program, Microsoft Word, that was used to prepare the brief.

This the 15th day of March, 2019.

Ms. Geeta N. Kapur
Attorney at Law

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Appellant's Brief has been filed by mail pursuant to Rule 26 by filing it electronically with the Court of Appeals website.

I further certify that a copy of the above and foregoing Appellant's Brief has been duly served by electronic mail upon Mr. Peter Regulski at his last known email address of: pregulski@ncdoj.gov.

This the 15th day of March, 2019.

Ms. Geeta N. Kapur
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