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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Tyrone Bateman, adopts and incorporates the jurisdictional statement in his opening brief.

STATEMENT OF FACTS

Appellant adopts and incorporates the statement of facts in his opening brief.

POINTS RELIED ON

Appellant adopts and incorporates the points relied on in his opening brief.

Reply Argument I

The State concedes that Appellant was angry and impassioned, but then argues the evidence was sufficient because he made a "deliberate" decision to kill. Resp. Br. 12. This argument overlooks the statutory definition of deliberation – cool reflection upon the matter for any length of time – which is an element of the crime beyond the defendant having formed the intent to kill. Mere intent – the "formed design to gratify a feeling of revenge" is not first-degree murder when it is formed "while under the influence of sudden violent passion." ***State v. Miller*****, 220 S.W.3d 862, 868 (Mo. App. W.D. 2007).**

The State accuses Appellant of asking this Court to view the facts contrary to the standard of review. Resp. Br. 10-12, 17-18. But the facts of this case are undisputed other than the contested element of deliberation. Appellant's characterization of the facts is consistent with the State's own description of the case at trial. App. Br. 20; Tr. 250-251. It was the State that characterized Tyrone as "bleeding," and "upset," as well as "mad" at the time of the crime. App. Br. 20; Tr. 250-251.

The standard of review requires the Court to take disputed facts in a light most favorable to the State and ignore contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993).

"Taking the evidence in this light, we consider whether a reasonable juror could find each of the elements beyond a reasonable doubt." *Id.* "[W]e are bound to consider the inferences favorable to the State unless the contrary inference is such that it would necessarily give rise to a reasonable doubt in a reasonable juror's mind." *Id.* at 413.

The standard of review, thus, does not require the Court to turn a blind eye to undisputed facts that a reasonable jury would not disregard. The facts surrounding the fight were not disputed – only Tyrone's mental state was at issue. Deliberation, or cool reflection upon the matter no matter how brief, "may be inferred, but it must still be proved beyond a reasonable doubt" with facts or reasonable inferences. *State v. Strong*, 142 S.W.3d 702, 717 (Mo. banc 2004). The State's admissions that Tyrone was bleeding, upset, and angry – undisputed facts a reasonable jury would not disregard – are irreconcilable with the State's assertion that the jury reasonably inferred cool reflection.

The State points to five facts it says support the element of deliberation or cool reflection.

(1) First, the State relies on Tyrone's statement to the victim that "I'm going to hurt you real bad." Resp. Br. 12; Tr. 366. But the State omits the undisputed fact that Tyrone made this statement while the victim was choking

him in a headlock, and after the victim had beat him with a tire iron. Resp. Br. 7; Tr. 284, 366, 427, 444-445.

This is certainly not the type of prior "threat" like in *State v. Evans*, 992 S.W.2d 275 (Mo. App. S.D. 1999), cited by the State. Resp. Br. 12. In that case, the defendant was guilty of the first-degree murder of his wife by drowning her in a swimming pool. *Evans*, 992 S.W.2d at 292. The Court of Appeals found evidence of deliberation based on the defendant having told people in advance that he had thought about killing his wife by drowning her in a swimming pool. *Id.* at 294.

Contrary to the State's assertions, Appellant is not arguing for a legal requirement that deliberation occur over a long period of time. Resp. Br. 12. Rather, Appellant simply argues that this case in no way resembles *Evans* and similar cases finding cool reflection based on evidence of prior threats. Because Tyrone's statement was made while he was being choked by the victim – undisputed evidence that a reasonable juror would not ignore – it is only relevant to Tyrone's intent to kill or cause serious physical injury – "hurt [the victim] real bad" – not to the element of cool reflection. Section 565.020; Section 565.002(3).

(2) The State next points to the fact that Tyrone left the scene of the fight to get a shotgun and that he used his cell phone. Resp. Br. 13. And there are

indeed cases that have held that retrieving a weapon and the time it takes to do so provide the basis for a finding of deliberation. But using this as evidence to support a finding of cool reflection in this case would require the jury to disregard other facts that are undisputed. Specifically, they would have to disregard that Appellant had been beaten with a tire iron, choked, and had kicked down a door immediately before shooting the victim. Tr. 284, 292, 308, 240, 364, 374, 371, 443-444. These undisputed facts, along with the State's admissions that Appellant was angry and impassioned, are something approaching direct evidence of mental state that no reasonable juror could ignore. "The evidence showed rage, not cool reflection." *State v. Black*, 50 S.W.3d 778, 797 (Mo. banc 2001) (Wolff, dissenting).

