IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC95221
	)	
	)	
ROSCOE MEEKS,	)	
	)	
Appellant.		

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION NINE,
THE HONORABLE MARGARET M. NEILL, JUDGE

APPELLANT'S SUBSTITUTE BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

In St. Louis City Circuit No. 1222-CR04018-01, the State charged Appellant, Roscoe Meeks, with Count I of the class A felony of assault in the first degree, § 565.050, and Count II of the unclassified felony of armed criminal action, § 571.015.[1] The State tried Mr. Meeks on the charges from December 9, 2013 through December 11, 2013. On December 11, 2013, a jury convicted Mr. Meeks of both counts.

On March 6, 2014, the Honorable Margaret M. Neill sentenced him, as a persistent felony offender under § 558.016, RSMo Cum. Supp. 2011, to concurrent terms of imprisonment of 20 years on Count I, and ten years on Count II. On March 10, 2014, Mr. Meeks filed a notice of appeal.

On October 27, 2015, this Court sustained Mr. Meeks' application for transfer, and transferred this case to this Court. Consequently, this Court has

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[1] Appellant Roscoe Meeks (Mr. Meeks) will cite to the appellate record as follows: Trial Transcript, "(Tr.)"; and Legal File, "(L.F.)." All statutory references are to RSMo 2000 unless otherwise stated.

jurisdiction over Mr. Meeks' appeal. Mo. Const., Art. V, § 10 (as amended 1982); Rule 83.04.

STATEMENT OF FACTS

At approximately 10:00 a.m. on July 4, 2012, Mario Valdez returned to the apartment at 1261 Hodiamont in the City of St. Louis that he shared with his friends and coworkers, Jose Flores and Daniel Alejo (Tr. 185, 187, 200, 223-224). Mr. Valdez, who believed that a beer was "something well-deserved" after a day's work, drank a couple of beers within an hour's time (Tr. 188). He got a "little drunk" that night (Tr. 203).

It was a holiday and Mr. Flores and Mr. Alejo invited him to visit other friends who lived "next door to the apartment next door" (Tr. 187, 215). Mr. Flores and Mr. Alejo headed outside (Tr. 188, 215). Mr. Valez asked them to wait for him (Tr. 188). He grabbed another beer from the refrigerator and followed them outside with the third beer in his hand (Tr. 188, 225).

Mr. Flores and Mr. Alejo were waiting outside when a strange man came out from a corner and began asking them about a woman (Tr. 217-218). Mr. Flores is Spanish-speaking and did not speak English, so he did not understand what the man was saying (Tr. 217-218, 225). Mr. Flores told the man that he "didn't know" what he was talking about (Tr. 218).

Mr. Flores, who was two feet away from the man, could see the man's face (Tr. 217). It was dark outside, but was neither "too dark" nor "too light" (Tr.

226). There was one streetlight 100 feet away and a second streetlight was 200 feet away (Tr. 202).

To Mr. Flores, the man appeared to be six feet tall and had dark hair (Tr. 220). Mr. Flores did not notice any scars or distinctive marks on the man (Tr. 226). Mr. Flores "didn't look all that closely" and noticed "just the face" (Tr. 226). Mr. Flores did not know the man, but the man appeared to be angry (Tr. 226).

When Mr. Valdez joined Mr. Flores and Mr. Alejo outside, the man walked up close to Mr. Valdez and assured himself that Mr. Valdez was the person for whom he was looking (Tr. 190). The man was looking for the man who took his girlfriend, a man named "Cri-Cri" (Tr. 191).

Mr. Valdez did not know anyone named Cri-Cri and he did not know the name of the man (Tr. 203-204). He had never seen the man before and he was a complete stranger to him (Tr. 203).

Mr. Valdez, though Spanish-speaking and not fluent in English, understood what the man was saying (Tr. 191, 203). Mr. Valdez told the man that he had moved into the apartment less than a month ago and that he did not understand (Tr. 191). Mr. Valdez then turned around and walked forward (Tr. 192).

The man told Mr. Valdez that he wasn't playing around (Tr. 219). He took a gun from behind his back and pointed it at the back of Mr. Valdez's head (Tr. 192, 218-219). Mr. Flores saw the gun and ran back to the apartment (Tr. 219, 226). He was scared and "pretty shaken up" (Tr. 219, 225).

From behind him, Mr. Valdez saw the man point the gun at his head, behind his ear (Tr. 192). Initially, Mr. Valdez did not move, but when he saw the man lowering the gun, he turned around to face the man and defend himself (Tr. 192).

Mr. Valdez took the man's hand to try to take the gun away (Tr. 193). Then, he heard a shot (Tr. 192). Mr. Valdez sustained a gunshot wound to the left, lower quadrant of his abdomen (Tr. 284). Mr. Flores, who heard the gunshot, called police (Tr. 219).

