

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,)	
)	
	Respondent,	
)	
vs.)	No. SC86417
)	
RONALD HAMPTON, Jr.,)	
)	
	Appellant.	
)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE MELVYN W. WIESMAN, JUDGE**

APPELLANT'S SUBSTITUTE BRIEF

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TRANSFER QUESTION

The Eastern District's opinion is contrary to previous decisions of appellate courts of this state, and presents a question of general interest and importance:

After the trial court has denied a State's peremptory strike of an African-American venireperson, based on the finding that the State has racially discriminated against that venireperson under *Batson*, is it improper for the trial court to keep that African-American venireperson *off* the jury, instead allowing the State to remove a white venireperson, even though this Court has held that the remedy for such a violation is to quash the strike and permit the improperly excluded venireperson to sit on the jury?

By holding that the trial court could remedy a *Batson* violation in a manner that still excludes the African-American venireperson who had been discriminated against, the Eastern District's opinion is contrary to previous opinions of this state (*State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993), *State v. Parker*, 836 S.W.2d 930 (Mo. banc 1992), *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004)), and of the United States Supreme Court (*Batson v. Kentucky*, 476 U.S. 79 (1986), *Powers v. Ohio*, 499 U.S. 400 (1991)).

JURISDICTIONAL STATEMENT

Appellant, Ronald Hampton, appeals his conviction following a jury trial in the Circuit Court of St. Louis County, Missouri, for first degree murder, § 565.020 and armed criminal action, § 571.015.¹ The Honorable Melvyn W. Wiesman sentenced Hampton to consecutive sentences of life imprisonment without probation or parole and life imprisonment, respectively. Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, § 3, Mo. Const.; § 477.050. This Court thereafter granted Hampton's application for transfer, so this Court has jurisdiction. Article V, §§ 3 and 10, Mo. Const. and Rule 83.03.

¹ All statutory references are to RSMo 2000, unless otherwise indicated. All Rule references are to Missouri Court Rules (2003), unless otherwise indicated. The record consists of two volumes of transcript (Tr.), and a legal file (L.F.).

STATEMENT OF FACTS

I. Jury selection

During jury selection, the State used five of its six peremptory strikes to remove African-American venirepersons (Tr. 222-23). Hampton made a *Batson*² challenge to each of those strikes (Tr. 222-32). After the prosecutor gave his reasons for the strikes (Tr. 223-26) and Hampton responded to those reasons (226-27), the trial court denied two of the prosecutor's peremptory strikes (Jurors Dodson and Jones) "under Batson" (Tr. 227-30). Dodson was re-seated; Jones, however, was not (Tr. 228-231). Instead, the State was allowed to use its extra strike, which resulted from not being allowed to remove Dodson, to strike a white venireperson who was similarly-situated to Jones (Tr. 228-31). As a result, however, Jones still did not serve on the jury (Tr. 228-31).

In Hampton's timely motion for new trial, he raised that the trial court erred in allowing the State to strike Jones after sustaining Hampton's objection to the State's strike pursuant to *Batson*, and after finding the strike to be pretextual (L.F. 101).

II. Evidence

On February 15, 2002, Daryl Chatman and Domonica Miller lived together at 6209 Wagner (Tr. 333-34, 371-72). They had lived there with two of Miller's children for about six months (Tr. 333-36, 371-72).

²*Batson v. Kentucky*, 476 U.S. 79 (1986).

After they moved in, Chatman and Miller began having problems (Tr. 372-82). Across the street, “guys,” who were “dressed up like gang members,” were “hanging out” (Tr. 373). “The people across the street” spray painted the Chatman/Miller garage with orange paint (Tr. 376-77). Someone also turned on the water from the outside spigot of the Chatman/Miller residence and left it running for about a day (Tr. 376-77).³ There also was a lot of vehicular traffic in front of their neighbor’s house (Tr. 377-78). Chatman and Miller contacted the police about the activities several times, but never got a “response” (Tr. 378, 380-81). Two of the people who were at that residence on a daily basis were Hampton and Samuel (Sam) Williams (Tr. 341, 378-80). Hampton lived there (Tr. 336, 340, 751-52). Williams lived down the street (Tr. 751).

On February 15, 2002, Chatman and Miller were leaving their residence when they saw some people gambling outside; Hampton was one of the gamblers (Tr. 382, 406-07). Miller called the police, who responded to the residence and broke up the “crap game” (Tr. 382-83).

Later, as Chatman and Miller started to leave in their vehicle, a number of people came out of the residence across the street carrying “sticks, boards, poles” (Tr. 384-85). Someone in the group called Chatman a “punk ass ni**er” for calling the police (Tr. 384). Chatman told them that he did not call the police (Tr.

³ Hampton objected to the evidence concerning this incident as well as the spray-painting incident (Tr. 65-67, 375-79). See Point II.

384). Hampton's father told everyone to leave Chatman alone (Tr. 384). Miller went inside her residence and Chatman went to a friend's residence (Tr. 385).

Later, when Chatman returned to the residence, he got into an argument with some people, including Hampton and Williams (Tr. 339-44, 358, 360-61, 365, 368). Someone threatened "to get" Chatman (Tr. 342-44, 350-54, 368, 388, 400-01, 407-08, 423, 425).⁴ Hampton, who was wearing blue jeans and a red pullover sweater, got into a car and drove off with Williams, who was wearing a red shirt and a red hat (Tr. 339, 354-55, 357-59, 389-90). The police came back to the scene (Tr. 389-91). Miller left her residence (Tr. 391).

When Miller returned around 11:00 p.m., Chatman was not there (Tr. 392). Two people were standing in the street near her residence (Tr. 410). At the end of her driveway, there was a car parked with two people inside (Tr. 411).

Shortly after she went inside, she heard the garage door open (Tr. 392-93, 413-14). Chatman pulled into the garage (Tr. 395). After he exited his car, but

⁴ Although Miller testified that it was Hampton who made the threat (Tr. 388), she had identified the person who made the threat as weighing about 130 pounds, and wearing a red fleece shirt (Tr. 409-10, 489). Williams weighs 130 pounds (Tr. 484). Hampton, on the other hand, weighs 170 pounds (Tr. 484). Detective John Wheeler testified that Miller told him that she was not sure who made the threat (Tr. 488-89). Miller's son testified that although he heard the threat, he could not tell who made it (Tr. 358-62, 367-69).

before the garage door could go down, someone ran inside the garage (Tr. 396, 414). According to Miller, the person was a black male, about five foot four, 130 pounds, wearing blue jeans and a red pullover sweater that had a hood on it (Tr. 398, 415-19, 485).⁵ She did not recognize the person because she did not see his face (Tr. 397, 419, 421-22, 490). That person shot at Chatman (Tr. 344-45, 396, 414). Miller locked herself inside the residence with some children who were already inside (Tr. 344-45, 398). The shooting continued (Tr. 398). Miller called the police and stayed inside until they arrived (Tr. 345, 398-99, 421).

When the paramedics arrived at the scene, Chatman was dead; he had been shot three times (Tr. 323-27, 435-52). All of the eleven spent .40 caliber shells found at the scene had been fired from the same gun (Tr. 529-33, 587-89, 592-93). In addition, a .40 caliber bullet was found in Chatman's body (Tr. 444-47, 595-96). An autopsy revealed the cause of death to be a gunshot wound to the chest, which had punctured the heart (Tr. 431, 448-49). There was evidence of marijuana and alcohol in his system (Tr. 454-56).

On April 8, 2002, Hampton was arrested and taken into custody (Tr. 661-63). While in custody, he gave the following statement to Wheeler (Tr. 663-79).

⁵ Detective Wheeler testified that Miller told him that the suspect was wearing a red and gray or black hat, a red fleece type shirt, and dark jeans (Tr. 485-87). She did not say anything about a "hoody" (Tr. 486).

On February 15, 2002, Anthony Ford, Hampton's brother, got into an argument with Chatman because Chatman had called the police "on them, and they said [Chatman] was selling dope or drugs on their turf" (Tr. 665). Also on that day, Chatman attempted to hit Hampton (Tr. 666). There had been verbal altercations between Hampton and Chatman in the past (Tr. 672).

Later, when Hampton was walking with Williams, they showed Hampton's uncle, Michael Sparks, some handguns (Tr. 666-67, 669, 672, 699, 701).⁶ Hampton had a semi-automatic handgun and Williams had a revolver (Tr. 672, 699, 701, 722-23). They told Sparks about the problems they were having with Chatman (Tr. 672).

Later, Hampton and Williams were sitting in a car outside of Hampton's residence with a man named Smoke or Smokey or Ricky Caldwell (Tr. 675, 677, 701-02). When Hampton saw Chatman pull into the garage, he gave his gun to Caldwell because he was afraid he might do something to Chatman (Tr. 676-77, 702). Caldwell took the gun, got out of the car, and shot Chatman (Tr. 676-77, 702-03).⁷

⁶ Earlier in the interview with Wheeler, Hampton had denied that he and Williams had handguns (Tr. 666-67).

⁷ Earlier in the interview, Hampton had denied being at the scene of the shooting (Tr. 668, 675-76).

In addition to the foregoing evidence, Williams testified for the State and gave the following testimony (Tr. 749-845).

On February 15, the police were called out to Wagner Street to break up a dice game (Tr. 753-54). After the police left, Chatman and some of the people who were playing dice got into an argument (Tr. 754). Hampton and Williams, who had argued with Chatman in the past, were part of that group (Tr. 754, 814-17, 840-41). Williams and Hampton thought that Chatman was a drug dealer (Tr. 814-15, 840-41).

Later that evening, Hampton and Williams were sitting outside Hampton's residence when Chatman and two other people pulled up in a car (Tr. 754-55). After Chatman and his friends exited the car, they were "down there holding their side like they had guns" (Tr. 755, 815-16). Hampton was trying to avoid a fight, but Chatman swung at Hampton (Tr. 755, 816). Hampton's father broke up the altercation (Tr. 755). Williams and Hampton got into a car and drove off (Tr. 756). While they were doing this, Hampton threatened to "get" Chatman (Tr. 756, 818).

Later, Williams and Hampton showed Sharks the guns they were carrying (Tr. 756-58). Williams had a .22 caliber handgun; Hampton had a semi-automatic handgun (Tr. 756-58, 824).

Around 11:00 p.m. that evening, Hampton, Williams, and Kim Smith were sitting in a car outside of Hampton's residence (Tr. 761-63). Williams was wearing a red hat, a red pullover long-sleeved T-shirt, and blue jeans (Tr. 765-66,

829). Hampton was wearing a long-sleeved “hoody with pullover hood and a jersey over that” (Tr. 766).

While they were sitting there, Miller returned home to her residence (Tr. 762). About fifteen minutes later, Chatman returned home (Tr. 763). When the garage door opened, Hampton ran by Ford and then ran into the garage (Tr. 764, 766). Smith and Williams also got out of the car (Tr. 764). Williams heard shots (Tr. 764, 766-67, 786). Shortly thereafter, Williams, Hampton, and Smith went to Ford’s residence (Tr. 767-68). While there, Hampton said he was sorry for what he did (Tr. 768-69).

The next day, Hampton told Williams that Sharks had blamed Williams for the shooting (Tr. 770-71).⁸ As a result, Williams went to Kansas City, where he stayed until he was arrested on April 20th (Tr. 771-73). Williams was charged with murder in the second degree and armed criminal action (Tr. 750, 775, 789-91, 794-95).

While Williams was incarcerated, he began receiving letters from Hampton (Tr. 575-77, 637-40, 775-79).⁹ In those letters, Hampton wrote such things like Williams should keep his mouth shut, that if the time came he would “take my

⁸ Detective Wheeler testified that Sharks had told him that, shortly after the shots were fired, Williams came out of Chatman’s garage carrying a gun (Tr. 700, 704-05, 717-19, 722-26).

⁹ Hampton objected to those letters (Tr. 28-39, 251, 642-643). See Point III.

weight like a man,” and “you go either ride with me or collide with me,” which Williams interpreted as meaning that he should keep his mouth shut (Tr. 776-77, 808, 836-37). Williams turned these letters over to the State after he agreed to testify against Hampton in return for a plea of guilty to an unlawful use of a weapon charge wherein the State would recommend a five-year sentence but Williams could ask the judge for a better sentence (Tr. 779-80, 796-99). Initially, however, he lied to the State about his own actions; he said that he was not at the scene (Tr. 782-84, 787, 804).

Ford also testified for the State (Tr. 256-91, 297-322). He denied being at the scene of the crime (Tr. 259-269, 281). He remembered, however, that he told the police that there had been a confrontation between Hampton and Chatman (Tr. 262). Ford also admitted that after Wheeler had arrested him at his work place, he told Wheeler that he saw Hampton shoot Chatman (Tr. 265-66, 308-11). The reason that he lied to Wheeler about seeing this was because he did not want to get fired from his job and he did not want his probation to get revoked for being arrested (Tr. 308-12). He was told that if he cooperated, they would call his probation officer and tell her that he was cooperating (Tr. 310-11). After he gave the statement to Wheeler, he was taken back to work, so he did not get fired and his probation was not violated (Tr. 311-12).

Wheeler, too, testified regarding his conversations with Ford. On December 10, 2002, Wheeler tape-recorded a conversation with Ford (Tr. 463-64). Ford said that he witnessed the murder of Chatman (Tr. 464). Earlier that day,

Ford and Hampton had a verbal altercation with Chatman, accusing him of calling the police on them regarding drugs and gambling (Tr. 465).

While Hampton's trial was going on, Ford told Wheeler that he would tell the truth and testify that Hampton shot Chatman if the prosecutor would make a deal with him (Tr. 468-71). Ford also told Wheeler that what he had said in December was the truth (Tr. 469).

III. Other procedural matters

Hampton was charged by indictment with first degree murder, § 565.020 (Count I) and armed criminal action, § 571.015 (Count II) (L.F. 22-25). On May 27-30, 2003, a jury trial was held in the Circuit Court of St. Louis County before the Hon. Melvyn W. Wiesman (L.F. 5-6).

After the foregoing evidence was presented, the jury found Hampton guilty of the charged offenses, recommending sentences of life imprisonment without eligibility for probation or parole on Count I and life imprisonment on Count II (Tr. 965-66; L.F. 95-96). The trial court granted Hampton the full twenty-five days to file a motion for new trial (Tr. 967; L.F. 97), which was timely filed on June 24, 2003 (L.F. 98-107).

On August 1, 2003, the trial court overruled the motion for new trial (Tr. 970) and sentenced Hampton to the recommended sentences, to run consecutively to each other (Tr. 984-85; L.F. 108-10).

On August 11, 2003, Hampton timely filed a notice of appeal, in *forma pauperis* (L.F. 111-13). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINTS RELIED ON

I.

The trial court clearly erred in allowing the State to exercise a peremptory strike against African-American venireperson Sandra Jones after the court had ruled in favor of Hampton's *Batson* challenge to that strike, because this violated Hampton's and Jones' rights to equal protection pursuant to the 14th Amendment to the United States Constitution and Article I, section 2 of the Missouri Constitution, in that the trial court initially denied that strike, finding that there were similarly-situated white jurors that were not stricken, which, in essence, is a finding that the State had racially discriminated against Jones when it exercised a peremptory challenge to remove her; but contrary to the existing case law that the remedy for such a violation is to quash the strike and permit the venireperson to sit on the jury, Jones was not re-seated, rather, the State was allowed to remove a similarly-situated white juror by using an extra strike that resulted from the trial court's ruling that another juror (Dotson) had been racially stricken by the prosecutor; this left Jones off the jury and kept the racial composition of the jury the same, which did not remedy the violation of Hampton's and Jones' equal protection rights.

State v. Edwards, 116 S.W.3d 511 (Mo. banc 2003);

State v. Hopkins, 140 S.W.3d 143 (Mo. App. E.D. 2004);

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

State v. Parker, 836 S.W.2d 930 (Mo. banc)

cert. denied, 506 U.S. 1014 (1992);

U.S. Const. Amend. XIV; and

Mo. Const. Article I, Section 2.

II.

The trial court abused its discretion in overruling Hampton's objections to the victim's wife, Ms. Miller, testifying that there had been two prior acts of vandalism to her residence, because this denied Hampton his rights to due process of law and to a fair trial, as guaranteed by the 6th and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this other crimes evidence was irrelevant because no relation to or connection between the acts of vandalism and Hampton or the charged crimes was established; and, the failure to prove a connection between Hampton and the alleged acts of vandalism permitted Hampton to be held answerable for the independent crimes of another.

State v. Jordan, 664 S.W.2d 668 (Mo. App. E.D. 1984);

State v. Moore, 645 S.W.2d 109 (Mo. App. W.D. 1982);

State v. Hicks, 535 S.W.2d 308 (Mo. App. Spr.D. 1976);

State v. Barriner, 34 S.W.3d 139 (Mo. banc 2000);

U.S. Const., Amends. VI and XIV; and

Mo. Const., Art. I, Secs. 10 and 18(a).

III.

The trial court abused its discretion in overruling Hampton's objections and in allowing into evidence letters that he had written to codefendant Williams (State's Exhibits 151-157) in their entirety, because these rulings violated Hampton's rights under the 1st Amendment to the United States Constitution and to due process, a fair trial and to be tried for the offense with which he was charged, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the letters contained irrelevant, bad character evidence of racial animosity that Hampton had toward white people, which was not probative because the murder was not racially motivated; this evidence was particularly prejudicial in this case because the State had struck four of the five African-American members from Hampton's venire panel, and had attempted to strike the other African-American venireperson but the trial court would not allow that strike after it had found it to be pretextual.

