IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #26819

STATE OF SOUTH DAKOTA,

PLAINTIFF AND APPELLEE

v.

DERRICK SCOTT,

DEFENDANT AND APPELLANT

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE WALLY EKLUND

APPELLANT'S BRIEF

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NOTICE OF APPEAL WAS FILED SEPTEMBER 20, 2013

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO. 26819

DERRICK P. SCOTT
Defendant and Appellant.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

As this is the second appeal in this case, the initial appeal will be referred to as *Scott I* and this appeal will be referred to as *Scott II.* Throughout this brief, Defendant and Appellant Derrick P. Scott will be referred to as "Scott." Plaintiff and Appellee State of South Dakota will be referred to as "State." References to documents in the record will be designated as "SR" followed by the appropriate page number. References to the Remand Hearing Transcript held on May 20, 2013, will be designated "RH" followed by the page number. References to the transcript of the Jury Trial , held on July 5 and 6, 2013, will be designated "JT" followed by the page number.

JURISDICTIONAL STATEMENT

Derrick Scott appeals from a final order on remand affirming his conviction for Aggravated Assault (Domestic Abuse). The order affirming the conviction was entered on August 21, 2013, by the Honorable Wally Eklund, Seventh Judicial Circuit Court Judge, Pennington County. SR 40. Appeal is by right pursuant to SDCL § 23A-32-2. Notice of Appeal was filed on September 20, 2013. SR 199.

STATEMENT OF LEGAL ISSUES

I. CONSIDERING THE ORIGINAL TRIAL JUDGE HAD LEFT THE BENCH, DID JUDGE EKLUND HAVE SUFFICIENT EVIDENCE, BACKGROUND, OR OPPORTUNITY TO REVIEW THE CREDIBILITY OF WITNESS, TO CONDUCT AND APPROPRIATE *BATSON* HEARING POST-TRIAL?

The remand court decided that there was sufficient evidence from the record and testimony of counsel to conduct an a *Batson* hearing post-trial over the objection of defense counsel.

United States v. Maxwell, 473 F.3d 868 (8th Cir 2007)
United States v. Rutledge, 648 F.3d 555 (8th Cir 2011)
State v. Cannon, 41 P.3d 1153 (Utah Ct.App.2002)

II. DID THE REMAND COURT ERR IN ADMITTING AND CONSIDERING EVIDENCE THAT HAD NOT BEEN PRESENTED AT THE TIME OF THE ORIGINAL *BATSON* CHALLENGE?

The remand court allowed the addition of evidence in the form of informal testimony and exhibits over the objection of defense counsel.

State v. Scott, 2013 SD 31, 829 N.W.2d 458

III. DID THE COURT FAIL TO ENGAGE IN A PROPER ANALYSIS OF THE THIRD PRONG OF A *BATSON* CHALLENGE?

State v. Cannon, 41 P.3d 1153 (Utah Ct.App.2002)
Garrett v. Morris, 815 F.2d 509 (8th Cir 1987)

The remand court ruled the State had provided a race neutral reason for the contest strike without analyzing evidence provided by defense counsel showing the reason was pretextual in violation of *Batson.*

STATEMENT OF CASE

Case History

A jury trial was held on January 5, 2012. JT 1. The jury found Scott guilty of Aggravated Assault under SDCL §22-18-1.1(1) and not guilty of Simple Assault under SDCL §22-18-1. SR 130. On February 14, 2012, Scott was sentenced on the Aggravated Assault by Circuit Court Judge Mary P. Thorstenson, and received an eleven year sentence. Sentencing Transcript 23. The judgment was filed on March 1, 2012. SR 136. Notice of appeal was filed March 30, 2012. SR 140.

On April 3, 2013, the South Dakota Supreme Court issued an opinion holding that the original trial court had not conducted the third prong of the *Batson* analysis, and thus remanded the case back to the circuit court to conduct the third prong of the analysis. *State v. Scott*, 2013 SD 31, 829 N.W.2d. 458. By then Judge Thorstenson had left the bench. Therefore the case on remand was assigned to Judge Wally Eklund.

On May 20, 2013, a remand hearing was held. RH 1. On May 24, 2013, Judge Eklund issued a memorandum decision with attached proposed findings of fact and conclusions of law finding no racial motivation and therefore affirming Scott's conviction. SR 174 & 177.

Objections to proposed findings of fact and conclusions of law were filed by counsel for Scott on May 31, 2013. SR 181. Findings of Fact and Conclusions of Law were signed on July 16 and filed on July 26th, 2013. SR 193. An Order RE: Remand on

Batson Issue, was filed on August 21, 2013, affirming Scott's conviction. SR 196. Scott appeals from this order.

STATEMENT OF FACTS

As this appeal is solely from the circuit court's decision on remand, the underlying facts of the aggravated assault case will not be discussed because they are irrelevant to this appeal.

