No. SC90528

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

TYRONE C. BATEMAN,

Appellant.

Appeal from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit, Division 11
The Honorable Joan L. Moriarty, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from convictions for murder in the first degree, § 565.020, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000, obtained in the Circuit Court of the City of St. Louis, and for which appellant was sentenced to life imprisonment without the possibility of probation and parole for murder and a consecutive term of ten years for armed criminal action. This appeal was transferred to this Court following the granting of appellant's application for transfer after opinion from the Eastern District Court of Appeals. Therefore, jurisdiction lies in this Court. Article V, § 10, Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

Appellant, Tyrone C. Bateman, was charged by indictment as a prior and persistent offender with first-degree murder and armed criminal action (L.F. 9-10). This cause went to a trial by jury in the Circuit Court of the City of St. Louis beginning on May 21, 2007, the Honorable Joan L. Moriarty presiding (L.F. 13).

The sufficiency of the evidence is at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: The victim, Miles Bateman, lived at 5538 Alcott in St. Louis with his mother, Linda Bateman, his nieces Latoya Bateman, Cindy Bateman, Linda Stepps, and Catherine Stepps, and his nephew Luster Dunn (Tr. 278-280, 295-297, 361, 424-425). Appellant, a distant cousin, lived up the street at 5508 Alcott with Linda Bateman's cousin, Carol Bateman (Tr. 311, 378, 425). A couple of nights before the day of the murder, March 21, 2005, the victim stayed the night at Carol's house, and discovered the next morning that appellant had taken his van and some money from him (Tr. 363, 372). When the victim got the van back, he found a pair of appellant's shoes or boots in the van, and decided to keep them until appellant gave him his money back (Tr. 372, 441-442).

The morning of March 21, 2005, the victim was outside his home fixing a flat tire on his van when appellant pulled up to the house with a friend, Tony Dickerson, and asked the victim for his shoes back (Tr. 282, 363-364, 426, 441-442). The victim refused and told appellant to leave (Tr. 364, 442). Appellant got out of the car and said, "Nigger, give me my boots" (Tr. 282, 364). The victim again refused, saying he was not going to give appellant

the boots until appellant paid him back his money (Tr. 282-283, 364). Appellant came towards the victim, prompting the victim to tell appellant that if appellant "[got] up on" him, he would hit appellant with the jack handle he was holding (Tr. 365). Appellant then struck or grabbed the victim, and the victim hit appellant in the head with the handle, which caused appellant's head to start bleeding (Tr. 283, 292, 366, 371). Appellant then pushed back at the victim, causing both to fall to the ground, where they wrestled (Tr. 284, 366).

The victim's niece, Latoya, who had been outside watching the fight with her brother Luster, went inside to tell her grandmother, Linda Bateman, that the victim and appellant were fighting outside (Tr. 284, 307, 367, 426). Linda Bateman went outside and found the two still wrestling on the ground; the victim had appellant in a "head lock" with his arm around appellant's neck (Tr. 284, 307, 366, 427). She told them that they needed to stop and that the victim needed to come inside (Tr. 284-285, 307, 367, 427). Appellant told the victim, "Nigger, when you get up off me, I'm gonna hurt you real bad" (Tr. 428). The victim eventually let appellant go, and appellant got up, got into his car, and quickly backed his car the wrong way down the one way street back to Carol's house (Tr. 285-286, 308-311, 367).

The victim went into his house and into the bathroom to wash his face (Tr. 369, 428). Linda Bateman said she wanted to call the police, but the victim said not to (Tr. 427-428). She then said that the victim should leave, and the victim replied, "I'm not a punk and I'm not a coward. I'm not going anywhere. But if I have to die, I'll die today" (Tr. 428). Meanwhile, Latoya and Linda Stepps, who were watching out the window, saw appellant

come out of his home talking on his cell phone and carrying a long gun; he got back in his car and drove back down to 5538 Alcott (Tr. 286-288, 312-314). Latoya told her grandmother that appellant had a gun, and the grandchildren started to go downstairs to the basement (Tr. 288, 314, 369). Appellant kicked the front door in and shot the victim, who was in the living room, with a shotgun (Tr. 288-289, 316-317, 325, 428-429). The shot hit the victim in the left chest and shoulder and the face, disfiguring his chin, as well as purportedly "blow[ing] off" two fingers (Tr. 263, 271, 275, 354, 369-370). Appellant then ran back to his car and drove off (Tr. 289, 428). The victim cried out, "Momma, help me," then fell to the floor, where his eyes rolled into the back of his head and his body started twitching (Tr. 290, 370).

