IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC90528
	)	
TYRONE BATEMAN	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE JOAN MORIARTY, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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In the Circuit Court of the City of St. Louis, Cause No. 22051-CR1429, the State of Missouri charged that Appellant, Tyrone Bateman, committed the crimes of Count I of murder in the first degree (Section 565.020) and Count II of armed criminal action (Section 571.015). A jury found Appellant guilty of both counts. On June 29, 2007, the trial court sentenced Appellant to a term of life imprisonment without the possibility of parole on Count I, and a consecutive term of ten years of imprisonment on Count II. He filed a timely notice of appeal of this conviction, sentence, and judgment on July 9, 2007.

The Missouri Court of Appeals, Eastern District, issued an opinion on February 24, 2009 reversing and remanding for a new trial, with a dissenting opinion. The State of Missouri filed a motion for rehearing *en banc* on March 11, 2009. The Court of Appeals granted the State's motion for rehearing on April 15, 2009, and reheard the case *en banc* on May 12, 2009. The Court of Appeals then issued its opinion affirming the convictions on September 1, 2009, with two dissenting opinions. This Court transferred the case on March 2, 2010 after application by Appellant. Jurisdiction lies in the Supreme Court of Missouri. Mo. Const. Art. V, Sec. 10; Rule 83.02.

STATEMENT OF FACTS

Miles Bateman and Tyrone Bateman (Appellant) were cousins. Tr. 280, 281.[1] They both lived on the 5500 block of Alcott in the City of St. Louis. Tr. 310-311, 473. They frequently went out together. Tr. 371, 464. They were close friends. Tr. 346. On March 21, 2005, Tyrone shot Miles after an argument. Tr. 284-289. Miles died less than a month later on April 12, 2005. Tr. 276.

The argument started as Miles was fixing his van's flat tire in front of his mother's house. Tr. 282. Tyrone and a mutual friend named Tony Dickerson drove up. Tr. 282, 464. Miles had Tyrone's shoes and was going to keep them until Tyrone paid him $300. Tr. 282, 283, 363, 372, 442. Also, Tyrone had returned Miles' van the night before with no gas. Tr. 372. Tyrone wanted his shoes back. Tr. 364. Tony said, "You all need to talk." Tr. 376. Miles responded, "I'm not talking to him." Tr. 376. Eventually the two cousins started arguing.

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[1] The victim and many of the witnesses in this case have the same last name. Accordingly, Appellant will refer to them by their first names for clarity. No disrespect is intended. Also, Appellant will refer to himself by his first name, for clarity, or as Appellant. All citations to Missouri Revised Statutes will be to RSMo. 2000 unless otherwise indicated. Also, in citations to the Record on Appeal, Appellant will refer to the Legal File in this case as "L.F." and the transcript as "Tr."

Tr. 282, 376. Tyrone got out of his car, and Miles said if Tyrone came any closer, he would hit him with the tire iron he was holding. Tr. 365. Then, Tyrone either pushed, grabbed, punched, or walked up to Miles. Tr. 283, 366, 377, 443.

Miles struck Tyrone on the head with the tire iron. Tr. 292, 364, 443-444. Tyrone was bleeding. Tr. 292, 308, 340, 371. It was as if someone had poured a cup of blood over Tyrone's head. Tr. 448, 464. Miles struck him on the head again. Tr. 444. He struck Tyrone a third time on the shoulder. Tr. 444. Then, Miles put his arm around Tyrone's neck and choked him. Tr. 284, 374. He also choked Tyrone with the tire iron. Tr. 443-444. Blood dripped from Tyrone's head and mouth. Tr. 340, 444-445. Miles' hands were covered in blood. Tr. 374.

Linda Bateman, Miles' mother, walked out onto the front porch and yelled at Tyrone and Miles to stop fighting. Tr. 285. Tyrone was on the ground in a headlock. Tr. 319, 444-445. Tyrone yelled that he was going to hurt Miles when he let him up. Tr. 308, 366, 428. Linda ordered Miles into the house. Tr. 285, 367. Miles went inside. Tr. 369.

Tyrone staggered back to his car, peeled out in reverse towards his house at 5508 Alcott, went inside, and stormed out with a shotgun. Tr. 286, 287, 309-310, 319, 385, 446. He got back into his car, drove up the block, kicked down the front door of Miles' mother's house at 5538 Alcott, and shot Miles. Tr. 279, 288, 325, 429. Tyrone was gone long enough for Miles to wash his face. Tr. 430.

