

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
v.)	No. SC93333
)	
STANLEY CARTER)	
)	
Appellant.)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 12
THE HONORABLE DENNIS SCHAUMANN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

In the Circuit Court of the City of St. Louis, Cause No. 0822-CR03529, the State of Missouri charged that Appellant, Stanley Carter, committed the crimes of Count I of the class B felony of assault in the first degree, a violation of Section 565.050, and the unclassified felony of armed criminal action, a violation of Section 571.050. He was found guilty by a jury, and sentenced by the court to concurrent terms of 15 years of imprisonment. This timely-filed appeal followed. The convictions were affirmed in a *per curiam* order and memorandum opinion by the Missouri Court of Appeals, Eastern District, on February 26, 2013. On June 25, 2013, the case was ordered transferred by this Court after Appellant's application. Jurisdiction is in the Supreme Court of Missouri. Mo. Const. Art. V, Sec. 9; Rule 83.04.

STATEMENT OF FACTS

Facts of the Case

Dion Thorpe was the manager of Baphorah's car wash at Natural Bridge and Fair in the City of St. Louis. Tr. 217. On May 27, 2008, he stopped by the car wash about 6:30 in the morning to pick up some keys and use the computer. Tr. 220. When he went into the office, he locked the front door to the building. Tr. 221.

As he was working and talking to a customer on the phone, he heard a knock. Tr. 221, 247. He went through the lobby to the front door and asked who it was several times, but did not get a response. Tr. 222, 224. He cracked the door, looked out, and saw the face of a man he recognized from two days before. Tr. 224. He had noticed the man standing on the car wash parking lot talking to a man by the name of Lips, whom he knew through the car wash owner's nephew, whose name was Repeat. Tr. 225, 226-227, 264, 272. Since he recognized him, he opened the door a bit more. Tr. 225. The man whom he identified as Appellant, Mr. Carter, was holding a cardboard box. Tr. 228. Mr. Carter ordered Mr. Thorpe to lie down on the ground as he pulled a weapon out of the box. Tr. 229.

Mr. Thorpe tried to close the door. Tr. 229. The gunman shot him in the leg. Tr. 231. The bullet went through his leg and left a scar. Tr. 242. He was, nevertheless, able to close and secure the door. Tr. 232. Two more shots came through the door and grazed his chest. Tr. 232, 243. He was left with two scars. Tr. 243. While this was happening, he was still on the phone with the customer; he told her he had just been shot. Tr. 232, 233. He called the police. Tr. 233.

A person sitting in a car at a nearby intersection saw the gunman. Tr. 282, 313. He described him as a black man, 20 to 26 years old, wearing all black. Tr. 284-285. He saw the shooter aim and shoot at the door. Tr. 286. He witnessed him go around the side of the car wash and get into a white Cadillac with a man and possibly a woman. Tr. 286, 289-90, 294.

When the police arrived, Mr. Thorpe told them he did not know the man who had shot him, but that he could identify him. Tr. 235. Officers talked to the witness in the car, and also to the woman to whom Thorpe had been talking on the phone. Tr. 300. Mr. Thorpe told the police the gunman was a black man, 20 to 30 years old, with a low haircut, and wearing a white t-shirt. Tr. 252, 345.

That same day, Mr. Thorpe received a call from Repeat, the owner's nephew. Tr. 268. Repeat said, "Let the street handle this." Tr. 269. Mr. Thorpe

had known Repeat since Repeat was a teenager. Tr. 270. He had also known the man called Lips for several years, through his association with Repeat. Tr. 271.

The next day, Mr. Thorpe went to the police station, where he told an officer that he recognized the gunman as the mystery person he had seen on the car wash lot on May 25, 2008, speaking with Lips, the man he knew as a friend of Repeat. Tr. 259, 305. After he told the officer about Repeat and Lips, the officer did a “search by association” and showed him numerous pictures. Tr. 260, 261. The officer obtained these photos from a database by searching these aliases, and eventually came up with a man named Antonio Shaw, whom Thorpe identified as Lips. Tr. 308. They also determined that Repeat’s real name was Richard Bobbett. Tr. 309. The police then looked for people the police had documented as “associates” of Lips and Repeat, which means family, friends, or others linked to them through criminal behavior. Tr. 309, 310.

