No. SC88161

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

JEROME McDANIELS,

Appellant.

Appeal from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit, Division 12
The Honorable Dennis M. Schaumann, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from convictions of two counts of attempted robbery in the first degree, §§ 564.011, 569.020, RSMo 2000, and two counts of armed criminal action, § 571.015, RSMo 2000, obtained in the Circuit Court of the City of St. Louis, Missouri, for which appellant was sentenced, as a persistent offender, to four concurrent seventeen-year terms in the custody of the Missouri Department of Corrections. The Missouri Court of Appeals, Eastern District, affirmed appellant's convictions and sentences. State v. McDaniels, ED86980, order (Mo. App., E.D. October 10, 2006). On December 19, 2006, this Court sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Mo. Const., Art. V, § 10, (as amended 1982).

STATEMENT OF FACTS

Appellant, Jerome McDaniels, was charged by indictment with two counts of attempted first-degree robbery and two counts of armed criminal action in the Circuit Court of the City of St. Louis (L.F. 9-10). An amended information in lieu of indictment was later filed charging appellant as a prior and persistent offender (L.F. 26-28). This cause went to a trial by jury beginning on August 2, 2006, the Honorable Dennis M. Schaumann presiding (L.F 45; Tr. 17).

The sufficiency of the evidence is not at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: Between 10:15 and 10:20 a.m. on October 31, 2003, the victims, Jennifer Claspill and Dawn Shaw, arrived at a check cashing business located at Kingshighway and Page in St. Louis in Claspill's car (Tr. 298-299, 348-349). They pulled into a parking lot off of Kingshighway near the business and parked next to a green Mazda 626 (Tr. 299-300, 349). Both Claspill and Shaw noticed three black males standing next to the Mazda talking to each other, and Claspill remarked to Shaw that she thought one of the men was cute (Tr. 301, 349-350). Claspill and Shaw then went into the check cashing business, noting during the 15-20 minutes that they were in the business that at least two of the guys were still around the Mazda (Tr. 301-302, 350-351).

When they returned to their car, Claspill and Shaw noticed that there were now only two black males in the Mazda; one was in the driver's seat while the other was crouched down to the floorboard of the passenger side (Tr. 305, 352). The Mazda passenger door was open (Tr. 305). As Claspill walked around the front of the Mazda to get into her car, one of

the black males, later identified as appellant, stood up, put a gun in her face and told her to give him her purse (Tr. 306-307, 353). Appellant was wearing a red hooded sweatshirt with the hood pulled up over part of his face, a black skull cap that covered much of his hair, and was pursing his lips so that his teeth could not be seen (Tr. 306-307, 340, 383). Appellant then pointed the gun at Shaw and ordered her to put her purse on the ground and step back (Tr. 307, 353). Claspill noticed that his finger was on the trigger and that this was no joke (Tr. 308). Shaw told Claspill, "Jen, don't give him shit. Get in the car" (Tr. 308, 354). Claspill and Shaw jumped in the car and Claspill told Shaw to remember the license plate numbers and to call 911 (Tr. 313). Claspill was able to get the door closed, even though appellant had grabbed it and tried to pull it open as she was closing it (Tr. 313, 354). Appellant said, "Bitch, I'm going to kill you" if Claspill did not stop trying to leave (Tr. 313, 354). Claspill ducked down in her seat, started the car, backed out of the parking lot onto Minerva Street, and drove off onto Kingshighway as Shaw called 911 (Tr. 314-316, 354-355).

As Claspill and Shaw were driving away, they saw a police car on nearby Union Boulevard near Page Boulevard (Tr. 315, 355395, 432-433). They made a U-turn, pulled behind the police car, and flagged down the occupants of the police car, Officers Sandra Watson and Regina Moore (Tr. 315-316, 395-396, 432-433). After the victims told the officers what had happened, the officers told the victims to stay on the phone with 911 while the officers went to see if they could locate the suspects. (Tr. 317, 396, 434-435).

The officers, with Claspill and Shaw following, started to go towards the check cashing store by turning onto Maple Avenue, where both the officers and the victims saw the green Mazda stopped in the street (Tr. 317, 362-363, 396, 435-436). Two black males were standing near the Mazda, then started walking away from it, so Moore got out of the police car and asked them where the gun was (Tr. 397-398, 437). Watson also got out of the patrol car and started to approach the Mazda, which appeared empty (Tr. 398, 437). As she got closer, she saw appellant (still wearing the skull cap, but not wearing the red hooded sweatshirt) hunched over in the fetal position under the dashboard, and ordered him to sit up with his hands up (Tr. 398-400, 400, 411, 438-439, 441-442, 452-453). Appellant failed to comply and appeared to be reaching for something on the floor (Tr. 398-401, 417, 438). Moore came over to the other side of the car and also began ordering appellant to show his hands (Tr. 438). The Mazda then started going in reverse, "zigzagging" down the street, and the officers jumped in their car and followed it (Tr. 319, 363, 403-404, 439). Appellant stopped the car after hitting a curb, got out of the car and started running (Tr. 319, 363, 404, 440). Moore chased appellant on foot while Watson pursued him in the patrol car (Tr. 405, 440). Officers were not able to stop appellant and returned to the Mazda, where the victims were waiting (Tr. 319, 364, 406, 442). The officers and the victims looked in the Mazda and saw the red hooded sweatshirt and the loaded SKS assault rifle used in the robbery (Tr. 320, 365, 406, 459, 459).