Tyrone was heard yelling as he drove around the block, "I got him." Tr. 463. On April 28, 2005, after Miles died, Tyrone was forcibly taken into custody by police while trying to hide in a closet. Tr. 398, 403.

The State charged Tyrone with the crimes of murder in the first degree (Section 565.020) and armed criminal action (Section 571.015). L.F. 9-10. His trial was held on May 21-24, 2007. Tr. 2-4. The State argued that Tyrone knowingly caused Miles' death after deliberation or cool reflection. Tr. 249, 518. The defense acknowledged that Tyrone caused his cousin's death by shooting him, but argued that he was not guilty of first-degree murder. Tr. 186, 225. In closing argument, the defense argued that the evidence supported Tyrone's conviction of the lesser-included offense of voluntary manslaughter. Tr. 507-514.

At trial, when the State made its peremptory strikes, defense counsel challenged certain strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986). The State initially attempted to strike venirepersons Jallow, Morris, Harris, and Johnson, who were all African-Americans. Tr. 223-225. The defense challenged the strike of Jallow, a black female, on the basis of race and the trial court sustained that objection. Tr. 228. In her place, the State then attempted to strike Thompson, an African-American man. Tr. 229. Defense counsel challenged that strike as well. Tr. 229. The State's reason for striking Thompson was that Thompson had asked the prosecutor if there were different degrees of murder. Tr. 230. The prosecutor

stated, "The reason I strike [sic] him for that reason is because I take that initiative that he showed as, you know maybe a sign that he has a more lenient bend to his personal disposition in this matter or in criminal matters." Tr. 230. Defense counsel argued that was a misstatement of what Mr. Thompson had said. Tr. 230. The exchange with Thompson was as follows:

> **State:** Juror 217, can you follow the court's instruction even if it differs from your own personal thoughts or beliefs on the issue?
>
> **Venireman Thompson:** Juror 217. I believe I can. But one question, when you say degree, what do you mean by that, First Degree, Second Degree?
>
> **State:** That will be entailed in the instruction that the Court gives you that there are elements that go into making a homicide a Murder in the First Degree. There are certain requirements, certain things that need to be sustained before it's Murder in the First Degree or to make it Murder in the First Degree.
>
> **Venireman Thompson:** I mean, is that like more of a harsher sentence?
>
> **State:** Murder in the First Degree is a higher charge, per se, than Murder in the Second Degree or even manslaughter. There's kind of a ranging of them. Murder in the First Degree in some instances carries the death penalty. It does not in this case. Any of those questions that you have as far as degrees go, the Court will give you an instruction on.

Let me ask you this: If your personal belief is one thing but the Court's instruction is another, will you be able to follow the Court's instruction and apply it to the facts of the case?

Venireman Thompson: Yes.

Tr. 169-171. Defense counsel pointed out that a white juror, Mr. Brindell, had volunteered a question about punishment. Tr. 230. He asked:

Yesterday we were talking. And I'm not talking about presumption of innocence or anything like that. But the State is not asking for the death penalty or it's been ruled out completely. And I'm trying, in my mind, to justify why if we determine that there was guilty in this case that we wouldn't be allowed to consider all possible punishment. Not that we would necessarily go for that, but why would we eliminate some of the punishment possibilities from the deliberation?

Tr. 145-146. The State did not attempt to strike Brindell. Tr. 231, 224-225. The court allowed the strike of venireman Thompson. Tr. 231.

While deliberating, the jury asked the court to define the term, "cool reflection" used in the first-degree murder verdict director. Tr. 522; L.F. 21. They also wanted to know what "sudden passion" meant. Tr. 522; L.F. 21. The court referred the jury back to the instructions without objection. Tr. 522.

The jury returned a verdict of guilty for murder in the first degree and armed criminal action. L.F. 21. The court sentenced Tyrone to terms of life imprisonment without the possibility of parole for murder, and a consecutive term of ten years of imprisonment for armed criminal action. L.F. 47; Tr. 528.

This appeal followed. L.F. 54.