While the man was attempting to reload and shoot again, Mr. Valdez threw the beer in his hand at the man's head and hit the man in the head or face (Tr. 193, 205). Then, Mr. Valdez ran (Tr. 193). As he ran, he sustained a second gunshot wound to his right buttock (Tr. 193, 284).

Detective Brian North-Murphy responded to the scene (Tr. 185, 240). An ambulance took Mr. Valdez to the hospital (Tr. 241). He had surgery and was in the hospital for five days (Tr. 195-196, 207).

At the scene, Detective North-Murphy spoke with Spanish-speaking witnesses with the assistance of a woman named Espinoza who lived at the apartment complex and knew Mr. Valdez and Mr. Flores (Tr. 242, 276).[2] The witnesses gave Detective North-Murphy a description of the shooter and led him to another witness, Courtney Carrion (Tr. 244).

Courtney Carrion is Mr. Meeks' ex-girlfriend from whom he had split a couple of months before (Tr. 232-233). She hung out in Mr. Valdez's apartment complex because she had friends who lived or frequented there (Tr. 233). When Detective North-Murphy gave Ms. Carrion the description of the shooter, Ms. Carrion said the description matched that of Mr. Meeks (Tr. 234, 244).

Detective North-Murphy created a six-man photo lineup that included Mr. Meek's photo and showed it to Mr. Flores (Tr. 244-246). Mr. Flores looked at the lineup for two or three minutes before making his identification (Tr. 228).

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[2] Detective North-Murphy had no reason to believe that Espinoza had seen the shooting (Tr. 282).

Mr. Flores identified Mr. Meeks from that photo lineup (Tr. 246).[3] He said he recognized Mr. Meeks by his face and facial hair (Tr. 220-221). Detective North-Murphy put out a wanted for Mr. Meeks' arrest (Tr. 266).

Detective North-Murphy also showed the photo lineup to Mr. Valdez in the hospital (Tr. 250). Detective North-Murphy believed Mr. Valdez was "somewhat coherent," but not sober (Tr. 250, 271). Mr. Valdez was on pain medication and "droopy[-]eyed" (Tr. 195, 250-251).

Mr. Valdez talked with Detective North-Murphy for five to ten minutes, and looked at the photo lineup for at least 30 seconds (Tr. 196, 206, 271). At the time, Mr. Valdez knew why the detective was showing him the photo lineup, and was aware that he should pick out the shooter if he saw him in the photos

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[3] Detective North-Murphy testified that Mr. Meeks was in position three in the photo lineup, but his police report reflected that Mr. Meeks was in position one in the photo lineup (Tr. 262-264). Detective North-Murphy testified that they must have put down the wrong position in the police report (Tr. 265). He did not have the original photo lineup because he had lost it; at trial, the State presented a printed copy of the photo lineup that he had scanned (Tr. 246-249, 264).

(Tr. 206). But Mr. Valdez did not identify anyone from the photo lineup (Tr. 196).

Mr. Valdez started to nod and Detective North-Murphy decided Mr. Valdez wasn't really paying attention or wasn't fully present (Tr. 250, 252). He told Mr. Valdez that he would "scratch" that non-identification and wait until he was off medication to show him the lineup (Tr. 250-251).

After Mr. Meeks' arrest, Detective North-Murphy picked up Mr. Valdez, Mr. Flores, and Espinoza and took them to the police station for viewing of a four-man physical lineup (Tr. 211, 252, 273, 276, 280). Mr. Valdez was not confident that he could make an identification initially because of the speed with which the incident had occurred, the stress, and the lighting (Tr. 210, 213). The incident happened at night and was over quickly (Tr. 201-202). Mr. Valdez "didn't have the certainty not a hundred percent, maybe the way that you might be able to recognize somebody when you see them during the day [.]" (Tr. 202). Mr. Valdez was also still taking pain medication (Tr. 209-210).

Detective North-Murphy spoke no Spanish and during the physical lineup, he used Espinoza as an interpreter for Mr. Flores and Mr. Valdez, in lieu of the department's language services (Tr. 273, 276-278). Espinoza was present during the lineups at the station and would have conversations in Spanish with

Mr. Flores and Mr. Valdez that Detective North-Murphy could not understand (Tr. 277, 280).

Mr. Valdez looked at the physical lineup for a minute (Tr. 210). Mr. Flores had told Mr. Valdez in the car that he (i.e., Mr. Flores) had previously identified someone from a photo lineup (Tr. 208-209, 230).

Also, Mr. Valdez saw the mark on Mr. Meeks' head (Tr. 210-211). Department of Revenue photos, taken long before the time of the charged incident, showed that Mr. Meeks has a mark on his head (Tr. 290-292); Defense Exhibits A, B, and C.