Meanwhile, appellant drove back to his house (Tr. 463). He told a nephew that "it" was at the back door and that the nephew needed to "put it up" (Tr. 463). Appellant also said, "I got him. I got him" (Tr. 463). During a subsequent search of the house, both the shotgun and an empty shotgun shell, which had been fired from the gun and was consistent with the shell used to shoot the victim, were recovered (Tr. 378, 382-386, 412, 415). Ballistics testing revealed that appellant was between nine and fifteen feet away from appellant when the shot was fired (Tr. 418-421).

The shotgun blast injured the victim's left lung and the major blood vessels of the left shoulder, as well as fracturing facial bones (Tr. 272, 274-275). The victim did not die immediately from his injuries, but was kept alive at the hospital until April 12 (Tr. 276).

On April 25, 2005, police received information that appellant was at an apartment on Highland Avenue (Tr. 394-395). Police searched the apartment, finding appellant hiding in the closet of a child's bedroom (Tr. 397-398). Appellant resisted arrest so intensely that a taser had to be used to subdue him (Tr. 398-399).

In his defense, appellant presented the testimony of appellant's friend and car passenger at the time of the fight, Tony Dickerson, who said that the victim hit appellant first during the fight, and the testimony of a police detective, who testified about prior statements by the witnesses, in an effort to establish a defense that appellant was only guilty of voluntary manslaughter (Tr. 440-483, 507-514).

Appellant was found guilty of first-degree murder and armed criminal action (L.F. 27-28). The court sentenced appellant to life imprisonment without the possibility of probation or parole for first-degree murder and a consecutive term of ten years for armed criminal action (L.F. 48; Tr. 528). This appeal follows.

ARGUMENT

I.

The trial court did not err in denying appellant's motion for judgment of acquittal at the close of all the evidence and in convicting appellant of murder in the first degree because there was sufficient evidence that appellant deliberated prior to murdering the victim in that appellant's actions before, during, and after the murder demonstrated that he coolly reflected prior to killing the victim.

Appellant claims that there was insufficient evidence to prove that appellant deliberated prior to murdering the victim, arguing that the evidence showed that there was no evidence of cool reflection, but instead showed that appellant was "acting out of the influence of a violent anger or passion" (App.Br. 17-27). But because the evidence showed that appellant threatened the victim prior to the shooting, went to retrieve the murder weapon, came back to the scene of the murder, forced his way into the victim's home, fled the scene after the shooting, bragged about the shooting afterwards, took efforts to hide the murder weapon, and hid from the police and resisted arrest, the evidence was sufficient to show that appellant deliberated prior to murdering the victim.

A. Standard of Review

In examining the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable trier of fact might have found a defendant guilty beyond a reasonable doubt. *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998). The appellate court does not act as a "super juror" with

veto powers, but gives great deference to the trier of fact. *Id.* In applying the standard, the appellate court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. *Id.* Further, "an appellate court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Id.* at 53, *quoting Jackson v. Virginia*, 443 U.S. 307, 326 (1979). "'[T]his inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* at 52, *quoting Jackson*, 443 U.S. at 318-19.

B. There was Sufficient Evidence of Deliberation

In order to convict appellant of murder in the first degree, the State had to present evidence that appellant knowingly caused the victim's death after deliberation upon the matter. § 565.020.1, RSMo 2000. "'Deliberation' means cool reflection for any length of time no matter how brief." § 565.002(3), RSMo 2000. The deliberation necessary to support a conviction of first-degree murder need only be momentary; the evidence must only show that the defendant considered taking another's life in a deliberate state of mind. *State v. Attwood*, 294 S.W.3d 144, 145 (Mo.App., S.D. 2009); *State v. Miller*, 220 S.W.3d 862, 868 (Mo.App., W.D. 2007); *State v. Davis*, 905 S.W.2d 921, 923 (Mo.App., E.D. 1995). 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 sudden violent passion. *Miller*, 220 S.W.3d at 868. "It is not necessary that the actor brood over his actions for any appreciable period of time to constitute deliberation." *State v. Baker*, 859 S.W.2d 805, 815 (Mo.App., E.D. 1993). The element of deliberation, like any state of mind, may be proven from the circumstances surrounding the crime. *State v. Tisius*, 92 S.W.3d 751, 764 (Mo.banc 2002). Here, while the initial fight with the victim showed that appellant was indeed angry at the victim shortly before the murder, there was sufficient evidence to show that appellant made a deliberate decision to murder the victim.