POINTS RELIED ON

I - The trial court erred in denying Tyrone's motion for judgment of acquittal at the close of all the evidence, and in imposing judgment and sentence, because the evidence was insufficient as a matter of law to support his conviction for the crime of murder in the first degree. There was no reasonable inference that Tyrone coolly reflected before shooting his cousin after a fight on the street during which the victim beat Tyrone on the head with a tire iron. The evidence was that Tyrone was injured and impassioned enough to break down a door an instant before shooting his cousin, after having driven a few houses down the street and retrieved a shotgun. The mere passage of time does not overcome the strong evidence in this case that Tyrone acted under the influence of anger or passion, and did not coolly reflect. A conviction based upon insufficient evidence violates Tyrone's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

State v. Roberts, 948 S.W.2d 577 (Mo. banc 1997);

State v. Miller, 220 S.W.3d 862 (Mo. App. W.D. 2007)**;**

Section 565.002(3);

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

Mo. Const. Art. I, Sec. 10.

II – The trial court clearly erred in overruling Tyrone's objection to the prosecutor's peremptory strike of African-American venireperson Thompson, violating his and the defendant'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, Sections 2 and 18(a) of the Missouri Constitution, in that the Court was acting under a misunderstanding of the *Batson* procedure, and thus clearly erred in approving the State's strike of Thompson. The State's reason for striking Thompson—that he had taken the initiative to ask a question about the degrees of murder and the difference in punishment—was a pretext for discrimination, as evidenced by the prosecutor's mischaracterization of what Thompson said and the prosecutor's failure to strike a similarly-situated white venireperson.

Snyder v. Louisiana, 552 U.S. 472 (2008);

State v. McFadden, 191 S.W.3d 648 (Mo. banc 2006);

State v. Parker, 836 S.W.2d 930 (Mo. banc 1992);

State v. Marlowe, 89 S.W.3d 464 (Mo. banc 2002);

U.S. Const. Amends. VI and XIV;

Mo. Const. Art. I, Secs. 2 and 18(a).

ARGUMENT

I - The trial court erred in denying Tyrone's motion for judgment of acquittal at the close of all the evidence, and in imposing judgment and sentence, because the evidence was insufficient as a matter of law to support his conviction for the crime of murder in the first degree. There was no reasonable inference that Tyrone coolly reflected before shooting his cousin after a fight on the street during which the victim beat Tyrone on the head with a tire iron. The evidence was that Tyrone was injured and impassioned enough to break down a door an instant before shooting his cousin, after having driven a few houses down the street and retrieved a shotgun. The mere passage of time does not overcome the strong evidence in this case that Tyrone acted under the influence of anger or passion, and did not coolly reflect. A conviction based upon insufficient evidence violates Tyrone's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Preservation

At the close of the evidence, trial counsel made a motion for judgment of acquittal and argued that there was insufficient evidence to support the element of deliberation or cool reflection. Tr. 437; L.F. 19, 22. The trial court denied the

motion. *Id.* The issue was included in the timely-filed motion for judgment of acquittal notwithstanding the verdict, or in the alternative, for a new trial, though not required, and the issue is preserved for appellate review. Rule 29.11(d); *State v. Washington*, 92 S.W.3d 205, 207 (Mo. App. W.D. 2002); L.F. 46.

Standard of Review

"The state has the burden and must prove each and every element of a criminal case." *State v. Smith,* 33 S.W.3d 648, 652 (Mo. App. W.D. 2000). Review of claims challenging the sufficiency of the evidence is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). The reviewing court views the evidence in a light most favorable to the verdict, considering all favorable inferences and disregarding all evidence and inferences contrary to the verdict. *Id.*

But in judging the sufficiency of the evidence, this Court will "not supply missing evidence, or give the State the benefit of unreasonable, speculative or forced inferences." *State v. Self*, 155 S.W.3d 756, 762 (Mo. banc 2005) (citation omitted); *State v. Whalen,* 49 S.W.3d 181, 184 (Mo. banc 2001). "The inferences must be logical, reasonable and drawn from established fact." *State v. Dixon,* 70 S.W.3d 540, 544 (Mo. App. W.D. 2002).

Argument

There are three elements to the crime of murder in the first degree: "A person commits the crime of murder in the first degree if he 1) knowingly 2) causes the death of another person 3) after deliberation upon the matter." Section 565.020; *State v. O'Brien,* 857 S.W.2d 212, 217 (Mo. banc 1993). Deliberation is defined as "cool reflection for any length of time no matter how brief." Section 565.002(3); *State v. Strong*, 142 S.W.3d 702, 717 (Mo. banc 2004). "Cool reflection" is an old term used to differentiate cold-blooded, deliberate murders from other homicides. *State v. Connor*, 252 S.W. 713, 719 (Mo. 1923); *State v. Shuster*, 183 S.W. 296 (Mo. 1916). Absent evidence of deliberation, an intentional killing is second-degree murder. *State v. Cole,* 71 S.W.3d 163, 169 (Mo. banc 2002); *see* sec. 565.021.1 (crime of second degree murder). The fact that a lethal weapon was used is not conclusive on the issue of deliberation. *Cole*, 71 S.W.3d at 169.