About ten days after the robbery, Claspill and Shaw were brought to the Justice Center to view photographic lineups (Tr. 323, 367, 463). They viewed the photographs

separately (Tr. 367, 463). In one lineup, both Claspill and Shaw identified the person in picture number one, Gregory Rowan, as looking similar to the driver of the Mazda, but both stated that they would want to see him in person to be 100% sure (Tr. 325, 369, 464-465). In a second lineup, both Claspill and Shaw identified the person in picture number three, appellant, as looking similar to the passenger, who had the gun during the robbery, but again wished to see appellant in a live lineup to be certain, especially because appellant's eyes were partially closed in the photograph (Tr. 325, 327, 370, 466; St. Exh. 5C). Officers Watson and Moore were also shown photo lineups, and both were able to positively identify appellant as the man they confronted in the front seat of the Mazda (Tr. 409-410, 446-447, 468).

Approximately a month later, Claspill and Shaw were again brought to the police station; this time they viewed a live lineup (Tr. 328, 371). Claspill viewed the lineup first (Tr. 329). Both Claspill and Shaw were able to pick out the driver, Gregory Rowan, from the lineup without difficulty (Tr. 329-332, 373). Another month later, Claspill and Dawn were again brought to the police station to view a live lineup (Tr. 322, 375). Immediately upon seeing the lineup, Claspill was able to identify appellant as the passenger in the car, the one who held the gun to her head (Tr. 333-336). Shaw also "automatically" identified appellant as the gunman (Tr. 375).

Appellant did not testify but called two witnesses, appellant's girlfriend and her mother, who testified that he was with them on October 31, 2003 (Tr. 493-497, 513-515). Appellant also called Gregory Rowan, appellant's accomplice, who testified that he did know

appellant, that appellant was not with him that day, and that he did not attempt to rob Shaw and Claspill (Tr. 541-545). Finally, he called a St. Louis City Justice Center correctional officer to testify about the live lineup, claiming he either saw or believed that appellant was handcuffed during the lineup (Tr. 555-563). In rebuttal, the State called three witnesses to testify that appellant was not handcuffed during the lineup (Tr. 564-584).

At the close of the evidence, instructions, and arguments of counsel, appellant was found guilty on all counts (L.F.61-64; Tr. 625). The court sentenced appellant to four concurrent terms of seventeen years in the custody of the Department of Corrections (L.F. 70-71; Tr. 656-657). This appeal follows.

ARGUMENT

I.

The trial court did not clearly err in denying appellant's Batson challenges to the prosecutor's peremptory strikes to venirepersons Crenshaw and Fisher because the prosecutor gave race- and gender-neutral reasons for the strikes and appellant failed to demonstrate that these reasons were pretextual.

Appellant claims that the trial court clearly erred in denying his race- and gender-Batson challenges to the State's peremptory strikes of venire members Crenshaw and Fisher, arguing that the reasons for the strike were not gender-neutral and that the reasons provided by the prosecutor were pretextual (App.Br. 18-32). But because the prosecutor provided a race- and gender-neutral reason for the strikes and appellant failed to demonstrate pretext, the trial court did not clearly err in overruling appellant's challenges to the State's peremptory strikes.

A. Facts

The prosecutor used his six peremptory challenges to strike six women, five of whom were black, as well as using his one peremptory challenge to the alternates to strike a black woman (Tr. 254-263). Following the State's announcement of their peremptory strikes, defense counsel raised a gender-Batson challenge to all of the strikes, and a race-Batson challenge to all of the strikes except the strike of venire member Kirchhoefer, who was white

(Tr. 254-263). In regards to the strikes of venire members Crenshaw and Fisher[1], the State responded as follows:

> Your Honor, Ms. Crenshaw as well as Ms. Fisher, day-care [sic] providers that care for young children. The difference between them, those two and the other jurors, these were two day-care providers caring for young children and [sic] their profession. It's a profession that is sympathetic to young people. And as that, I believe women [sic] cause them to be sympathetic to a young defendant and differentiating them from other jurors, Your Honor.
>
> THE COURT: So your reasons for Ms. Crenshaw and Ms.--
>
> [Prosecuting Attorney]: Their professions.
>
> THE COURT: And Ms. Fisher, juror 542, are [sic] the same?
>
> [Prosecuting Attorney]: Yes, Your Honor.