(3) Next, the State makes the argument that violently kicking down a front door is evidence of cool reflection. Resp. Br. 13. The State argues this shows Appellant was "determined" to commit murder. Resp. Br. 13. Kicking down the front door is relevant to the element of Appellant's intent to kill or cause serious physical injury, but does not under any reasonable inference suggest calm, cool reflection. First-degree murder is a homicide committed, "while not under the influence of sudden violent passion." *Miller*, 220 S.W.3d at 868.

(4) The state argues further that the fact the victim was shot in the left chest and face supported the element of cool reflection. Resp. Br. 15-16. But the law is clear that the position of a wound is relevant to whether the defendant intended to kill or cause serious physical injury. *State v. O'Brien*, 857 S.W.2d 212, 218 (Mo. banc 1993). The State has not explained how the position of the wound on the body tends to prove or disprove the disputed element, other than in the most conclusory terms.

(5) The State argues, finally, that conduct after the shooting proved deliberation. Resp. Br. 16-17. Again, the State does not explain how, exactly, the post-crime actions tended to prove or disprove the disputed element. The State cites cases (Resp. Br. 16) for the proposition that resisting arrest or flight implies "guilt" but overlooks that this is a case where Appellant conceded his guilt of a homicide. The State has not explained, except in a conclusory way, how Appellant's actions after the crime tend to prove or disprove the disputed element of deliberation.

The state has acknowledged, both at trial and on appeal, that Tyrone was bloodied, angry, and broke down a door the instant before shooting his cousin. Tr. 250-251; Resp. Br. 7-8. The State's concession that Tyrone was angry makes this case factually unusual among first-degree murder cases this Court has considered, and thus distinguishable on those grounds. The State could find

only one first-degree murder case affirmed on sufficiency grounds after a street fight that is even remotely similar to the one in this case. Resp. Br. 14. That case, *State v. Hatfield*, 465 S.W.2d 468, 470 (Mo. 1971), is distinguishable on its facts, though, because in that case the defendant retrieved a weapon before the fight began, was not injured, stabbed the victim three times with a broken beer bottle, and had not been assaulted by the victim.

Because there was insufficient evidence that Appellant deliberated or coolly reflected 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. The convictions must be reversed.

Reply Argument II

The trial court improperly analyzed Appellant's *Batson*[1] challenge, because the State's explanation mischaracterized Thompson's statements, and because of the existence of a similar juror of another race that the State did not strike. The erroneous *Batson* analysis and the totality of the relevant facts in this case show clear error, requiring reversal.

The State disputes that it mischaracterized the statements of Thompson, who was one of the African-American jurors it struck and the subject of this *Batson* challenge. Resp. Br. 25. The prosecutor struck Thompson because he "beat" him to the question on the degrees of murder. Tr. 230. The prosecutor claimed "that initiative that he showed [was] 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.

But in fact, Thompson answered a direct question from the prosecutor, and asked a follow-up question about first and second degree murder, a topic that the prosecutor had just brought up. Tr. 165-66, 169-170. Thompson did not "beat" him to a question about the different degrees of murder, and his question did not come before the State asked the panel if they could follow the court's instructions about the different degrees of murder. The prosecutor's

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

explanation was simply not accurate. Because its reason was a mischaracterization, the State's "race neutral" explanation fails. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

The State argues this conclusion requires the Court to view the facts in a light most favorable to Appellant, not the trial court's ruling. Resp. Br. 25. But it is clear from the record that the State mischaracterized Thompson's statements, and the trial court made no fact finding on the mischaracterization issue, or on the issue of the similar juror raised by Appellant. Tr. 230-231. And while Appellant acknowledges the general rule that the State cites about deference, using the State's standard, appellate courts would be virtually unable to reverse under *Batson*, since doing so would always be contrary to fact findings impliedly made by the trial court. There are times when there is trial court error in *Batson* claims, requiring reversal. There is no standard of heightened deference in *Batson* claims compared to other claims of trial court error.

On the issue of the similarly-situated juror, the record is clear that the trial court did not address the pretext arguments made by Appellant by examining the record or compare Thompson's comments to Brindell's statements. Tr. 231. Accordingly, Appellant did not "ignore" the record in stating the court did not expressly credit the reasons given by the prosecutor. Resp. Br. 26. A finding

by the trial court that the prosecutor's reasons are racially neutral is a finding of facial neutrality, the second step of a *Batson* analysis. *State v. Marlowe*, 89 S.W.3d 464, 468 (Mo. banc 2002). The trial court stated the reason was race neutral but did not address the allegations of pretext raised by Appellant. Tr. 230-231.