When Thorpe did not pick out any of these “documented associates” as the shooter, the officer conducting the investigation mentioned to Shell Sharp, a foot patrol officer in the area, if he had any ideas about who the gunman might be. Tr. 330. Sharp told the officer that based upon the description (a black man, aged 20 to 30, with a low haircut) the gunman “sounded like Stanley Carter.” Tr. 330, 345. The police then showed Mr. Thorpe a single picture of Mr. Carter. Tr.

334. Mr. Thorpe identified Mr. Carter as the shooter. Tr. 239, 311-312. He later viewed a live lineup, in which he identified Mr. Carter as the person who shot at him. Tr. 240, 26, 314. The police issued a wanted for Mr. Carter. Tr. 336. A few days later, Mr. Carter came to the police station and turned himself in. Tr. 336.

Mr. Carter, his wife, and his wife's friend testified. Tr. 396, 404, 464. They all testified that Mrs. Carter gave birth at St. Mary's Hospital on May 24, 2008. Tr. 397, 405. Mr. Carter was at the hospital with his wife until she and the baby were discharged around noon on May 26, 2008. Tr. 401. The shooting happened at 6:30 in the morning on May 27, 2008. Tr. 219. According to Mr. Carter and his wife, it was their first night home with their newborn baby in the early morning hours of May 27, 2008 when the shooting occurred, and Mr. Carter was home at the time of the shooting. Tr. 418, 474. He testified he did not leave the house for several days after coming home with the baby. Tr. 418.

He testified he only became aware he was wanted after his wife's friend told him, "Stanley, you're in the *Whirl*," a local tabloid-style newspaper. Tr. 424. He bought a copy of the newspaper, which had a reference to a shooting by "Stanley Carter and an unknown person" and gave his father's address on Labadie. Tr. 425. He called his probation officer, as well as the police station. Tr.

427. Finally, he asked his cousin, a police officer, to accompany him to turn himself in. Tr. 428.

Mr. Carter testified the police officer who interviewed him mostly asked about unrelated issues involving weapons and guns, and also asked for information on the criminal activities of Lips and Repeat. Tr. 431, 460. Mr. Carter admitted he had sold drugs near his father's house on Labadie before, and that he knew Lips and Repeat. Tr. 452. He denied committing the charged crime. Tr. 438-439.

Batson Challenges

Five of the State's six peremptory strikes were of African-American venirepersons. Tr. 182. Three of the strikes, those against (1) Kenneth Moore, (2) Donald White, and alternate strike (3) Jamie Jones, were based on these jurors being "familiar with" the area of Natural Bridge and Fair, near Fairground Park. Tr. 183, 189, 191. The objections to these strikes were overruled. Tr. 184, 191.

During jury selection, Mr. Moore stated that he would be "very sympathetic" towards the victim. Tr. 55. Moore stated at a different time that he had sympathy for victims of crime. Tr. 121. Nevertheless, the prosecutor said that based on being familiar with the high-crime area where the assault occurred, Moore would "hold that against the victim." Tr. 183.

Jones stated, "I'm familiar with Natural Bridge." Tr. 118. She stated, "I have family members that live on Fair and Harris." Tr. 118. She "might be in the process of moving to that area." Tr. 119. Jones also said that knowing the area would not affect her decision. Tr. 119.

White stated that he knew that neighborhood "kind of well" and it would not affect him. Tr. 122-123.

The State alleged he struck everyone who was familiar with the area and exercised his strikes "accordingly with that theory." Tr. 190-192. Defense counsel reiterated that he believed this reason was pretextual and that the people were struck due to their race. Tr. 190-192.

