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 REPLY BRIEF AND ARGUMENT

Gwenda Reneé Robinson
Missouri Bar No. 43213
District Defender, Office B/Area 68
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Appellant Meeks adopts the jurisdictional statement set out in Appellant's Brief, Statement and Argument.[1]

STATEMENT OF FACTS

Appellant Meeks adopts the statement of facts set out in Appellant's Brief, Statement and Argument.

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

REPLY ARGUMENT[2]

Respondent argues that "[t]he trial court's finding is not clearly erroneous where the State struck a similarly situated white venireperson, Ms. Hosie; successfully moved to strike for cause the white venireperson whose racial remarks prompted the outburst (Venireperson Arnold); and where the entire row was eliminated from the jury . . ." (Resp. Br. 14).

Yet, Hosie and African-American venireperson Collins were not similarly situated. Venirepersons are not similarly situated if they differ in relevant respects. 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 she often thought police officers whom she knew "often" lied (Tr. 121). A "generally positive" attitude toward law enforcement is "usually favorable to the State's position." *State v. McFadden*, 191 S.W.3d 648, 657 (Mo. banc 2006). But Hosie's belief indicated that Hosie did not

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[2] Appellant Meeks does not waive the allegation of trial court error presented in Points II and III of his previously filed substitute brief, but specifically replies to respondent's argument addressing Point I.

have a generally positive attitude toward law enforcement and, as such, would not have been favorable to the State's position. *See*, *e.g.*, *State v. Clark*, 407 S.W.3d 104, 108 (Mo. App. E.D. 2013) (distinguishing between jurors). Because Hosie's responses on voir dire indicated that she would have been a less favorable juror for the State than Collins, Hosie is not similarly situated and is not comparable to Collins. As a result, the prosecutor's striking of Hosie is not probative of any lack of discriminatory intent.

Respondent argues the contrary (Resp. Br. 25). Respondent explains that the prosecutor struck Collins because she was in the row involving the outburst and the prosecutor felt better if no one in the row involving the outburst served (Resp. Br. 25-26, 29; Tr. 164-166). Respondent further states that the prosecutor's striking of Hosie and of "every person in the row involved in the outburst that she could" supports the trial court's finding that no racial animus motivated the strike of Collins (Resp. Br. 25-26).

The prosecutor, however, did not strike every person in the row involved in the outburst that she *could*. Knight was also in the same row as Collins and Hosie, and the prosecutor could have struck Knight (Tr. 165; Stipulation, para. 5; *see also* Resp. Br. 25, 28). Knight, like Collins, is a woman and the female voice that the prosecutor heard cry, "Let's open that can," could just as likely have

been Knight's (*see* Tr. 166). Knight, however, unlike Collins, is Caucasian or white (Stipulation, para. 5).

The prosecutor not only failed to move to strike Knight from the jury, but also objected when the defense moved to strike her for cause, forcing the defense to use a peremptory strike to remove her from the jury (Tr. 160). Knight, a retired latent print examiner, had worked 30 years (Tr. 80-81, 109-111). She knew a lot of police officers, had worked closely with them, and was close friends with some of them (Tr. 80-81, 109-111). She told the defense during the defense's voir dire, "I don't do defense work" (Tr. 112). The defense, and not the State, struck her (Stipulation, para. 5).

Respondent in its brief acknowledges that Knight was the exception to the rule purportedly utilized by the prosecutor in exercising her peremptory strikes (Resp. Br. 25). And, that the prosecutor made an exception where Knight was concerned and failed to strike her is evidence that the prosecutor's explanation is a sham and a pretext for racial discrimination. *State v. Livingston*, 220 S.W.3d 783, 789 (Mo. banc 2007) (stating existence of similarly-situated white jurors who were not struck is probative of pretext).

Here, the prosecutor's explanation was inherently racially discriminatory. The prosecutor initially explained that she struck Collins "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" (Tr. 165).

This explanation could be no more explicit of the prosecutor's discriminatory intent, but respondent in its brief argues that this explanation does not indicate that the prosecutor was making "a race-based assumption of a racial group characteristic or voting tendency" (Resp. Br. 29). Respondent is incorrect.

The prosecutor expressly stated that her intention was to exclude from the jury a group of people of a particular race who were sitting in the row directly behind her based on an implicitly held assumption about that group – that the group of African-Americans and Mexican-Americans, whom she believed had heard, and may have become offended by, the racist comments of another venireperson, could not impartially and fairly consider the case (Tr. 165).