State v. Driscoll, 55 S.W.3d 350 (Mo. banc 2001);

Commonwealth v. Mahdi, 388 Mass. 679, 448 N.E.2d 704 (1983);

State v. Johnson, 456 S.W.2d 1 (Mo. 1970);

State v. Barriner, 34 S.W.3d 139 (Mo. banc 2000);

U.S. Const. Amends. I and XIV; and

Mo. Const. Article I, Sections 10 and 18(a).

IV.

The trial court abused its discretion in overruling Hampton's objections and in allowing the State to question its witnesses about Hampton's courtroom attire and in allowing the State's witnesses to testify that they had never seen Hampton wear a suit before, because this line of questioning violated Hampton's rights to due process and a fair trial, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that whether Hampton had ever worn a suit prior to trial was irrelevant; and, the questioning was designed to portray Hampton as someone who was trying to mislead the jury by representing himself in a better light than he was in reality.

State v. Bowden, 439 A.2d 263 (R.I. 1982);

State v. Ervin, 835 S.W.2d 905 (Mo. banc 1992);

State v. Earvin, 743 S.W.2d 125 (Mo. App. E.D. 1988);

State v. Ray, 945 S.W.2d 462 (Mo. App. W.D. 1997);

U.S. Const. Amend. XIV; and

Mo. Const. Article I, Sections 10 and 18(a).

V.

The trial court abused its discretion in denying Hampton's requests for mistrials after, in the jury's presence: the prosecutor yelled for Hampton's mother's removal from the courtroom; the court refused Hampton's request to have her removed outside of the jury's presence, and instead, ordered Hampton's parents to leave the courtroom because they were endorsed witnesses; and, the bailiff announced that Ms. Hampton "took off and that security just went after her," which defense counsel was forced to repeat in open court because the court refused a sidebar request, because all of this violated Appellant's rights to due process and a fair trial, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the court did not minimize or eliminate the prejudicial impact from the outbursts, which were caused by the prosecutor; rather, by refusing to handle the situation out of the jury's presence, the court exacerbated the prejudice by ordering Ms. Hampton out of the courtroom, commenting that she was a witness who was not allowed to be there and refusing to allow defense counsel to make a sidebar record about the bailiff's statement; and, the sum total of what happened prejudiced Hampton, because it created an adverse inference that Ms. Hampton had damaging testimony against Hampton, but was refusing to give such testimony, and that the defense was doing something improper concerning her.

State v. Johnson, 672 S.W.2d 160 (Mo. App. E.D. 1984);
State v. Harris, 662 S.W.2d 276 (Mo. App. E.D. 1983);
State v. Hamilton, 791 S.W.2d 789 (Mo. App. E.D. 1990);
State v. Webber, 982 S.W.2d 317 (Mo. App. S.D. 1998);
U.S. Const. Amend. XIV; and
Mo. Const. Article I, Sections 10 and 18(a).

ARGUMENT

I.

The trial court clearly erred in allowing the State to exercise a peremptory strike against African-American venireperson Sandra Jones after the court had ruled in favor of Hampton's *Batson* challenge to that strike, because this violated Hampton's and Jones' rights to equal protection pursuant to the 14th Amendment to the United States Constitution and Article I, section 2 of the Missouri Constitution, in that the trial court initially denied that strike, finding that there were similarly-situated white jurors that were not stricken, which, in essence, is a finding that the State had racially discriminated against Jones when it exercised a peremptory challenge to remove her; but contrary to the existing case law that the remedy for such a violation is to quash the strike and permit the venireperson to sit on the jury, Jones was not re-seated, rather, the State was allowed to remove a similarly-situated white juror by using an extra strike that resulted from the trial court's ruling that another juror (Dotson) had been racially stricken by the prosecutor; this left Jones off the jury and kept the racial composition of the jury the same, which did not remedy the violation of Hampton's and Jones' equal protection rights.

1. Introduction

This case is not concerned with when, and if, a party has committed a *Batson*¹⁰ violation. The trial court found that this happened; it found that the State had racially discriminated against two venirepersons when it exercised two of its peremptory challenges to remove the venirepersons on account of their race. The issue, rather, concerns the way to remedy such a *Batson* violation. Although this Court has held that the proper remedy for such a violation is “to quash the strikes and permit those members of the venire stricken for discriminatory reasons to sit on the jury if they otherwise would,” *State v. Grim*, 854 S.W.2d 403, 416 (Mo. banc 1993), here the trial court did not re-seat one of the improperly stricken jurors (Jones), and the Eastern District Court of Appeals affirmed that decision. A new trial must be ordered.

2. Facts

During jury selection, the State used five of its six peremptory strikes to remove African-American venirepersons, including Juror No. 5, Bernard Dotson, and venireperson No. 26, Sandra Jones (Tr. 222-23). Hampton made *Batson* challenges to each of those strikes (Tr. 222-32). The trial court then asked the prosecutor if he had a “race-neutral basis” for the strikes of those venirepersons (Tr. 223).

¹⁰*Batson v. Kentucky*, 476 U.S. 79 (1986).

Regarding Dotson, the prosecutor said that he believed that from Dotson's body posture, Dotson seemed to be "totally disinterested in being here and was not paying attention" (Tr. 223-24).

Regarding Jones, the prosecutor said, "Sandra Jones indicated that she was a witness in a criminal case, Your Honor. Particularly that she was a witness who underwent cross-examination. She didn't indicate whether it was by the State or by the defense, but she indicated that it was -- that she didn't care for it." (Tr. 225-26).¹¹

Hampton responded to the prosecutor's reasons (Tr. 226-27). Regarding Dotson, Hampton said, "[Dotson] gave an appropriate response when called upon. He seemed to be paying attention. And juror No. 2, it was noted also was reading during *voir dire* and has not been stricken by the State for not paying attention" (Tr. 226-27).

Regarding Jones, Hampton said, "She did not indicate that there was anything about that experience that would prevent her from being fair and impartial in this case." (Tr. 226). Hampton also noted that there had been a

¹¹ It is curious that the prosecutor claimed to believe that being a witness in a case was such an important factor to jury service, yet it was Hampton who asked the question, not the State (Tr. 175-77). The "witness" factor was not mentioned by the prosecutor until an African-American said she had been a witness and the prosecutor had to justify its peremptory strike of her.

similarly-situated white juror (#13, Sestrich) who had not been stricken by the State (Tr. 226). Hampton further noted, “Five of the six peremptory challenges, the State’s peremptory challenges are African-American, Your Honor. I think the percentage is almost a hundred percent of his strikes have been used to eliminate African-American jurors from this case. And I know we talked about it earlier, just for the Court to take judicial notice that my client appears to be African-American as well” (Tr. 227).

The record showed, contrary to the State’s assertion, Ms. Jones did *not* indicate that “she didn’t care for it” (Tr. 225-26). In fact, when asked “were they mean to you,” she replied, “no,” and when asked “were they tough on you” she again replied, “no” (Tr. 177) She said that there was nothing about that experience that would prevent her from being a juror (Tr. 177).

Finding the State’s stated reasons to be a pretext for discrimination, the trial court denied the State’s motion to strike Dotson, based “upon the record” and the court’s “observations” (Tr. 227).

The State’s reason for striking Jones was also found to be a pretext for discrimination because there were similarly-situated white jurors that were not stricken (Tr. 228-30). The trial court said, “As to Sandra Jones, I believe there are similarly-situated white *jurors* that were not stricken. The motion to strike will be denied ... under Batson.” (Tr. 228-29) (emphasis added). The following then occurred:

The Court: As I said, the motion to strike for cause will be denied as to 26 [Jones]. So I'm denying your leave to strike Juror 26 [Jones] and No. 5 [Dotson]. So you have to make two new strikes.

[The Prosecutor]: Which ones do I have to redo?

The Court: 26 [Jones] and 5 [Dotson].

[The Prosecutor]: You are not allowing?

The Court: I'm not allowing those strikes.

[The Prosecutor]: Judge, I'm not questioning the Court's judgment, but can you tell me, was there another juror similarly-situated in terms of being a witness? I'm just curious because I didn't have it.

The Court: I did not mark my sheet, but I remember there were others similarly situated. Which ones do you have marked that have been witnesses?

[Defense Counsel]: Juror No. 4 [Mizulski], who's been stricken. Juror No. 13 [Sestrich].

The Court: Juror No. 4 [Mizulski] was stricken for cause.

[Defense Counsel]: Correct. There was also Juror No. 13 [Sestrich].

[The Prosecutor]: I'm sorry, Your Honor, I didn't hear anything about her. What if I strike 13 [Sestrich] does that make any difference.^[12]

¹² The prosecutor was able to have this additional strike because of the first *Batson* violation involving Dotson (Tr. 227).

The Court: If you are striking all of those that have been witnesses in cases, then you can strike the two that are witnesses, but I'm not going to allow you to strike only one.