Upon seeing the mark on Mr. Meeks' head, Mr. Valdez assumed that the beer bottle that he had thrown at the shooter had made the mark (Tr. 210-211, 213). Mr. Valdez identified Mr. Meeks from the physical lineup (Tr. 211, 256). He later said that he remembered Mr. Meeks' face and that it was impossible for him to forget (Tr. 197, 212).

Mr. Flores also identified Mr. Meeks from the physical lineup (Tr. 221).[4]

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[4] Further police investigation yielded no gun and though police attempted to obtain a surveillance video of the shooting, they were unable to do so (Tr. 266-268).

In St. Louis City Circuit No. 1222-CR04018-01, the State charged Mr. Meeks with Count I of assault in the first degree, and Count II of armed criminal action (L.F. 14-15). The State tried Mr. Meeks on the charges from December 9, 2013 through December 11, 2013 (Tr. 1-344; L.F. 3-6). On December 11, 2013, a jury convicted Mr. Meeks of both counts (Tr. 328; L.F. 65-66).

On March 6, 2014, the Honorable Margaret M. Neill sentenced him, as a persistent felony offender, to concurrent terms of imprisonment of 20 years on Count I, and ten years on Count II (Tr. 336; L.F. 85-87).[5]

On March 10, 2014, Mr. Meeks filed a notice of appeal (L.F. 89-93). This appeal follows. Additional facts will be stated in the argument portion of appellant's brief.

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[5] The written sentence and judgment erroneously fails to reflect the trial court's oral pronouncement of 20 years on Count I and ten years on Count II, and instead, reflects concurrent 20-year sentences on each count (Tr. 336; L.F. 86-87).

POINT – I.

The trial court clearly erred in overruling Mr. Meeks' *Batson* objection to the prosecutor's peremptory strike of African-American venireperson Collins, because the strike was race-based and violated his and the striken panelist's rights to equal protection and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2 and 18(a) of the Missouri Constitution, in that the proffered reason—that Ms. Collins had responded negatively to a racist remark made by another venireperson and that the State wanted to "make sure I don't start out the case where there is a person of . . . African-American descent upset about racial issues" and wanted to strike anyone who was upset by the remarks—was improper, because this reason for striking Ms. Collins was not race neutral, and thus violates the rule of *Batson* and its progeny that peremptory strikes must be exercised in a race-neutral manner.

Batson v. Kentucky, 476 U.S. 86 (1986);

State v. Smith, 5 S.W.3d 595 (Mo. App. E.D. 1999);

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

Mo. Const., Art. I, §§ 2 and 18(a);

Rules 29.11 & 30.20.

POINT – II.

The trial court abused its discretion in sustaining the State's objection to the defense's closing argument, because during closing argument the defense argued that a conviction was significant and would have consequences for the defendant, and the court improperly sustained the State's objection to this argument, violating Mr. Meeks' right to due process, to assistance of counsel, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the defense has the right during closing argument to argue the seriousness of a criminal conviction and to be mindful of the defendant's liberty, and there is a reasonable likelihood that being restrained from making this point to the jury affected the outcome of trial in this very close case.

State v. Jones, 398 S.W.3d 518 (Mo. App. E.D. 2013);

Herring v. New York, 422 U.S. 853 (1975);

State v. Barton, 936 S.W.2d 781 (Mo. banc 1996);

U.S. Const., Amend. V, VI, & XIV;

Mo. Const., Art. I, §§ 10 & 18(a);

Rules 29.11 & 30.20.

POINT – III.

The trial court plainly erred, causing manifest injustice or a miscarriage of justice, in entering written sentence and judgment of a term of 20 years of imprisonment for Count II of armed criminal action, because the written sentence and judgment materially differs from the trial court's oral pronouncement of a ten-year term of imprisonment and the inclusion of this material clerical error in Mr. Meeks' written sentence and judgment prejudices Mr. Meeks by denying his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution. This Court must remand for the trial court's correction of this clerical error *nunc pro tunc*.

McArthur v. State, 428 S.W.3d 774 (Mo. App. E.D. 2014);

State v. Jackson, 158 S.W.3d 857 (Mo. App. E.D. 2005);

U.S. Const., Amend. V & XIV;

Mo. Const., Art. I, § 10;

Rules 29.12, 30.20, 30.27, & 83.08.

ARGUMENT – I.

The trial court clearly erred in overruling Mr. Meeks' *Batson* objection to the prosecutor's peremptory strike of African-American venireperson Collins, because the strike was race-based and violated his and the striken panelist's rights to equal protection and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2 and 18(a) of the Missouri Constitution, in that the proffered reason—that Ms. Collins had responded negatively to a racist remark made by another venireperson and that the State wanted to "make sure I don't start out the case where there is a person of . . . African-American descent upset about racial issues" and wanted to strike anyone who was upset by the remarks—was improper, because this reason for striking Ms. Collins was not race neutral, and thus violates the rule of *Batson* and its progeny that peremptory strikes must be exercised in a race-neutral manner.