Closing Argument

The defense was that Mr. Carter was misidentified after officer Shell Sharp introduced his name to the investigating officers, who responded by showing the victim Mr. Carter's picture, leading to his misidentification. Tr. 501. The defense pointed to the discrepancy between the descriptions of the shooter by the victim and the passerby. Tr. 502. He argued the identification was not reliable, given the short time Thorpe saw the shooter. Tr. 499-500. Defense counsel questioned why, if officers were concerned with getting the right person, they did not attempt to resolve the discrepancy between the two descriptions or test any of

the bloodstained clothes left at the scene. Tr. 504. He pointed out that Mr. Carter turned himself in, would be unlikely to be out committing crimes shortly after the birth of his daughter, and would likely not have been on the parking lot talking to Lips on the day after his daughter was born as Thorpe claimed. Tr. 506, 509. Further, he suggested that officers were more concerned with getting information from Mr. Carter about Lips and Repeat then determining who actually committed this crime. Tr. 508, 509.

The prosecutor responded:

That's it, ladies and gentlemen. I heard the standard package defense argument for every case that I've done. Okay. Cops incompetent. Don't do a good job. Victim must be lying. That's it. Sometimes they pick one, sometimes they go with both. All right?

Tr. 511.

A jury found Mr. Carter guilty of Count I of the class B felony of assault in the first degree, a violation of Section 565.050, and the unclassified felony of armed criminal action, a violation of Section 571.050. L.F. 91. On January 13, 2012, the court sentenced him to concurrent terms of 15 years of imprisonment. L.F. 99.

This timely-filed appeal followed. L.F. 104.

POINTS RELIED ON

I - The trial court clearly erred in overruling Mr. Carter's *Batson* objections to the prosecutor's peremptory strikes of African-American venirepersons Kenneth Moore, Donald White, and Jamie Jones, because the rulings violated his and the stricken panelists' rights to equal protection and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 18(a) of the Missouri Constitution, in that (1) the proffered reason - that the jurors were "familiar with" the Fairground Park neighborhood and thus would not sympathize with the victim - was a pretext for striking them, as shown by the fact that the reasoning does not withstand logical scrutiny, has no rational relationship to the case, and has a particular tendency to apply to African Americans; (2) the State did not ask the venire any questions about this issue; (3), the "reason" contradicts Moore's statements that he would sympathize with the victim; (4) and the State disproportionately struck African-American venirepersons.

State v. Bateman, 318 S.W.3d 681 (Mo. banc 2010)

State v. McFadden, 216 S.W.3d 673 (Mo. banc 2007)

State v. Livingston, 220 S.W.3d 783 (Mo. App. W.D. 2007)

State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987)

U.S. Const. Amends. VI and XIV and Mo. Const. Art. I, Secs. 2 and 18(a)

II - The trial court plainly erred, resulting in manifest injustice, in failing to *sua sponte* admonish the State or declare a mistrial during the State's closing argument, because during closing argument the prosecutor stated that Mr. Carter was presenting the "standard package defense argument" seen in "every case" he's done, in that, the comments violated his right to due process, his right to present a defense, and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article 1, sec. 10 and 18(a) of the Missouri Constitution, improperly belittled the defense, suggested that the defense was part of some type of syndrome of standard arguments, argued matters not in evidence, improperly injected issues broader than Mr. Carter's guilt or innocence, and had a decisive effect on the jury, affecting the outcome of trial.

State v. Hornbeck, 702 S.W.2d 90 (Mo. App. E.D. 1986)

State v. Burnfin, 771 S.W.2d 908 (Mo. App. W.D. 1989)

State v. Salitros, 499 N.W. 2d 815 (Minn. 1993)

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

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

ARGUMENT

I - The trial court clearly erred in overruling Mr. Carter's *Batson* objections to the prosecutor's peremptory strikes of African-American venirepersons Kenneth Moore, Donald White, and Jamie Jones, because the rulings violated his and the stricken panelists' rights to equal protection and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 18(a) of the Missouri Constitution, in that (1) the proffered reason - that the jurors were "familiar with" the Fairground Park neighborhood and thus would not sympathize with the victim - was a pretext for striking them, as shown by the fact that the reasoning does not withstand logical scrutiny, has no rational relationship to the case, and has a particular tendency to apply to African Americans; (2) the State did not ask the venire any questions about this issue; (3), the "reason" contradicts Moore's statements that he would sympathize with the victim; (4) and the State disproportionately struck African-American venirepersons.