(Tr. 259). Appellant then challenged the State's reasoning, stating that appellant's age, 27 years old, was "not that young," that there were no "young people" involved in the case, and that there were a number of teachers, such as Jean Sherry, who the State did not strike (Tr.

[1]Appellant does not challenge the strikes of any other venire members in this appeal.

260). The prosecutor then responded that he did not strike Jean Sherry because she had family members that were in law enforcement and that she taught at a college, not a day care (Tr. 260). The trial court then overruled appellant's objections, finding that the strikes were reasonable and they were not motivated by race or gender (Tr. 260).

B. Standard of Review

Trial judges are vested with considerable discretion in determining the plausibility of the prosecutor's reasons for peremptory strikes and whether the prosecutor purposefully discriminated in exercising peremptory strikes. State v. Gray, 887 S.W.2d 369, 384 (Mo.banc 1994). The appellate court will not reverse the trial court's decision as to whether the strike was racially motivated unless that decision is clearly erroneous. Id. This decision is clearly erroneous when it leaves the reviewing court with a firm impression that a mistake has been made. State v. Cole, 31 S.W.3d 163, 172 (Mo.banc 2002).

C. The Trial Court's Ruling was Not Clearly Erroneous

Using a peremptory challenge to strike a potential juror based solely on that juror's race violates the Equal Protection Clause of the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The same is true for the use the sex of the potential juror as the sole basis of a peremptory challenge. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). For a defendant to challenge the State's peremptory strike at trial, the defendant must object to the prosecutor's use of peremptory challenges and identify the racial or gender group to which the stricken person belongs. State v. Brown, 998 S.W.2d 531, 541 (Mo. banc 1999). The State then

must provide explanations for the peremptory challenges which are race- and gender-neutral. Id. The State's reason need not rise to the level of a challenge for cause, nor need it even be a persuasive or plausible explanation. Id.; Purkett v. Elam, 514 U.S. 765, 115 S.Ct. 1769, 1770, 131 L.Ed.2d 834 (1995). The reason is deemed race- and gender- neutral unless discriminatory intent is inherent in the explanation. State v. Marlowe, 89 S.W.3d 464, 468 (Mo. banc 2002). Once the prosecutor articulates a reason, the burden shifts to the defendant to show the State's proffered reason was merely pretextual and that the strike was actually based on race or gender. Cole, 31 S.W.3d at 172. In determining pretext, the Court considers the totality of circumstances, including the presence of similarly situated jurors of a different race or sex not struck (a crucial factor), degree of logical relevance between the proffered reason and the case, the prosecutor's credibility (based on his demeanor/statements during voir dire and the court's prior experience with the prosecutor), and the demeanor of excluded venire members. Marlowe, 89 S.W.3d at 469-470. While the presence of similarly-situated white or male jurors is crucially probative of pretext, it is not dispositive. State v. Parker, 836 S.W.2d 930, 939 (Mo. banc 1992). The ultimate burden of persuasion regarding racial or gender motivation rests with, and never shifts from the opponent of the strike. Purkett, 514 U.S. at 769.

1. Step One: Identification of the Racial/Gender Group

At trial, appellant clearly stated that he was making separate race-Batson and "gender-Batson" challenges to the strikes, stating, "On five out of six I'm objecting on the basis of race. And the fact that I believe he struck all females. If I'm not mistaken. And then the

one white person that he struck was a white female. I'm making a Batson challenge on both racial [sic] and gender" (Tr. 254). This was sufficient to satisfy the first step of for both his race- and gender-based challenges. At no point at the Batson hearing, however, did appellant make an argument that "black women" are a separately cognizable minority group to support a single Batson challenge (Tr. 254-264). In a footnote in his brief, appellant refers to a law journal article and to case law from two states that treat black women as separate cognizable group for Batson purposes (App.Br. 23). The reasoning for making such an argument appears to be that the defense would then be able to create an inference of discrimination by combining two factors where such an inference could not be drawn from the presence of merely one, e.g., white women nor black men would be considered in the same gender group or racial group, even if the prosecutor did not strike members of either group. The Supreme Court has never ruled on this issue, but federal courts have found that race/gender combinations do not comprise separately cognizable groups for Batson purposes. Covington v. Lord, 275 F.Supp.2d 352, 359 (E.D.N.Y. 2003), citing Turner v. Marshall, 63 F.3d 807, 813 (9th Cir.1995), overruled on other grounds by Tolbert v. Page, 182 F.3d 677, 681 (9th Cir.1999) (en banc). As striking a person because of race and sex would violate both Batson and J.E.B., the rights of black women serving on venire panels are adequately protected—should a prosecutor strike a black woman, he will have to show that he did not discriminate on either basis. Therefore, there is no reason necessary for protecting the rights of venire members to create separately cognizable groups based on a combination of traits.

