NO. COA18-998 **THIRTEEN-A DISTRICT**

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Columbus**
	)	
ANTIWUAN TYREZ CAMPBELL	**)**	

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BRIEF FOR THE STATE

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BRIEF FOR THE STATE

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ISSUES PRESENTED

I. WHETHER DEFENDANT HAS PRESENTED THIS COURT WITH THE MATERIAL NECESSARY TO REVIEW THOSE PARTS OF THE PROCEEDING HE CLAIMS ARE ERROR.

II. WHETHER THE TRIAL COURT ERRED BY FINDING DEFENDANT DID NOT MAKE OUT A PRIMA FACIE CASE OF BATSON DISCRIMINATION.

STATEMENT OF THE CASE

On 15 April 2015, the Columbus County Grand Jury indicted Antiwuan Tyrez Campbell ("Defendant") and charged that on 11 March 2015, Defendant murdered William Allen Davis, Jr., in the first-degree, and Defendant removed K'andra James from one place to another without her parent's consent for the purposes of terrorizing her parent, Porsha James. (Rpp 2-3)

The Honorable Douglas B. Sasser, Superior Court Judge presiding, tried the Defendant before a jury during the 24 July 2017 Criminal Session of Columbus Superior Court. (TVol. I p 1)

PROCEDURAL HISTORY

The State incorporates by reference as if fully set forth herein the procedural history set out in its Motion to Dismiss the Defendant's Appeal filed 24 April 2019. (Mot. Dismiss Appeal pp 1-3) By order dated 7 May 2019, this Court ordered that the State's motion to dismiss be referred to the panel that will be assigned to hear the case, such that this panel will necessarily review the motion to dismiss. Moreover, the Motion to Dismiss contains vital procedural and legal analysis germane to this appeal which need not be set out twice.

DEFENDANT'S BATSON CHALLENGE

The record[1] makes manifest, Defendant stood silent while the State exercised three peremptory challenges against prospective African American jurors. When the State exercised a peremptory challenge to Ms. Holden – the second potential first alternate juror – Defendant voiced a Batson objection for the very first time. The ensuing *colloquy* made clear the State had previously peremptorily challenged one white and one African American potential juror without objection. (Mr. Coe and Ms. Davis, respectively). (TVol. III, pp 70-72) The State had also peremptorily challenged the first prospective alternate juror, Mr. Stanton, again without objection, and the second prospective alternate juror, Ms. Holden. Thus, in total, the State, exercised three of the four peremptory challenges against African Americans.

The trial court expressly ruled that Defendant had not made a prima facie case of Batson discrimination sufficient to pass the burden of proof to the State to articulate race-neutral reasons for its peremptory challenges. (Id. at

[1] As discussed in the State's Motion to Dismiss the Defendant's Appeal, at Defendant's insistence the trial transcript does not contain voir dire, but only the colloquy between the trial court and trial counsel. (State's Mot. Dismiss Appeal pp 1-2) The "facts" set out in this section are summarized from the colloquy, such that the undersigned makes no guarantee of their accuracy. Because Defendant has submitted a deficient record, he cannot complain about fair inferences derived from the colloquy to which he did not contemporaneously object.

73) The trial court offered the State an opportunity to provide its reasons for its challenges. (Id.) The State objected claiming that if it provided reasons it would effectively stipulate that Defendant had made a prima facie case of discrimination. (Id.)

After a brief recess and in an overabundance of caution, the trial court reiterated its finding that the Defendant had not made a prima facie showing, but ordered the State put its reasons for its peremptory challenges on the record. (Id. at 74) As to potential juror Vereen, an African American female, the State explained it had challenged her because around the time of the incident she had dated the brother of Clifton Davis, a possible witness and someone who may have been complicit in the kidnapping charge.[2] (Id. at 74-75) Additionally, Ms. Vereen had family who lived very close to the Defendant's family and may have been familiar with them. (Id. at 75) The State explained it challenged potential juror Coe, a white male, because of his familiarity with the area and his prior knowledge of the case. (Id. at 76-77)

The State stated it peremptorily challenged potential alternate juror Stanton, an African American male, because he was socially familiar with

[2] Davis was one of three men who drove Defendant to the murder scene and later fled with the kidnapping victim, K'andra James, the four-year old daughter of Porsha James.

Porsha James, the State's sole occurrence witness and the mother of the kidnapping victim. (Id. at 77) Moreover, Mr. Stanton vacillated as to whether he would render his decision based upon State's evidence or the defense evidence. (Id. at 78) Lastly, Mr. Stanton had two friends who had been murdered and he stated those experiences would impair his ability to be a fair and impartial juror. (Id.)