Preservation

The issue is preserved for appellate review. Mr. Carter alleged that the strike of these venirepersons was motivated by race, citing *Batson v. Kentucky*, 476 U.S. 86, 87 (1986), and after the state gave its reasons behind the strikes, made argument as to why the reasons were pretextual. Tr. 182, 184, 189, 191,

190-192. The issue was also included in Appellant's motion for new trial. Rule 29.11(d); L.F. 94.

Law and Standard of Review

Peremptory strikes are a method of rejecting prospective jurors “for real or imagined partiality.” *Swain v. Alabama*, 380 U.S. 202, 220 (1965). Racially motivated strikes, however, violate a defendant’s and the struck venireperson’s Fourteenth Amendment equal protection rights. *Batson*, 476 U.S. at 87. *Batson* was intended to protect both individual defendants and venirepersons from racial discrimination in the jury selection process. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). While an individual juror does not have a right to serve on a petit jury, that juror does have the right not to be excluded because of race. *Id.* at 409.

To summarize the three-step inquiry created by *Batson*: the defendant must first make a *prima facie* showing that the prosecution exercised its peremptory challenges based on race. *State v. McFadden*, 191 S.W.3d 648, 651 (Mo. banc 2006). This can be accomplished by citing *Batson* and alleging that the strikes are motivated by race or gender and are pretextual, or by demonstrating that the prosecution has improperly removed jurors consistently and systematically. *Id.*; *State v. Edwards*, 116 S.W.3d 511, 525 (Mo. banc 2003); *Swain v. Alabama*, 380 U.S. 202 (1965).

In the case of alleged racial discrimination in jury selection, once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a race-neutral explanation for excluding the juror. *McFadden*, 191 S.W.3d at 651. The defense must then demonstrate that the State's seemingly race-neutral explanation is pretextual, and that the true reason is race. *Id.*

The court must then determine whether the defendant has carried his ultimate burden of proving purposeful discrimination. *McFadden*, 191 S.W.3d at 651. The trial court should, "[make] detailed findings on the record in support of a ruling on a peremptory challenge under *Batson*." *Moran v. Clarke*, 443 F.3d 646, 653 (8th Cir. 2006). Further, as to the issue of discriminatory intent, "*Batson* . . . requires the judge to assess the plausibility of [the prosecutor's] reason in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005). "In deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93.

The trial court's findings after a *Batson* challenge will be set aside if they are clearly erroneous. *McFadden*, 191 S.W.3d at 651. A finding is clearly erroneous when the reviewing court is left with the definite and firm impression that a mistake has been made. *Id.*

Relevant Facts

Five of the State's peremptory strikes were of African American venirepersons. Tr. 182. Three of the strikes, of (1) Kenneth Moore, (2) Donald White, and alternate strike (3) Jamie Jones, were based solely on these venirepersons being "familiar with" the area of Natural Bridge and Fair, a neighborhood in the City of St. Louis, near Fairground Park. Tr. 183, 189, 191.¹

During jury selection, Mr. Moore had stated that he would be "very sympathetic" towards the victim based upon some prior experiences. Tr. 55. When speaking with defense counsel, he stated he was familiar with the neighborhood and the crime problem there, and reiterated he would be sympathetic towards the victim. Tr. 120-121.² Based on Moore being familiar

¹ The two other relevant strikes, Taylor and Quawrells, were made because they were familiar with the Fairground Park neighborhood, as well as for expressing concern about deciding a criminal case based upon one eyewitness. Tr. 182, 187, 184.