1. Conduct Prior to the Murder

First, appellant's actions before the murder show deliberation. At the end of the fight, appellant threatened the victim, saying that he was going to hurt the victim "real bad" (Tr. 366, 428). Prior threats by the defendant against the victim "show malice and premeditation [.]" *State v. Evans*, 992 S.W.2d 275, 295 (Mo.App., S.D. 1999). In *State v. Roberts*, 948 S.W.3d 577 (Mo. banc 1997), this Court described such evidence of a pre-existing relationship that provides a motive for the murder as "bad-blood" evidence, one of four general categories of evidence establishing deliberation. *Id.* at 589. Appellant argues that this was not evidence of "bad blood" because appellant and the victim were only "family members in an argument" and were not "enemies" because there was not evidence of "longstanding bad blood between them" (App.Br. 20). This argument seems to impose a requirement that deliberation must occur over a long period of time. Such a conclusion

contradicts the above law establishing that deliberation need not occur over a long period of time. Thus, the evidence of the fight and appellant's threat to harm the victim because of the fight established a motive for the murder and thus provided evidence of appellant's deliberation in the victim's murder.

After threatening the victim, appellant committed several acts showing that he had coolly formulated a plan to kill the victim. Evidence that the defendant "did or said certain things in advance of the act to facilitate the crime" fits into a second broad category of evidence of deliberation appropriately called "planning evidence." *Roberts*, 948 S.W.3d at 589. Appellant left the scene of the fight and returned to his own home to retrieve his shotgun, then came back to the scene, showing a deliberate intention to use that weapon on the victim (Tr. 286-288, 312-313). Bringing a deadly weapon to the commission of a crime indicates an intention to use the weapon and supports a finding of deliberation. *State v. Stacy*, 913 S.W.2d 384, 387 (Mo.App., W.D. 1996). Appellant spoke to someone on his cell phone while carrying the gun to his car (Tr. 286-287). From this evidence, the jury could have reasonably concluded that, if appellant was clear-headed enough to carry on a phone conversation with someone while carrying out his plan to kill the victim, he was clear-headed enough to be "coolly reflecting" on the murder. Appellant's act in kicking in or breaking down the front door of the house (Tr. 288, 325, 429), which appellant argues showed only "violent passion or anger" and supported "no other reasonable inference," actually supported the inference that appellant was determined to commit the murder by any

means, and was not going to allow a locked door to stop him. Thus, his breaking into the house to kill the victim supported the finding of deliberation.

Appellant argues that there was no planning evidence because he did not bring a weapon to the initial confrontation during which the fight between appellant and the victim occurred (App.Br. 22-23). Again, appellant seems to impose an "extended period of time" requirement to the planning element that simply is not applicable. For example, in *State v. Hatfield*, 465 S.W.2d 468 (Mo. 1971)[1], the defendant and victim got into an argument in a bar and decided to go outside to fight; as they left the bar, the defendant grabbed a beer bottle, broke it, and started after the victim, slashing him in the neck with the broken bottle. *Id.* at 470-71. This Court upheld the first-degree murder conviction, finding that the defendant's action in taking the bottle to use as a weapon constituted sufficient evidence of "premediation and deliberation." *Id.* at 471. Similarly, in this case, even if appellant had not planned to kill the victim prior to the fight, the evidence of his acts immediately after the fight provided sufficient evidence of planning to support the finding of deliberation.

Further, the amount of time it took appellant to leave the scene of the fight, go home, find the shotgun, come back out, make a phone call, drive back down to the victim's house,

[1]While *Hatfield* was convicted under § 559.010, the old statute for first-degree murder, the definition of "premeditation"—"thought beforehand for any length of time no matter how short"—is so similar to the current definition of deliberation that *Hatfield* should still be considered instructive. *See State v. Roberts*, 709 S.W.2d 857, 862-63 (Mo. banc 1986)(discussing premeditation and deliberation and citing *Hatfield* approvingly).

and break in the door showed that appellant had more than enough time to overcome any passion aroused by the fight and had sufficient time to reflect on his decision to kill the victim prior to the murder. "Deliberation requires only a brief moment of 'cool reflection' and may be inferred from the fact that a defendant had the opportunity to terminate an attack after it began." *State v. Cole*, 71 S.W.3d 163, 169 (Mo. banc 2002). Appellant argues that *Cole* should not apply because there was no "ongoing attack," as there was only one gunshot (App.Br. 25). Respondent believes *Cole* is also applicable to the time necessary from the point of setting the plan to murder into effect until the murder is completed. "Deliberation for purposes of proving murder in the first degree occurs if the actor had time to think and intended to kill the victim for any period of time." *State v. Hudson*, 154 S.W.3d 426, 429 (Mo.App., S.D. 2005). Here, appellant had sufficient time to calm down after the fight and choose not to kill the victim. The fact that he did not do so supports a finding that he had a deliberate plan to kill the victim. Therefore, appellant's actions before the murder supported an inference of deliberation.