Facts and Preservation of the Error

During *voir dire*, a venireperson named Arnold (struck for cause) made racist statements in front of the jury panel (Tr. 145, 154).

Arnold said:

> Statistically speaking, we live in the seventh most dangerous city in the United States. And I hate to go

into race here. But statistically, we're in St. Louis; he's black. There's more into it, but I don't know those facts. But it's more than likely he did something. I'm not saying—what's the word. It's more likely he's guilty.

(Tr. 145).

Most of the courtroom gasped or had some negative response to his remarks (Tr. 166).

Defense counsel responded that he didn't want to "open up a can of worms," but asked if anyone shared Arnold's sentiments or if the panel could presume Mr. Meeks innocent as the instructions require them to do (Tr. 146). An unidentified woman behind the State yelled, "[L]et's open that can" (Tr. 166).

The following exchange occurred after voir dire:

THE COURT: Go ahead. Mr. Mahon, you indicated you have a *Batson* motion?

MR. MAHON [Defense Counsel]: Yes, your Honor. The State is moving to strike Ms. Collins, Juror 677, on page four, your Honor.

THE COURT: Okay.

MR. MAHON: And it just appeared to me that

there were similarly situated individuals who also only said what they do for work. Mr. Wolchock sitting behind her, Juror 1310; Mr. Niermann, Juror 403.

THE COURT: Ms. Benninger?

MS. BENNINGER [Prosecutor]: The reason I struck Ms. Collins is that when Mr. Arnold made very racist statements in the box, there was a huge outcry behind me. I struck Ms. Hosie; I've struck Ms. Collins. The rest of the row was struck already for cause. That leaves Donna Knight, who I could pretty much place my bets on the defense will likely strike her. So to make sure I don't start out the case where there is a person of Mexican descent and African-American descent upset about racial issues, I feel better if no one in that row directly behind me is serving. So I made my bets the defense is more likely to strike Knight than Collins, and I chose Collins.

THE COURT: Well, the Court will agree that Mr. Arnold's statements were definitely racist, and the Court finds that the State's reasoning for striking

Ms. Collins and Ms. Hosie are racially neutral. Because that what he had to say was quite offensive to the Court and I'm sure everyone else in the courtroom. Did you have a *Batson* motion on Hosie? I guess not.

MR. MAHON: No, your Honor. I didn't know when that happened exactly who expressed some sort of disgust. I think like ten people in the courtroom made a gasp when that happened. It was hard to pinpoint it was Ms. Collins.

MS. BENNINGER: I would agree most of the courtroom gasped. There was someone directly behind me who yelled, let's open that can, and it was a woman's voice. But I didn't want to spin around, and the statement was over. And there's a difference between being offended, which I think we all were, most of the courtroom gasped, including my table, and a difference of yelling that and interjecting that into a case. And I feel like, "let's open that can" is different than just being offended.

THE COURT: Anything further?

MR. MAHON: No, your Honor, that was is [sic] it.

THE COURT: All right.

(Tr. 164-166).

Defense counsel assigned error to the trial court's ruling in Mr. Meeks' timely-filed motion for new trial (L.F. 81). Consequently, this issue is preserved for appellate review. Rule 29.11(d). Should this Court conclude otherwise, Mr. Meeks respectfully requests review for plain error under Rule 30.20.

Applicable Law and Standard of Review

"Under the Equal Protection Clause, a party may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin or race." *State v. Hampton*, 163 S.W.3d 903, 904 (Mo. banc 2005) (quoting *State v. Marlowe*, 89 S.W.3d 464, 468 (Mo. banc 2002)). In *Batson v. Kentucky*, 476 U.S. 79, 86, 95-98 (1986), the United States Supreme Court forbade a prosecutor from discriminatorily striking potential jurors on the basis of their race, and established a three-step test for determining when a prosecutor's exercise of peremptory strikes resulted in a violation of the Equal Protection Clause.

The Missouri Supreme Court adopted its own three-step test in *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992). First, the defendant must raise a

Batson challenge with respect to one or more specific jurors struck by the prosecutor and identify the cognizable racial group to which the excluded jurors belong. *Id*. Second, once the defendant has raised his or her *Batson* challenge, the prosecutor must offer a reasonably specific and clear race-neutral reason for the strikes. *Id*. And third, assuming the prosecutor can articulate an acceptable reason for the strikes, the defendant must show that the prosecutor's proffered reasons for the strikes were merely pretextual and that the strikes were racially discriminatory. *Id*.