Respondent only partially acknowledges this. Respondent states that the prosecutor's explanation merely "mentioned race" and was "not solely" based on race (Resp. Br. 28).

Respondent further states that "[t]he concern was not with black [i.e., African-American] jurors 'as a group' but with a particular outburst that the

prosecutor's 'horse sense' feared might reflect a preventable bias" (Resp. Br. 25, 29). Respondent overlooks that "horse sense" and "hunches" are legitimate justifications only if racial discrimination is not the motive and the prosecutor's explanation is race-neutral. *State v. Payton*, 747 S.W.2d 290, 292 (Mo. App. E.D. 1988) (citing *State v. Antwine*, 743 S.W.2d 51, 65 (Mo. banc 1987)); *State v. Smith*, 944 S.W.2d 901, 912 (Mo. banc 1997).

The prosecutor's explanation here is not race-neutral and is inherently racially discriminatory. The prosecutor's stated concern was not just with the group or row of jurors who had made an outburst, but with one specific subset of jurors within that group, "African-Americans and Mexican-Americans," and, with the female juror, belonging to that race-based subset, who said, "Let's open that can" (Tr. 164-166).

The prosecutor did not move to remove the whole row of jurors who made the outbursts, Caucasians and African-Americans alike (Stipulation, para. 4 & 5). She left Knight, a Caucasian, and removed Collins, an African-American, for the specific race-based reason that she wanted to make sure that she did not start out with a jury containing African-Americans and Mexican-Americans who were upset about racial issues (Stipulation, para. 4 & 5; Tr. 164).

Notwithstanding, respondent argues that the outburst, and not race, was the prosecutor's concern (Resp. Br. 25, 29). Respondent relies, in part, on facts showing that the prosecutor did not use her peremptory strikes against only African-Americans or all African-Americans on the panel, and that other African-Americans who were not part of the row remained on the panel (Resp. Br. 25, 29).

Notably, a large number of blacks on the panel or the jury does not prevent a defendant from making out a successful claim under *Batson*.[3] *See*, *e.g.*, *State v. Robinson*, 811 S.W.2d 460, 462 (Mo. App. E.D. 1991). "Under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987). *Batson* requires evaluation of the "whole picture" or the totality of the facts and circumstances surrounding the case. *State v. Taylor*, 18 S.W.3d 366, 374 (Mo. banc 2000).

A review of the totality of the circumstances reveals that the prosecutor in this case violated *Batson*. The prosecutor struck an African-American

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[3] *Batson* is a reference to *Batson v. Kentucky*, 476 U.S. 79 (1986).

venireperson for a *race-based reason* based on an implicit *race-based assumption* or stereotype about African-Americans upset about *racial* issues.

This fact distinguishes Mr. Meeks' case from *Hernandez v. New York*, 500 U.S. 352 (1991), upon which respondent relies, and renders *Hernandez* inapplicable to Mr. Meeks' case (Resp. Br. 30-34). In *Hernandez*, the prosecutor's reason for using his peremptory challenges to strike the two Latino venirepersons was not race-based. *Hernandez*, 500 U.S. at 356, 361. It "rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals." *Id.* at 361. The prosecutor struck the two Latino jurors for the race-neutral reason that there was a great deal of uncertainty whether they would be able to accept the translator's rendition of the Spanish-language testimony. *Id*. at 356-357. The Court held that the prosecutor's race-neutral reason might well result in disproportionate removal of prospective Latino jurors, but that it did not violate *Batson*. *Id*. at 357-361.

In contrast to *Hernandez*, in this case, there is no allegation of disproportionate impact and the prosecutor's reason for striking African-American venireperson Collins was not race-neutral. The prosecutor's reason rested on the express intention to exclude African-American and Mexican-

American jurors, and on an implicitly held assumption that African-Americans and Mexican-Americans, who are upset about racial issues, would make unfit jurors.

Because the prosecutor's reason for striking Collins was not race-neutral and was race-based, the trial court's finding of no *Batson* violation is not entitled to the same deference. "This Court's deference to the trial court is not without limits." *State v. McFadden*, 216 S.W.3d 673, 676 (Mo. banc 2007). The prosecutor admitted her decision to remove Collins was based on race, and "it would be difficult to conceive of a case more clearly demonstrating the applicability of *Batson*." *See State v. Holman*, 759 S.W.2d 902, 903 (Mo. App. E.D. 1988) (reversing and remanding for a new trial where prosecutor admitted that he struck the black juror on account of her race).

"Once a discriminatory reason has been uncovered—either inherent or pretextual—this reason taints the entire jury selection." *Payton v. Kearse*, 329 S.C. 51, 59 (S.C. 1998); *Rector v. State*, 444 S.E.2d 862, 865 (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).