2. Conduct During the Murder

The actual act causing the death of the victim also supported the inference of deliberation. Deliberation can be inferred from the number, severity, and location of wounds to the victim. *State v. Smith*, 185 S.W.3d 747, 759 (Mo.App., S.D. 2006). While appellant only shot the victim once, it was with a shotgun blast to the left chest and face, with appellant aiming upwards toward the victim's head and firing from only 3-5 yards away (Tr. 263, 349, 418-421). The shot resulted in a "large wound" which injured the left lung and

major blood vessels of the left shoulder, as well as breaking bones in the victim's face (Tr. 271-275). Thus, the nature of the close range shotgun blast and of the wound to the victim showed a deliberate attempt to kill the victim.

3. Conduct After the Murder

Finally, conduct after a murder, broadly referred to in *Roberts* as "failure-to-act" evidence, which is evidence that the defendant did not take actions consistent with an innocent mind, may also support a finding of deliberation. *Roberts*, 948 S.W.3d at 589. Appellant's actions after the murder showed that he had fully intended to commit murder. First, appellant immediately left the house and fled from the scene in his car, making no efforts to render aid to the victim. Immediate flight from the scene and failing to render or procure aid for the victim support the finding of deliberation. *Tisius*, 92 S.W.3d at 764; *State v. Samuels*, 965 S.W.2d 913, 922-23 (Mo.App., W.D. 1998). Second, appellant bragged about shooting the victim, telling Tony Dickerson, "I got him. I got him." (Tr. 463). Boasting of one's "murderous achievement" shows deliberate, premeditated murder in the first degree. *State v. Inks*, 37 S.W. 942, 946 (Mo. 1896). Third, appellant had his nephew take the murder weapon and hide it, showing an effort to conceal the weapon (Tr. 463). Efforts to conceal or dispose of evidence of involvement in a murder shows deliberation. *Tisius*, 92 S.W.3d at 764; *State v. Moore*, 949 S.W.2d 629, 632 (Mo.App., W.D. 1997). Finally, appellant's rigorous attempts to resist arrest, requiring a taser to subdue him, showed his consciousness of guilt and supported the finding of deliberation. *See State v. Blewitt*, 853 S.W.3d 455, 461 (Mo.App., W.D. 1993)(resisting arrest shows consciousness of guilt).

Therefore, appellant's actions after the murder showed that he deliberated in the murder of the victim.

Appellant attempts to dispute the applicability of this well-established line of cases by arguing that action after the crime is not relevant where appellant did not dispute intent, which appellant was not doing because he admitted guilt to a homicide (App.Br. 24). Appellant's only support is *State v. Taylor*, 929 S.W.2d 925 (Mo.App., S.D. 1996), which dealt with the defense's ability to admit evidence of voluntary intoxication to rebut claims about acts after the crime. *Id.* at 926-28. But Taylor says absolutely nothing discrediting the use of evidence of post-crime acts to demonstrate any mental state, let alone deliberation. *Id.* Even if appellant had any support for his alleged rule that evidence of post-crime action is only relevant when intent is at issue, intent was (and still is) at issue, as lack of deliberation was the only contested issue in the case. Therefore, appellant's argument that post-crime actions cannot not be considered in determining whether appellant deliberated is wholly without merit.

C. Conclusion

In essence, appellant's argument is that there was insufficient evidence for first-degree murder because he draws inferences from the evidence allegedly showing that appellant was acting under the influence of passion and therefore did not or could not have deliberated in the murder (App.Br. 17-27). Respondent does not necessarily dispute that the evidence could have supported the inference that appellant was acting under the influence of anger and that a jury could have concluded that he had not "coolly reflected" upon the

murder. But, as shown above, Missouri law also permitted the jury to consider the evidence of appellant's motive, his actions prior to the crime demonstrating a plan and resolve to kill the victim, the severity of the victim's injuries, and appellant's actions after the crime as evidence that he deliberated prior to killing the victim. In essence, appellant's argument that the jury was required to draw the inferences most favorable to his view of the evidence is an argument based on the long-rejected equally valid inferences rule. *See State v. Freeman*, 269 S.W.3d 422, 424 n. 4 (Mo. banc 2008). Because appellant's entire argument ignores the proper standard of review, requiring the evidence to be viewed in the light most favorable verdict, it is meritless. Because appellant's actions before, during, and after the murder all supported the conclusion that appellant deliberated on the murder of the victim, there was sufficient evidence to convict appellant of first-degree murder.

For the foregoing reasons, appellant's first point on appeal must fail.

II.

The trial court did not clearly err in overruling appellant's *Batson* challenge to the State's peremptory strike of venire member Thompson because appellant failed to prove that the strike of Thompson was racially motivated in that the prosecutor's explanation for the strike was reasonably related to the State's interest in attempting to obtain a first-degree murder conviction, there were no other similarly-situated venire members not struck by the State, and the prosecutor did not use all of his available strikes to rid the venire of African-American panelists.