As to potential juror Holden, the State indicated it had struck her because she was from the Tabor city area and was familiar with Kizzy Miller, Porsha James' aunt to whom the four-year old kidnap victim, K'andra James, had been returned. (Id. at 79; TVol. IV p 231)

STATEMENT OF THE FACTS[3]

Porsha James and her then four-year old daughter, K'andra James, lived in the first floor apartment located at 310 Holland Street, Chadbourn, North Carolina. (TVol. III p 183) In the very early morning hours of 11 March 2015, Ms. James' current boyfriend, William Allen Davis, Jr., was also present in the

[3] Defendant raises no issue on the proofs, the closing arguments, or the jury instructions, so at first blush it may appear a rendition of the facts is superfluous. However, a superficial overview of the facts makes manifest that in many ways this case rested heavily on credibility. Accordingly, a cursory rendition of the facts is necessary to appreciate the importance the prosecutor attached to the potential jurors' familiarity with the witness and any possible biases in his decision to exercise peremptory challenges.

apartment as he intended to repair Ms. James' automobile the next morning. (Id. at 190-91)

At approximately 2:00 a.m., Ms. James got up and went to the bathroom. (Id. at 192) When she returned to the bedroom she heard knocking on her bedroom window. (Id. at 192-93) Ms. James asked who it was and the Defendant replied, "It's me; open the door." (Id. at 193-94) Mr. Davis asked her to answer the door (Id. at 197), and Ms. James went to the front door. (Id. at 195) Defendant told Ms. James he had come to see his daughter. (Id. at 194) At first Ms. James would not open the door, and Defendant told her "[y]ou know I shoot." (Id.) She unlocked and opened the front door, but did not unlock or open the screen door. (Id. at 195) The Defendant was standing on the other side of the screen door and he again demanded to see his "daughter."[4] (Id. at 196) Ms. James refused to let the Defendant in, telling him that it was very late and K'andra was asleep. (Id. at 194-96) When Ms. James told Defendant

[4] Ms. James started dating the Defendant when she was seven months pregnant with K'andra, and dated him for three years after K'andra's birth (T Vol. III pp 184-85) Ms. James broke up with the Defendant because he had a "hand problem," i.e., he regularly beat her. (Id. at 186) Although Defendant is not K'andra's biological father and he provided her no support except for a pair of shoes and a box of diapers, she came to call him "daddy." (Id. at 196-97, 324)

her "friend" was present, Defendant became enraged and tore the locked screen door open and barged into her apartment. (Id. at 196)

Ms. James tried to stop Defendant from entering the apartment by grabbing his jacket, and Defendant reached back and "knocked" her in the mouth and she fell to the ground. (Id. at 197)

Defendant walked directly to Mr. Davis, who was then standing in the bedroom doorway, and confronted him asking if he was with his "baby mama," i.e., Ms. James. (Id. at 198-99) Ms. James was still on the floor when K'andra fell into her arms, when she saw the two men standing in the bedroom doorway. (Id. at 202-03) She heard two gunshots. (Id. at 203) K'andra was scared. (Id.)

Ms. James took K'andra outside and she hollered for help. (Id. at 203) She saw three men outside. (Id. at 203) One of the men, Deron [sic], replied "Twelve ain't in there doing nothing." (Id. at 204) Defendant came out of the house and confronted Ms. James with a gun in his hand. (Id. at 206) As she turned around, Defendant struck Ms. James in the back of her head with his gun. (Id. at 207) Ms. James fell to the ground. (Id. at 208) As she started to get up, she noticed K'andra was no longer with her. (Id.) Demond helped Ms. James up and she called out for her "baby." (Id.) Demond told the Defendant "Antiwuan, give the girl her baby. You know you hear her crying." (Id.)

Defendant angrily responded, "No, instead of her worrying about my baby, she need to be checking on that nigga in there." (Id.) Defendant put K'andra in the car. (Id. at 209)

Ms. James ran into the house to check on Mr. Davis. (Id.) When she did, the four men left with K'andra. (Id.) Ms. James found Mr. Davis in the bathroom. (Id. at 211) Mr. Davis was bleeding from the mouth. (Id.)