2. Step Two: Facially Race- and Gender-Neutral Reasons for the Strike

Appellant makes no argument that the prosecutor's proffered reason for the strikes of Crenshaw and Fisher—that their jobs as day care providers would make them more sympathetic to the defense—are inherently racially discriminatory, nor can he. There is no mention of race in the prosecutor's explanation, and thus the second step of the Batson challenge as to race was satisfied by the prosecutor (Tr. 259). Appellant strenuously argues, however, that the prosecution's explanation is not gender-neutral, as the term "women" appears in the transcript in the prosecutor's explanation regarding how their jobs would make them more sympathetic (App.Br. 21-26).

Appellant's argument appears to concede that his conclusion that the prosecutor explicitly used gender in explaining his strikes is tenuous by couching his argument in terms such as: "***If*** this Court inteprets these remarks" to be about women being sympathetic (App.Br. 21)(emphasis added); "***If the prosecutor said*** what he appeared to say on the record" (App.Br. 25)(emphasis added); and calling the prosecutor's statement "somewhat confusing" (App.Br. 25). Appellant's caution is admirable, as it appears to be well-founded. A review of the record shows that it is far more likely that either the court reporter erred in reporting that the prosecutor said "women" in his explanation or that the term "women" was preceded by a qualifying word such as "*these* women," which may or may not have been heard or understood by the court reporter.

First, a review of the simple syntax of the sentence in which the word "women" appears shows that such a sentence would have been unlikely to be said. The sentence, "And

as that, I believe women [sic] cause them to be sympathetic to a young defendant and differentiating them from other jurors, Your Honor[,]" as recorded, would ostensibly mean that the prosecutor believed that women would cause the two prospective jurors to by sympathetic to a young defendant (which would be nonsensical), not that the fact that the two venire members were women would cause those same two venire members to be sympathetic (Tr. 259). To interpret the sentence as appellant is interpreting it simply cannot be supported by the word choice record by the prosecutor. Thus, the syntax of the sentence supports the conclusion that the record was mistaken.

Second, the context of the sentence in the explanation shows that the prosecutor's sentence was not about women being sympathetic, but was about day care providers being more sympathetic. The immediately preceding statements by the prosecutor were, "The difference between them, those two and the other jurors, these were two day-care providers caring for young children and [sic] their profession. It's a profession that is sympathetic to young people." (Tr. 259). Thus, the most logical reading of the next sentence was that the prosecutor was referring to the two women's jobs, and not their status as women, in the challenged sentence. Therefore, the context of the sentence supports the conclusion that the record was mistaken.

Third, the lack of reaction by either the court or defense counsel to the use of the word "women" leads to the conclusion that the prosecutor did not use the word or that he did not use it as an explanation of the basis of the strike. When the prosecutor was done with his explanation, the Court merely asked the prosecutor to confirm that the reason provided

applied to both venire members, and did not call into question that explanation, which would have been expected had the prosecutor actually mentioned sex as a reason for the strike (Tr. 259). The court's finding that the reason provided was reasonable and not "gender motivated" also would be extremely unlikely had the prosecutor's statement actually constituted a reliance on gender (Tr. 260). Further, and maybe more importantly, defense counsel, whom the record shows was extremely vigilant in listening to the prosecutor's statements (Tr. 254-264), made absolutely no reference to the prosecutor's statement being a reference to women. Instead, he directs his response towards his belief that the reason was not related to the case and that there were similarly-situated jurors (Tr. 259-260). Had the prosecutor actually said that he was relying on the fact that women are more sympathetic to justify his strike, defense counsel, a lawyer with fifteen years experience (Tr. 198), would have certainly mentioned it in his argument. Therefore, the reactions of the court and defense counsel support the conclusion that the prosecutor did not refer to women to support his strike.