On the issue of the trial court's apparent misunderstanding of the law on similarly-situated jurors, the State argues that Appellant waived any reliance on this fact by not correcting the trial court. Resp. Br. 29. The State cites *State v. Johnson*, 220 S.W.3d 377 (Mo. App. E.D. 2007), for its claim that a *Batson* defendant is required to have expressly raised every fact and argument that is relevant to pretext at the trial court level. Resp. Br. 29. In *Johnson*, the defendant failed to point out the numerous similarly-situated venirepersons he noted on appeal, but had argued pretext based upon other reasons. *Id.* at 382-383. The Court of Appeals would not acknowledge the existence of the similarly-situated venirepersons. *Id.* at 383, 387 (Draper, dissenting).

This case is, first, different than *Johnson* because the misunderstanding of the law by the trial court in this case is not specifically relevant to whether or not the State engaged in purposeful discrimination based on race. 220 S.W.3d at 382-383. Rather, it relates to how much deference this Court should grant the trial court and whether there was reversible error. The State's argument

overlooks that the trial court's misunderstanding of law is relevant to whether there was trial court error in this case, and to this Court's standard of review. App. Br. 37-38.

Further, the holding in *Johnson* puts an impermissible burden on the defendant that has carried forward into other cases. 220 S.W.3d at 387 n.1 (Draper, dissenting). For example, in *State v. Collins*, a robbery and burglary case citing *Johnson*, the State struck an African-American juror whose brother had been convicted of sodomy, but not a Caucasian juror whose brother and father had been convicted of burglary and trespassing. 290 S.W.3d 736, 742 (Mo. App. E.D. 2009). The defendant argued the two jurors were similarly-situated, but did not state to the trial court that the struck juror's relative's sodomy conviction was irrelevant in a robbery and burglary case, and thus indicative of pretext. *Id.* Like in *Johnson*, the Court of Appeals would not acknowledge that the State's reason was highly suspicious due to its irrelevancy. 290 S.W.3d at 743 n.4.

The State is now attempting to persuade this Court to follow the lead of these cases – essentially, to turn a blind eye to relevant facts that are facially apparent from the record, not engage in the four-factor scrutiny of the proffered reasons, and overlook the trial court's failure to do so. Resp. Br. 29-30. This is contrary to this Court's precedent, and would put a greater burden

on those raising a *Batson* claims than those raising other kinds of trial court error.

For example, when the issue is the admission of evidence and the error is raised on appeal, cases find that to preserve the issue for review the party must make an objection, state the legal grounds for the objection, and carry the same objection forward on appeal. *See*, e.g., *State v. Placke*, 290 S.W.3d 145, 152 (Mo. App. S.D. 2009) (defendant objected on the basis of hearsay, carried the same objections forward in the motion for new trial, and raised in point on appeal, preserving point for review); *State v. Penn,* 413 S.W.2d 281, 283 (Mo. 1967) (holding that objections on the grounds that questioned evidence is "hearsay" preserves the claim of error for appellate review). In these cases, the appellate court will consider the point preserved and proceed to consider the totality of the relevant facts that are in the record. *Placke*, 290 S.W.3d at 153-154 (where legal objection was made on basis of hearsay, appellate court engaged in detailed hearsay analysis based on facts apparent in the record); *State v. Baker*, 103 S.W.3d 711, 716 (Mo. banc 2003) (court will not impose a "hypertechnical" burden on defendants in a suppression of evidence claim where the trial court was on notice of the nature of the objection).

Putting a higher burden on those alleging a *Batson* violations by requiring them to articulate every relevant factual consideration or else waive the claim is

contrary to the intent behind *Batson* – to remedy the previous "crippling burden of proof imposed upon defendants" to prove a violation of equal protection rights which "nearly immunized a prosecutor's use of peremptory challenges from constitutional scrutiny." *State v. Parker*, 836 S.W. 2d 930, 933 (Mo. banc 1992). The reach of a *Batson* error goes beyond the particular defendant to infringe upon the right of the venireperson to perform his or her civic duty of sitting on a jury. *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

This Court should instead affirm that courts have a duty to consider the totality of the facts and circumstances surrounding the case. *State v. McFadden*, 216 S.W.3d 673, 676 (Mo. banc 2007); *see Johnson*, 220 S.W.3d 377, 386-389 (Draper, dissenting). The totality of the relevant circumstances in this case – and the trial court's failure to consider them – demonstrate clear error.

CONCLUSION

Based on the arguments in this brief and Appellant's opening brief, 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. On Point II, in the alternative, the remedy is to remand for a new trial based on the *Batson* error in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 28th day of April, 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 **3,265** 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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