The witnesses in this case were reasonably consistent about what happened on May 21, 2005. There was a fight (Tr. 284, 307, 364, 427, 443); Miles struck Tyrone multiple time with a tire iron and had him in a headlock (Tr. 283, 292 366, 445); and Tyrone was bleeding profusely from the head (Tr. 308, 340, 371, 444, 445, 448). From that point, the evidence was essentially presented as the State outlined it its opening statement to the jury:

> Tyrone at this time is bleeding, very upset. He's mad. He gets back in his car. It's a one-way street. Puts the car in reverse and drives – floors it and goes several houses back down to his house or where he was staying. Stays in there for a short period of time. You will hear the witnesses tell you, after a short period of time, he comes out of that house with a big, long gun, a shotgun. You will hear he gets back into the car, drives right back down Alcott. That's the street this is on. Drives right to the residence where Miles was out there working on his car. Miles is not outside.
>
> You will hear the defendant gets out of his car with the shotgun, crosses the sidewalk, comes up the steps, kicks in the door of where Miles Bateman lives and where all the other children—several of the other children live, kicks in the door and shoots.

Tr. 250-251. In sum: Tyrone is hurt and bleeding; he floors his car backwards to his house; he returns quickly; he kicks down a door; he shoots Miles. Tr. 286, 279, 287, 288, 309-310, 319, 325, 385, 429, 446. There was no evidence or reasonable inference from the State's evidence that Tyrone was anything other than deeply impassioned or angry immediately before the shooting. Anger or passion is irreconcilable with the concept of "cool reflection." Section 565.002(3).

There was insufficient evidence to support the jury's finding that there was deliberation or cool reflection in this case.

It is true that the deliberation necessary to support a conviction of first-degree murder may only be momentary. *State v. Miller*, 220 S.W.3d 862, 868 (Mo. App. W.D. 2007), *citing State v. Jones,* 955 S.W.2d 5, 12 (Mo. App. W.D. 1997). But the law is equally clear that the evidence must show "the defendant considered taking another's life in a deliberate state of mind." *Id.* "A deliberate act is a free act of the will done in furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose *and while not under the influence of violent passion suddenly aroused by some provocation.*" *Id.* (emphasis added). The evidence was that Tyrone was acting under the influence of anger or passion that was "suddenly aroused by some provocation" – being beat on the head with a tire iron. *Miller*, 220 S.W.3d at 868.

The State argued that leaving the house and returning to kick in the door meant that Tyrone calmly or coolly reflected before pulling the trigger. Tr. 506. But under these particular facts, the passage of a short amount of time does not equal proof of cool reflection beyond a reasonable doubt. The State's argument overlooks the essential element of the charged crime that Tyrone reflect in a cool and unimpassioned state of mind during that time. "Whether there was deliberation is not dependent upon the time involved in the act." *State v. Wilson*,

645 S.W.2d 372, 373 (Mo. banc 1983). Contrary to the State's argument, kicking down a door, after having been violently assaulted with a tire iron only minutes before, shows passion or anger. Tr. 288, 325; State's Exhibit 10, 12. Violent passion or anger is not cool reflection. Section 565.0002(3). To reconcile the State's argument and the objective facts of the case, Tyrone would have to be violently impassioned and coolly reflective at the same time. This is not common sense.

This Court had found that circumstantial evidence of conduct "relevant to the issue of deliberation in a first degree murder case falls into a least four broad categories." *State v. Roberts,* 948 S.W.2d 577, 589 (Mo. banc 1997). First, there may be "direct evidence that the defendant did or said certain things in advance of the act to facilitate the crime." *Id.* This is "planning evidence." *Id.* Planning evidence, in *Roberts,* was the conduct of the defendant carrying a hammer to the victim's house after promising his companions that he would "take care" of a drug debt. *Roberts*, 948 S.W.2d at 589; *see State v. Black*, 50 S.W.3d 778, 788-789 (Mo. banc 2001) (defendant followed the victim for over a mile, for nearly 10 minutes, before getting out of his car, walking over to the victim, reaching through the window, and stabbing him in the neck); *Miller*, 220 S.W.3d 862 at 864 (noting defendant hid in bushes outside house for three hours with a .38

before confronting victim). There is no planning evidence in this case. Tyrone did not bring a weapon when he stopped to talk to Miles.