The police arrived. The first officer on the scene testified he saw a black male (later identified as Mr. Davis) hunched over in the kitchen area on his knees. (Id. at 111) Mr. Davis appeared to have a gunshot wound to his chin. (Id.) Mr. Davis was moving back and forth and groaning. (Id.) The officer described Ms. James as hysterical. (Id. at 112) The officer tried to talk to Mr. Davis, and at some point Mr. Davis fell to his stomach. (Id.) Ms. James told the officer her ex-boyfriend, Antiwuan Campbell, came to the residence; [and] she opened the door to talk to him and he burst through and went to the bedroom where Mr. Davis was located. (Id. at 113) The officer observed that Mr. Davis writhed around on his stomach, and writhed out the front door onto the patio. (Id. at 112, 114)

According to Ms. James, Mr. Davis complained of being hot, so Ms. James tried to help him walk to the front door. Mr. Davis collapsed as they walked to the front door. (Id. at 211, 213)

Shortly after the first officer arrived, Ms. James' cousin, Olivia Miller, pulled up and reported that her mother, Kizzie, had just told her that Defendant had dropped off K'andra with her. (TVol. IV p 231) Neither Ms. Miller nor her mother testified, but both had been listed as witnesses. (T Vol. III p 79)

The medical examiner testified that during the autopsy of Mr. Davis, he determined that Mr. Davis suffered three gunshot wounds. One wound was to Mr. Davis' chin and exited the bottom of his chin, almost to his neck. (TVol. VI p 615) It appeared the bullet went through the chin and down into his chest. (Id. at 618) The second wound was found to the right side of his chest and lodged in the region of his right armpit. (Id. at 615) Lastly, Mr. Davis suffered an entrance wound at his left armpit. (Id.) The medical examiner also removed a bullet lodged in the left side of Mr. Davis' back. (Id.) The medical examiner determined that Mr. Davis died as a result of gunshot wounds to the head and chest. (Id. at 635)

During a canvass of the crime scene, police recovered a .32 caliber handgun from near the entrance to the bedroom and documented a bullet hole in the bedroom wall over the pillow on the far side of the bed. (TVol. V p 467; pp 544-49)

Police arrested Defendant at his home. At the time of his arrest, police

recovered four expended .32 caliber shell casings from Defendant's left rear pants pocket. (TVol. IV pp 430, 435)

Ballistic examination revealed that the two bullets recovered from Mr. Davis' body and the bullet recovered from the bedroom wall had similar rifling characteristics, but it could not be determined whether they were fired from the .32 caliber handgun recovered from the scene. (TVol. V pp 570-94) Ballistic examination of the four expended .32 shell casings recovered from Defendant's left rear pocket at the time of his arrest were all fired from the same weapon, but not the weapon recovered from the crime scene. (Id. at 594)

Defendant testified and claimed that he shot Mr. Davis in self-defense. (TVol. VI pp 726-39)

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE DEFENDANT HAS NOT PRESENTED THIS COURT WITH THE MATERIAL NECESSARY TO REVIEW THOSE PARTS OF THE PROCEEDINGS HE CLAIMS ARE IN ERROR, NOR DOES HE PRESENT ANY REASONABLE EXPLANATION FOR HIS FAILURE TO DO SO.

The State incorporates by reference as if fully set forth herein, its argument in its Motion to Dismiss the Defendant's appeal filed 24 April 2019. By order dated 7 May 2019, this Court ordered that the State's motion to dismiss be "referred to the panel that will be assigned to hear the case," such

that this panel will necessarily review the motion to dismiss. As of the date of this filing, this Court has not ruled on the State's motion to dismiss. Moreover, the motion to dismiss contains vital procedural and Batson analysis germane to this appeal which need not be set out twice.

There are several vital questions Defendant neglects to answer in response to the State's motion to dismiss, which all militate in favor of the dismissal of his appeal. First, why – given his obligation pursuant to N.C. R. App. P. 9(a)(3) to compile a record "necessary for an understanding of all issues presented on appeal" – did Defendant knowingly submit a record – after no less than six months study – which was wholly incomplete and wholly insufficient to understand the sole issue he raises on appeal? Second, why – in derogation of his obligation to submit a complete record – did Defendant not timely notify the State of the record's deficiency so that the parties could compile a satisfactory narrative in lieu of the transcript?[5] See Fortis Corp. v.

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[5] As predicted (see State's Mot. Dismiss Appeal, p 11) Defendant faults the State, arguing that it "had the opportunity to object to the record on appeal." (See Def.'s Br., p 5) This argument should carry little weight given how Defendant represented to the State that the proposed record included "the ***complete*** eight volume stenographic transcript of the proceedings from July 24 until August 2, 2017." (R. p 25 (emphasis supplied)) Given that it is highly unusual that any defendant concerned with potential Batson violations would request complete recordation, but specifically exclude voir dire, Defendant's representation that the transcription was complete makes it highly likely that the State was lulled into a false sense of belief that the record was complete.

Northeast Forest Products, 68 N.C. App. 752, 753-54, 315 S.E.2d 537, 538-39 (1984) (failure to follow appellate rules and provide a complete stenographic transcript ***or*** a narrative summary thereof violated requirement that appellant submit a properly made up record such that the appeal was subject to dismissal). Lastly, how can this Court fully, fairly, and reasonably review the discretionary decision of the trial court absent review of the same evidence the trial court heard? See State v. Moore, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985) (holding an appellate court cannot assume or speculate that there was prejudicial error, when none appears on the record before it, such that review denied of purported error arising from State's improper closing argument where transcription of closing argument was not included in the record).

In support of his argument that the record is sufficient and need not be more complete, Defendant notes that the question of whether a prima facie case of discrimination has been made turns – in part – upon (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

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Defendant ought not profit from confusion he fomented.

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." (Def.'s Br., p 9 (citation omitted)) Ironically, Defendant overlooks that the record he has produced does not allow reasoned consideration of questions and statements by the prosecutor which tend to support or refute an inference of discrimination[6] – ***a factor no doubt considered by the trial court and which – in its judgment -- militated in favor of its finding that Defendant had not made out a prima facie case of discrimination*** – and focuses solely on the colloquy between the trial court and counsel and the mere number of peremptory challenges of African Americans from which he infers discrimination. (The emphasized portion of the foregoing sentence is concededly and purposefully speculative, and intended to illustrate that given the current state of the record there is little else for the parties and this Court to rely upon, save conjecture and speculation).

Defendant avoids an answer to these three vital questions regarding the

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[6] To be sure, there are myriad other Batson factors to be considered (see State's Mot. Dismiss Appeal, pp 6-11), but this factor – which Defendant cites in his response provides a ready and compelling example.

record's glaring deficiencies because it is not in his best interest to do so. An honest consideration of those questions illustrate that Defendant has raised an issue which presents a very low hurdle, and which he urges this Court to resolve by consideration of the number of strikes the State exercised without due regard to the circumstances which gave rise to those strikes. Yet, as Defendant concedes, those circumstances are altogether germane to resolution of the issue. (Def.'s Br., p 6) (See also State v. Waring, 364 N.C. 443, 487, 701 S.E.2d 615, 643 (2010) ("[S]tatistics tell only part of the story. More powerful than . . . bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." (citations and quotation marks omitted)).

The current record affords Defendant an unwarranted advantage – and affords the State a pronounced and unwarranted disadvantage – and limits this Court's consideration to factors on their face favorable to Defendant while precluding an examination of the full record and factors which may be favorable to the State.

WHEREFORE, the State moves that this Court dismiss defendant's appeal.

II. THE TRIAL COURT DID NOT ERR BY FINDING DEFENDANT DID NOT MAKE OUT A PRIMA FACIE CASE OF BATSON DISCRIMINATION. EVEN IF DEFENDANT IS ENTITLED TO RELIEF, HE SEEKS THE WRONG REMEDY.

Defendant argues that the trial court erroneously held that he did not make a prima facie case of Batson discrimination. Defendant premises that argument ***solely*** upon the fact that the State exercised three of the four peremptory challenges it utilized against African Americans. (Def.'s Br. pp 10-12) That showing does not establish that the trial court erred, or that Defendant is entitled to relief.

On direct review of a Batson challenge, the United States Supreme Court rejected Defendant's logic in Hernandez v. New York:

> [d]isparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent, ***but it will not be conclusive*** in the preliminary race neutrality step of the Batson inquiry. ***An argument relating to the impact of a classification does not alone show its purpose.***

Hernandez v. New York, 500 U.S. 352, 362, 111 S. Ct. 1859, 1867, 114 L. Ed. 2d 395, 407 (1991) (emphasis supplied).

The North Carolina Supreme Court reached the same conclusion in State v. Barden, 356 N.C. 316, 344, 572 S.E.2d 108, 127 (2002), where it held that a numerical analysis of a Batson challenge is not necessarily dispositive, but may be helpful to determine whether a prima facie case of discrimination has been

established. The Court would later observe "statistics tell only part of the story. More powerful than . . . bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." State v. Waring, 364 N.C. 443, 487, 701 S.E.2d 615, 643 (2010) (citations and quotation marks omitted). Accordingly, Defendant has not shown that the trial court erred, or that he is entitled to relief.