[The Prosecutor]: I would be happy to do that, but I didn't see that 13 [Sestrich] was a witness. The Court: Are you moving to strike Juror 13 [Sestrich] as one of your State's strikes.

[The Prosecutor]: Yes, sure.

The Court: Then which other one are you seeking to strike?

[The Prosecutor]: Only two I have listed, Judge, as witnesses, only two I have is 26 [Jones] and 28 [Cierpiot].

[Defense Counsel]: Juror 4 [Mizulski] and remaining jurors 13 [Sestrich], 28 [Cierpiot] and 26 [Jones] indicated they had been witnesses in cases.

The Court: I will then allow the strike of Juror 26 [Jones] in light of the fact that he's also taking 13 [Sestrich].
(Tr. 229-31).

Because the trial court allowed this "remedy" for the prosecutor's racial discrimination, the racial composition of Hampton's jury remained the same and Jones was still not on it (Tr. 230-31). Also, juror Cierpiot, who was similarly-situated to Jones regarding having been a witness but who was not African-American, remained on the jury (S.L.F. 1; Tr. 216).

3. *Preservation*

As noted above, Hampton made a timely *Batson* challenge to the State's peremptory strike of Jones (Tr. 222-23). In Hampton's timely motion for new trial, he raised that the trial court erred in allowing the State to strike Jones after sustaining Hampton's objection to the State's strike pursuant to *Batson*, and after finding the strike to be a pretext for discrimination, in violation of the 14th Amendment to the United States Constitution, and Article I, Section 2 of the Missouri Constitution (L.F. 101). This point is properly preserved for appeal. Neither the State in its brief below nor the Eastern District Court of Appeals in its opinion contested the preservation of this issue.

4. *Standard of Review*

A racially motivated peremptory strike violates Hampton's and the struck venireperson's equal protection rights. *Batson*, 476 U.S. at 86-87; *Powers v. Ohio*, 499 U.S. 400 (1991). On a *Batson* claim, an appellate court will set aside the trial court's finding if it is clearly erroneous. *State v. Nicklasson*, 967 S.W.2d 596, 613 (Mo. banc 1998). The trial court's finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. *State v. Smulls*, 935 S.W.2d 9, 15 (Mo. banc 1996).

5. *The three-stage procedure of a Batson claim in Missouri*

A *Batson* challenge consists of a three-stage process: (1) Opponent raises *Batson* challenge; (2) Proponent provides an explanation; and, (3) Opponent proves a pretext for discrimination. *State v. Marlowe*, 89 S.W.3d 464, 468-69

(Mo. banc 2002); *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc), *cert. denied*, 506 U.S. 1014 (1992).

In Stage 1, after the State used five of its six strikes to remove African-Americans, Hampton raised a timely *Batson* challenge before the venire was excused and the jury sworn (Tr. 222-23). *Marlowe*, 89 S.W.3d at 468.

So, the trial court proceeded to Stage 2-- requiring the prosecutor to give race neutral explanations for each of the five strikes (Tr. 223-26). *Id.* After the prosecutor gave his reasons, which are set out above as to Dotson and Jones, the trial court shifted the burden to Hampton to show that the prosecutor's reasons were a pretext for discrimination and that the strikes were actually racially motivated -- Stage 3 (Tr. 226-30). *Id.*

At this third stage, Hampton satisfied his burden as to two venirepersons -- Dotson (No. 5) and Jones (No. 26). The trial court denied the prosecutor's strike of Dotson, finding, "Based upon the record and my observations, the State's motion to strike Juror No. 5 is denied under Batson." (Tr. 227).¹³ Thus, the trial court found that this strike was discriminatory. *Id.* at 469-70.

¹³ See, *State v. Holloway*, 877 S.W.2d 692 (Mo. App. E.D. 1994) (in affirming the trial court's disallowance of defendant's peremptory strikes, the appellate court relied on the defendant's failure to bring the alleged "inattentiveness" of venirepersons to the trial court's attention during *voir dire*); *State v. Metts*, 829 S.W.2d 585, 587 (Mo. App. E.D. 1992) ("[a]n attorney who fails to call the court's

Likewise, the trial court also found the prosecutor's strike of Jones was merely a pretext for discrimination, stating that there were similarly-situated white jurors who were not stricken. (Tr. 228-29).

6. *Trial court's remedy was contrary to this Court's cases*

Having found that the prosecutor's strike of Jones was merely discriminatory, the question remains whether the trial court fashioned an appropriate remedy for that *Batson* violation?¹⁴

The Eastern District affirmed the trial court's decision, finding that "the prosecutor corrected the situation by excluding" a similarly situated white juror. *State v. Hampton*, No. ED83318, slip op. at 5, 2004 WL 2157417 (Mo. App. E.D. 2004).¹⁵ This holding is contrary to cases from this Court and the United States Supreme Court.

In *Batson*, the United States Supreme Court left it to the state and federal courts to determine whether it is more appropriate in a particular case, upon a

attention to such inattentiveness should be fully prepared to have a strike due to inattentiveness disallowed.").

¹⁴ Dotson was allowed to sit on Hampton's juror based upon the trial court's finding of a *Batson* violation; so no claim of error is raised regarding Dotson.

¹⁵ As noted above, the State had this new peremptory strike to use because the trial court had disallowed the State's strike of juror Dotson after finding the State's strike of Dotson was a pretext for discrimination (Tr. 227).

finding of discriminations against African-American jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire. *Batson*, 476 U.S. at 99-100 n. 24.

Batson was designed to “serve multiple ends.” *Powers*, 499 U.S. at 406. A *Batson* violation harms the defendant, the prospective jurors, and the entire community. *Batson*, 476 U.S. at 86-87. Such purposeful discrimination violates a defendant’s right to equal protection because it denies him or her protection that a trial by jury is intended to secure. *Id.* at 86. Similarly, by denying a juror participation in jury service on account of his or her race, the party exercising the strike unconstitutionally discriminates against the excluded jurors. *Id.* at 87. Finally, the harm from discriminatory jury selection undermines public confidence in the fairness of our system of justice. *Id.* Cases following *Batson* have confirmed the existence and significance of jurors’ equal protection rights, e.g. *Powers, supra.*

This Court has chosen the proper remedy for a *Batson* violation to be “to quash the strikes and permit those members of the venire stricken for discriminatory reasons to sit on the jury if they otherwise would.” *Grim*, 854 S.W.2d at 403. This remedy takes into account and vindicates both the accused’s and the excluded venireperson’s equal protection rights. *Parker*, 836 S.W.2d at 936.

Here, the trial court correctly permitted Dotson to sit on the jury (Tr. 227). Jones, however, was not allowed to sit on the jury because the trial court allowed the State to keep its strike of Jones, even after it had found that the State had discriminated against her (Tr. 229-31). Instead of re-seating Jones, the trial court allowed the prosecutor to peremptorily strike a similarly-situated white juror leaving Jones off of the jury and the racial composition of the jury the same (Tr. 229-31).

But that is not the remedy for a *Batson* violation. *Grim, supra*. This Court has rejected a motion to quash the jury panel as a remedy because such a remedy does not redress “the discrimination endured by the excluded venirepersons . . . since they remain wrongfully excluded from jury service.” *Parker*, 836 S.W.2d at 936. Yet here too the racial discrimination endured by Jones was not redressed because she remained wrongfully excluded from jury service. Jones had a right not to be excluded from jury service for a racially discriminatory reason. *Grim*, 854 S.W.2d at 416; *Powers*, 499 U.S. at 409.

Similarly, Hampton’s equal protection rights were violated by the trial court’s remedy. A criminal defendant has a constitutional right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Batson*, 476 U.S. at 85-86. Here, however, the State was allowed to keep its strike of Jones even after the court had found that the State’s reason for the strike was discriminatory. This left the racial composition the jury the same because the

prosecutor was allowed to remove one white juror while Jones was still excluded. The racial discrimination was not rectified.

7. Other evidence of pretext

The Eastern District's opinion is also contrary to *State v. Hopkins*, 140 S.W.3d 143(Mo. App. E.D. 2004) and *State v. Edwards*, 116 S.W.3d 511, 527 (Mo. banc 2003), because it only focused on similarly-situated venireperson Sestrich, and did not look at the other factors which show the strike of Jones was pretextual.

(a) Another similarly-situated juror

As noted in *Hopkins, supra*, the first and possibly most crucial factor in determining pretext is the existence of similarly-situated white jurors who were not struck. *Hopkins*, 140 S.W.3d at 158-60. Here, the trial court found there were "similarly-situated white jurors that were not stricken." (Tr. 228-29). Although the trial court did not have Sestrich "written down" as such a juror, the trial court remembered "there were other jurors" (Tr. 229).

Yet the Eastern District's opinion ignored the fact that another similarly situated non-African American venireperson (Cierpiot) was not struck by the State, and, in fact, served on the jury! (S.L.F. 1). Cierpiot had been a witness in a case (Tr. 175-76); yet she was not struck by the State. The existence of similarly-situated jurors is evidence that the state's strike is pretextual. *Id.* The Eastern District's opinion, however, does not even mention Cierpiot.