To establish deliberation, there may also be, "evidence of a pre-existing relationship between the victim and the defendant prior to the murder that provides a motive for the killing." *Roberts*, 948 S.W.2d at 589. This is "bad-blood evidence." *Id.* An example of bad-blood evidence is seen in *State v. Cummings*, where the evidence showed the defendant seethed with jealousy over the victim's relationship with the defendant's boyfriend for weeks, and then methodically tied up and gagged the victim in such a way as to suffocate her almost instantly. *Cummings*, 134 S.W.3d 94, 101-102 (Mo. App. S.D. 2004). Here, Tyrone and Miles were not enemies; they were close relatives and friends in an argument. Tr. 280, 281, 346. There was no evidence that Miles and Tyrone had ever fought before or that there was any bad blood between them before this incident.

Third, to show deliberation, "there may be no direct evidence of planning, but the complicated manner in which the defendant carried out the crime shows that the murder could not have been committed as a result of a spur-of-the-moment decision to act." *Roberts*, 948 S.W.2d at 589. This is "complicated-design evidence." *Id; see State v. Futo*, 990 S.W.2d 7, 10-13 (Mo. App. E.D. 1999) (noting that defendant purchased a weapon, bought an airplane ticket from California

under an assumed name, and fabricated a story to hide the trip before killing family members in St. Louis). There is no complicated-design evidence or inference in this case.

"Fourth, there may be evidence that the defendant failed to take action that a person who did not possess a guilty mind would be expected to take." *Roberts*, 948 S.W.2d at 589. "Most often this conduct occurs after the crime is committed." *Id.* This is "failure-to-act" evidence. *Id.* Failure to act evidence is only logically relevant in cases where the defendant is disputing the element of intent however. *See State v. Taylor*, 929 S.W.2d 925, 926 (Mo. App. S.D. 1996) (intoxication, explaining failure to act, is relevant where State uses failure-to-act evidence to prove intent). The evidence was that Tyrone fled, the police arrested him about a month later, and he resisted arrest. Tr. 403. But this conduct is irrelevant to the specific element of deliberation because Tyrone did not dispute his guilt of a homicide. Tr. 253-255; 507-514; S*ee State v. Franco-Amador*, 83 S.W.3d 555, 558-59 (Mo. App. W.D. 2002) ("Flight does not establish a defendant's guilty knowledge of a particular crime in comparison to other possible charges and is alone insufficient to support a conviction").

The State will argue that cool reflection is implied because Tyrone had the "opportunity to terminate an attack after it began." *Cole*, 71 S.W.3d 169. In *Cole*, for example, the opportunity to terminate the attack was dispositive because the

defendant stabbed the victim twenty-one separate times. *Id.* In *State v. Ervin*, 979 S.W.2d 149, 159 (Mo. banc 1998), another example, the defendant struck the victim multiple times with a brick, left, and returned to hit him again. In *State v. Johnston*, 957 S.W.2d 734, 747 (Mo. banc 1997), the defendant chased the victim for a long distance before beating her, supporting the element of deliberation. But the facts of this case are unique and distinguishable from these cases that have held the mere passage of time is enough to support this element.

In this case, in contrast, the State conceded that Tyrone was bleeding and angry after having been beaten with the tire iron. Tr. 250-251. Tyrone had been beaten severely on the head, which fueled a snap or "spur–of-the-moment" decision to retrieve a weapon and shoot a single time. *Roberts*, 948 S.W.2d at 589. There was no "opportunity to terminate an attack after it began" under the facts of this particular case, since the "attack" consisted of kicking down a door and shooting once. *Cole*, 71 S.W.3d 169. Unlike in *Cole* and similar cases, there was no ongoing attack; Miles was shot once immediately upon Tyrone's arrival. The passage of time can support the element of deliberation in some cases, but not where the defendant was wounded and "under the influence of violent passion aroused by some provocation." *Miller*, 220 S.W.3d at 869.