Finally, a review of the rest of the record shows that there were several errors by the court reporter in either understanding what was said or in transcribing what she heard. For example:

- Reporting that the judge said, "You ***play*** continue, Mr. Hinckley" instead of "You ***may*** continue, Mr. Hinckley" (Tr. 301);
- Reporting that victim Shaw said, "but he asked me to

step up, if I wanted the ***buys*** behind the thing to step up" instead of (most likely) "***guys***" or (possibly) "***boys***" (Tr. 372);

- Reporting that victim Shaw twice spoke of the defendant's lips being "***pierced***" instead of being "***pursed***" (Tr. 383, 389);
- Reporting that the prosecutor asked Officer Watson that when the victims told her about the defendant's having a gun during the robbery, the reporter simply leaves off the last word of the question, "You said they had a?" even though the witness was able to answer that question "Correct" (Tr. 418);
- Reporting the word "handcuffs" in one instance as "***hand KUFS***," even though "handcuffs" was reported correctly in the next question (Tr. 426);
- Reporting that Officer Moore testified that the defendant had "MBA" emblems on his jersey instead of "NBA" jerseys, when the officer's testimony clearly referred to NBA basketball teams (Tr. 453).

- Reporting that the judge said, "And that that[2] in no way should have the authorities in this case to [sic] ***seize*** their lineup procedures based upon the mere request for an attorney prior to lineup" instead of "to ***cease*** their lineup procedures" (Tr. 537).

In light of the fact that the record shows numerous misunderstandings or typographical errors, it is highly likely that the prosecutor did not use the word "women" at all, but instead used the word "would," which would make far more sense in the sentence. At the very least, the accuracy of the transcript can be called into question enough to defer to the trial court's better opportunity to have heard the prosecutor's explanation for the strike. Adding into the equation that, even accurately recorded, the prosecutor's entire explanation of the strike was not incredibly articulate and may have included some mumbling or pauses that the record cannot reflect, this Court should defer to the trial court's finding that the proffered reason for the strike was the venire member's profession, and not their sex, and find that the trial court did not clearly err in finding that the prosecutor's explanation was in fact gender-neutral, thus satisfying the prosecutor's obligation under the second step of the gender-Batson challenge.

[2] This may have been either a stutter by the judge, an intended us of the word "that" twice, or a typographical error—any conclusion about that cannot be discerned from the record.

3. Step Three: Challenging the Explanations as Pretextual

Appellant argues that the State's race- and gender-neutral reason for the strikes of venire members Crenshaw and Fisher—that he believed their occupations as child care providers may make them more sympathetic to the defense—was pretextual (App.Br. 26-31). At the outset, it is important to note that this Court has repeatedly held that employment is a valid race-neutral reason for a prosecutor to exercise a peremptory challenge. See, e.g., State v. Johnson, 207 S.W.3d 24, 37 (Mo. banc 2006); State v. Williams, 97 S.W.3d 462, 472 (Mo. banc 2003). Thus, it is not patently unreasonable for the prosecutor to rely on occupation as the basis for his strike, as appellant seems to argue.

Appellant begins his attack on the prosecutor by first arguing that that the occupation of child-care worker, or the believed tendency of sympathy towards young defendants for those in such a profession, was "not at all related to the case," contending that there were no children involved in the case, that he "was not a child, a teenager, or even college-age," and that there was no record that appellant looked younger than he was at the time of trial (App.Br. 27). As to how appellant looked, there is some indication in the record of appellant's appearance—there are photographs from the photo lineup and the live lineup showing appellant's appearance, and it is not unreasonable to believe that appellant looked quite a bit younger than his twenty-seven years, which in and of itself is not an "old" age.

Regardless, appellant overstates his case that the trait used by the prosecutor to make these two strikes had to be explicitly fact-specific to the case. In Johnson, decided just four months ago, this Court upheld the trial court's denial of a Batson challenge of a venire

member the prosecutor struck because she was a student and thus may not have had the "life experience" he preferred for jurors to have, stating that such reasoning on behalf of the prosecutor was "logical." Id. at 37. There was nothing about that case specifically that would have required "life-experienced" jurors, yet this Court found that reason to be a valid, race-neutral reason for a peremptory strike. Likewise, in this case, while appellant's actual age may not have fallen into the realm of "young" (a completely subjective conclusion), the fact that those who choose to care for the young would tend to be more compassionate in general would be the same type of justification as this Court upheld in Johnson. This reasoning about child-care workers and sympathy has been upheld by at least the Eastern District as a legitimate race-neutral reason for a strike. State v. Davis, 835 S.W.2d 525, 527-28 (Mo.App., E.D. 1994). Therefore, the trial court did not clearly err in finding such a preference against child-care workers by the prosecutor reasonable.

Appellant next attacks the prosecutor for failing to strike venire members whom he claims were similarly situated, identifying specifically venire members Sherry (a white female), Vollmer (a white male), and Steven Revere (a black male) as similarly-situated. First, for appellant to rely on either Vollmer or Revere is improper, as he failed to argue that these jurors were similarly situated at trial (Tr. 259-260). Appellant's failure to raise these similarly-situated jurors at trial puts respondent at a disadvantage, in that appellant's failure to make a pretext argument at trial prevented the prosecutor from explaining why Crenshaw and Fisher were not similarly situated to these venire members, as there was no indication

the State would be required to make such an explanation. Appellant should not be able to rely on his arguments of pretext raised for the first time on appeal.