During the third step, the trial court must determine whether the defendant carried his or her burden of proving purposeful discrimination, and in doing so, 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) (citing *Marlowe*, 89 S.W.3d at 468); *see also Purkett v. Elem*, 514 U.S. 765, 768 (1995). In evaluating pretext, the trial court will consider whether the reasons are (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). 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) (citing *Parker*, 836 S.W.2d at 939).

A crucial fact that the trial court should consider is whether there are similarly situated jurors of a different race whom the prosecutor did not strike. *State v. Weaver*, 912 S.W.2d 499, 509 (Mo. banc 1995). Normally, evidence of discrimination is established when the State's reason for striking a juror applies to an otherwise-similar member of another race who is permitted to serve on the jury. *McFadden*, 216 S.W.3d at 676.

Nonetheless, while the existence of similarly situated jurors is probative, it is not dispositive. *See Miller-El v. Dretke*, 545 U.S. 231, 247 n. 6 (2005) (stating, "A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters"). The trial court must also consider: the degree of logical relevance between the proffered reasons and the case on trial; the prosecutor's credibility based on the prosecutor's statements during voir dire and the court's past experiences with that prosecutor; and, the demeanor of the excluded jurors. *State v. Johnson*, 220 S.W.3d 377, 388 (Mo. App. E.D. 2007).

If the trial court determines that the prosecutor struck potential jurors in violation of *Batson*, the remedy is to quash the strikes and reinstate those jurors

stricken for discriminatory reasons, if they would otherwise have served on the jury. *Hampton*, 163 S.W.3d at 904-905. This remedy vindicates the equal protection rights of the defendant and the jurors. *Parker*, 836 S.W.2d at 936.

This Court will review the trial court's ruling on a preserved *Batson* challenge for clear error. *State v. McFadden*, 191 S.W.3d 648, 651 (Mo. banc 2006). The trial court's ruling is clearly erroneous if this Court is left with the definite and firm conviction that a mistake was made. *McFadden*, 216 S.W.3d at 675.

Argument

The trial court clearly erred in overruling Mr. Meeks' *Batson* objection to the prosecutor's peremptory strike of African-American venireperson Collins, because the strike was race-based.

The State must give reasons for its peremptory strike that are facially legitimate and race-neutral. *State v. Payton*, 747 S.W.2d 290, 294 (Mo. App. E.D. 1988). "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror." *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

Here, the State admittedly based its decision to challenge Collins on race. The State explained that it struck Collins because she "is a person of . . . African-

American descent upset about racial issues" (Tr. 165). Race was inherent in this explanation and the explanation established a clear *Batson* violation.

In *State v. Holman*, 759 S.W.2d 902, 903 (Mo. App. E.D. 1988), the State explained that it struck a venireperson "principally because she is a woman, and secondly because she is black." Though race was one, but not the only, reason, for the State's strike, the *Holman* court found that the prosecutor's partly race-based explanation violated *Batson*. *Id*. The *Holman* court held "[i]t would be difficult to conceive of a case more clearly demonstrating the applicability of *Batson*." *Id*.

Similarly, here, though the State's reason for striking Collins was not as directly discriminatory as the reason in *Holman*, it was no less impermissible under *Batson*. Less direct explanations that involve the race of the potential juror violate *Batson* as well.

In *State v. Blackmon*, 744 S.W.2d 482, 486 (Mo. App. S.D. 1988), the prosecutor gave a lengthy explanation about why he struck an African-American man, which "boil[ed] down" to this: "I did not strike [the man] because he was Black. I struck him because he was a member of the Black community." This "explanation did not satisfy the requirements of *Batson*." *Blackmon*, 744 S.W.2d at 486.

"What the *Batson* application of the equal protection clause forbids is a peremptory challenge to a potential juror solely on account of his race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a Black defendant." *Id*. (*citing Batson*, 476 U.S. at 89). The *Blackmon* court held that the State's explanation in *Blackmon* "was little more than an expanded statement that he acted on the assumption that . . . a black juror, would be unable to consider the State's case impartially." *Id*.

The State in this case struck Collins on the assumption that she, as a person of African-American descent, would be unable to consider the State's case impartially because she had heard, and may have become offended by, the racist comments of another venireperson (Tr. 145). This discriminatory reason did not satisfy the requirements of *Batson*.

"Once a discriminatory reason has been uncovered—either inherent or pretextual—this reason taints the entire jury selection." *Payton v. Kearse*, 329 S.E.2d 51, 59 (S.C. 1998); *Rector v. State*, 444 S.E.2d 862 (Ga. 1994); *State v. Ornelas*, 330 P.3d 1085, 1092-1096 (Idaho Ct. App. 2014) (adopting a modified version of this rule and collecting cases). "Regardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory

factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process." *State v. Lucas*, 18 P.3d 160, 163 (Ariz. Ct. App. 2001).