This Court is required to take the evidence in the light most favorable to the State and to grant the State all reasonable inferences from the evidence. *State*

v. Thomas, 75 S.W.3d 788, 790 (Mo. App. E.D. 2002). And yet, the Court cannot simply disregard all inferences favorable to the defendant when they "are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them." *Id.* The element of deliberation is "forced" in this case and not a logical or reasonable extension of the undisputed evidence. *Self*, 155 S.W.3 at 702; *Dixon*, 70 S.W.3d at 544. No reasonable juror could have found from this evidence that Tyrone coolly reflected before committing this crime against his friend and family member. There was, in fact, evidence the jury did not understand the concept of "cool reflection." Tr. 522. This is not a first-degree murder case.

Since the State did not prove each element of murder in the first degree beyond a reasonable doubt, the jury could also not properly find Tyrone guilty of armed criminal action. *See State v. Krause*, 682 S.W.2d 55, 56 (Mo. App. E.D. 1984). Tyrone's conviction for armed criminal action must therefore also be reversed. A conviction for armed criminal action cannot stand unless the defendant is first found guilty beyond a reasonable doubt of the underlying offense. *State v. Carpenter*, 57 S.W.3d 405, 410 (Mo. App. S.D. 2001).

Deliberation, or cool reflection upon the matter no matter how brief, "may be inferred, but it must still be proved beyond a reasonable doubt." *Strong*, 142 S.W.3d at 717. Because the State did not adduce sufficient evidence that Tyrone

deliberated upon the matter when he caused his cousin's death, the trial court erred when it overruled his motion for judgment of acquittal, entered judgments of conviction, and sentenced him for murder in the first degree and armed criminal action, in violation of his rights to due process and to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution. Appellant's convictions must be reversed.

II – The trial court clearly erred in overruling Tyrone's objection to the prosecutor's peremptory strike of African-American venireperson Thompson, violating his and the defendant'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, Sections 2 and 18(a) of the Missouri Constitution, in that the Court was acting under a misunderstanding of the *Batson* procedure, and thus clearly erred in approving the State's strike of Thompson. The State's reason for striking Thompson—that he had taken the initiative to ask a question about the degrees of murder and the difference in punishment—was a pretext for discrimination, as evidenced by the prosecutor's mischaracterization of what Thompson said and the prosecutor's failure to strike a similarly-situated white venireperson.

Preservation

The State announced its peremptory strikes that included Thompson. Tr. 229. Defense counsel made a *Batson* objection based on race. Tr. 229. The State gave its reason for striking Thompson. Tr. 230. Defense counsel argued that the reason was pretextual because of a mischaracterization by the State about what Thompson said, and because there was a similarly-situated white juror who the State did not strike. Tr. 230-231. The court allowed the strike. Tr. 231. The issue

was included in the timely-filed motion for new trial. L.F. 45. Rule 29.11(d). The issue is preserved for appellate review.

Law and Standard of Review

Peremptory strikes are a method of rejecting prospective jurors "for real or imagined partiality." *Swain v. Alabama*, 380 U.S. 202, 220 (1965). Racially motivated strikes, however, violate a defendant's and the struck venireperson's Fourteenth Amendment equal protection rights. *Batson v. Kentucky*, 476 U.S. 86, 87 (1986). *Batson* was intended to protect both individual defendants and venirepersons from racial discrimination in the jury selection process. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). While an individual juror does not have a right to serve on a petit jury, that juror does have the right not to be excluded because of race. *Id.* at 409.

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

In the case of alleged racial discrimination in jury selection, once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a race-neutral explanation for excluding the juror. *McFadden*, 191 S.W.3d at 651. The defense must then demonstrate that the State's seemingly race-neutral explanation is pretextual, and that the true reason is race. *Id.* This can be done by showing the reasoning is fantastic or implausible, or by pointing out the existence of a similarly-situated juror of another race who was not struck. *State v. Marlowe*, 191 S.W.3d 464, 469 (Mo. banc 2007).

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

The trial court's findings after a *Batson* challenge will be set aside if they are clearly erroneous. *McFadden*, 191 S.W.3d at 651. A finding is clearly

erroneous when the reviewing court is left with the definite and firm impression that a mistake has been made. *Id.*

Discussion

The trial court invited the State to make its peremptory strikes first. Tr. 223. The State moved to strike venirepersons Jallow, Morris, Harris, and Johnson, all African-Americans. Tr. 223-225. Defense counsel challenged the strike of Jallow, an African-American woman, and the trial court did not allow that strike. Tr. 225, 228.