Appellant claims that the trial court erred in overruling his *Batson* challenge to the State's strike of venire member Thompson, arguing that the explanation—that Mr. Thompson's initiative in asking a question about the relative punishments for first- and second-degree murder—was pretextual as evidenced by a similarly-situated white venire member asking a question about punishments for first-degree murder (App.Br. 28-38). But because appellant failed to demonstrate that the strike was racially motivated, as the explanation was reasonably related to the State's interest in obtaining a first-degree murder conviction, the alleged similarly-situated white venire member was not actually similarly situated, and the prosecutor did not use all available strikes to rid the venire of African-American panelists, the trial court did not clearly err in overruling the *Batson* challenge.

A. Facts

At the start of the second day of *voir dire*, the prosecutor asked if anyone, having had the night to think about the previous day's questions, had any "response to anything we may

have talked about yesterday" (Tr. 145). Venire member Brindell, who was white, asked the following:

> Yesterday we were talking. And I'm not talking about presumption of innocence here 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 guilt 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, 240). The prosecutor generally explained why the prosecuting attorney would seek the death penalty in only certain types of murder cases, and also explained that the jury would not have any say as to punishment at all (Tr. 146-147).

Later during *voir dire*, the prosecutor asked the venire if the jury could follow the instructions for murder in the first degree, regardless of their own personal opinions as to what constituted murder in the first degree or murder in the second degree (Tr. 165-166). After five other venire members answered the question, the prosecutor asked venire member Thompson, who was black, if he could follow the court's instruction even if it differed from his own personal thoughts or beliefs (Tr. 169). Venire member Thompson replied:

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?

[Prosecuting Attorney]: 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?

[Prosecuting Attorney]: 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 instructions is another, will you be able to follow the Court's instruction and apply it to the facts of this case?

VENIREMAN THOMPSON: Yes.

[Prosecuting Attorney]: You'd be able to set aside even if you disagree with it?

VENIREMAN THOMPSON: (Juror nods head.)

[Prosecuting Attorney]: Is that a yes?

VENIREMAN THOMSPON: Yes. I'm sorry.

(Tr. 169-171).

The prosecutor did not initially include Thompson in his peremptory strikes, but when a *Batson* challenge was upheld to one of the other strikes, the prosecutor struck Thompson (Tr. 223-229). Appellant made a *Batson* challenge to the strike (Tr. 229). The prosecutor explained that the sole reason for striking Thompson was that Thompson's "initiative" in asking unprovoked questions about there being offenses other than first-degree murder to consider "maybe a sign that he has a more lenient bend to his personal disposition in this matter or in criminal matters" (Tr. 229-230). Appellant replied that the explanation was pretextual, arguing that Thompson's question merely showed that he did not understand what the different degrees meant and claiming that venire member Brindell was similarly situated because he asked why the jury could not consider capital punishment in this case (Tr. 230-231). The court denied the challenge, finding that the strike was racially neutral (Tr. 231).

B. Standard of Review

Trial judges are vested with considerable discretion in determining the plausibility of the prosecutor's reasons for peremptory strikes and whether the prosecutor purposefully discriminated in exercising peremptory strikes. *State v. Gray*, 887 S.W.2d 369, 384

(Mo.banc 1994). The appellate court will not reverse the trial court's decision as to whether the strike was racially motivated unless that decision is clearly erroneous. *Id.* This decision is clearly erroneous when it leaves the reviewing court with a firm impression that a mistake has been made. *State v. Cole*, 31 S.W.3d 163, 172 (Mo.banc 2002).

C. Appellant Failed to Prove Pretext

Using a peremptory challenge to strike a potential juror based solely on that juror's race violates the Equal Protection Clause of the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79 (1986). For defendant to challenge the State's peremptory strike at trial, the defendant must object to the prosecutor's use of peremptory challenges and identify the racial or gender group to which the stricken person belongs. *State v. Brown*, 998 S.W.2d 531, 541 (Mo. banc 1999). The State then must provide explanations for the peremptory challenges which are race-neutral. *Id.* The State's reason need not rise to the level of a challenge for cause, nor need it even be a persuasive or plausible explanation. *Id.; Purkett v. Elam*, 514 U.S. 765, 767-68 (1995). The reason is deemed race-neutral unless discriminatory intent is inherent in the explanation. *State v. Marlowe*, 89 S.W.3d 464, 468 (Mo. banc 2002). Here, appellant admits that the prosecutor's reason for striking Thompson was at least facially neutral as to race (App.Br. 28). Thus, the first two stages of the *Batson* challenge were conducted without any alleged error.

Once the prosecutor articulates a facially race-neutral reason for the strike, the burden shifts to the defendant to show the State's proffered reason was merely pretextual and that the strike was actually based on race. *Cole*, 31 S.W.3d at 172. In determining pretext, the

Court considers the totality of circumstances, including the presence of similarly situated white jurors not struck (a crucial factor), degree of logical relevance between the proffered reason and the case, the prosecutor's credibility (based on his demeanor/statements during voir dire and the court's prior experience with the prosecutor), and the demeanor of excluded venire members. *Marlowe*, 89 S.W.3d at 469-470. While the presence of similarly-situated white jurors is crucially probative of pretext, it is not dispositive. *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992). The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from the opponent of the strike. *Purkett*, 514 U.S. at 769.

1. The Explanation was Reasonable and Highly Relevant to the Case

Here, appellant failed to demonstrate that the prosecutor's explanation for the strike of Thompson was pretextual, and thus that the strike was racially motivated. First, the rationale for the strike—that Thompson's inquiry about the degrees of murder showed that he may be inclined to be more lenient to the defendant—was reasonable and logically relevant to the case. The prosecutor was attempting to obtain a conviction for first-degree murder against appellant, while appellant's defense was to focus on seeking a conviction for a lesser offense. Thus, the purpose of the prosecutor's initial question—to make sure the jurors would follow the instruction for first-degree murder—was highly relevant. While the prosecutor had stated during his initial question that the court would provide the instructions to explain how the offense was defined (Tr. 166), this explanation was not sufficient for Thompson, and he continued to press the prosecutor as to the meanings of the different degrees of the offenses

(Tr. 169-171). No one else on the panel seemed to have any trouble with that question without knowing how the court would define the offenses, as all who were asked were able to say whether or not they would set their own views aside and follow the instructions (Tr. 168-177). Thus, it was reasonable for the prosecutor to conclude that Thompson's unprovoked question about what the degrees of crime meant, when the prosecutor had already said that the court's instructions would define murder in the first degree, indicated that Thompson may have been more interested than other venire members in the lower degrees of the offense, and would therefore have been more inclined to show leniency by convicting appellant of a lesser offense.

Appellant attempts to avoid the implication of the above through several arguments. First, appellant simply draws inferences from the exchange between Thompson and the prosecutor in the light most favorable to his argument, not to the court's ruling, to conclude that the prosecutor's argument "mischaracterized" Thompson's remarks (App.Br. 32-34). This argument completely ignores the principle that appellate courts review claims involving an exercise of the trial court's discretion in the light most favorable to the court's ruling. *See, e.g.*, *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 226 n. 11 (Mo. banc 2008). As this Court has established, although review is for clear error, the determination of the plausibility of the prosecutor's explanation of a peremptory strike is a matter of the trial court's "considerable discretion." *Gray*, 887 S.W.2d at 384. Moreover, it is the defendant who bears the burden of demonstrating that a prosecutor's explanation was pretextual. *State v. Morrow*, 968 S.W.3d 100, 113 (Mo. banc 1998). To allow the defendant to accuse the trial

court of error by imposing its own interpretation of the explanation would seemingly do away with this requirement, as such a rule would always require the trial court to accept the defendant's pretext argument. Appellant cites no authority permitting the record to be viewed in the light most favorable to his argument as opposed to the light most favorable to the ruling. Thus, the record should be viewed in the light most favorable to the denial of the *Batson* challenge. Because the record explained above demonstrates that there was a basis for finding that the prosecutor's conclusion that Thompson might have been inclined to prefer a lesser-included offense was reasonable, appellant's conclusory argument that the prosecutor "misrepresented" Thompson's answers must fail.

Second, appellant argues that the trial court's ruling is entitled to no deference as to the legitimacy of the explanation because the court did not specifically say that it was crediting the prosecutor's explanation in its ruling (App.Br. 35-37). This statement is simply wrong, as the court held that the "State's reasoning for that is racially neutral" (Tr. 231). Thus, the court did credit the prosecutor's rationale for the strike. Ignoring this record, appellant goes on to argue that, because the court was not specific, "there is an inference of intentional discrimination" (App.Br. 37). That statement is unsupported by any citation to any relevant law and clearly contradicts this Court's precedent. A trial court is afforded "great deference" in the review of a *Batson* challenge because "its findings of fact largely depend on its evaluation of credibility and demeanor." *Kesler-Ferguson v. Hy-Vee, Inc.*, 271 S.W.3d 556, 557 (Mo. banc 2008). For example, in *Morrow*, the prosecutor explained that a venire member struck by the State "looked very troubled," did not look up while the death

penalty was discussed, and was "hesitant and reluctant" when saying she could follow the death penalty. *Morrow*, 968 S.W.3d at 114. The court noted that its memory was the same as the State's as to equivocating by answering questions with questions, but did not specifically mention the non-verbal reasons. *Id.* This Court upheld the denial of the *Batson* challenge, holding that "body language" was a legitimate basis for a strike, even though the court had not specifically referenced the body language of the venire member in its finding. *Id.* This Court further stated that the subjective nature of peremptory strikes required this Court to place "*great reliance in the trial court's judgment* when it comes to assessing the legitimacy of the state's explanation." *Id.* (emphasis added). Thus, this Court will defer to the trial court's ruling as to the prosecutor's explanation due the trial court's ability to observe the *voir dire*.

Appellant argues that the recent United States Supreme Court case of *Snyder v. Louisiana*, 552 U.S. 472 (2008), requires this Court to ignore its precedent and refuse to defer to the court's ruling due to the lack of an explicit finding such as "I find that Mr. Thompson did show a tendency toward leniency in his answer and thus find the prosecutor's argument non-pretextual." Appellant misreads the scope of *Snyder*. In *Snyder*, the prosecutor provided two distinct reasons for striking a venire member: apparent nervousness and schedule conflicts with the venire member's student teaching duties. *Id.* at 478. The Court found that the second reason was pretextual because other similarly-situated white venire members had even more pressing schedule conflicts. *Id.* at 484-85. The Court then refused to "presume" that the trial court had accepted the prosecutor's nervousness argument

that the venire member was nervous because the court had not explicitly said if it was accepting the first, the second, or both of the prosecutor's explanations, and thus had not made a finding that it agreed that the venire member was actually nervous. *Id.* 477, 485.

While appellant concludes that this isolated decision not to presume a certain finding establishes a rule that must be followed, the rest of the Court's opinion establishes that this is not a rule, but an exception to the rule. The Court explicitly stated that the determination of credibility and demeanor lie "peculiarly" with the trial court's judgment and, absent "exceptional circumstances," the Court would defer to the trial court. *Id.* at 474. Such an "exceptional circumstance" was present in *Snyder*: the prosecutor used two unrelated explanations, the trial court did not specifically state which of the two it was crediting (or if it was crediting both), and one was found to be clearly pretextual. Here, the same exceptional circumstance does not exist. By appellant's own admission, "[t]he prosecutor gave one reason for striking Thompson: because he took the initiative to ask whether there were other degrees of the murder and whether the punishment would be different depending on the degree of the crime" (App.Br. 32). Therefore, the same extraordinary circumstance present in *Snyder*—confusion as to whether or not the court credited a legally pretextual explanation or another explanation which may have been non-pretextual—is not present here. Therefore, *Snyder* does not mandate the setting aside of the well-settled rule that the trial court is entitled to deference in its ruling in this case

Appellant also attacks the deference due to the trial court's decision by arguing that the trial court did not understand how to conduct a *Batson* challenge due to what he claims

was an error of law during the granting of another challenge by the court. During that earlier unrelated *Batson* challenge, the trial court considered the presence of a similarly-situated *African-American* venire member not struck by the State when granting appellant's *Batson* challenge to the State's strike of another African-American venire member (Tr. 228-229). Appellant claims that the Court was somehow precluded from considering similarly-situated venire members of the same race in deciding to grant a *Batson* challenge, and therefore "misunderstood the law" (App.Br. 31). This argument must also fail. First, appellant did not raise this challenge to the court's ruling at the time it was made or during the challenge of Thompson to support his argument of pretext (Tr. 228-231). The failure to challenge the court with this argument during the *Batson* challenge precludes consideration of it on appeal. *State v. Johnson*, 220 S.W.3d 377, 383 (Mo.App., E.D. 2007), citing *State v. Winfield*, 5 S.W.3d 505, 515 (Mo. banc 1999). Appellant's failure to point out the error is especially egregious here, as he relied on what he now claims to have been error at the trial court to receive a favorable ruling, and then uses that ruling against the court here. Therefore, appellant should not benefit from his failure to raise this objection below.

Further, appellant's claim that the trial court erred or misunderstood the law is wrong on its merits, as it was not necessarily improper for the trial court to rely on the State's failure to strike one similarly situated venire member, even of the same race, in deciding to grant a *Batson* challenge. This Court has stated that, in determining whether the prosecutor's reason for the strike was pretextual, the trial court can consider "the totality of the circumstances." *Kesler-Ferguson*, 271 S.W.3d at 569. When setting out the four