The rest of the prosecutor's explanation, which was only marginally less discriminatory, was that it was her intent to strike the entire row of venirepersons with whom Collins was seated, because she had heard, behind her back, a large outcry from that row after Arnold's racist remarks (Tr. 164-165). This explanation - about excluding venirepersons who were vocal about the offensiveness of another venireperson's racist remarks about African-Americans – was neither race-neutral on its face nor legitimate when considered within the context of the case.

The prosecutor agreed that almost the entire courtroom gasped at Arnold's comments (Tr. 166). Yet, without ever even turning around to see from whom the gasps and outcries were coming, the prosecutor singled out one row of venirepersons out of a whole courtroom and that one row just happened to contain an African-American female juror, Collins (Tr. 166).

The prosecutor claimed that she had heard a "huge outcry" from Collins' row, and that for that reason, she struck Collins and Hosie, who was in the same row as Collins (Tr. 165). She stated that she left Knight, who was also in the same

row as Collins and Hosie, to the defense, who ultimately used a peremptory strike to remove her (Tr. 165; *see* Stipulation, para. 5).

The pretext of the prosecutor's reasons, however, becomes clear upon a review of the record of voir dire (Tr. 160). Well after the huge outcry, at the conclusion of voir dire, the defense moved to strike for cause Knight, who was in the same row from which the huge outcry was heard, and the prosecutor *objected* to Knight's removal (Tr. 160) [emphasis added]. It was most likely the mere fact that the prosecutor objected that caused the trial court to deny the defense's motion to strike Knight and that resulted in the defense having to use a peremptory strike to remove her (Tr. 160).

The prosecutor's objection to Knight's removal from the jury for cause calls into serious doubt the legitimacy of the prosecutor's reason for striking Collins. It begs the question of whether the prosecutor would have, instead, stood silent or consented to the defense's motion to strike Knight for cause, if the prosecutor's concerns about the fairness and impartiality of Knight, and all those with whom she shared a row, including Collins, were, in fact, genuine. Disingenous or pretextual reasons, such as striking jurors of "mothering age" without expressly citing gender as a reason for the strike, do not give the State

cover to engage in discrimination. *State v. Smith*, 5 S.W.3d 595, 597 (Mo. App. E.D. 1999).

Moreover, Hosie, whose striking the prosecutor argued to rebut Mr. Meeks' *prima facie* case of racial discrimination, was not similarly situated to Collins. On voir dire, Collins indicated that she had no concerns about anything that the prosecutor had discussed on voir dire (Tr. 81), whereas Hosie stated during the defense's voir dire, that police officers whom she knew "often" lied (Tr. 121). Hosie's negative view of police credibility, and not a desire to strike a particular "row," was the likely reason for the prosecutor's strike of Hosie.

Ultimately, the State peremptorily struck three African-American venirepersons, leaving one African-American juror on the jury. *See* Stipulation, para. 6. The State's reason for striking African-American venireperson Collins was not race neutral, and thus violates the rule of *Batson* and its progeny that peremptory strikes must be exercised in a race-neutral manner. The trial court's ruling violated Mr. Meeks' and the striken panelist's rights to equal protection and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2 and 18(a) of the Missouri Constitution. Thus, this Court must reverse Mr. Meeks' convictions and remand for a new trial.

ARGUMENT – II.

The trial court abused its discretion in sustaining the State's objection to the defense's closing argument, because during closing argument the defense argued that a conviction was significant and would have consequences for the defendant, and the court improperly sustained the State's objection to this argument, violating Mr. Meeks' right to due process, to assistance of counsel, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the defense has the right during closing argument to argue the seriousness of a criminal conviction and to be mindful of the defendant's liberty, and there is a reasonable likelihood that being restrained from making this point to the jury affected the outcome of trial in this very close case.

Facts and Preservation of the Error

At trial, the following exchange occurred during the defense's closing argument:

> Now, there's a lot that hangs in the balance. For Roscoe, this isn't some sort of law school examination. This is not a mock trial. This is real life. The State is asking you to convict him. That's going to have dire

consequences.

MS. BENNINGER [Prosecutor]: Objection to the comment on consequences. We're asking the jury to convict; that's it.

THE COURT: The objection's sustained.

(Tr. 318).

Defense counsel assigned error to the trial court's ruling in Mr. Meeks' timely-filed motion for new trial (L.F. 82-83). Consequently, this issue is preserved for appellate review. Rule 29.11(d). Should this Court conclude otherwise, Mr. Meeks respectfully requests review for plain error under Rule 30.20.

Standard of Review

The trial court has broad discretion in controlling closing argument and may allow counsel wide latitude. *State v. Woodworth*, 941 S.W.2d 679, 698 (Mo. App. W.D. 1997). Courts should only exclude those statements by counsel that misrepresent the evidence or law, that introduce irrelevant prejudicial matters, or that otherwise tend to confuse the jury. *State v. Rush*, 949 S.W.2d 251, 256 (Mo. App. S.D. 1997) (citing *State v. Barton*, 936 S.W.2d 781, 783 (Mo. banc 1996)).

"The right to a fair trial demands a reasonable opportunity to present the defendant's theory of the case during closing argument." *Barton*, 936 S.W.2d at 783 (citing *Herring v. New York*, 422 U.S. 853, 860-861 (1975) and *State v. Williams*, 681 S.W.2d 948, 950 (Mo. App. E.D. 1984)); *see also* U.S. Const., Amend. VI; Mo. Const., Art. 1, § 18(a). Closing argument is the defendant's "last clear chance to persuade the trier of fact that there may be reasonable doubt about his guilt." *Herring*, 422 U.S. at 862. Defense counsel may argue inferences that are justified by the evidence and that strongly favor the client. *Barton*, 936 S.W.2d at 783; *State v. Jones*, 629 S.W.2d 592, 594 (Mo. App. W.D. 1982).

If the trial court prohibits defense counsel from making an argument that is essential to the defendant's theory of defense and justified by the evidence and reasonable inferences from the evidence, then the trial court abuses its discretion. *Barton,* 936 S.W.2d at 784. The trial court's ruling will be reversed if the abuse of discretion prejudiced the defendant, i.e., if absent the abuse, there is a reasonable probability the verdict would have been different. *State v. Roberts*, 838 S.W.2d 126, 132 (Mo. App. E.D. 1992).

Argument

The trial court abused its discretion in sustaining the State's objection to the defense's closing argument because the defense's closing argument did not

introduce an improper or irrelevant concern for the jury's consideration. Defense counsel merely argued that the jury be mindful of the very real consequences that would follow its guilty verdict (Tr. 318). This argument was permissible.

In *State v. Jones*, 398 S.W.3d 518, 521 (Mo. App. E.D. 2013), the trial court precluded defense counsel from making a similar closing argument that the jury's decision would affect Jones' liberty. On appeal, the Eastern District held that it was not persuaded "that the concept of liberty is an irrelevant issue for consideration by a jury during the guilt phase of their deliberation." 398 S.W.3d at 522. It recognized the deprivation of liberty as a consequence of criminal conviction, and noted a host of other collateral consequences, including the stigma of criminal conviction and possible adverse effects on the individuals' ability to obtain future employment. *Id.* (citing *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. banc 1993)). The Eastern District held that defense counsel was entitled to argue to the jury that they should be mindful of the effect their decision would have on Jones' liberty. *Id.* at 523.

Mr. Meeks was, likewise, entitled to argue to the jury that his conviction would have dire consequences. That Mr. Meeks would suffer such dire consequences upon his conviction was a relevant consideration for the jury and

an argument about these consequences would have impressed upon the jury the gravity of their duty at trial.

Moreover, had the trial court permitted Mr. Meeks latitude to make his argument, there is a reasonable probability that the outcome of Mr. Meeks' trial would have been different. The evidence indicated that there was a strong possibility that Mr. Flores and Mr. Valdez had mistakenly identified Mr. Meeks. Mr. Flores and Mr. Valdez had limited opportunity to view the shooter. The incident happened quickly in the dark of night and the nearest streetlights were hundreds of feet away (Tr. 201-202, 213, 217, 225-226). Mr. Valdez testified that these conditions affected his ability to be 100% certain of his identification (Tr. 203).

Also, there was a possibility that Mr. Valdez and Mr. Flores had not paid the degree of attention to the shooter that would permit a 100% positive identification. Mr. Valdez, who was a "little drunk" that night, turned his back to the shooter during the incident (Tr. 192, 203). Mr. Flores "didn't look all that closely" at the shooter and ran the second the shooter produced a gun (Tr. 219, 225-226).

Additional factors called into question the accuracy and reliability of these men's identifications. Mr. Meeks was a complete stranger to Mr. Flores and Mr.

Valdez (Tr. 203, 226). Mr. Meeks is a 40-something African-American man (L.F. 14-15). Mr. Valdez was 25 (Tr. 184). And, both Mr. Valdez and Mr. Flores were Spanish-speaking and weren't fluent in English (Tr. 203, 217).

Mr. Meeks only became a suspect after his ex-girlfriend, with whom he had recently broken up, told police that he matched the description of the shooter (Tr. 232-233). There were possible unexplored motives for her disclosure.

And, lastly, the identification was possibly tainted by the highly questionable interpretation services of Espinoza, who was present during the lineups at the station and whose credentials were not established (Tr. 276-277, 280). At the hospital, Mr. Valdez looked at a photo lineup, containing Mr. Meeks' photo, and did not identify anyone from the lineup (Tr. 196, 206, 271). But at the station, after receiving instruction from Espinoza, Mr. Valdez identified Mr. Meeks from the physical lineup (Tr. 211, 256, 280-281). He based his identification of Mr. Meeks, at least partially on the presence of a mark on Mr. Meeks' head (Tr. 210-211, 213).

Given the totality of the circumstances surrounding the identifications, reasonable jurors would reasonably have believed in Mr. Meeks' misidentification as the shooter and might have had reasonable doubt about his

guilt. Without wide latitude during closing argument, however, Mr. Meeks stood less of a chance of impressing upon the jury that they needed to "carefully weigh the evidence of a defendant's guilt given the significant impact a criminal conviction will have upon the defendant." *Jones*, 398 S.W.3d at 523. Had the trial court permitted Mr. Meeks to make his argument, there is a reasonable probability that the jury would have had reasonable doubt about the accuracy and reliability of the identifications of Mr. Meeks as the shooter, and would have acquitted him of the charged offenses.

Thus, the trial court denied Mr. Meeks' right to due process, to assistance of counsel, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Meeks' convictions and remand for a new trial.

ARGUMENT – III.

The trial court plainly erred, causing manifest injustice or a miscarriage of justice, in entering written sentence and judgment of a term of 20 years of imprisonment for Count II of armed criminal action, because the written sentence and judgment materially differs from the trial court's oral pronouncement of a ten-year term of imprisonment and the inclusion of this material clerical error in Mr. Meeks' written sentence and judgment prejudices Mr. Meeks by denying his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution. This Court must remand for the trial court's correction of this clerical error *nunc pro tunc*.

This assignment of error is presented in the alternative to Points I and II of appellant's brief. Mr. Meeks acknowledges that this assignment of error was not raised before the trial court or in the briefs filed by former appellate counsel in the appellate court below, and that for this reason, this assignment of error is not preserved for appellate review. *State v. Moore*, 303 S.W.3d 515, 523 (Mo. banc 2010); *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc 1997); Rules 30.27 & 83.08(b). Mr. Meeks, however, respectfully requests plain error review under Rule 30.20.

Standard of Review

Plain error relief is appropriate when the alleged error so affects the rights of the defendant as to cause a manifest injustice or miscarriage of justice. *State v. Phelps*, 965 S.W.2d 357, 358 (Mo. App. W.D. 1998); Rule 29.12(b).

Argument

The trial court plainly erred, causing manifest injustice or a miscarriage of justice, in entering written sentence and judgment of a term of 20 years of imprisonment for Count II of armed criminal action, because the written sentence and judgment materially differs from the trial court's oral pronouncement of a ten-year term of imprisonment.

In criminal cases, generally, the written judgment and sentence of the trial court should reflect its oral pronouncement of sentence before the defendant. *State v. LaJoy*, 216 S.W.3d 256, 259 (Mo. App. E.D. 2007) (citing *State v. Patterson*, 959 S.W.2d 940, 941 (Mo. App. E.D. 1998)). The failure to accurately memorialize the trial court's judgment as announced in open court is a clerical error. *State v. Johnson*, 220 S.W.3d 377 (Mo. App. E.D. 2007) (citing *State v. Goodine*, 196 S.W.3d 607, 624 (Mo. App. S.D. 2006)). This is because the legal force attached to a judgment comes from the court's judicial act, not a clerical entry in the record. *Gooddine*, 196 S.W.3d at 624.

Here, the written sentence and judgment fails to accurately memorialize the trial court's judgment as announced in open court. The inclusion of this material clerical error in Mr. Meeks' written sentence and judgment prejudices Mr. Meeks by denying his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution.

This Court must remand for the trial court's correction of this clerical error *nunc pro tunc*. When a material discrepancy between the written judgment and sentence and the oral pronouncement is caused by a clerical error, the proper remedy is the entry of a *nunc pro tunc* order correcting the error. Rule 29.12(c); *McArthur v. State*, 428 S.W.3d 774, 782 (Mo. App. E.D. 2014) (remanding for correction of clerical error); *State v. Jackson*, 158 S.W.3d 857, 858 (Mo. App. E.D. 2005) (remanding for correction of the written judgment to reflect the sentence imposed at the hearing).

CONCLUSION

WHEREFORE, based on his arguments in Points I and II, Mr. Meeks respectfully requests that this Court reverse his convictions and remand for a new trial. In the alternative, Mr. Meeks respectfully requests that this Court remand for correction of the clerical error in his written sentence and judgment *nunc pro tunc*.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I certify that a copy of this brief was served via the Court's electronic filing system to Gregory L. Barnes of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 at Greg.Barnes@ago.mo.gov on **Monday, November 30, 2015**. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Book Antigua 13-point font. The word-processing software identified that this brief contains 7,687 words.

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