This is called the *per se* approach or tainted approach. *Ornelas*, 330 P.3d at 1092. Under this approach, a discriminatory explanation will vitiate other race-neutral reasons for the exercise of a peremptory strike and the entire selection process regardless of the genuineness of the other reasons for the strike. *Payton*, 329 S.C. at 59.

This approach was arguably the approach taken in *Holman* upon which Mr. Meeks principally relied in his opening brief (App. Br. 28). Regardless of the existence of other race-neutral reasons for the prosecutor's strike of the African-American venireperson, the *Holman* court determined that the existence of just one race-based reason was sufficient to vitiate the strike. *Holman*, 759 S.W.2d at 903.

Should this Court determine that the prosecutor's reason for striking Collins was not solely based on race, Mr. Meeks urges this Court to adopt the *per se* or tainted approach in lieu of the "mixed-motive" or "dual motivation" approach to which respondent referred (Resp. Br. 35-40). "By adopting dual motivation, this Court would be approving a party's consideration of discriminatory factors so long as sufficient nondiscriminatory factors were also

part of the decision to strike a juror" and "any consideration of discriminatory factors in this decision is in direct contravention of the purpose of *Batson* which is to ensure peremptory strikes are executed in a nondiscriminatory manner." *Payton*, 329 S.C. at 59-60. Such an adoption would "erode what little protection *Batson* provides against discrimination in jury selection." *Id*. at 60.

Should this Court, however, determine that the "mixed-motive" or "dual motivation" analysis applies, Mr. Meeks argues that respondent has not demonstrated by a preponderance of the evidence that the strike would nevertheless have been exercised even if race had not motivated the strike. Under that analysis, "[i]f a party exercises a peremptory challenge in part for a discriminatory purpose, a trial court must decide whether the party whose conduct is being challenged has demonstrated by a preponderance of the evidence that the strike would have nevertheless been exercised even if an improper factor had not motivated in part the decision to strike." *United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995).

Respondent has not met its burden. As previously stated, although respondent states that the prosecutor struck Collins for the race-neutral reason that she was in the row involving the outburst, the prosecutor struck some but not all of the venirepersons in that row and the prosecutor's selectivity

evidenced her discriminatory motive in striking Collins (Resp. Br. 25-26, 29; Tr. 164-166). Racial discrimination, and not a concern about the outburst, was the substantial motivating factor behind the prosecutor's use of a peremptory strike against Collins.

Race was determined not to be the substantial, motivating factor behind the prosecutor's use of peremptory strikes against African-American venirepersons in *Darden* and *Weaver v. Bowersox*, 241 F.3d 1024 (8th Cir. 2001). Respondent cites *Darden* and *Weaver* as support for this Court's affirmance of the trial court's ruling to overrule Mr. Meeks' *Batson* objection, but *Darden* and *Weaver* are inapposite (Resp. Br. 35-38).

The prosecutors in both *Darden* and *Weaver* each gave so many race-neutral reasons for striking the venirepersons that the race-based reasons became merely incidental, and as a consequence, the courts below held that the peremptory strikes were based on those race-neutral reasons. *Darden*, 70 F.3d at 1531; *Weaver*, 241 F.3d at 1031-1032. In each case, the Eighth Circuit later held that the lower court's decision to allow the strike based on several racially-neutral reasons was equivalent to a finding that the prosecutor would have exercised the strike, even without the one race-based reason. *Id*.

As distinguished from *Darden* and *Weaver*, in this case, there were not several racially-neutral reasons supporting the strike of Collins, the race-based reason proffered by the prosecutor was not merely incidental to other race-neutral reasons, and the record and totality of the circumstances indicate that the prosecutor would not have exercised the strike against Collins without the race-based reason. For these reasons, *Darden* and *Weaver* are not dispositive of the issue presented by Mr. Meeks.

This Court should find that the trial court clearly erred in overruling Mr. Meeks' *Batson* objection to the prosecutor's peremptory strike of African-American venireperson Collins.

CONCLUSION

WHEREFORE, based on his arguments in Points I, II, and III, 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,

/s/Gwenda Reneé Robinson
Gwenda Reneé Robinson, Mo. Bar #43213
District Defender, Office B/Area 68
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT

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 **Wednesday, February 17, 2016**. 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 2,908 words.

/s/Gwenda Reneé Robinson
Gwenda Reneé Robinson, Mo. Bar #43213
District Defender, Office B/Area 68
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT