No. SC95221

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ROSCOE MEEKS,

Appellant.

Appeal from St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable Margaret M. Neill, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Defendant was convicted of first-degree assault and armed criminal action following a jury trial presided over by the Hon. Margaret Neill in the Circuit Court of the City of St. Louis. Defendant was sentenced as a prior and persistent felony offender to a total of 20 years in prison. (Tr. 335-336; LF 85-87).[1]

The sufficiency of the evidence to convict is not at issue. Viewed in the light most favorable to the verdicts, the evidence and reasonable inferences from the trial established the following facts:

Victim, Mario Valdez ("Victim") is a Spanish-speaking immigrant with a limited comprehension of English.[2] Victim is not capable of "communicating 100% in English" but can "pick up words here and there." (Tr. 191).

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[1] The written judgment says that Defendant was sentenced to 20 years for each count, to be served concurrently (LF 85-87); however, in the oral pronouncement, which controls, the court sentenced Defendant to 20 years for assault and 10 years for armed criminal action, to be served concurrently. (Tr. 335-336). *See*, *State ex. rel. Zinna v. Steele*, 301 S.W.3d 510, 514 (Mo. banc 2010),

[2] Victim testified at trial through an interpreter (Tr. 184).

On July 4, 2012, after working and sending money transfers at a store, Victim returned home and was invited by a friend he roomed with to see other friends who lived next door. (Tr. 184-185, 187-188). Around 10 p.m., Victim grabbed a beer and joined his friends, whom he found talking to Defendant in the street. (Tr. 184-185, 188-190). Victim's friends also spoke Spanish. Defendant kept mentioning someone named "Cri-Cri" and Victim understood that Defendant was looking for the person who took away his girlfriend. (Tr. 191). Victim was not that person. (Tr. 191).

Nonetheless, Defendant got within 8 inches of Victim to assure himself that Victim was the person he was looking for. (Tr. 189-190). Victim told Defendant in English that he didn't understand what he was talking about, and that he had had his apartment for less than a month. (Tr. 191).

As Victim turned to keep on walking, Defendant pulled out a gun and pointed it at Victim's head. (Tr. 192). Initially, the gun was behind Victim's ear, but when Victim saw Defendant moving the gun downward, he tried to defend himself to escape from the gun. (Tr. 192). Victim took Defendant's hand to push it down and heard a gunshot. (Tr. 192-193, 198). Victim heard the trigger as Defendant attempted to shoot again. (Tr. 193). As Defendant separated from Victim to try to reload the gun, Victim threw the beer in his hand at Defendant, hitting Defendant in the head, and began to run. (Tr. 193). Defendant shot Victim a second time. (Tr. 193).

Victim has a scar above his beltline and another large scar down the center of his stomach from surgery performed to reconstruct the inside of his body as a result of one of the gunshot wounds. (Tr. 193-194). Part of Victim's intestine came out when one of the bullets entered and opened up his stomach. (Tr. 194). The second shot struck Victim in the buttocks, and its impact threw Victim forward. (Tr. 193).

After being shot for the second time, Victim got up, ran, and hid by a trash receptacle. (Tr. 194). After approximately one minute, during which Victim did not hear more shots, he headed back towards his apartment but lost consciousness and fell near a fence. (Tr. 194-195).

Although Victim was not in a condition to identify anyone from a photo lineup while in the hospital, he identified Defendant at a physical lineup and at trial as the person who shot him and testified that he found it impossible to forget the face of the person who attempted to take his life. (Tr. 196-197, 211, 212). Victim testified that he was 100% certain that Defendant was the shooter. (Tr. 211).

Victim's roommate at the time of the incident, Jose Flores, testified that Defendant came from a corner, got within two feet of him, and that because he doesn't speak English, he didn't know what Defendant was asking him and his friend, Daniel Alejo, who had left Victim's apartment with Flores prior to Victim's arrival on the scene. (Tr. 215-217). He told Defendant that

he "didn't know" the answer to his question, and when Defendant asked Victim as Victim arrived, Victim told Defendant that he didn't know. (Tr. 218). Defendant appeared to be angry. (Tr. 225-226).

Flores testified that Defendant told Victim that he wasn't playing around, took a gun from his back, and pointed it at Victim's head. (Tr. 218-219). Flores ran back to their apartment and as he was entering the apartment, he heard shots. (Tr. 219). Flores called police and then went out to look for Victim; Flores found Victim wounded and holding onto a fence. (Tr. 219). Victim was lying on the ground by the time police arrived. (Tr. 219).

Flores testified that he remembered "practically everything," gave a description of the shooter, and identified Defendant with confidence both in a physical lineup and at trial as the man who shot Victim. (Tr. 220-222, 229).

Victim's ex-girlfriend, Courtney Carrion, was known to hang out in the apartment complex where the shooting took place and was there at the time of the shooting, although she did not witness it. (Tr. 232-234). She and Defendant had broken up a couple of months prior to the shooting. (Tr. 232-233). Witnesses gave a description of the shooter and referred a detective to Ms. Carrion, who told the detective that the description sounded like Defendant. (Tr. 234). Ms. Carrion told the detective where she thought Defendant could be located and what type of car he drove. (Tr. 234-235, 242-244).

The detective went through 250 pictures to find five other people who closely resembled Defendant in height, weight, and skin complexion, and showed the resulting photo spread to Flores, who identified Defendant as the shooter. (Tr. 244-246).

The detective tried to show the photo spread to Victim in Barnes Hospital, but Victim was hooked up to a "lot of things," heavily medicated, droopy-eyed, had a blank stare and would nod off and then snap awake like a drunk person, and the detective didn't think he had Victim's full attention or concentration or that Victim knew what was going on; to avoid a tainted identification, the detective told Victim they would do it some other time. (Tr. 250-251, 270-271, 280). Victim testified that he was weak and didn't have sufficient awareness to be able to identify anyone at the hospital; he was still recovering from surgery. (Tr. 196).

Once Victim was out of the hospital, both Victim and Flores identified Defendant in a live lineup. (Tr. 253-256). Defendant was permitted to choose his position in the lineup, and his position was different when viewed by each witness. (Tr. 255-256).

Victim's medical records established that Victim suffered severe gunshot wounds to the abdomen and buttocks. (Tr. 282). Victim's mesentery was protruding and he was bleeding from the wound to his buttock. (Tr. 283-

284). Victim required surgery to repair his small bowel, mesentery, colon, and abdominal wall. (Tr. 282).

Defendant elected not to testify but admitted three of his Department of Revenue photographs from different time periods to establish that he had a preexisting scar in an attempt to undermine Victim's basis for identifying him in the lineup. (Tr. 288, 292). Victim testified that notwithstanding this mark, he remembered the face of the shooter and "it's practically impossible to forget what a person who's about to take your life away" looks like. (Tr. 212).

The jury found Defendant guilty of both first-degree assault and armed criminal action. (Tr. 328-332). The court found that Defendant was a prior and persistent offender and sentenced Defendant to 20 years in prison. (LF 40-41, 85-87; Tr. 173, 335-336).

The Missouri Court of Appeals, Eastern District, affirmed. *State v. Meeks*, 2015 WL 3875204 (Mo. App. E.D. Aug. 13, 2015).

Defendant sought transfer, requesting this Court to "expressly decide whether Missouri follows the *per se* or tainted approach or the dual motivation analysis (i.e., the mixed-motive analysis or the "but-for" test)" when race is "offered as even a partial motivation for a peremptory strike[.]" Application for Transfer at 1, 8. This Court granted transfer.

ARGUMENT

I.

The trial court did not clearly err by overruling Defendant's *Batson* objection to the State's peremptory strike of Venireperson Collins because the State gave a race-neutral reason in context, which was not pretextual. The State struck the white venireperson who initiated a racial conflict by making a racist comment during *voir dire*, and everyone in the row from which a responsive comment was yelled by an unidentified female advocating that a race-based can of worms be opened was stricken either for cause or through peremptory strikes by the State, the defense, or the court, which supported the credibility of the prosecutor's explanation that this was her objective.

In the alternative, if race is deemed a substantial part of the explanation or motivation for the strike, because a race-neutral explanation based on behavior during *voir dire* was also given and found credible, Eighth Circuit precedent applies a dual-motivation analysis and the trial court's ruling that the prosecutor made the strike for a race-neutral reason is not clearly erroneous.

Defendant contends that the trial court clearly erred by overruling his objection based on *Batson v. Kentucky*, 476 U.S. 79 (1986), to the State's use

of a peremptory strike against Venireperson Collins, an African-American female.[3]

After Venireperson Arnold (stipulated to be a white male) suggested in a response to a defense question during *voir dire* that Defendant was more likely to be guilty because he was a black person in the seventh-most-violent city in America. Defense counsel attempted to squelch the impact by saying that he did not desire to open "a can of worms." The prosecutor heard a female voice from a row of prospective jurors behind her) shout, "Let's open that can!"

The prosecutor struck Venireperson Arnold for cause and later explained that she wished to eliminate the entire row from which the disruptive yell from the unidentified female originated through the use of peremptory strikes, leaving only the venireperson she was certain the defense would strike. The prosecutor stated that she did not want "to start out the case where there is a person of Mexican descent or of African-

[3] Venireperson Collins did not self-identify her race, nor did the defense identify her race prior to raising the *Batson* challenge. However, the State proceeded to give its race-neutral reason and the court ruled on the challenge. The parties stipulate for purposes of this appeal that Collins is an African-American female. Stipulation at ¶ 1.

American descent upset about racial issues" and "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[4] than Collins, and I chose Collins." (Tr. 164-166).[5]

The prosecutor struck both a white female (Venireperson Hosie) and Venireperson Collins from that row; three other venirepersons in that row had been removed for cause and the State accurately forecast that Defendant

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[4] Venireperson Knight was a retired latent examiner who had worked closely with "some" police officers over her 30-year career; the defense had previously attempted to strike her for cause. (Tr. 80-81, 109-111, 160).

[5] The reference to "Mexican" descent apparently pertained to the Victim (who was from Mexico, as were several prosecution witnesses), since none of the venirepersons at issue are Hispanic. It is at best unclear whether the parallel reference to a person "of African-American descent" is to the Defendant or Venireperson Collins. The record does not preclude the prosecutor's belief that it was also possible that Venireperson Hosie was the source of the outburst, nor does it preclude the possibility that the person making the outburst was supporting Venireperson Arnold's racist views rather than opposing them (in which case both parties in interest needed protection). Indeed, the trial judge emphasized Arnold's racist remarks in her ruling as a basis for finding the prosecutor's explanation credible and race-neutral.

would strike the remaining venireperson (a latent fingerprint examiner for the St. Louis County Police Department) from that row because Defendant had sought to strike that venireperson for cause. (Tr. 158-160). No one from that row served on the jury. Stipulation at ¶¶ 2, 5, 9.

The court and the prosecutor acknowledged that virtually the entire courtroom had gasped at the remark about Defendant being more likely to be guilty because he was black, including the prosecution table, but the prosecutor drew a distinction between the near-universal gasps and the "yelling" and injection of race into the case that she heard from a female voice in that row. The court found the explanation race-neutral in context where the entire row referenced by the prosecutor had either been the subject of for-cause strikes, of peremptory strikes by the prosecutor, or of an anticipated peremptory strike by the defense after a failed challenge for cause by the defense.

The 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 as the prosecutor explained was her (race-neutral) objective. Moreover, the State had no interest in a racially-biased jury where the Victim

and other eyewitnesses were immigrants or migrant workers from Mexico with a limited grasp of English, living on the margins of society.

A. Standard of review and framework for general *Batson* analysis

An appellate court will set aside a trial court findings on a *Batson* challenge only if they are "clearly erroneous." *State v. McFadden*, 191 S.W.3d 648, 651 (Mo. banc 2006). A finding is clearly erroneous when the reviewing court is left with the definite and firm impression that a mistake has been made. *Id*.

Because the legitimacy of the State's explanation is a subjective exercise, the court places "great reliance" on the trial court's judgment. *State v. Pointer*, 215 S.W.3d 303, 305 (Mo. App. W.D. 2007) (*quoting State v. Morrow*, 968 S.W.2d 100, 114 (Mo. banc 1998)); *State v. Rollins*, 321 S.W.3d 353, 365 (Mo. App. W.D. 2010).[6] Appropriate deference is given because "a

[6] As Justice Breyer observed in his concurrence in *Rice v. Collins*, 546 U.S. 333 (2006):

> The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges

finding of intentional discrimination is a finding of fact." *Batson v. Kentucky*, 476 U.S. at 98 n.21. *See*, *Hernandez v. New York*, 500 U.S. 352, 364 (1991); *Rollins* at 365. An issue "does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Hernandez*, 500 U.S. at 366 (quoting *Miller v. Fenton*, 474 U.S. 104, 113 (1985)).

> A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. . . . Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. . . . Although the prosecutor must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive or even plausible"; so long as the reason is not inherently discriminatory, it suffices. *Purkett v. Elem,* 514 U.S. 765, 767-768 (1995) (*per curiam*).
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> cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson*.

Id. at 343.

> Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. . . . This final step involves evaluating "the persuasiveness of the justification" proffered by the prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, *supra,* at 768[.]

Rice v. Collins, 546 U.S. 333, 338 (2006). *See*, *Rollins* at 365-366.

"Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility" and "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Hernandez v. New York*, 500 U.S. 352, 365 (1991). "In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor," making "the trial court's firsthand observations of even greater importance." *Snyder*, 552 U.S. at 477. "In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Id*.

Because "these determinations of credibility and demeanor lie 'peculiarly within a trial judge's province,'" the United States Supreme Court has held that "in the absence of exceptional circumstances, we would defer to"

the trial court. *Id.* (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985) and *Hernandez*, 500 U.S. at 366).

"Jury selection is, after all, an art and not a science. By their very nature, peremptory challenges require subjective evaluations of venireman by counsel. Counsel may rely upon perceptions of attitudes based upon demeanor…and many other fundamental background facts. There is, of course, no assurance perceptions drawn within the limited context of voir dire will be totally accurate. Counsel simply draws perceptions upon which he acts in determining the use of peremptory challenges." *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. banc 1987).

There are several factors to consider in determining whether the opponent of the strike has met its burden of proving that the State's explanation was pretextual and that the strike was motivated by race. *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992). A trial court's primary consideration is the plausibility of the prosecutor's explanation in light of the totality of the facts and circumstances surrounding the case. *Id.* Additional factors that should be considered are: (1) the existence of similarly situated white jurors who were not struck by the state; (2) the degree of logical relevance between the proffered explanation and the case to be tried in terms of the charged offense, the nature of the evidence to be adduced, and the potential punishment; (3) the prosecutor's demeanor or statements during

voir dire; (4) the demeanor of the excluded venireperson; (5) the court's past experiences with the prosecutor; and (6) other objective factors bearing on the state's motive to discriminate, such as the conditions prevailing in the community and the race of the defendant, the victim, and the material witnesses. *Id.* at 940.

Even if the prosecutor's explanation results in the disproportionate removal of minority venirepersons, disparate impact alone will not convert a facially race-neutral explanation into a *per se* violation of equal protection. *State v. Parker*, 836 S.W.2d 930, 934 (Mo. banc 1992); *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 1869 (1991). Equal protection analysis turns on the intended consequences of government classifications; "[u]nless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality." *Hernandez*, 500 U.S. at 362.

Because much of the determination, by necessity, turns upon evaluation of intangibles such as credibility and demeanor, trial judges are vested with considerable discretion in determining whether the defendant established purposeful discrimination. *Parker*, 836 S.W.2d at 934; *Hernandez*, 111 S.Ct. at 1869. Facts or circumstances that detract or lend credence to the state's explanations are relevant. *State v. Livingston*, 220 S.W.3d 783, 787 (Mo. App. W.D. 2007) (en banc).

B. Racial confrontation during voir dire and related *Batson* colloquy

During voir dire, defense counsel polled the jury on who believed the defendant was innocent, who believed he was guilty, and who was neutral at the outset of the trial. After a lengthy discussion of the presumption of innocence, he re-polled to find if anyone still maintained they would start from a position of neutrality. (Tr. 145).

Venireperson Arnold held to this position and was asked to elaborate; he gave the following explanation:

> 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.
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> [DEFENSE COUNSEL]: All right.
>
> VENIREPERSON ARNOLD: However, I personally don't believe there's evidence backing that up. There is no weapon, there is no –
>
> [DEFENSE COUNSEL]: You don't know. We haven't gotten into the evidence yet.
>
> VENIREPERSON ARNOLD: Well, she's saying there's only going to be speaking. To me, there's not enough evidence to back that up. On one

side, he's guilty. On the other side, all that stuff that we've discussed, he's not guilty. So I'm neutral.

(Tr. 146).

At that point, defense counsel stated:

> And I don't want to open up a can of worms the Judge doesn't want to open up at ten to five with a few things said there. But does anyone share any of those sentiments, or is everyone able to do what the Judge is asking of them and required in the instructions and presume that Roscoe is innocent because you haven't heard any evidence yet? Is everyone able to do that? All right. Thank you.

(Tr. 146).

The prosecutor moved to strike Venireperson Arnold for cause, and the motion was sustained without objection. (Tr. 154).

After the conclusion of peremptory strikes, Defendant made a *Batson* motion as to Venireperson Collins and stated the following:

> . . . The State is moving to strike Ms. Collins, Juror 677, on page four, your Honor.
>
> THE COURT: Okay.
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> [DEFENSE COUNSEL]: 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 [sic] 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.

[DEFENSE COUNSEL]: 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.

> [PROSECUTOR]: I would agree most of the courtroom gasped. There was somebody 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.**

(Tr. 164-166) (emphasis added).

The Court asked if there was anything further, and defense counsel stated, "No, your Honor, that was is it [sic]." (Tr. 166).

C. *Batson* analysis

The purpose of peremptory strikes is to "assure the parties that the jurors before whom they will try the case will decide on the basis of the evidence placed before them, and not otherwise[.]" *Swain v. Alabama*, 380 U.S. 202, 219 (1965); 19 Mo. Prac., Criminal Practice & Procedure § 21.11 (3d ed. 2013). Prosecutors may still use horse sense and play hunches, so long as the factors they rely on are racially neutral. *State v. Kempker*, 824 S.W.2d 909, 911 (Mo. banc 1992).

Here, the prosecutor wanted jurors who would try the case and "decide on the basis of the evidence placed before them, and not otherwise[.]" *Swain*,

380 U.S. at 219. Considered in the context of the racial confrontation that had just made a "huge" impact on the courtroom atmosphere, she desired jurors that would take a race-neutral approach, and was concerned about potential jurors who affirmatively asserted, in violation of courtroom decorum, that they desired to "open that can" of worms based upon race. The trial judge, who had observed first-hand the incident which provoked the breach of decorum and the outburst from the venireperson(s), found this explanation credible and, in context, race-neutral.

The trial judge had the opportunity to observe both the demeanor of the prosecutor and the demeanor of the venireperson against whom a peremptory strike was exercised, and to factor in any previous experience with the prosecutor in question. *See, Hernandez*, 500 U.S. at 365 ("the best evidence often will be the demeanor of the attorney who exercises the challenge"); *Snyder*, 552 U.S. at 477 ("race-neutral reasons for peremptory challenges often invoke a juror's demeanor" so "the trial court's firsthand observations" are "of even greater importance" as to "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor").

This Court is not in a position, based upon a cold record, to discount the prosecutor's reasons as pretextual. The U.S. Supreme Court has recognized that "these determinations of credibility and demeanor lie peculiarly within a

trial judge's province" and that "in the absence of exceptional circumstances," it "would defer to" the trial court. *Snyder*, 552 U.S. at 477 (internal quotation marks and citations omitted).

The trial court was in the best position to evaluate the prosecutor's stated motivation in the entire context of courtroom events. Even if the outburst and statement did not rise to the level that would justify a challenge for cause, the prosecutor's horse sense may reasonably have convinced her that the venireperson had been more motivated to "open that can" of worms and infect her view of the evidence with an emotional lens than the rest of the panel, particularly since the outburst occurred after defense counsel had just said he did not want to open such a can.

While the prosecutor's explanation mentioned race, this does not preclude it from being race-neutral so long as it was related to a concern for a fair trial in which the evidence was viewed through a race-neutral lens, and the prosecutor would apply the same standards to members of all races. *See, Hernandez, supra*. Here, the prosecutor struck the white venireperson who made the initially objectionable remarks which provoked the outburst (Arnold); struck every person in the row involved in the outburst that she could, either through a challenge for cause or a peremptory strike with the exception of the venireperson she knew the defense would strike; and struck a similarly situated white venireperson (Hosie). In short, she ensured that

every venireperson, regardless of race, who might have been involved in the incident on either side would be eliminated from the jury. This supports the trial court's finding that the prosecutor's explanation was credible and, in context, race-neutral.

Defendant did not meet his burden under the *Batson* framework. He initially failed to identify the race of the venireperson against whom the strike was offered[7] and jumped immediately to the third step of offering

[7] While this defect dropped out of the case once the State offered an explanation, the original record is sparse at best on this issue. Defendant seemed to assume that Venireperson Collins is African-American, but his objection did not identify the protected class to which the venireperson ostensibly belonged. The prosecutor's explanation references two different ethnic groups and two venirepersons from the row involved in the outburst, without specifically stating whether Venireperson Collins was of "Mexican" or "African-American" descent, or both. There was no reference to the alleged racial identity of the alleged similarly situated venirepersons offered to preemptively rebut an explanation which the prosecutor never offered (venirepersons who spoke only when asked about their jobs), of Venireperson Arnold, or of the remainder of the row who were stricken by either party, and there is no data on the racial composition of the venire as a whole, of the jury

similarly situated venirepersons for an anticipated explanation that the prosecutor never made (i.e., those who had answered only questions about their employment). Once the prosecutor explained her reasoning, and differentiated between those venirepersons who gasped appropriately at the

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which served, or of the other venirepersons against whom the prosecutor offered peremptory strikes. To correct these omissions, the parties have stipulated for purposes of appeal that Venireperson Collins declined to state her race but is African-American, and that Venireperson Hosie and Venireperson Arnold are white. Stipulation at ¶¶ 1-3. The parties have stipulated that the prosecutor exercised peremptory strikes on three white venirepersons rather than on another African-American female who served on the jury, and that the alternate was an African-American male. Stipulation at ¶¶ 4, 6-7. The parties have stipulated that the defense exercised all of its peremptory strikes against white venirepersons, including Venireperson Knight. Stipulation at ¶ 5. The parties have further stipulated for purposes of this appeal that the jury consisted of 10 whites, 1 African-American, and one juror who declined to state his race, and that the alternate was an African-American. Stipulation at ¶¶ 6-7. Finally, the parties have further stipulated that no venirepersons from the row occupied by Venirepersons Collins and Hosie served on the jury. Stipulation at ¶ 9.

racial remarks of Venireperson Arnold (actions which did not cause her concern), and those involved in the outburst who wanted to "open that can" of race-based worms, the defense offered no similarly situated white venirepersons who were not stricken, and no argument for pretext beyond the concern that he could not be sure the person making the outburst was Venireperson Collins. When the prosecutor explained that she attempted to strike every person from the row who could have been responsible for the outburst, with the exception of a venireperson she was confident the defense would strike, the defense declined to make any further argument on the issue of pretext.

While the Equal Protection Clause "forbids the prosecutor to challenge potential jurors **solely** on account of their 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[,]"[8] here the prosecutor struck the venireperson and other members of her row not "solely" on the basis of race, but on the basis of an outburst suggesting the potential juror(s) wanted to "open that can" of race-based worms and a concern that the poisoned atmosphere of the courtroom might color or distract the venireperson's view of the evidence. The concern was not with black jurors "as a group" but with a

[8] *Batson*, 476 U.S. at 89 (emphasis added).

particular outburst that the prosecutor's "horse sense" feared might reflect a preventable bias, precisely the kind of concern peremptory strikes are designed for, and the trial court found that the explanation was not "racially motivated." *See*, *State v. Bateman*, 318 S.W.3d 681, 689 (Mo. banc 2010). Other black jurors who were not part of the row from which the outburst came remained on the panel.

Here, there was no race-based **assumption** of a racial group characteristic or voting tendency; rather, the justification offered was based on a specific outburst and limited to the pool of possible participant(s) in that outburst, regardless of race. *See*, *Batson*, 476 U.S. at 89. The challenged strike was attributed to behavior and demeanor during *voir dire*.

Indeed, the prosecutor exercised three peremptory strikes against white venirepersons (including one who was similarly situated) and declined to strike an African-American female who served on the panel and an African-American male who served as an alternate. Stipulation at ¶¶ 4, 6-7. These facts, combined with the trial court's unique opportunity to assess the demeanor of the prosecutor, the demeanor of the challenged venireperson, and the atmosphere of the courtroom after the outcry, support the trial court's ruling that the prosecutor did not engage in purposeful discrimination.

In *Hernandez v. New York*, *supra*, the United States Supreme Court held that a prosecutor offered a race-neutral explanation when he struck two Spanish-speaking, Hispanic venirepersons because he feared they may not defer to the official translation of Spanish-language testimony; the Court upheld the trial court's ruling despite defense arguments that in New York, Spanish-language ability could serve as a proxy for ethnicity or race and that the reason would disproportionately impact Latinos. *Hernandez*, 500 U.S. at 357-361.

"As explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals." *Id.* at 361.

> The prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose **conduct during *voir dire*** would persuade him that they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos. While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause.

Id. (emphasis added).

In *Hernandez*, the prosecutor cited specific responses and the demeanor of the stricken venirepersons during *voir dire*, which caused him to doubt their ability to defer to the official translation of Spanish-language testimony. *Id*. at 360. Because the reason for the strikes was found credible and was based on "conduct during *voir dire*," the trial court's finding of no prosecutorial purpose to discriminate on race or ethnicity was not clearly erroneous. *Id*.

"The trial court took a permissible view of the evidence in crediting the prosecutor's explanation." *Id*. at 369. "Apart from the prosecutor's demeanor, which of course we have no opportunity to review, the court could have relied on the facts that the prosecutor defended his use of peremptory challenges without being asked to do so by the judge, that he did not know which jurors were Latinos, and that the ethnicity of the victims and prosecution witnesses tended to undercut any motive to exclude Latinos from the jury." *Id*. at 369-370. Nor were all of these facts necessary. "***Any*** of these factors could be taken as evidence of the prosecutor's sincerity." *Id*. at 370 (emphasis added).[9]

[9] Of interest in light of the issue raised by Defendant in the Application for Transfer, the United States Supreme Court did not deem it necessary to engage in a dual-motivation or mixed-motive analysis in *Hernandez*, nor did

Similarly, in this case the prosecutor's articulated basis divided jurors into two classes: those whose "conduct during *voir dire*" reflected a desire to "open" a race-based "can" of worms so strong that it manifested itself in a spontaneous outburst in breach of courtroom decorum, and those who reacted with appropriate shock and dismay but did not express an affirmative desire to inject race into the case or to violate courtroom norms by participating in the outburst. *See*, *id*. The stricken venirepersons from the row from which the outburst came were not limited to African-Americans, and included a similarly situated white venireperson (Hosie).

Moreover, as in *Hernandez*, the ethnicity of the victims and key witnesses—who were minorities living on the margins of society that would hardly benefit from a racially-biased jury—were independent factors which,

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it deem the fact that it "may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis" to require it to find that Spanish-language proficiency in that case was a race-based factor which prevented it from judging the ultimately race-neutral reason given by the prosecutor, which was in essence "Spanish-language proficiency plus potential inability to defer to interpreter." *See*, *id*. at 371. Rather, the stated reason was analyzed as a whole.

in addition to the prosecutor's demeanor, "could be taken as evidence of the prosecutor's sincerity." *Id*.

Even if the classification had resulted in a disproportionate impact upon minority venirepersons, there would have been no *per se* violation of the Equal Protection Clause. *Id*. Rather, the prosecutor cited a specific response to events during *voir dire* and the demeanor of the row of persons in which the strikes were exercised. *Id*. Among other reasons, "demeanor and attitude are proper explanations for exercising a peremptory challenge." *State v. Brown*, 998 S.W.2d 531, 546 (Mo. banc 1999); *State v. Miller*, 162 S.W.3d 7, 16 (Mo. App. E.D. 2005) (also citing inattentiveness).

The trial court's finding that the prosecutor's explanation was based on the desire for a race-neutral decision based on the evidence, and not on racial animus--when viewed in the light of specific events and conduct which occurred during *voir dire*, the trial judge's ability to observe the resulting impact on the courtroom atmosphere, and the trial judge's unique ability to observe the demeanor of both the prosecutor and the challenged venireperson--is not clearly erroneous. *See also, State v. Rollins*, 321 S.W.3d 353, 368 (Mo. App. W.D. 2010) (prosecutor may reasonably have believed that venireperson's previous personal experience with discrimination by a police officer would have made him unduly sympathetic to defense). As in *Rollins*, "[b]ecause the legitimacy of the State's explanation is a subjective exercise,"

this appellate court should place "great reliance" on the trial court's judgment and "accord great deference on appeal to the trial court's decision as to whether the State exhibited discriminatory intent." *Id.* at 365. *See also*, *Hernandez*, 500 U.S. at 365.

This is particularly true where the Victim and eyewitnesses were members of a marginalized minority group of non-English speaking Mexican immigrants, and the State clearly had no interest in a racially-biased jury. *See*, *State v. Parker*, 836 S.W.2d at 940 (race of victim and material witnesses factor to be included in the analysis); *Hernandez*, 500 U.S. at 370. The State struck similarly situated white venirepersons (Arnold and Hosie) who either participated or may have participated in the highly-charged exchange, and the entire row involved in the disturbance was eliminated from the jury. *Id.*

Far from seeking to discriminate, the prosecutor sought to "assure the parties that the jurors before whom they will try the case will decide on the basis of the evidence placed before them, and not otherwise[.]" *Swain v. Alabama*, 380 U.S. at 219; 19 Mo. Prac., Criminal Practice & Procedure § 21.11.

Because the trial court's factual finding is not clearly erroneous, Defendant's first point should be rejected.

D. In the alternative, if this Court holds that there was a mixed motive, dual-motivation analysis applies under 8th Circuit precedent and produces the same result.

The same result would obtain if this Court were, *arguendo*, to view this as a "dual motivation" or "mixed-motive" situation in which both a racial motivation and a race-neutral reason were "inherent" in the prosecutor's explanation. "If 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." *U.S. v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995) (quoting *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995) (internal citation omitted). *See also*, *Howard v. Senkowski*, 986 F.2d 24, 26-30 (2nd Cir. 1993); *U.S. v. Tokars*, 95 F.3d 1520, 1533-1534 (11th Cir. 1996); *Wallace v. Morrison*, 87 F.3d 1271 (11th Cir. 1996); *Gattis v. Snyder*, 278 F.3d 222 (3rd Cir. 2002).

In *Weaver v. Bowersox*, 241 F.3d 1024 (8th Cir. 2001), the Eighth Circuit found that inclusion in a prosecutor's list of ostensibly race-neutral reasons of a concern that a venireperson would have difficulty giving "the death penalty, *particularly to a fellow black person*" did not taint the factual findings on the remaining explanations, which were based "upon the way she behaved and

answered questions, that is, hesitation, lack of eye contact, flippancy and other intangibles observed only by those in the courtroom." *Id.* at 1031-1032. Because the Missouri Supreme Court had found that the peremptory strike "was based" upon the several race-neutral reasons given by the prosecutor, there was the equivalent of a finding that the prosecutor "would have exercised the strike even if he hadn't expressed a facially discriminatory motive." *Id.* at 1032. This met the 8th Circuit test for "dual motivation analysis" recognized in *Darden*. *Id.*

In *Darden*, the 8th Circuit "rejected a *Batson* claim where the prosecutor gave several race-neutral reasons for striking a venireperson before adding one reason that was discriminatory." *Weaver*, 241 F.3d at 1032; *Darden*, 70 F.3d at 1531. The trial court had found that a prosecutor's statement "regarding the tendency of young black women to sympathize with drug dealers" was "not racially neutral but that the other reasons were, and that those other reasons formed the basis for the strike." *Darden*, 70 F.3d at 1531. In *Weaver*, the 8th Circuit said that in *Darden*, the trial court "did not expressly find that the prosecutor's peremptory strike was based solely on the race-neutral reasons, but said 'the other reasons you expressed give cause that are … racially neutral-the other reasons you stated….For that reason I'm allowing the strike….[T]he other reasons you gave give the basis for being

a strike." *Weaver*, 241 F.3d at 1032 (quoting *Darden*, 70 F.3d at 1531).[10] *Darden* held that the court's decision "to allow the strike on the basis of the several racially neutral reasons was equivalent to a finding that the prosecutor would have exercised the strike even without the one non-racially neutral motive." *Darden*, 70 F.3d at 1531.

Here, dual motivation is not at issue because in context the prosecutor's explanation was that she wanted jurors who would not inject race into the trial with outbursts, and she struck both white and black venirepersons involved or potentially involved in outbursts over racial issues but did not

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[10] The prosecutor in *Darden* also struck the venireperson because she "said nothing in voir dire" and cited his experience in picking more than 200 juries in opining that people who don't answer questions "are either naïve or withholding information or have virtually no experience with the criminal justice system" and are "a lot more naïve and a lot less knowledgeable about the events and the happenings on the street involving street crimes which is what we're talking about right here." *Id.* at 1530. The prosecutor also cited the venireperson's youth, the fact that she was single with a child, and that she was a renter. *Id.* The trial court noted that the prosecutor struck two other jurors who said virtually nothing during voir dire, both white. *Id.* at 1531.

strike those who gasped appropriately but conformed their conduct to courtroom decorum. Moreover, the reference to not wanting either "a person of Mexican descent" or "a person of African-American descent" to begin the trial upset about race may reasonably have been interpreted by the court as suggesting a desire for fairness and the perception of fairness for both the Mexican victim and the African-American defendant (particularly with the opportunity to observe demeanor and any gestures that may have accompanied the statement).

However, assuming *arguendo*, that this Court were to construe the explanation as containing both an impermissible racial component and a permissible race-neutral reason, the trial court specifically ruled that the prosecutor's explanation was "race-neutral" which, under prevailing 8th Circuit precedent, is "equivalent to a finding that the prosecutor would have exercised the strike even without the one non-racially neutral motive." *Darden*, 70 F.3d at 1531; *Weaver,* 241 F.3d at 1031-1032.[11]

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[11] There is admittedly both a Circuit split and a difference among state courts about whether mixed-motive analysis used in other Equal Protection Clause claims applies to *Batson* claims (as Defendant's cases illustrate). Though a dissent from the denial of certiorari urged the U.S. Supreme Court to take and resolve the issue as early as 1989, *see Wilkerson v. Texas*, 493 U.S. 924

(1989) (Marshall, J., dissenting), the Court has declined to do so in the more than 26 years since. In *Snyder v. Louisiana*, *supra*, decided in 2008, the Court stated:

> In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative.…We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. For present purposes it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution.

Snyder, 552 U.S. at 485 (internal citation omitted). *See also, Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 247 (1977) (mixed-motive in failure to rehire, school board may show by a preponderance of the evidence that it would have reached the same decision in the absence of the exercise of free-speech rights); *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) (mixed-motive in denial of rezoning, plaintiffs failed to carry burden of proving racially discriminatory intent or purpose was a motivating factor in the rezoning decision).

Because the trial court finding that the State's motivation was race-neutral, and therefore no purposeful discrimination was present, is not clearly erroneous, Defendant's first point should be rejected even if this Court believes that a dual motivation was present.

II.

Even if, *arguendo*, the trial court should have permitted the defense's closing argument to reference "dire consequences" should the jury return a guilty verdict, Defendant was not prejudiced where Defendant was permitted to argue that "there's a lot at stake here[,]" "[t]here's too much at stake to come back guilty on 50/50," "[r]ight now another person's future hangs in the balance, Roscoe Meeks[,]" and "I expect some emotion for [Defendant] as well as for [Victim]." Moreover, such an argument would not have altered the jury's assessment of the testimony of Victim and another eyewitness identifying Defendant as the shooter.

Defendant argues that the trial court abused its discretion by sustaining the State's objection to "the comment on consequences" during the following portion of defense counsel's closing argument, presented here with additional surrounding context:

> I expect some emotion for him [Defendant], as well as for Mario.
>
> ***
>
> 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.

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

THE COURT: The objection's sustained.

[DEFENSE COUNSEL]: They're asking you to convict him of a criminal offense based on that evidence. And there's a lot at stake here.

(Tr. 318).

The prosecutor objected to the latter sentence, but the court overruled the objection. (Tr. 319).

A. Standard of review

"It is well established that the trial court has considerable discretion in regulating the content of closing argument." *State v. Jones*, 398 S.W.3d 518, 522 (Mo. App. E.D. 2013). "The trial court has the power to confine the subject matter of closing argument to relevant issues based upon the evidence presented at trial." *Id.*; *State v. Cloninger*, 760 S.W.2d 550, 552 (Mo. App. S.D. 1988). An appellate court reviews a trial court's judgment regulating the content of closing argument for an abuse of the trial court's discretion. *Jones*, 398 S.W.3d at 521. Even if the appellate court finds the presence of error, it will not reverse the trial court's judgment unless it finds that the error prejudiced the defendant in such a manner that a reasonable probability exists that the error affected the outcome at trial. *Id.*

B. No prejudice where Defendant was repeatedly allowed to make essentially the same point, and the argument would not have impacted on the credibility determination of the jury

In *Jones*, *supra*, this Court held that while it was error to prohibit the defendant from mentioning the word, "liberty" in his closing argument, the "importance of this principle" that it was the jury's duty to carefully weigh the evidence of a defendant's guilt given the significant impact a criminal conviction would have upon the defendant "was reflected in the trial court's decision to allow [the defendant] to argue that the jury's decision would have significant consequences for [the defendant]." *Id.*, 398 S.W.3d at 523. The Court held that the jury had been presented two significantly different versions of the events portrayed, and believed the testimony of the victim over that of the defendant. *Id.* In light of this, the Court concluded, "We are not persuaded that the jury would likely have altered this factual determination had [the defendant] been allowed to argue in closing argument that his liberty was at stake." *Id.*

The Court further held that the defendant had not been prejudiced because while he had been denied the right to use the word "liberty," the trial court had permitted him to emphasize to the jury that its decision would have significant consequences for him. *Id.* The terms he was permitted to use

"aptly describe[d] for the jury the impact their verdict could have upon" the defendant. *Id*.

"Given the clear determination of witness credibility by the jury, and the language [the defendant] was permitted to use during closing argument," the *Jones* Court rejected "any suggestion that the jury would have acquitted" the defendant "but for the trial court's prohibition of the use of the word 'liberty' during" the defendant's closing argument. *Id*. at 523-524.

The same two bases for rejecting the defendant's claim of prejudice in *Jones* apply here. First, the case turned on the credibility of two eyewitnesses. Jose Flores testified that he was confident of his identifications of Defendant as the shooter in a photo lineup, in a physical lineup, and at trial. Victim testified that he was 100% certain that Defendant was the shooter, and had previously identified Defendant in a physical lineup in which Defendant was placed in a different position than he was in at the time Flores identified him. There is no reason whatsoever to believe that the jury would have changed its assessment of the credibility of these identifications had the objection to Defendant's use of the words, "dire consequences" in his closing argument not been sustained. *See*, *id*.

This is especially true since, as in *Jones*, Defendant made essentially the same point multiple times. Defendant was permitted to argue that "there's a lot at stake here[,]" "[t]here's too much at stake to come back guilty

on 50/50," "[r]ight now another person's future hangs in the balance, Roscoe Meeks[,]" and "I expect some emotion for [Defendant] as well as for [Victim]." (Tr. 318-319).

There was no objection to Defendant's argument that, "Right now another person's future hangs in the balance, Roscoe Meeks." (Tr. 318). Nor was there any objection to defense counsel's statement that, "I expect some emotion for him [Defendant], as well as for Mario." (Tr. 318). There was no objection to defense counsel's argument that, "There's too much at stake here to come back guilty on 50/50." (Tr. 306).

The trial court overruled the objection to Defendant's argument that, "They're asking you to convict him of a criminal offense based on that evidence. And there's a lot at stake here." (Tr. 318-319).

Moreover, defense counsel was permitted to emphasize the consequences for Defendant to the jury during *voir dire* as follows:

> I mean, a guy's freedom is at stake. Everyone knows the gravity of the situation. We're not arguing over money here. This is a man's liberty. They're asking you to convict him of a crime with huge impacts.

(Tr. 146-147).

Indeed, everyone did know "the gravity of the situation" and that "a man's liberty" was "at stake." (Tr. 146-147). The jury convicted Defendant anyway, based on its assessment of the evidence of guilt.

Defendant's second point should be rejected.

III.

The State concurs that there was plain error in the written judgment and sentence on the armed criminal action count and that the clerical error should be corrected to conform to the oral pronouncement of sentence but believes this Court may order the correction of the sentence through a Rule 30.23 order and that a remand is unnecessary.

Defendant's final point, which was not before the Court of Appeals, contends that this Court should remand for a *nunc pro tunc* order correcting the written judgment and sentence on Count II (armed criminal action) to conform to the oral pronouncement of sentence. The oral pronouncement provided for 10 years of imprisonment on this count; the written sentence and judgment provided for 20 years.

Defendant is correct in asserting that the oral pronouncement of sentence controls over the written judgment. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 516 (Mo. banc 2010). Under Rule 30.20, this Court can reach this issue under plain-error review, and under Rule 30.23, this Court can and should order the correction of Defendant's sentence to conform to the trial court's oral pronouncement of sentence on Count II. *State v. Harris*, 364 S.W.3d 790, 796-797 (Mo. App. W.D. 2012).

CONCLUSION

Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 9,514 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 15TH day of January, 2016, to:

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