In ruling, however, the trial court *sua sponte* relied on the existence of a similarly-situated African-American juror. Tr. 228. But because the challenged juror was black, the existence of similarly-situated jurors of another race was actually the relevant factor. *State v. Johnson*, 207 S.W.3d 24, 35 (Mo. banc 2006) ("Evidence of purposeful discrimination is established when the stated reason for striking [a minority] venireperson applies to an otherwise-similar member of *another race* who is permitted to serve") (emphasis added). The trial court misunderstood the law. *Id.*

This misunderstanding becomes important because the State immediately attempted to strike Thompson, another African-American. Tr. 229-230. The State wanted to strike Thompson because he took the "initiative" to ask about different degrees of murder. Tr. 230. The prosecutor said, "The reason I strike

[sic] him for that reason is because I take that initiative that he showed as, you know maybe a sign that he has a more lenient bend to his personal disposition in this matter or in criminal matters." Tr. 230. Defense counsel argued that the reason given was a mischaracterization of what Thompson had said. Tr. 230. She also pointed out a similarly-situated white juror, Brindell, who also took the initiative to ask a question about when the death penalty applied in murder cases. Tr. 231.

The court allowed the strike of Thompson. It found the State's reason to be race-neutral, without resolving whether the State had mischaracterized what Brindell had said, and apparently not understanding that the existence of a similarly-situated white juror is relevant to the inquiry. Tr. 228, 231. The court did not attempt to clarify what Thompson said, address defense counsel's response that the State was mischaracterizing Thompson's remarks, or compare Thompson to Brindell. Tr. 231.

The prosecutor gave one reason for striking Thompson: because he took the initiative to ask whether there were other degrees of murder and whether the punishment would be different depending on the degree of the crime. Tr. 229-230. He interpreted that as "maybe a sign that he has a more lenient bend to his personal disposition." Tr. 230. But the record in the case shows that the prosecutor had talked to the panel about the crimes of first-degree murder and

second-degree murder, and whether they could set aside their personal beliefs about what those crimes entail and follow the court's instructions. Tr. 165-166. The prosecutor then asked Mr. Thompson directly whether he could follow the court's instructions. Tr. 169.

Thompson responded, "Yes. But one question, when you say degree, what do you mean by that, First Degree, Second Degree?" Tr. 170. The prosecutor said there were different elements to each charge. *Id.* Thompson then asked, "I mean, is that like more of a harsher sentence?" *Id.* The prosecutor confirmed that first-degree murder was a more serious charge than second-degree murder or manslaughter. *Id.*

In evaluating a *Batson* challenge, the trial court's "chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case." *State v. McFadden*, 216 S.W.3d 673, 676 (Mo. banc 2007). The record reflects that the State mischaracterized Thompson's remarks, because Thompson did not volunteer a question about lenient sentencing. Thompson responded to a direct question by the prosecutor by asking about whether one form of murder was harsher than others. Tr. 169-170. The prosecutor's mischaracterization is evidence of pretext. *Ali v. Hickman*, 584 F.3d 1174, 1190 (9th Cir. 2009), *citing Miller-El*, 545 U.S. at 244 (finding evidence of pretext where prosecutor "simply mischaracterized"

answer); *compare State v. Johnson*, 200 S.W.3d 377, 382-383 (Mo. App. E.D. 2007) (alleged mischaracterization by prosecutor noted for first time on appeal and not considered); *State v. Bass*, 81 S.W.3d 595, 611 (Mo. App. W.D. 2002) (same).

Also, the record shows that Brindell, a white man, had volunteered a question about the charge and the range of punishment. Tr. 145. On the morning of the second day of trial, the State asked if anyone had any additional responses to any questions from the day before. Tr. 145. Brindell volunteered a question. *Id.* He asked:

> Yesterday we were talking. And I'm not talking about presumption of innocence or anything like that. But the State is not asking for the death penalty or it's been ruled out completely. And I'm trying, in my mind, to justify why if we determine that there was guilty in this case that we wouldn't be allowed to consider all possible punishment. Not that we would necessarily go for that, but why would we eliminate some of the punishment possibilities from the deliberation?

Tr. 145-146. The prosecutor replied that the death penalty is usually reserved for particular types of crimes, and also informed him that the jury would not decide punishment in this case. Tr. 145-146.

Brindell and Thompson were similar jurors asking similar questions. Thompson answered a direct question from the prosecutor and asked a follow-up question about first and second degree murder, which was a topic the prosecutor had just brought up himself. Tr. 165-66, 169-170. Brindell volunteered a question about the range of punishment. Tr. 145-146. Brindell mentioned the death penalty, but was careful to say the jury wouldn't necessarily impose the death penalty even if it was available. Tr. 146. It is not at all apparent that their respective questions were motivated by leniency towards either party or a preference for lenient or harsh punishment.