This factor weighs in Appellant's favor.

(b) No logical relevance of proffered reason

Also, the record shows that there was no logical relevance between the proffered reason and the case to be tried because the prosecutor did *not* attempt to identify potential jurors who were witnesses; rather, it was defense counsel who asked the “witness” questions. *See, Hopkins*, 140 S.W.3d at 150-51 (“[I]f ‘adding things up’ was important to the prosecutor, he would have asked questions necessary to determine if any of the other venirepersons’ employment involved such activity. Because the prosecutor did not ask those questions, his behavior is inconsistent with his stated reasoning for striking [the African-American venireperson].”).

This factor weighs in Appellant’s favor.

(c) Prosecutor’s credibility - prosecutor misstated record

We do not know the trial court’s past experience with this particular prosecutor; in fact, we don’t know whether the court had any past experience. The record is silent on that. But we *do* know the court’s *present* experience with this prosecutor.

First, the prosecutor’s questioning during *voir dire* did not support his subsequent reasoning for wanting to strike Jones. As noted above, the prosecutor did not ask the venire about whether they had ever been a witness. It was defense counsel who asked the questions (Tr. 175-77). In fact, the prosecutor failed to ask any follow-up questions on this topic, such as an important topic of whether or not the witness veniremembers had been witnesses for the State or for defendants.

The “witness” factor apparently did not become important to the prosecutor until the prosecutor had to justify his strike of Jones. As noted by the court in *Hopkins*, *supra*, “[b]ecause the prosecutor did not ask those questions, his behavior is inconsistent with his stated reasoning” for the peremptory strike. *Hopkins*, 140 S.W.3d at 150-51.

Second, the record also shows that the prosecutor misstated the record, asserting that Jones had indicated that “she didn’t care for” being cross-examined as a witness.¹⁶ When Jones was asked “Were they mean to you?” she replied, “no” (Tr. 177). When Jones was asked “Were they tough on you?” she again replied, “no” (Tr. 177). She said that there was nothing about that experience that would prevent her from being a juror (Tr. 177). A mischaracterization of a venireperson’s testimony is certainly relevant, if not dispositive, of purposeful discrimination. *See, Hopkins*, 140 S.W.3d at 154 (“the prosecutor’s statement during voir dire that [the venireperson’s] relationship with [an African American defense attorney] ‘is more than just a base relationship’ is inaccurate considering [the venireperson’s] actual voir dire testimony. The State mischaracterized [the venireperson’s] relationship with [the defense attorney] as more than a ‘base relationship’”). Yet, the Eastern District did not even discuss this factor.

¹⁶ If Jones had stated this, then it would seem to be important which side did the cross-examining, the State or the defense. The prosecutor admitted that he did not know the answer to that question (Tr. 225).

Third, as noted above, because the trial court denied the strike *under Batson*.” (Tr. 229) (emphasis added), the record shows that the trial court found that the prosecutor’s reason *was* pretextual.

Fourth, the Eastern District’s opinion does not even mention that the trial court had already found the prosecutor’s stated reason for striking juror Dotson (that he was disinterested in being a juror) was a pretext for discrimination. Yet the State’s failed attempt to strike other minority jurors is relevant to this Court’s determination as to whether pretext was involved in the strike of other veniremembers. *Hopkins*, 140 S.W.3d at 155-57. *Hopkins* held that the failed attempt to strike another minority juror and an attempt to rely on a non-race-neutral reason for the strike of another minority veniremember shed some light on the prosecutor’s demeanor and credibility. *Id.* at 157.

This factor weighs in Appellant’s favor.

(d) The demeanor of the excluded veniremember

As in *Hopkins*, 140 S.W.3d at 151-53, 155, there is nothing on the record which indicates that Jones was not able to serve as a fair and impartial juror.

This factor weighs in Appellant’s favor.

(e) Other objective factors

This Court has also noted that, “[o]bjective factors bearing on the state’s motive to discriminate on the basis of race, such as the conditions prevailing in the community and the race of the defendant, the victim, and the material witnesses, are also worthy of consideration.” *Parker*, 836 S.W.2d at 940.

In its brief below, Respondent argued that because Hampton, the victim, and material witnesses in this case were African-American, “[n]o strategic advantage would have been gained by removing African-American veniremembers” (Resp. Br. at 25-26).

The fact that Hampton is African-American is an objective factor worthy of consideration. Also, in addressing Hampton’s third point of this brief (4th point in the Eastern District), respondent argued that letters that Hampton wrote to a witness (Williams) in this case were relevant because the letters “included statements in which [Hampton] accused Williams of selling [Hampton] out to ‘white folks’ and ‘white crackers’”, which revealed, “[Hampton]’s strategy to appeal to Williams’s sense of racial and personal allegiance . . .” (Resp. Br. at 53). Thus, there existed a highly objective factor bearing on the State’s motive to discriminate on the basis of race in this case.

8. *Conclusion*

The State was allowed to strike Jones even after the trial court had found that the State’s reason for the strike was discriminatory. By not re-seating Jones, the trial court violated the equal protection rights of Hampton and Jones. Therefore, this Court must reverse Hampton’s convictions and remand for a new trial. *Marlowe*, 89 S.W.3d at 470.

II.

The trial court abused its discretion in overruling Hampton's objections to the victim's wife, Ms. Miller, testifying that there had been two prior acts of vandalism to her residence, because this denied Hampton his rights to due process of law and to a fair trial, as guaranteed by the 6th and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that this other crimes evidence was irrelevant because no relation to or connection between the acts of vandalism and Hampton or the charged crimes was established; and, the failure to prove a connection between Hampton and the alleged acts of vandalism permitted Hampton to be held answerable for the independent crimes of another.

1. Facts & Preservation

Prior to trial, Hampton filed a "Motion in Limine to Preclude References to Prior Disputes Between the Defendant and Daryl Chatman" (L.F. 69-71). That motion sought to preclude evidence that Chatman's garage door had been spray-painted, and evidence of "people coming and going all the time" (L.F. 69). The motion argued that this testimony was irrelevant and would constitute evidence of uncharged crimes and prior bad acts (L.F. 69-70).

During a hearing on that motion, Hampton elaborated that Chatman's girlfriend, Miller, "talks about somebody spray painting her garage, people coming and going all hours of the night from [the house across the street from

Chatman's and Miller's residence]" (Tr. 65-66). Hampton noted that Miller "never specifically says" that Hampton spray painted her garage (Tr. 65). He further noted that there were several people who lived at the residence across the street from Chatman and Miller (Tr. 65-66).

The trial court denied the motion because the court did not have "enough feel for the evidence in this case to be able to make that ruling yet" and advised Hampton to object to the evidence if he did not believe it was relevant (Tr. 66-67).

During the State's direct examination of Miller, the following occurred:

Q. [The Prosecutor] Ms. Miller, after you moved in that house, did you regret moving in that house, did you regret moving in that home?

A. Yes.

Q. What happened? What was going on in the neighborhood that made you regret moving in to that house?

A. First of all, when I moved there, the people across the street threw –
[Defense Counsel]: Your Honor, I'm going to object pursuant to my motion in limine.

The Court: Overruled.

A. Go ahead?

The Court: You may answer, ma'am.

A. They spray painted my garage door with orange paint. And the second thing, that they left water on the side of my house just running for a whole day.

Q. [The Prosecutor] Let me back up. Your garage door got spray painted?

A. Yes.

[Defense Counsel] Your Honor, again I object and ask that an ongoing objection be noted for this line of testimony.

The Court: Objection is noted. Objection is overruled.

Q. [The Prosecutor] Okay. So you said the garage door got painted?

A. Yes.

Q. All right. How was it painted – well, you didn't hire a company to go out and paint your garage door?

A. No.

Q. Vandals?

A. It was painted orange.

Q. Okay. And then you said that your water was left on one day too, right?

A. Yes.

Q. What do you mean by that?

A. The water hose was just running on the side of the house.

Q. You meant where the spigot is on the outside?

A. Yes.

Q. So someone turned that on?

A. Yes.

Q. It was running all day?

A. Yes.

Q. Is this the stuff that happened when you first moved in?

A. Yes, it did.

Q. Okay. What else was going on?

A. It was just a number of things. People jumping in and out of cars, getting back in, getting out of them. Some of them was knocking at my door.

[Defense Counsel]: Your Honor, can we approach?

[The Prosecutor]: Judge, I'm going to ask that --

The Court: Overruled. Request is denied.

[Defense counsel]: Your Honor, I object unless there's going to be testimony that [Hampton] did this, somebody saw [Hampton] do this. This is prior bad acts, no relevance to this case whatsoever.

The Court: Overruled.^[17]

Q. [Prosecutor] You can continue.

A. And so we had went to the police numerous times telling them what was going on, even stop the police and tell them what was going on, and we never get no response or anything of what could happen or what was going to happen.

¹⁷ Because Hampton's objections were overruled, the admission of this evidence was given the imprimatur of the trial court. *State v. Luleff*, 729 S.W.2d 530, 536 (Mo. App. E.D. 1987).

Q. All right. Do you recognize that house?

A. Yes.

Q. What house is that?

A. The house directly in front of me, the house I lived in.

Q. Across the street?

A. Yes.

Q. Do you know who stays there?

A. I don't know who stays there. Be so many people coming in and out. I don't know who live there.

Q. Okay. Do you know whether or not the Defendant lived there?

A. He was over there every day.

(Tr. 375-79).

In Hampton's timely motion for new trial, he alleged that the trial court erred in overruling his objections and in allowing Miller to testify about the spray-painting and running water incidents because there was no evidence that Hampton was responsible for such incidents (L.F. 100, 104; claims 8 & 20). This issue is properly preserved for appeal.

2. Standard of Review

A trial court enjoys broad discretion in determining the relevance of evidence. *State v. Ray*, 945 S.W.2d 462, 467 (Mo. App. W.D. 1997). While this Court generally will not interfere with the trial court's ruling on the admission or

exclusion of evidence, this Court will do so when there exists a clear showing of an abuse of that discretion. *Id.*

3. Discussion

Evidence is logically relevant if it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial. *Ray*, 945 S.W.2d at 467. Evidence is legally relevant if its probative value outweighs its prejudicial effect. *Id.*; *State v. Barriner*, 34 S.W.3d 139, 144-45 (Mo. banc 2000). To be admissible, evidence must be both logically and legally relevant. *Id.* Further, in Missouri, the State cannot put on evidence merely to show that the defendant is a bad or evil man to support the further inference that he therefore committed the crime with which he is charged. *State v. Kitson*, 817 S.W.2d 594, 597-598 (Mo. App. E.D. 1991).

Here, the evidence concerning the acts of vandalism was evidence of other crimes that were not connected to Hampton, and therefore was inadmissible evidence. *State v. Moore*, 645 S.W.2d 109, 100-11 (Mo. App. W.D. 1982) (other than fact that handgun was found some eight days after robbery and in path of defendant's flight from police, no relation to or connection between handgun and defendant or crime was established, so admission of handgun was prejudicial error).

In *State v. Jordan*, 664 S.W.2d 668 (Mo. App. E.D. 1984), the State, during its cross-examination of an eyewitness employee of a gas station that was robbed, asked that witness whether another employee had received a phone call

from an African-American male¹⁸ saying that he was the man involved in the robbery and if he ever saw the attendants again, they would be dead. *Id.* at 671. The *Jordan* Court noted that there was no foundation presented that the defendant made the threatening call or that he caused it to be made. *Id.* The court found the State's questions about the phone call to be both erroneous and prejudicial. *Id.* at 672. Offering evidence that cannot be associated with the defendant, directly or indirectly, may well form the basis for declaring a mistrial, or for granting a new trial, or for reversal on appeal. *Id.* "A failure to prove a connection between the defendant and the alleged threat permitted the defendant to be held answerable for the independent actions of another, and that is impermissible." *Id.* (citing, *State v. Hicks*, 535 S.W.2d 308, 312 (Mo. App. Spr.D. 1976)).

Similarly, here there was no evidence connecting Hampton to the acts of vandalism, so the evidence was both erroneous and prejudicial. This Court must reverse and remand for a new trial.

¹⁸ The defendant was an African-American male. *Id.* at 669-70.

III.

The trial court abused its discretion in overruling Hampton’s objections and in allowing into evidence letters that he had written to codefendant Williams (State’s Exhibits 151-157) in their entirety, because these rulings violated Hampton’s rights under the 1st Amendment to the United States Constitution and to due process, a fair trial and to be tried for the offense with which he was charged, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the letters contained irrelevant, bad character evidence of racial animosity that Hampton had toward white people, which was not probative because the murder was not racially motivated; this evidence was particularly prejudicial in this case because the State had struck four of the five African-American members from Hampton’s venire panel, and had attempted to strike the other African-American venireperson but the trial court would not allow that strike after it had found it to be pretextual.

1. Facts & Preservation

Prior to trial, Hampton filed a Motion in Limine to Preclude Admission into Evidence of Letters Allegedly Written by the Defendant to the Co-Defendant (L.F. 32-34). That motion complained, in part, that Hampton’s letters to Sam Williams included such things as “vague references to prior bad acts,” that the letters are “replete with profanity and racially and sexually disparaging language,” that “such

evidence is offered solely as an attempt to show the Defendant's character and possible bad acts, poor English, and bad grammar and to inflame the passions and prejudices of the jury," that the letters are "irrelevant and immaterial to the issues in this case," and that the letters are "more prejudicial than probative" (L.F. 32-33).

At a hearing on the motion (Tr. 28-39), Hampton again complained that the letters should not be admitted into evidence because they include references to prior bad acts; they are irrelevant; they use profanity, racial slurs, sexually disparaging language towards women and would be offered to show Hampton's bad character (Tr. 28-29). Regarding the racial slurs, Hampton noted that several cases hold that this type of evidence is admissible only if it is relevant, but if the evidence of his beliefs is not relevant, then the admission of evidence of racial animosity would be unconstitutional under the First and Fourteenth Amendments to the United States Constitution (Tr. 29, 38).

The State argued that the letters were "basically a campaign to keep [Williams] quiet about what he saw that night" (Tr. 31). The State further argued that in his letter Hampton was using race and hatred "as a means of trying to get the accomplice to backpedal and to remain quiet, not make further statements." (Tr. 32).

The trial court denied the motion in limine, and ruled that the letters "in their entirety" would be admissible (Tr. 39).

Later, during the State's opening statement, Hampton again objected, "pursuant to my motion, to introduction of any evidence regarding these letters as well as the mischaracterization by the State regarding the contents of the letters" (Tr. 251). That objection was overruled (Tr. 251).

Later, when the letters (State's Exhibits 151-160, including the envelopes) were offered into evidence, Hampton objected again for the same reasons previously given (Tr. 642-643). The trial court overruled that objection (Tr. 643).

Included in those letters are the following sentences:

And the bad part about it is you sold me to some white folks, you didn't sale (sic) me for a 100,000 of green money but to some white crackers who love to see us go against each other. All they letting us know is who this world belongs to and we can turn ya'll (Black People) against each other in any situation, so therefore this world will never belong to ya'll. See they think this world belongs to them. The world belongs to God the creator of all of us.

(State's Exhibits 151-157).

In Hampton's timely motion for new trial, he alleged that the trial court erred in allowing into evidence the letters, as well as testimony about those letters, (L.F. 98-99; claim 3). The motion noted that this evidence was not relevant for the previously given reasons, and admitting it violated Hampton's constitutional rights under the First and Fourteenth Amendments to the United States Constitution and

Article I, Section 10 and 18(a) of the Missouri Constitution (L.F. 98-99). This issue is preserved for appeal.

2. *Standard of Review*

A trial court enjoys broad discretion in determining the relevance of evidence. *State v. Ray*, 945 S.W.2d 462, 467 (Mo. App. W.D. 1997). While this Court generally will not interfere with the trial court's ruling on the admission or exclusion of evidence, this Court will do so when there exists a clear showing of an abuse of that discretion. *Id.* The trial court's erroneous admission of irrelevant evidence can violate a defendant's due process rights entitling the defendant to a new trial. *State v. Barriner*, 34 S.W.3d 139, 144-45 (Mo. banc 2000).

3. *Discussion*

Evidence is logically relevant if it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial. *Ray*, 945 S.W.2d at 467. Evidence is legally relevant if its probative value outweighs its prejudicial effect. *Id.*; *Barriner*, 34 S.W.3d at 144-45. To be admissible, evidence must be both logically and legally relevant. *Id.* Further, in Missouri, the State cannot put on evidence merely to show that the defendant is a bad or evil man to support the further inference that he therefore committed the crime with which he is charged. *State v. Kitson*, 817 S.W.2d 594, 597-98 (Mo. App. E.D. 1991). "The introduction of testimony that serves only to inflame and prejudice the jury can warrant a new trial. *State v. Olson*, 854 S.W.2d 14, 15 (Mo. App.

W.D. 1993); *State v. Earvin*, 743 S.W.2d 125, 128 (Mo. App. E.D. 1988). For instance, references to race or racial hatred principally to inflame jurors or appeal to their racial prejudices or fears constitute prosecutorial misconduct.

Commonwealth v. Mahdi, 388 Mass. 679, 693, 448 N.E.2d 704, 712 (1983).

Such references are incompatible with the concept of a fair trial because of the likelihood that they will sweep jurors beyond a fair and calm consideration of the evidence. *Id.* 388 Mass. at 693, 693 N.E.2d at 712-13.

In *State v. Driscoll*, 55 S.W.3d 350, 352-56 (Mo. banc 2001), this Court held that evidence that defendant was member of a white racist prison gang was not relevant in the trial of an inmate who was convicted of killing a corrections officer. The mere evidence of a defendant's membership in such a gang is a First Amendment violation if not otherwise relevant. *Id.* at 354. The logical relevance of this gang membership was "tenuous at best" and the prejudicial effect of the evidence far outweighed its probative value so that it had no legal relevance. *Id.* On the other hand, the gang evidence enabled the State to portray Driscoll as a person of bad character. *Id.* at 355. This Court also held that this constitutional error was not harmless beyond a reasonable doubt, even though the evidence of "guilt was substantial, and much of it was uncontroverted," including three eyewitness and some admissions made by Driscoll to two inmates. *Id.* at 356-58. Although the prosecutor made no reference to the evidence in the guilt phase closing argument, it was highly prejudicial, warranting a new trial. *Id.* at 358.

Similarly, here, evidence about what Hampton felt about “white folks” and “white crackers” was not relevant. Rather, the racially charged evidence portrayed Hampton as a person of bad character. Although parts of the letter were admissible, the portions reflecting racial animosity should not have gone to the jury.

In *State v. Johnson*, 456 S.W.2d 1 (Mo. 1970), jail guards seized an outgoing letter, written by the defendant while he was awaiting trial on the pending charges. *Id.* at 2. The letter contained admissions of guilt, including that the defendant “was guilty,” but that the only person testifying against him was also “in on the make.” *Id.* The letter suggested that the addressee have someone talk to the witness and get him to change his mind about testifying against the defendant. *Id.* The letter also included, however, a portion where the defendant noted that his codefendant had gone to trial and had gotten life, and that the defendant’s attorney believed that if the defendant’s case did not change, he would get the same thing. *Id.* In reversing, this Court held that the court should have excluded the inadmissible portions, including the reference to defense counsel’s appraisal of defendant’s chances at trial. *Id.* at 3-4. “The fact that these statements were contained in a letter admittedly written by defendant does not change this.” *Id.* at 4. Likewise, here the letters should not have gone to the jury in their entirety.

The remaining question is whether the admission of this evidence was prejudicial. This Court will declare error in the admission of evidence to be

harmless only if it can declare a belief that it was harmless beyond a reasonable doubt. *Driscoll*, 55 S.W.3d at 356. Here, a not guilty verdict was not out of the question. There was no confession in this case. The victim's wife could not identify the shooter; in fact, her physical description of the suspect was a closer fit to Williams than Hampton (Tr. 397-98, 415-19, 421-22, 484-87, 490). Although Williams testified against Hampton, he had a motive to lie. He had been charged with the murder (Tr. 750, 775, 789-91, 794-95), Hampton's uncle had told the police that Williams had committed the crime (Tr. 700, 704-05, 717-19, 722-26, 770-71), and Williams agreed to testify against Hampton if the State dropped the murder and armed criminal action charges in exchange for a guilty plea to unlawful use of a weapon (Tr. 779-80, 796-99). His testimony was suspect.

Although Ford made statements to Detective Wheeler saying that Hampton did the murder (Tr. 265-66), Ford recanted those statements at trial and explained that he had made those statements because he had been arrested at his work place, and he believed that he needed to make the statements so that his probation would not be revoked and he would not lose his job (Tr. 308-12). The evidence was stronger in *Driscoll* than this case, and in *Driscoll* this Court could not declare the admission of the racist evidence harmless beyond a reasonable doubt. This Court should likewise reverse here.

The admission of this evidence violated Hampton's constitutional rights as guaranteed under the 1st and 14th Amendments to the United States Constitution,

and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court should reverse and remand for a new trial.

IV.

The trial court abused its discretion in overruling Hampton's objections and in allowing the State to question its witnesses about Hampton's courtroom attire and in allowing the State's witnesses to testify that they had never seen Hampton wear a suit before, because this line of questioning violated Hampton's rights to due process and a fair trial, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that whether Hampton had ever worn a suit prior to trial was irrelevant; and, the questioning was designed to portray Hampton as someone who was trying to mislead the jury by representing himself in a better light than he was in reality.

1. Facts & Preservation

During the State's direct examination of the victim's step-son, the prosecutor asked, "Did you ever see him in a coat and tie and glasses before?" (Tr. 337). Hampton objected that the questioning was "improper" (Tr. 337). The trial court overruled that objection (Tr. 337).

When the State followed with the question, "When you saw him around the neighborhood, how was he dressed?," Hampton again objected that it was irrelevant how Hampton dresses (Tr. 337). The trial court again overruled the objection (Tr. 337).

After requesting to approach the bench, Hampton argued that the witness had already identified Hampton, that how Hampton dresses is irrelevant, and that the State's questioning was an attempt to show Hampton's bad character (Tr. 338). Hampton noted that how he dresses "around the neighborhood" was a different question than how he was dressed on the night of the crime, which would be relevant (Tr. 338).

The trial court again overruled the objection, but limited further questioning to what Hampton wore in the 24-hour time period surrounding the murder (Tr. 338). Nevertheless, during the State's questioning of the victim's wife, the State continued the line of questioning by asking her, "Now, when he said that to you, was he wearing a coat and tie and wire-rim glasses?" (Tr. 389).

Hampton objected, but the trial overruled the objection and the witness was allowed to answer that she had never seen Hampton wear that attire before (Tr. 389).

In Hampton's timely motion for new trial, he alleged that the trial court erred in overruling his repeated objections and in allowing the State's witnesses to testify as to whether or not they had ever seen Hampton wear a suit before (L.F. 104; claim 21). The motion noted that this evidence was not relevant, but was designed to portray Hampton as someone who was attempting to perpetrate a fraud on the court by changing his manner of dress, violating Hampton's constitutional rights under the Fourteenth Amendments to the United States Constitution and

Article I, Section 10 and 18(a) of the Missouri Constitution (L.F. 104). This issue is preserved for appeal.

2. *Standard of Review*

A trial court enjoys broad discretion in determining the relevance of evidence. *State v. Ray*, 945 S.W.2d 462, 467 (Mo. App. W.D. 1997). While this Court generally will not interfere with the trial court's ruling on the admission or exclusion of evidence, this Court will do so when there exists a clear showing of an abuse of that discretion. *Id.* The trial court's erroneous admission of irrelevant evidence can violate a defendant's due process rights entitling the defendant to a new trial. *State v. Barriner*, 34 S.W.3d 139, 144-45 (Mo. banc 2000).

Discussion

Evidence is logically relevant if it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial. *Ray*, 945 S.W.2d at 467. Evidence is legally relevant if its probative value outweighs its prejudicial effect. *Id.*; *Barriner*, 34 S.W.3d at 144-45. To be admissible, evidence must be both logically and legally relevant. *Id.* The introduction of testimony that serves only to prejudice the jury can warrant a new trial. *State v. Earvin*, 743 S.W.2d 125, 128 (Mo. App. E.D. 1988).

A defendant's attire at trial is wholly irrelevant to the ultimate question of his or her guilt or innocence. *State v. Ervin*, 835 S.W.2d 905 (Mo. banc 1992); *State v. Bowden*, 439 A.2d 263, 267-68 (R.I. 1982) (trial court improperly allowed

testimony that defendant, who was in the military, was out of uniform at trial because he was not wearing type of shoes required to be worn with uniform he was wearing). Whether Hampton had ever worn a suit prior to trial was irrelevant. The questioning was an obvious attempt by the State to portray Hampton as someone who was trying to mislead the jury by presenting himself in a better light than who he was in reality.

The remaining question is whether the admission of this evidence was prejudicial. This Court will declare error in the admission of evidence to be harmless only if it can declare a belief that it was harmless beyond a reasonable doubt. *State v. Driscoll*, 55 S.W.3d 350, 356 (Mo. banc 2001). Here, a not guilty verdict was not out of the question. *See* argument to Point III, *supra*. Thus, this Court cannot declare the admission of this evidence harmless beyond a reasonable doubt. *See, Bowden*, 439 A.2d at 269-70 (Rhode Island Supreme Court could not say that the references to defendant's attire at trial did not play a role influencing the jury in reaching its verdict).

The admission of this evidence violated Hampton's constitutional rights to due process and a fair trial as guaranteed under the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court should reverse and remand for a new trial.

V.

The trial court abused its discretion in denying Hampton's requests for mistrials after, in the jury's presence: the prosecutor yelled for Hampton's mother's removal from the courtroom; the court refused Hampton's request to have her removed outside of the jury's presence, and instead, ordered Hampton's parents to leave the courtroom because they were endorsed witnesses; and, the bailiff announced that Ms. Hampton "took off and that security just went after her," which defense counsel was forced to repeat in open court because the court refused a sidebar request, because all of this violated Appellant's rights to due process and a fair trial, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the court did not minimize or eliminate the prejudicial impact from the outbursts, which were caused by the prosecutor; rather, by refusing to handle the situation out of the jury's presence, the court exacerbated the prejudice by ordering Ms. Hampton out of the courtroom, commenting that she was a witness who was not allowed to be there and refusing to allow defense counsel to make a sidebar record about the bailiff's statement; and, the sum total of what happened prejudiced Hampton, because it created an adverse inference that Ms. Hampton had damaging testimony against Hampton, but was refusing to give such testimony, and that the defense was doing something improper concerning her.