In State v. Hoffman, the North Carolina Supreme Court identified the factors germane to whether Defendant established a prima facie case of Batson discrimination, which include:

> the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Hoffman, 348 N.C. 548, 550, 500 S.E.2d 718, 720 (1998) (citing State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995)).

As discussed above, the record as presently constituted – at best – establishes a single, but non-conclusive factor, i.e., the number of peremptory

strikes the State exercised, but precludes the State from citing additional evidence in support of the trial court's credibility finding.

Indeed, like full blown Batson review, the issue before this Court is a question of fact, "and as a result the trial court's ruling . . . ***must be accorded great deference by a reviewing court.*** This is because often there will be little evidence except the statement of the prosecutor, and the demeanor of the prosecutor can be the determining factor. The presiding judge is best able to determine the credibility of the prosecutor." Hoffman, 348 N.C. at 554, 500 S.E.2d at 722 (emphasis supplied; quotation marks and citations omitted); see also Hernandez, 500 U.S. at 365, 111 S. Ct. at 1868-69, 114 L. Ed. 2d at 409 (trial court's findings of fact on Batson ruling are "accorded great deference on appeal" because they "largely turn on evaluation of credibility.").

Given the sorry state of the record and the great deference this Court owes to the trial court's credibility assessment, Defendant is entitled to no relief. This court cannot assume or speculate that there is prejudicial error where none appears on the face of the record. State v. Moore, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985) (holding an appellate court cannot assume or speculate that there was prejudicial error, when none appears on the record before it, such that review denied of purported error arising from State's improper closing argument where

transcription of closing argument was not included in record). The record here is barren, as it contains none of the evidence heard by the trial court in making its credibility assessment, including, but not limited to: questions and statements of the prosecutor which tend to support or refute an inference of discrimination; the answers to those questions by prospective jurors; and any nervousness or evasiveness they may have evinced therein. See State v. Smith, 328 N.C. 99, 123, 400 S.E.2d 712, 725-26 (1991) (recognizing that "[c]hoosing jurors [is] more art than science, [and] involves a complex weighing of factors" (citations omitted)); see also id. at 126, 400 S.E.2d at 727 (observing "jury selection is often driven by inferences about a juror's ability to be fair based upon counsel's ***observation*** of the juror's behavior during *voir dire*. Thus, a prospective juror's nervousness or uncertainty in response to counsel's questions may be a proper basis for a peremptory challenge . . . .") (emphasis supplied).

Lastly, Defendant seeks a remedy – reversal and a new trial – which is at odds with the case law. (Def.'s Br. p 14) In Hoffman, the North Carolina Supreme Court reviewed the question of whether trial court erred in finding that the defendant had not made out a prima facie case of Batson discrimination. Here, as in Hoffman, the trial court ruled that the Defendant had not established a prima facie case of Batson discrimination before the state

articulated its reasons for the peremptory challenges, such that

> review is limited to whether the trial court erred in finding that defendant failed to make a prima facie showing. We do not proceed to step two of the Batson analysis when the trial court has not done so. Finally, although the State was given an opportunity to articulate its reasons for its peremptory challenges, defendant was not given an opportunity to respond. Defendant must be accorded this opportunity; we have held that the defendant . . . has a right of surrebuttal to show that the explanations are pretextual.

Hoffman, 48 N.C. at 554, 500 S.E.2d at 722-23 (citations and quotation marks omitted).

In short, because the trial court did not reach the last two parts of the Batson analysis, the North Carolina Supreme Court did not presume review. Rather, it limited relief to a remand for an evidentiary hearing for findings of fact and conclusions of law as to whether defendant had made a prima facie case of Batson discrimination as to two of the challenged jurors.

CONCLUSION

For the above and foregoing reasons, this Court should dismiss Defendant's appeal, or in the alternative, deny Defendant relief. In the event this Court determines Defendant is entitled to relief, such relief ought to be limited to a remand for an evidentiary hearing for findings of fact and conclusions of law as to whether Defendant had made a prima facie case of

Batson discrimination as to the challenged jurors.

Electronically submitted this the 21st day of May, 2019.

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CERTIFICATE OF COMPLIANCE WITH RULE 28 (j)(2)

Undersigned counsel certifies that the State's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Word, the program used to prepare the brief.

Electronically submitted this the 21st day of May, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, and by sending a copy by electronic mail, addressed to his ATTORNEY OF RECORD as follows:

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