When a *Batson* challenge has been made and it is the prosecutor's opportunity to explain why he struck a particular juror, he stands or falls on the plausibility of the reasons he gives. *Miller-El*, 545 U.S. at 252. While the two jurors' questions were not identical, *Batson* does not require that they be so for them to be similarly-situated. *Id.* at 247. In any event, the trial court did not attempt to clarify Thompson's comments or compare them to Brindell's statements. And the prosecutor's stated reason – that Thompson initiated a question about punishment – does not hold up. "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El*, 545 U.S. at 252.

In *Snyder v. Louisiana,* 552 U.S. 472 (2008), the defendant made a *Batson* challenge and the prosecutor explained that he had requested the strike first because the juror in question looked "nervous," and second because the prosecutor worried that the juror might attempt to deliver a guilty verdict to a lesser charge in order to keep deliberations short and get back to his job more quickly. *Id.* at 480-481. As in this case, the trial court did not make any findings regarding the challenge, saying only: "All right. I'm going to allow the challenge. I'm going to allow the challenge." *Id.* at 478-479.

The Supreme Court emphasized that the trial court and its ability to observe factors like demeanor and tone of voice has a "pivotal role" in evaluating *Batson* claims. *Id.* at 478. The Court noted that where "race-neutral reasons for peremptory challenges . . . invoke a juror's demeanor," the trial court's first-hand observations are "of even greater importance." *Id.*

Here, as in *Snyder*, it was difficult to tell why the trial court denied the challenge. *Id.* at 478. The trial court may have credited the prosecutor's mischaracterization of Thompson's statements. The court made its decision based upon a mistaken belief that Brindell's comments were not relevant because he was of a different race than Thompson. Tr. 228.

In *Batson* cases, "[t]he issue of whether the circuit court applied the correct legal standard is a question of law that is reviewed *de novo*. *Kesler-Ferguson v.*

Hy-Vee, Inc., 271 S.W.3d 556, 558 (Mo. banc 2008); *see also United States v. Stephens*, 514 F.3d 703, 712 (7th Cir. 2008) (holding deference on a trial court's finding in a *Batson* claim, "is due only when a district court properly performs its task . . . [it] abuses its discretion when it makes an error of law."). When the trial court misunderstands the law, the deference to its ruling must be limited because the appellate court can no longer place "great reliance . . . on the trial court's assessment of the legitimacy of the State's explanation." *State v. Morrow*, 968 S.W.2d 100, 114 (Mo. banc 1998).

Where the record shows the trial court misunderstood the law and there are no specific findings, this Court's deference to its ultimate conclusion is limited. *Snyder,* 552 U.S. at 479 (refusing to "presume that the trial judge credited the prosecutor's [asserted reasons for striking a juror]" because no specific findings had been made). Without specific findings, there is an inference of intentional discrimination based upon the State's mischaracterization of Thompson's statements and the existence of a similar white juror that the State did not strike.

The totality of the relevant circumstances demonstrates clear error in this case. Mr. Thompson, an African-American, was struck from the jury by the State in violation of Equal Protection and the right to a fair trial. U.S. Const.

Amend. VI, XIV; Mo. Const. Art. I, sec. 2, 18(a). This case must be remanded for a new trial.

CONCLUSION

On Point I, this Court should find that the State's evidence was insufficient to support a conviction for the class A felony of murder in the first degree. The conviction, and the corresponding armed criminal action charge, must be vacated. The Court, in its discretion, may find Appellant guilty of a lesser-included offense and enter sentence and judgment on that charge and remand for resentencing within the range of punishment. *State v. Cobbins*, 21 S.W.3d 876, 880 (Mo. App. E.D. 2000).

On Point II, in the alternative, the remedy is to remand for a new trial. The record reflects the trial court misunderstood the law and there are no specific findings, limiting this Court's deference. *Snyder,* 552 U.S. at 479. Without findings to the contrary, the totality of the relevant circumstances demonstrates clear error.

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CERTIFICATES OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 25th day of March, 2010, two true and correct copies of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Mr. Richard Starnes of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Book Antiqua 13-point font. The word-processing software identified that this brief contains **8,170** words. Also, the enclosed diskette has been scanned for viruses with a currently updated version of McAfee VirusScan Enterprise 7.1.0 software and found to be virus-free.

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APPENDIX