1. Facts & Preservation

In the presence of the jury, there was a disruption in the courtroom and the prosecutor yelled for Hampton's mother to be removed from the courtroom (Tr. 726-30).

At a bench conference, defense counsel noted that Hampton's parents, who were in the courtroom, were not being called by the defense as witness, and while they had been endorsed by the State, they had not been subpoenaed by the State (Tr. 726-27). The prosecutor said that he intended to call Ms. Hampton as a witness (Tr. 727). When defense counsel pointed out that the State had endorsed her as a witness and noted that "the exclusionary rule" had been invoked, the prosecutor replied that he did not know she was in the courtroom because he had never seen her before (Tr. 727).

The trial court then directed that Ms. Hampton be excluded from the courtroom for the rest of the trial (Tr. 727). Defense counsel asked that the exclusion be done "quietly" (Tr. 727). The trial court noted that since the prosecutor had endorsed her as a witness, that it was his duty to make sure she was not in the courtroom, and that it was his obligation to get her out quietly (Tr. 728). The trial court noted that the bailiff had been trying to get her to leave the courtroom, but that she was refusing (Tr. 728). The trial court said that if Ms. Hampton continued to refuse to leave that she would be arrested and held in contempt (Tr. 728).

When defense counsel asked if they could do that “outside,” the trial court replied, “No.” (Tr. 728). In the presence of the jury, the trial court then said, “The two people in the back of the courtroom, I’m going to ask that you leave the courtroom. You are endorsed witnesses. You are not allowed to be in the courtroom.” (Tr. 729).

Another bench conference was held (Tr. 729-30). At that time, defense counsel requested a mistrial because of the “spectacle” the prosecutor had created (Tr. 729). Defense counsel reminded the court that earlier two of the State’s witnesses had violated the court’s rulings on Hampton’s motions in limine, and that the prosecutor had admitted that he had not advised one of the witnesses about the court’s pretrial rulings even though the trial court had advised the prosecutor to instruct all of his witnesses about the rulings (Tr. 729-30). Defense counsel argued, “It’s a combination of stunts like this by the State that is preventing [Hampton] from receiving a fair trial in this case” (Tr. 730). The trial court denied the motion for mistrial (Tr. 730).

The prosecutor then attempted to call Ms. Hampton as a witness (Tr. 730). After he announced her name, he asked to approach the bench (Tr. 730). There, he advised the court that Ms. Hampton was refusing to come inside the courtroom (Tr. 730). When the prosecutor admitted that she had not been personally served with a subpoena, the trial court ruled that it was not going to force her to testify (Tr. 731). The proceedings returned to open court (Tr. 731).

Defense counsel then request to re-approach the bench (Tr. 731). The trial court refused that request (Tr. 731). Defense counsel then was forced to renew her motion for mistrial in the presence of the jury (Tr. 731). Defense counsel said that it was unfair for the bailiff to announce in open court, after the prosecutor had called out Ms. Hampton's name, that she "took off and that security just went after her" (Tr. 732). Defense counsel renewed her request for a mistrial (Tr. 732). The trial court denied that request and commented, in the presence of the jury, "The Court will note that the statement was not made openly and visibly in court until counsel for [Hampton] made its statement" (Tr. 732).¹⁹

Later, at a bench conference, defense counsel made a further record of what had happened (Tr. 747-48). Defense counsel noted,

[the prosecutor] made a showing loudly asking that a particular witness [Ms. Hampton] be excluded from the courtroom. The inference in his tone and his manner was that the defense was doing something improper with regard to that witness

(Tr. 747).

Defense counsel further noted that prosecutor's actions created "an improper inference that could be attributable to [Hampton] and to his counsel" (Tr. 748). Counsel also said that after Ms. Hampton had been announced as a witness

¹⁹ The trial court's criticism is unfair in light of the fact that it had refused defense counsel's request to approach the bench and make a record (Tr. 731-32).

by the prosecutor in open court, the bailiff entered the courtroom and said that “she had left and that security had gone after her” (Tr. 748). Defense counsel asserted that she had been standing near counsel table, “which is precisely in the same position as the jury box,” and that she had been able to hear what the bailiff said (Tr. 748). Defense counsel further complained that she had been denied her request to approach the bench “and make a sidebar as to that out of the hearing of the jury” (Tr. 748). As a result, defense counsel again requested a mistrial because “this jury has been improperly tainted and improperly poisoned against me and my client” (Tr. 748).

The trial court again denied the request, but admitted that “the record needs to reflect that this has been a particularly difficult case, that the case has not moved along smoothly and has been problematic all the way through” (Tr. 748-49). The court also agreed that it “was inappropriate for the State to yell out that those people need to be excluded from the courtroom,” and that the request should have been done “sidebar” (Tr. 749). Nevertheless, the trial court denied the mistrial request, noting that it did not believe “that there’s anything biased or prejudicial by the conduct of the prosecutor in what he did” (Tr. 749).

In Hampton’s motion for new trial, he alleged that the trial court erred in overruling his request for mistrial, noting that the sum total of everything that had happened concerning Ms. Hampton was prejudicial to Hampton, and the fact that the jury heard that she had “taken off with security after her,” after the prosecutor had announced her as a witness, created an adverse inference that she had

damaging testimony against Hampton, but was refusing to give such testimony (L.F. 105-06; claim 25). This point is properly preserved for appeal.

Standard of Review

The decision whether to declare a mistrial rests largely within the discretion of the trial court. *State v. Webber*, 982 S.W.2d 317, 323 (Mo. App. S.D. 1998). This Court will reverse a trial court's exercise of discretion after a showing of clear abuse and substantial prejudice resulting to the defendant. *Id.*

Discussion

“Emotional outbursts have no place in a trial and are to be prevented as far as possible.” *State v. Johnson*, 672 S.W.2d 160, 163 (Mo. App. E.D. 1984).

Where outbursts occur, however, the trial court has broad discretion in minimizing or eliminating the prejudicial impact from the outburst. *Id.* The trial court may consider the spontaneity of the outburst, whether the prosecution was at fault, whether something similar, or even worse, could occur on retrial, and the further conduct of the trial. *Id.*; *State v. Hamilton*, 791 S.W.2d 789, 795 (Mo. App. E.D. 1990).

Here, all of these factors favor the grant of a mistrial. The outburst certainly was not spontaneous. Although Ms. Hampton had not been subpoenaed as a witness and had not been informed that she was to remain out of the courtroom during the testimony, the State had the bailiff attempt to remove her from the courtroom during testimony. It is understandable that a defendant's mother would be upset about her attempted removal from the courtroom when she

had not been advised that she was a witness and that she needed to remain outside the courtroom. It was the prosecutor's fault. He had not subpoenaed or spoken to Ms. Hampton. Thus there was no reason for her to think that admonition for witnesses to stay out of the courtroom applied to her. The prosecutor further exacerbated the situation by yelling for Ms. Hampton's removal in the presence of the jury.

The trial court's actions also failed to minimize or eliminate the prejudicial impact from the outburst. The trial court refused Hampton's request to remove Ms. Hampton from the courtroom out of the presence of the jury (Tr. 728). This was a reasonable request. Had the trial court done so, he could have explained that situation to Ms. Hampton rather than have a situation where a bailiff unexpectedly was attempting to remove her from the courtroom for no apparent reason. Instead, the trial court took the course of ordering her removal from the bench in the presence of the jury. This maximized rather than minimized the prejudice to Hampton.

The trial court further exacerbated the situation by not allowing defense counsel to make her record out of the presence of the jury concerning what the bailiff had said that Ms. Hampton "took off and that security was after her" (Tr. 732).

The trial court then scolded defense counsel for repeating in open court what the bailiff had said, even though it was the trial court that had refused defense counsel's request to make a sidebar record (Tr. 732). All of this would be

avoidable on retrial. Sometimes the manner in which the case is tried can warrant a new trial. *State v. Harris*, 662 S.W.2d 276 (Mo. App. E.D. 1983) (“the record indicates defendant did not receive a fair trial due to the continued harangue between the prosecutor and defense counsel throughout a heated trial”). This is such a case.

The situation involving the exclusion of Ms. Hampton from the courtroom in the presence of the jury violated Hampton’s rights to due process and a fair trial, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. The trial court should have declared a mistrial to protect Hampton’s rights, and because it did not, this Court should reverse and remand for a new trial.

CONCLUSION

For the reasons set forth above, Mr. Hampton respectfully requests that this Court reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 14,049 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on January 12, 2004. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of January, 2004, to Evan J. Buchheim, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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