² These statements are attributed to a juror named Watawa in the transcript. Tr. 120-121, 183-184. Based upon all parties stating that Mr. Moore made these statements (Tr. 184), as well as substantively identical statements elsewhere by

with the Fairground Park neighborhood and its crime problems, the prosecutor struck him, allegedly because since the victim (a car wash manager) was a “businessman in that area” and that Moore would hold the dangerousness of the area against the victim. Tr. 183; Appendix A5. Defense counsel countered that Moore simply “knows of the area and . . . heard about shootings and a lot of crime in that area” but said he “would have sympathy for the victim.” Tr. 184; Appendix A5. The court allowed the strike, finding the State’s reasoning was race neutral and not pretextual. Tr. 184; Appendix A5.

White and Jones also said they were familiar with the neighborhood around Fairground Park in response to a question by defense counsel. Tr. 119, 122-123. White stated that he knew that neighborhood “kind of well” and it would not affect him. Tr. 122-123. Jones stated that she had family members who lived at Fair and Harris. Tr. 118. She also said she “might be in the process of moving to that area” and that being familiar with the area would not affect her decision making. Tr. 119.

Moore (Tr. 53-55) it appears the attribution to Watawa was a court reporter’s error and that Moore made the statements on pages 120-121.

As to White, the State claimed that White being “familiar with the area, a known area of violence” was the reason for the strike. Tr. 189; Appendix A7. The defense responded, “The State is striking this person because these two jurors indicated that they know that violence occurs in this area. There’s no other reason to strike them other than the fact [of] their race, because knowing of violence in the area is probably not enough to strike them at all.” Tr. 190; Appendix A7. The prosecutor then said he struck Jones for the same reason: that she “admitted she was familiar with the area.” Tr. 191; Appendix A7.

The prosecutor reiterated he struck everyone who was familiar with the area and exercised his strikes “accordingly with that theory.” Tr. 190-192; Appendix A7. The prosecutor went through each African-American juror he struck because he or she was familiar with the Fairground Park neighborhood, and correctly pointed out that no white jurors were familiar with the area. Tr. 190; Appendix A7. Defense counsel stated again that he believed this reason, while facially race-neutral, was pretextual. Tr. 192; Appendix A7. “We again believe that those reasons [are] pretextual and [the jurors were] basically struck simply because of their race.” Tr. 192; Appendix A7.

Argument

The prosecutor's reason for striking these people – that they were familiar with the Fairground Park neighborhood – is facially race-neutral, but was a pretext for removing these jurors because of race. The area in question is 4101 W. Natural Bridge Avenue. Tr. 118; L.F. 17. Defense counsel, not the State, asked if anyone was familiar with that area. Tr. 118. White said he knew the area “kind of well.” Tr. 122. Jones said she had family in the area, and was thinking about moving there. Tr. 118-119. Moore said he was familiar with the area and its crime problem, and would be sympathetic towards the victim. Tr. 55, 121.

In addition to its suspicious tendency to apply to African Americans,³ the State's given reason behind these strikes does not withstand logical scrutiny. The reasoning was, essentially, that jurors who knew that this part of the City of St.

³ The area around Fairground Park comprises United States census tracts 1102, 1103, 1104, and 1105. <http://projects.nytimes.com/census/2010/explorer> (last accessed July 31, 2013). The address where the crime took place is in census tract 1103, which according to the 2010 census contains a population of 3,394 people. <http://projects.nytimes.com/census/2010/explorer>. A full one hundred percent of the 3,394 people in census tract 1103 identify as black. *Id.*

Louis had a crime problem would somehow hold that fact against the assault victim. Tr. 183. The State went to great pains to point out that he removed every person who was familiar with the crime-ridden neighborhood in question. Tr. 182. But every person who was familiar with the area around Fairground Park was African American. Tr. 182, 190-191. The State's reasoning is highly suspect, with no rational connection to the case at hand, and had a strong tendency to apply to African Americans.

Also, it is worth noting the State used "familiarity" with the area around the assault as its supposedly race-neutral "theory" (Tr. 192) for striking these individuals, but asked no questions about this issue. If the State was truly and legitimately concerned with whether anyone on the panel was familiar with the area and thought it might somehow create unsuitable jurors from its perspective, it would have asked that question.