circumstances identified in cases such as *Marlowe* typically included in evaluating a *Batson* challenge, this Court has not said that the list is exclusive or exhaustive. In fact, in *Parker*, which set out the four circumstances as relevant, this Court also stated, "*Any facts or circumstances* that detract from or lend credence to the prosecutor's proffered explanations are, therefore, relevant." *Parker*, 836 S.W.2d at 939 (emphasis added). For example, this Court has considered other factors in evaluating *Batson* claims, such as: the use of strikes to rid the jury of all venire members of one racial group, *Kesler-Ferguson*, 271 S.W.3d at 560; the presence of a trial strategy to force the defense to strike similarly-situated but apparently pro-State venire members, *State v. Smith*, 944 S.W.2d 901, 913 (Mo. banc 1997); and the prosecution's failure to use all of its strikes against minorities, *State v. Johnson*, 207 S.W.3d 24, 37 (Mo. banc 2006). The refusal to use the same reason for a strike uniformly when strikes were available to do so, even against a juror of the same race, is certainly "relevant" to the sincerity of the reason, and thus can be relevant to the determination of pretext. Therefore, this ruling of the trial court did not show that the court misunderstood the law of *Batson*, and thus does not provide a basis for refusing to defer to the trial court's finding that the prosecutor's explanation was valid.

2. Venire Member Brindell was Not Similarly Situated

Appellant also argues that he established pretext below because he identified juror Brindell as a similarly-situated white juror, claiming that he was similarly situated because he also asked an unprovoked question about punishment (App.Br. 34-35). This argument is wrong. First, Brindell's question was not unprovoked, but was specifically in response to a

question asking if anybody had anything to add to what was asked during the first day (Tr. 145). Second, unlike Thompson's answer, which could reasonably have shown an inclination to lean towards giving a more lenient punishment, Brindell's answer suggested that he wished to be harsher on appellant by being able to at least consider the death penalty (Tr. 145-146). Thus, Brindell's "initiative" did not suggest leniency towards the defense, but instead suggested that Brindell would be a bad juror for the defense, and thus better for the State. Appellant must have reached a similar conclusion, as he used one of his peremptory strikes to remove Brindell from the jury (Tr. 238). Therefore, while both may have shown initiative about the level of crime and punishment for the offenses, Brindell's was the kind of initiative that would benefit the State in its effort to obtain the harshest conviction possible. Therefore, Brindell and Thompson were not similarly-situated.

Respondent does not suggest that jurors must be identical to be considered similarly situated. This Court should rightfully be concerned with superficial differentiations between otherwise similarly situated jurors which have little to do with the substance of the case, such as those based on appearance or occupation. *See, e.g.*, *State v. McFadden*, 216 S.W.3d 673, 676-77 (Mo. banc 2007)(rejecting peremptory strike based on venire members "crazy red hair"); *State v. McFadden*, 191 S.W.3d 648, 653 (Mo. banc 2006)(rejecting peremptory strike based on occupation without explanation as to how occupation would make the venire member an undesirable juror). Here, however, the difference between Thompson and Bridell was not superficial, it was substantive: their questions suggested two different outlooks as to punishment—Thompson's towards leniency, Brindell's towards harshness—which

suggested that Thompson would be a better juror for the defense and Brindell a better juror for the State. By ignoring the content of their questions and just focusing on the form, it is appellant who depends on superficiality. Because the State should not be allowed to use superficial differences to distinguish between jurors of different races to thwart a claim of pretext, defendants should not be allowed to depend on superficial similarities to establish a claim of pretext. Therefore, because Thompson and Brindell suggested two contrary and relevant points of view about punishment, they were not similarly situated.

3. The Prosecutor Did Not Use All Available Strikes Against African-Americans

Finally, appellant failed to demonstrate racial motivation because the prosecutor, who could have exercised all of his strikes against African-Americans, did not do so—the record suggests that the prosecutor struck at least two white venire members,[2] and there were two African-Americans on the panel after the State completed its strikes whom the State never attempted to strike (Tr. 223-237, 241-242).[3] The prosecutor's failure to use all available challenges against minority jurors is relevant to show the reason for a strike is not racially

[2]Appellant did not mount *Batson* challenges to the strikes of juror 1094 and juror 5 (Tr. 223-237). As appellant raised challenges to four of the six original strikes, and then to the replacement strike of Mr. Thompson, it is reasonable to conclude that he would have raised *Batson* challenges to these two jurors as well if they were African-American.

[3]Defense counsel stated that there were only three African Americans left on the panel after the State's strikes, and one of these presumably was juror 673, whose strike was disallowed by the court (Tr. 241-242).

motivated. *Johnson*, 207 S.W.3d at 37. Therefore, the fact that the prosecutor could have used more strikes to strike more African-American venire members and did not do so supports the trial court's finding that the strike was not racially motivated.

For the foregoing reasons, appellant's final point on appeal must fail.

CONCLUSION

In view of the foregoing, appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 8005 words, excluding the cover, this certification and the appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 16th day of April, 2010, to:

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APPENDIX