Regardless, none of these venire members were similarly situated. First, Ms. Sherry (the only venire member argued by appellant at trial as similarly-situated) was a college teacher, not a day-care or preschool worker, and thus would not be expected to possess the same type of sympathetic character that one would believe that those who choose to work with very young children would have. Further, the prosecutor had other reasons for preferring Ms. Sherry to either of the challenged jurors, as she had relatives who were police officers (Tr. 218-219, 260). Thus, Sherry was not similarly situated to Crenshaw and Fisher for purposes of establishing a race-based Batson violation.

Likewise, neither Vollmer nor Revere was similarly-situated. The fact that Vollmer had four children did not make him comparable to Crenshaw and Fisher—there is a considerable difference between having four children of your own (all of whom would not be an infant, toddler, or preschooler for more than a few years) and choosing to work at a career in which you voluntarily spent all of your days with young children. That a person would choose such a career at least creates the inference that such a person would generally be more kind, compassionate, and caring than the general population, including parents. As to Mr. Revere, whom appellant claims was similarly situated (as to his gender-Batson claim) because he worked for the school district, there is no record that Mr. Revere's job put him in the day-to-day care of very young children. When asked by the prosecutor what school he worked at, he ostensibly replied, "Stationary," to which the prosecutor replied, "Oh okay.

Thank you" (Tr. 140). As there appears to be no school with such a name in the St. Louis School District, this may be a typographical error or may refer to some job within the school district which does not involve direct work with children. See St. Louis Public Schools website, and links therein, http://www.slps.org/school/index.htm (accessed March 12, 2007). Regardless, because the record fails to show how Mr. Revere's school district job made him as likely as child-care workers to be sympathetic, he is not similarly situated.

Finally, appellant finishes his attack on the prosecutor by arguing that the statistical analysis of his strikes demonstrate an underlying racial and gender prejudice in the making of the strikes (App.Br. 30-31). Admittedly, the prosecutor did use all of his available strikes to strike women, and all but one to strike black venire members (Tr. 254-262). But a close look at the prosecutor's use of his strikes in their entirety shows that the strikes were in fact race- and gender-neutral, regardless of the ultimate makeup of the jury.

First, even though appellant attempts to use the entire group of the prosecutor's strikes to support his claim, he did not raise the denial of his race- and gender-Batson challenges to any of these other venire members on appeal (Tr. 254-264; App.Br. 15, 18). In doing so, appellant essentially tacitly admits that, at the very least, the trial court did not err in finding that these strikes were race- and gender-neutral. It seems improper to fault the prosecutor for the sum affect of his strikes when appellant does not now find fault with the majority of those same strikes. As such, any use of admittedly valid strikes in determining racial and gender-based discrimination in all of the strikes should not be given much, if any, weight.

Second, as appellant points out, a majority of the venire members remaining at the time the State made its strikes were female (App.Br. 31 n. 9; Supp.L.F. 14-20). Of the twenty four venire members available for the jury itself, fifteen were women and only nine were men (Tr. 254-266). Thus, even if the prosecutor's strikes were made randomly, one would expect that more females would be struck.

Third, even though he could used his strikes to strike all black women on the panel, the prosecutor did not, leaving one black female, Lee Velle Stevenson, on the panel instead of Christine Kirchhoefer, a white female. The prosecutor's failure to use all available challenges against minority jurors is relevant to show the reason for a strike is not racially motivated. See Johnson, 207 S.W.3d at 37 (cannot demonstrate pretext where reasons used by the prosecutor exhausted all strikes, yet left minority venire members on the panel); State v. Shurn, 866 S.W.2d 447, 456 (Mo. banc 1993)("[T]he prosecutor's failure to use all his challenges against blacks is relevant to show that race was not the motive for the use of peremptory strikes."). In this case, had the prosecutor simply wanted to strike black female venire members, he could have easily struck Ms. Stevenson, who stated that it would be difficult for her to judge anyone and did not know if she could do it (Tr. 148-149). By leaving her on the panel, the prosecutor showed not only that he was not out to strike only black females, but also showed how important he thought keeping day-care providers off of the jury actually was. Thus, the failure to strike Ms. Stevenson supports the trial court's finding that the prosecutor was not being intentionally discriminatory by striking Crenshaw or Fisher.

Finally, the fact that the prosecutor's goal was not to keep as many women or minorities off of the panel can be seen from his failure to make any kind of Batson challenge to the defendant's strikes. Defendant used four of his six strikes from the jury panel, as well as his one alternate strike, to strike white males, leaving only two white males on the jury. He also struck one white female and the only Hispanic female left on the panel (Tr. 265-266; Supp.L.F. 14-20). Thus, the prosecutor had a valid basis to challenge appellant's apparently discriminatory use of his own strikes, with the hopes of having one or more disallowed, leading to more women being taken off the panel. The prosecutor instead made no such challenge. This also evidences a finding that the prosecutor was not looking to load the jury with white members or males (a task he failed to do, as the jury had eight women, four black members, another racial minority, as well as two black alternate members), but instead was looking to strike those jurors whom he thought would make defense-sympathetic jurors based on the reasons provided. As such, a careful look at the totality of the prosecutor's strikes, as well as his reaction to the defense strikes, supports the trial court's determination that the appellant failed to demonstrate that the strikes of Crenshaw and Fisher were motivated by either race or gender.

For the foregoing reasons, appellant's first point on appeal must fail.

II.

The trial court did not err in overruling appellant's objection to the identification of appellant by victims Shaw and Claspill because the police procedures used in the photograph line-up and the physical line-up were proper and not suggestive and the identifications were reliable.

Appellant claims that the trial court erred in admitting the identification of appellant by the victims, Shaw and Claspill (App. Br. 26-27). Appellant claims that the officers' use of a photo array and a subsequent live line-up was unduly suggestive because appellant was the only individual who appeared in both line-ups (App. Br. 26-27). Appellant also alleges that their identifications were unreliable because their descriptions of appellant at the scene differed from the descriptions given by the officers who attempted to arrest appellant (App. Br. 27). But because the identification procedures used were not impermissibly suggestive, and because the identifications of appellant by the victim were reliable, the trial court did not err in admitting the identification evidence.

A. Standard of Review

Appellant filed motions to suppress identification before trial and objected to evidence of the identifications of appellant at trial by the victims (L.F. 5, 24; Tr. 310-312, 334, 355-357). He also included this claim in his motion for new trial. Therefore, his claim is preserved. A claim of improper admission of evidence identifying the defendant as the perpetrator of a crime is reviewed for abuse of discretion. State v. Barriner, 210 S.W.3d 285, 296 (Mo.App., W.D. 2006). An abuse of discretion is found when the decision to admit or

exclude the challenged evidence is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. State v. Forrest, 183 S.W.3d 218, 223 (Mo. banc 2006). In reviewing such a decision, the appellate court defers to "the trial court's superior opportunity to judge the credibility of the witnesses and view the facts in the light most favorable to the trial court's ruling, disregarding any facts and inferences contrary to the ruling." Barriner, 210 S.W.3d at 296.

B. The Identifications were Admissible

To prevail on a claim that a pretrial identification was suggestive, appellant must "demonstrate that the investigative procedures employed by the police were impermissibly suggestive, and then that the suggestive procedures made the identification . . . unreliable." State v. Vinson, 800 S.W.2d 444, 446 (Mo. banc 1990); State v. Chilton, 119 S.W.3d 176, 178 (Mo.App., E.D. 2003). If the court determines that the procedures were not impermissibly suggestive, the identification may be admitted. State v. Glover, 951 S.W.2d 359, 362 (Mo.App., W.D. 1997). In that case, factors relevant to reliability go to weight of the evidence, not its admissibility. Id. at 364. Although reliability is the focus in determining the admissibility of identification testimony, appellant "must clear the suggestiveness hurdle before procuring a reliability review." Id.

1. The Pretrial Identification was Not Improperly Suggestive

Appellant claims that the identification was suggestive because appellant was the only individual who appeared in both the photograph line-up and the live line-up (App.Br. 38-44). It is well established, however, that the fact that a defendant is the only one who appears in

both a photo spread and a live line-up does not render identification procedures unduly suggestive, even when a witness misidentifies or cannot identify the defendant the first time. State v. Glessner, 918 S.W.2d 270, 277 (Mo.App., S.D. 1996); State v. Garrett, 825 S.W.2d 954, 958 (Mo.App., E.D. 1992); State v. Stephens, 708 S.W.2d 345, 348 (Mo.App., S.D. 1986).

In Glessner, for example, a second lineup was permissible even though the witness could not pick someone out of the first lineup and the defendant was the only person appearing in both lineups. There, the defendant had shaved his beard after attempting to rob the victim. Glessner, 918 S.W.2d at 277. At a live lineup, the victim was not able to pick the person who tried to rob him because of the change in appearance. Id. at 274. About ten days later, police presented the witness with a photographic lineup of men with beards; the defendant was the only person who appeared in both lineups. Id. at 276. The Southern District, relying on earlier cases to the same effect, determined that there was nothing impermissibly suggestive in merely having the defendant as the only person appearing in both lineups. Id. at 277.

Likewise, in this case, there was nothing impermissibly suggestive about having an initial photographic lineup followed by a later physical lineup. Notably, in this case, the reason the victims had initial difficulty identifying the perpetrator was because appellant's eyes were mostly closed in the photograph and thus concealed them (Tr. 325, 327, 370, 466; St.Exh. 5c). Both of the victims believed that the person in the photograph might be the perpetrator, but asked to see a live line-up in order to see the person with his eyes open so

that they could be certain (Tr. 325, 369-370). This was not suggestive police procedure, but instead was an admirable effort by the victims to ensure that they did not accuse the wrong man of attempting to rob them—as Shaw said, she wanted to be "a hundred percent sure" (Tr. 369). Further, even though appellant's appearance had changed from the time the picture of him was taken (presumably before this crime, and therefore less like he looked at the time of the crime) until the time of the lineup, the two victims expressed none of the "uncertainty" they had at the photo lineups: Claspill was able to identify appellant as soon as she walked in the room to view the lineup, and Shaw "automatically" knew appellant was the robber upon seeing him (Tr. 334, 374). As such, the evidence, in the light most favorable to the court's ruling, shows that Claspill and Shaw made their live lineup identifications on the basis of their observation of him at the scene of the crime, and not from their seeing an older picture of him. Therefore, appellant's claim that the identification procedures were improperly suggestive is meritless, and appellant's point must fail on that basis alone.

2. The Identifications were Reliable

Additionally, appellant cannot show that the identifications by the victims in this case were unreliable. In determining the reliability of an identification, an appellate court looks at the totality of the circumstances surrounding the identification. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); State v. Simmons, 875 S.W.2d 919, 922 (Mo.App., W.D. 1994). These circumstances include: 1) the witness' opportunity to view the suspect at the time of the crime; 2) the witness' degree of attention to the event; 3) the accuracy of prior descriptions of the criminal made by the witness; 4) the witness' level of

certainty; and 5) the length of time between the crime and the identification. Brathwaite, 432 U.S. at 114; Simmons, 875 S.W.2d at 922.

Looking at the four factors, the totality of the circumstances demonstrate that the identifications were reliable. Both victims testified that they were close, within a few feet of perpetrator (Tr. 306, 340, 349-353, 384). Both victims testified to what he was wearing and his appearance and they saw him multiple times (Tr. 301, 306-308, 349-353, 382). The victims were certain about their identifications (Tr. 333-334, 374). And, it was only about a couple of months between the crime and the live lineup. Based on all of the factors, the identification was reliable.

Appellant claims that their identifications are not reliable because their descriptions of appellant do not match the patrol officers' descriptions. The officers testified that appellant had gold teeth, had facial hair, and that he was wearing a blue and white shirt (Tr. 340, 414). The victims testified that they did not notice gold teeth and that appellant was wearing a red hooded sweatshirt at the time of the robbery (Tr. 306, 340, 365-366, 383). What appellant fails to acknowledge is that Claspill and Shaw both testified that appellant did not fully open his mouth during the robbery, instead pursing his lips so that they covered his teeth (Tr. 340, 383). As to appellant's facial hair, there was no testimony presented by the victims on what type of facial hair, if any, appellant had; thus, they never denied that appellant had facial hair. Further, Officer Moore, who chased appellant, described the hair as "scraggly side burns," as if he was just starting to grow a beard, and Claspill testified that appellant was using the hood of his sweatshirt to attempt to cover his head, therefore concealing the sides

of his face (Tr. 306, 452). Thus, due to appellant's efforts to conceal his identity, the victims would not have necessarily noticed whether or not he had any gold teeth or whether he had facial hair starting to grow on the sides of his face. Finally, although the victims testified that appellant had on a red sweatshirt while the officers saw him moments later wearing a blue and white shirt, appellant fails to acknowledge that the red sweatshirt was in the car that appellant was located in when police found him mere minutes after the robbery (Tr. 319-320, 365-366, 406-407). Obviously, appellant had taken off the red sweatshirt after attempting to rob the victims. Further, Claspill's testimony about the shirt appellant was wearing when they first saw him while entering a store, which she believed was a "jersey," was consistent with Moore's description of appellant's shirt he fled the scene in as having basketball team logos on it (Tr. 309, 453). Thus, the descriptions of appellant by the victims were not different from those by the patrol officers—they merely saw appellant at different times. As such, the victims' identifications were reliable, and the trial court did not abuse its discretion in overruling appellant's objections and admitting the identifications of appellant.

Based on the foregoing, appellant's second and final claim on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 7693 words, excluding the cover, this certification and the appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 12th day of March, 2007, to:

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APPENDIX

Sentence and Judgment A-1