Further, with respect to Mr. Moore, he *twice* stated on the record that he would be likely to sympathize with the victim in this case. Tr. 54-55, 121. Yet, the prosecutor stated that Moore being familiar with the area and its crime problem might make him "hold it against" the victim. Tr. 183. Defense counsel pointed out this incongruity, but the court still allowed the strike. Tr. 184. Similar problems are present with the strikes of Jones and White: it makes no

sense that being “kind of” familiar with the area (Tr. 122) around Fairground Park or having family in the area (Tr. 118) would make a person lack sympathy with the car wash manager who was the victim of this crime.

An additional relevant fact is that the State used the overwhelming majority of its strikes to exclude African-American venirepersons. *State v. Robinson*, 811 S.W.2d 460, 463 (Mo. App. E.D. 1991) (evidence of purposeful discrimination when State used all of its available strikes against black veniremen); *McFadden*, 191 S.W.3d at 657 (“happenstance . . . fails the prosecutor in this instance, where 83% of the eligible African American venire members were stricken using pretextual reasons”); Tr. 182. “The prosecutor's disproportionate number of strikes against other minority venirepersons and/or the number of minority venirepersons remaining after peremptory strikes in the case before the court, is significant.” *State v. Bateman*, 318 S.W.3d 681, 691 (Mo. banc 2010).

Taking all these facts together, the court should consider whether the State’s reasoning was, (1) race-neutral, (2) related to the case on trial, (3) clear and reasonably specific, and (4) legitimate. *State v. McFadden*, 216 S.W.3d 673, 676 (Mo. banc 2007). During the third step, the court will look to the plausibility of the prosecutor’s reasons for striking the jurors to determine if the reasons are

mere pretext. *State v. Hopkins*, 140 S.W.3d 143, 148 (Mo. App. E.D. 2004); *see also Purkett v. Elem*, 514 U.S. 765, 768 (1995). In doing so, the trial court will take into consideration the plausibility of the prosecutor's reasons in light of the totality of the facts and circumstances surrounding the case. *State v. Livingston*, 220 S.W.3d 783, 787 (Mo. App. W.D. 2007). Further, the court will consider whether there is a "low degree of logical relevance between the State's explanation for its peremptory strike of [the] venireperson[s] . . . and the case to be tried." *Livingston*, 220 S.W.3d at 789.

In this case, the totality of the circumstances suggest that the State's strikes were exercised using what it characterized as a "theory" that was not a legitimate concern, and only applied to African-American venirepersons. Tr. 192. The theory the State chooses to justify peremptory strikes after a *Batson* motion must make sense in the context of the case and, more importantly, be a *legitimate concern*, not just a facially race-neutral reason that the African-American jurors have in common. *McFadden*, 216 S.W.3d at 676. It is not acceptable to use familiarity with a part of the city that is, literally, populated exclusively by African Americans as a so-called concern justifying peremptory strikes, when the stated concern flies in the face of reality and has no logical or reasonable justification.

“[C]ourts” in cases such as this one, “should . . . review more closely attempts to justify peremptory strikes based upon vague references to a venireperson's attire, demeanor, and similar attributes.” *State v. Edwards*, 116 S.W.3d 511, 550 (Mo. banc 2003) (Teitelman, J., concurring). “Many times these characteristics merely expose a venireperson to be peremptorily stricken for his or her race rather than his or her ability to serve as a juror.” *Id.* Further, it is never sufficient for the State to simply generate a facially neutral explanation and the inquiry to end there. “We do not believe . . . that Batson is satisfied by ‘neutral explanations’ which are no more than facially legitimate, reasonably specific and clear.” *State v. Johnson*, 220 S.W.3d 377, 388 -389 (Mo. App. E.D. 2007) (Draper, dissenting) (quoting *State v. Antwine*, 743 S.W.2d 51, 65 (Mo. banc 1987)). “Were facially neutral explanations sufficient without more, *Batson* would be meaningless.” *Id.* “We do not believe the Supreme Court intended a charade when it announced *Batson*.” *Id.*

The State’s theory behind these strikes does not withstand even a small amount of scrutiny by this Court: the explanation the State offered was not related to the case on trial, was not clear and reasonably specific, and was not legitimate. *McFadden*, 216 S.W.3d at 676. The totality of the facts reveal

purposeful discrimination by the State in the elimination of these three venirepersons, in violation of the excluded jurors' as well as the defendant's right to Equal Protection and a fair trial. U.S. Const. Amend. VI, XIV; Mo. Const. Art. I, sec. 2, 18(a). This case must be remanded for a new trial.

II - The trial court plainly erred, resulting in manifest injustice, in failing to *sua sponte* admonish the State or declare a mistrial during the State's closing argument, because during closing argument the prosecutor stated that Mr. Carter was presenting the "standard package defense argument" seen in "every case" he's done, in that, the comments violated his right to due process, his right to counsel, to present a defense, and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article 1, sec. 10 and 18(a) of the Missouri Constitution, improperly belittled the defense, suggested that the defense was part of some type of syndrome of standard arguments, argued matters not in evidence, improperly injected issues broader than Mr. Carter's guilt or innocence, and had a decisive effect on the jury, affecting the outcome of trial.

Preservation

Mr. Carter did not object to the State's comments or include a point in his motion for new trial. Appellant asks for review of this issue for plain error. Rule 30.20.

Standard of Review

Relief under the plain error standard is granted when the error so substantially affects the rights of the accused that a manifest injustice or a miscarriage of justice results if left uncorrected. *State v. Hadley*, 815 S.W.2d 422,

423 (Mo. banc 1991); Rules 30.20 and 29.12(b). Alleged errors by a prosecutor in closing argument justify relief under this standard if the error had a decisive effect on the jury. *State v. Sidebottom*, 753 S.W.2d 915, 920 (Mo. banc 1988). A prosecutor's statements have a decisive effect if there is "a reasonable probability that the verdict would have been different had the error not been committed." *State v. Johns*, 34 S.W.3d 93, 116 (Mo. banc 2000). When an appellate court determines that error resulted from an improper personal attack during closing argument in a criminal matter, "the state must overcome the presumption of prejudice by proving beyond a reasonable doubt that the error is harmless." *State v. Greene*, 820 S.W.2d 345 (Mo. App. S.D. 1991).

Discussion

The defense was that Mr. Carter was misidentified after officer Shell Sharp gave Carter's name to the investigating officers, who responded by showing the victim Mr. Carter's picture, leading to his misidentification. Tr. 501. The defense pointed to the discrepancy between the physical description of the shooter by the victim, and the passerby. Tr. 502. He argued the identification was not reliable, given the short time Thorpe saw the shooter. Tr. 499-500. Defense counsel questioned why, if officers were concerned with getting the right person, they did not attempt to resolve this discrepancy or test any of the bloodstained clothes

left at the scene. Tr. 504. He pointed out that Mr. Carter turned himself in, would be unlikely to be out committing crimes at this time, and would not have been on the parking lot of a car wash on the day his daughter was born. Tr. 506, 509. Further, he suggested that officers were more concerned with getting information about the criminal activity of Lips and Repeat than determining who committed this crime. Tr. 508, 509.

The prosecutor responded:

That's it, ladies and gentlemen. I heard the standard package defense argument for every case that I've done. Okay. Cops incompetent. Don't do a good job. Victim must be lying. That's it. Sometimes they pick one, sometimes they go with both. All right?

Tr. 511.

A prosecutor should scrupulously refrain from making statements calculated to engender prejudice or excite passion against the defendant. *State v. Stockbridge*, 549 S.W.2d 648, 651 (Mo. App. K.C.D. 1977). The State should also not inject matters not properly before the jury which would tend to add to the onus under which the defendant necessarily labors by reason of the charge upon which he is standing trial. *State v. Selle*, 367 S.W.2d 522, 530 (Mo. 1963). "Trial courts have a duty to ensure that every defendant receives a fair trial, which

requires the exercise of its discretion to control obvious prosecutorial misconduct *sua sponte*.” *State v. Roberts*, 838 S.W.2d 126, 131 (Mo. App. E.D. 1993).

Further, “[i]t is clearly improper for the State to argue matters not in evidence.” *State v. Hornbeck*, 702 S.W.2d 90, 93 (Mo. App. E.D. 1986). This includes comments that degrade the defense, attack defense counsel personally, or attack defense counsel’s integrity or character, or purely personal attacks. *Id.*; *State v. Crews*, 923 S.W.2d 447, 482 (Mo. App. S.D. 1996); *State v. Spencer*, 307 S.W.2d 440, 446-47 (Mo. 1957); *State v. Burnfin*, 771 S.W.2d 908, 912 (Mo. App. W.D. 1989) (prosecutor alleged defense counsel had “trashed” witness because he could not read, and made two other improper comments during closing argument).

That the prosecutor’s remarks were not based in the record or any inference from it. They were instead an attempt to tell the jury, based on his own experience as a prosecutor, that the defense was part of some type of syndrome of standard arguments made by all defendants and should therefore be disregarded. *See State v. Salitros*, 499 N.W. 2d 815 (Minn. 1993) (reversing for a new trial when prosecutor argued that defense is “common” and attempted to discredit the defense based upon what “defense attorneys” characteristically or “typically” do in similar cases, in his opinion).

The prosecutor argued matters not in evidence, attempting to discredit the defense based upon, allegedly, what he has observed in “every case I’ve done.” Tr. 511. He attempted to discredit the entire defense by labeling it a “standard package defense argument” based on what he (allegedly) has seen in his years as a prosecutor. Tr. 511. In doing so, he went outside reasonable inferences in the record. He improperly injected issues broader than the guilt or innocence of Mr. Carter based on arguments that are unfair, untrue, and un rebuttable: what he allegedly sees in “every” case and the alleged existence of a “standard package” defense argument that reduces the defense in this case to a generic argument that should be disregarded. Because the line of argument attacked the entire defense, and, if believed, would have caused the jury to discount the entire defense based on the unsupported assertions of the prosecutor, it would have had a decisive effect on the jury, affecting the outcome of trial.

“In rare instances, the making of improper statements injects poison and prejudice into the case which may not be neutralized and it is appropriate to grant relief even though the error may not have been preserved for appellate review.” *Burnfin*, 771 S.W.2d at 913. It is by no means unprecedented to grant relief under the plain error standard of review for clear error in closing argument, even where the remarks might have affected the verdict and the

evidence of guilt is relatively strong. *Greene*, 820 S.W.2d at 347; *State v. Taylor*, 216 S.W.3d 187, 195 (Mo. App. E.D. 2007) (finding plain error in improper statements in closing argument). Improper use of post-*Miranda* silence in closing argument, for example, may constitute a manifest injustice and therefore, plain error. *State v. Zindel*, 918 S.W.2d 239, 241 (Mo. banc 1996); see also *Wessel* 993 S.W.2d at 576 (closing argument statements about defendant's request for an attorney plain error). Here, the State's argument discredited the entire defense by its unsupported assertions that the defense was a "package" defense seen in "every" case. Tr. 511. This argument goes beyond permissible bounds, inasmuch as it relies on statements of the prosecutor that the jury would accept as true. It is likely, based on the prosecutor's assertions that the defense was a kind of prepackaged, generic argument, that the jury did not listen or fully consider the defense.

This case should be remanded because the prosecutor's statements crossed the line in a way that substantially affected Appellant's constitutional rights. U.S. Const. Amend. V, VI and XIV; Mo. Const. Art. I., Sec. 10 and 18(a). The result was an unfair trial. The case should be remanded for a new trial.

CONCLUSION

Based on Points I and II, this case must be remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this 1st day of August, 2013, a true and correct copy of the foregoing brief was served via the efilings system to the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Lucida Bright Serif 13 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains **6,482** words.

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