ARGUMENT

I.

JUDGE EKLUND DID NOT HAVE SUFFICIENT EVIDENCE, BACKGROUND, OR OPPORTUNITY TO REVIEW THE CREDIBILITY OF WITNESS, TO CONDUCT AN APPROPRIATE *BATSON* HEARING POST-TRIAL.

The Supreme Court correctly stated in *State v. Derrick Scott* (hereinafter referred to as *Scott I*) that the findings of fact of the circuit court are granted great deference, as the analysis depends highly on credibility, referencing *United States v. Maxwell*, 473 F.3d 868, 872 (8th Cir 2007). This long held position of the Supreme Court and is based on the "trial court's opportunity to observe the witnesses and examine the evidence." *In re Estate of Smid*, 2008 SD 82, ¶ 11, 756 N.W.2d 1, 6.

> That deference [to the trial court] is heightened when a litigants race-neutral reason for striking a prospective juror involves the juror's demeanor; there is no way for an appellate court to review this sort of intangible, which appears nowhere on our cold transcript.

U.S. v. Rutledge, 648 F.3d 555, 558 (8th Cir 2011).

However, in this case, Judge Eklund sits in no better position than does this Court. Judge Thorstenson was the trial judge, and therefore it was only Judge

Thorstenson who had the opportunity to observe the jurors during voir dire, hear and observe the State when proffering its reasoning for striking Juror Laroche, and observe defense counsel when initially raising its concern over the strike. Judge Eklund had no opportunity to do so nor did he do so. Although Judge Eklund may have been able to observe counsel for both sides at the time of the hearing on remand, that hearing occurred sixteen months after the *Batson* challenge in question had taken place. Mannerisms, voice inflections, etc., that people use on a regular basis to weigh and otherwise consider determinations of credibility would have been significantly different at the time of the remand hearing than at the time of the challenge. Judge Eklund, prior to the hearing on remand, had the same transcript which the Court stated "on this record, it is unknown whether Juror Laroche was improperly stricken because the court never fulfilled its duty under *Batson*." *Scott I*, at ¶ 22. The Court also noted the "practical difficulties" involved, referring to *State v. Cannon,* 41 P.3d 1153, 1158 (Utah Ct.App.2002). These "practical difficulties" were outlined in a footnote in *Cannon*, which stated:

> [p]erhaps chief among the practical difficulties on remand is the fact that the trial judge who initially oversaw this case has retired and is not eligible to sit in any capacity. Therefore, on remand, the trial court will be in a position not unlike that which we occupy, having not been present during the first trial.
>
> *Id.* at 1158 - footnote 3.

At the remand hearing, the State illustrated the difficulty placed on Judge Eklund. The Deputy State's Attorney indicated to the court that the "feelings" he had relayed to Judge Thorstenson at the time of the challenge were based on what he "perceived as being a lack of interest in the process, along with concerns as to whether she [Juror Laroche] was paying attention." RH 4. But this only serves to illustrate the problem.

Judge Eklund, unlike Judge Thorstenson, had no opportunity to observe Juror LaRoche, nor did he do so. Had the State actually stated these reasons to Judge Thorstenson at the time of the challenge, her honor would have been in a position to not only determine if this were true, but also if this reason applied equally to other jurors not of Ms. LaRoche's race who had not been struck by the State.

The fact that a hearing held sixteen months later is going to be significantly different only further increasing Judge Eklund's inability to accurately judge credibility.

> The trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.
>
> *Rutledge*,at 560.

It stands as above fact that Judge Eklund had no opportunity to evaluate, nor did he evaluate, the State's demeanor, or the demeanor of Juror Laroche, when that evaluation was required to be made.

This Court has long recognized the trial judge's superior position in weighing credibility, which is due to the first-hand observations of the participants relevant to the credibility at the time the statements were made. Because Judge Eklund did not have that advantage, and the record does not contain any observations of Judge Thorstensoh as to the credibility of the State, or actions of Juror LaRoche, Judge Eklund erred as a matter of law in failing to determine that insufficient factual basis evidence exist to overcome the *Batson* challenge deficiencies. The only appropriate remedy now is a new trial.

II.

THE REMAND COURT ERRED IN ADMITTING AND CONSIDERING EVIDENCE THAT HAD NOT BEEN PRESENTED AT THE TIME OF THE *BATSON* CHALLENGE.

Over the objection of counsel for Scott, Judge Eklund allowed the State to admit into evidence at the remand hearing, a number of exhibits, i.e., State's A-E, which the State did not have in their possession at the time of the challenge of the strike of Juror LaRoche, and that had not been presented to Judge Thorstenson.

As this Court stated in *Scott I, "*we agree with those courts that have held that a limited remand is required to allow the circuit court to engage in the missing analysis." *Scott I* at ¶ 22. Therefore on remand the circuit court was to conduct the analysis that should have been performed *at the time of the challenge*. The State did not possess a copy of the complaint against Juror LaRoche, the amended complaint, the police report, or the order dismissing the charge against LaRoche. As such, even if Judge Thorstenson had conducted the third prong of the *Batson* analysis, this evidence would not have been provided to her, and therefore should not be considered now. At the time of the challenge the Deputy State's Attorney Hyronimus:

> I asked her one question and I just didn't get a good feeling from her response. I also know, it's my understanding that Ms. Laroche has recently, I believe, been involved in criminal activity wherein I think she was charged or at least investigated for like threatening behavior on a phone and I just—it's not because she's Native American. I just don't think she, based on her answers today and other reasons, I don't think that she would be a fair juror in this case.
>
> *Scott I* at ¶15.

At the time of the challenge, the State was not sure if Juror Laroche had been charged with, or investigated for, criminal activity. At the time of the challenge before Judge Thorstenson, counsel for Scott specifically requested that if the State had

information beyond the juror questionnaires, that such information be provided to them. JT 102-103, *Scott I,* at ¶15. This information was never provided by the State during the entirety of the trial, and therefore is improper to be considered now.

III.

THE REMAND COURT FAILED TO ENGAGE IN A PROPER ANALYSIS OF THE THIRD PRONG OF THE *BATSON* CHALLENGE.

Even if this Court were to hold that Judge Eklund had sufficient evidence to proceed with the analysis, and were to hold that he did not err in admitting new evidence rather than making findings from the available record, the third prong of the analysis under *Batson* was still not performed.

The State argued at the time of the remand hearing that the sole reason for the remand was to have the remand court consider the feelings that the prosecutor had towards Juror Laroche, and the State's claim that Juror Laroche had been charged with or investigated for criminal behavior. This was inaccurate. In *Scott I*, the Supreme Court stated:

> "Under *Batson*, the circuit court had the duty to assess the veracity of the State's race-neutral reasons and determine whether Scott met his burden of proving purposeful discrimination." "We remand to the circuit court to determine if Scott proved that the State was motivated by purposeful discrimination."
>
> *Scott I* at ¶21, 23.

Based on what is stated within the remand court's Findings of Fact and Conclusions of Law, and considered in light of his memorandum decision, the circuit court limited its analysis of the third prong solely to whether or not the State could show that Juror Laroche had been charged with a crime or not.

Regarding the Conclusions of Law, the circuit court's ruling consisted solely of:

> 11. State has come forward with evidence supporting its reason for striking Juror Laroche due to an investigation of her regarding criminal behavior which preceded Scott's trial. This evidence is consistent with statements made during the Batson challenge portion of the trial before Judge Thorstenson.
>
> 12. The reason offered by the State was race neutral.
>
> 13. Furthermore, the reason offered for the strike was not pretextual or designed to mask an improper consideration of race.

Conclusion of Law 13 was not supported by any finding of fact. Viewed from the perspective of the court's memorandum decision, none of the evidence or factors presented by counsel for Scott appear to have been considered. The third prong is where the State's race-neutral reason for striking a juror is analyzed. The circuit court simply limited the analysis to whether or not the State could back the self-serving excuse made before Judge Thorstenson. This is an error that requires reversal.

In remanding the case back for an analysis of the third prong of *Batson*, the Court partly relied on *State v. Cannon,* 41 P.3d 1153, 1158 (Utah Ct.App.2002). *Cannon* is extremely helpful in that it lays out five factors that a court should consider in determining if the proffered reason from the State is pretextual. Those factors are:

> "(1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged."
>
> *Cannon* at 1157.

1. <u>Alleged group bias not shown to be shared by the juror in question.</u>

This factor indicates the response given by the State was pretextual.

None of the State's questions to Juror Laroche probed whether or not she had a particular bias against the police department or the State's Attorney. None of the State's questions probed whether or not Juror Laroche knew Deputy's State's Attorney Hyronimus, or had any particular bias against him. In fact, the questioning that did occur indicates that Ms. Laroche did not know Mr. Hyronimus. During voir dire, counsel for Scott asked jurors if any of them knew Todd Hyronimus. No one on the jury panel indicated that they did. JT 21. Laroche also did not respond when counsel for Scott asked the "catch-all" question at the end of the defense portion of voir dire. JT 69-70. Nothing in the trial record shows that Juror Laroche had any particular bias towards the State. No questions were posed to Ms. Laroche as to her personal feelings toward the State or police officers.

Juror Laroche did not respond when the State asked the panel if any of the panel believed that police are just out to arrest people, or to make our days bad. JT 76. When the panel was then asked if everyone agreed that police are not just out to arrest people or make our day bad, the entire panel, including Juror Laroche, agreed with this statement. JT 77.

2. Failure by the State to examine the juror or perform only a perfunctory examination.

This factor favors a finding that the State's reason is pretextual.

The State asked only one question of Juror Laroche, that being (essentially) if she agreed with another juror's answer. Juror Laroche answer was positive for the State, as

was the statement of the juror before her. JT 91-92. The State never questioned Juror Laroche about being charged with a crime, or anything about its disposition, or if that experience would cause a bias against the State. If this was truly a concern of the State, clearly these questions would have been asked. Nor can bias be assumed soley from having been charged with a crime, particularly one that ultimately was dismissed. Indeed, Juror Laroche may have been in favor of the State and Mr. Hyronimus, because charges against had been dismissed.

3. Singling the juror out for special questioning designed to evoke a certain response.

Again, this factor indicates that the State's reason was pretextual.

Although it is difficult to glean from the cold record, because attorneys during voir dire call on people who have raised their hand to a question, it is quite clear that Ms. Laroche was specifically chosen by the State to answer a question during voir dire. JT 92. In fact, right before calling on Juror Laroche, the prosecutor made commented that he hated calling on people because being called on terrified him in law school. JT 92. The transcript is also clear that the State specifically called on Michelle Lehmann, also a Native American. JT 85. A careful review of the transcript only reveals two other non-Native American jurors that may have been specifically called on by the State: Juror Lien and Juror Spiers. JT 94, 96.

It should be noted, that of the four people who were called on by the State, two of the four were Native American. Additionally, the State specifically called on two of the three Native American jurors, out of a panel of over 35 people. In other words, a gross disparity of proportion.

It is also clear from the transcript that the State attempted to evoke a specific response from Juror Laroche in getting her to agree that a victim of a car theft and a victim of a domestic abuse may react differently.

4. The prosecutor's reason is unrelated to the facts of the case.

This factor is slightly more neutral than any of the first three. The prosecutor's reasoning that Juror Laroche had been previously charged or investigated for threatening behavior and thus acts as justification for striking her from the panel has little to do with an assault alleged to have be perpetrated by Derrick Scott. She had no knowledge of anyone connected to the assault case. Additionally, Juror Laroche was not convicted of any charge in her case, (State's Exhibit D), so there is no evidence that she actually ever engaged in such behavior or would wrongfully sympathize with a person who allegedly assaulted his girlfriend.

5. A challenge based on reasons equally applicable to juror[s] who were not challenged.

This factor heavily favors Scott's contention that the State's proffered reason was pre-textual. Other than the "feeling" mentioned by the State, the only other reason put forth at the time of the challenge was the possibility that Juror Laroche had been charged or investigated for threatening phone calls. JT 101-102.

In *Garrett v. Morris*, 815 F.2d 509 (8th Cir. 1987) the prosecutor's race neutral explaination for striking black jurors was education level. *Id* at 513. However, the record indicated that all the black jurors struck were high school graduates, and one was three credits short of a business degree. *Id* at 513. However, of the white jurors that

were empaneled, two had not completed high school, and two never specified their level of education. *Id* at 514. Considering this evidence from the record the Court stated "It is thus difficult to credit the prosecutor's statement that he struck the black jurors on the ground that they 'lacked education'". *Id* at 514.

Garrett is similar to the case before the Court.

Juror Russell Brown, a white, non-Native American juror, had indicated that he had a criminal conviction on his juror questionnaire, but was never questioned by the State as to his conviction, what it was for, when it occurred, or if that would create a bias against the State. Juror Brown was not struck by the State, and served as a juror. JT 104 & Defense Exhibit 7 (Sealed Documents).

At the hearing for remand, Deputy State's Attorney Hyronimus told the judge that his "feelings" in regards to Juror Laroche were that he perceived her as lacking interest in the process, along with concerns as to whether she was paying attention. Mr. Hyronimus also pointed out that based on the transcript, Juror Laroche had not volunteered answers to any questions by either the State or the defense. RH 4.

Of course, as argued earlier, Mr. Hyronimus made no such explanation of his feeling to Judge Thorstenson, who had the chance to view the jurors during voir dire, and potentially could have confirmed that Juror Laroche was indeed noted to have been paying attention. As such, there is no foundation within the record that such a basis would appropriately serve as justification for a "feeling" at the time, or if it was an accurate depiction of Juror Laroche's demeanor.

Contrarily, the record does indicate that Juror Laroche answerd one question, which had been specifically asked by the State. JT 92. Nothing in the record indicates that Juror Laroche had to be called on more than once, or that there was a significant delay in her response. In short, nothing in the record supports the State's contention that she was not paying attention.

What the record does show, however, is that four white, non-Native American jurors, i.e., Michael Devine, Sandra Studer, Jill Dierkhising, and Mackenzie Nolan, also did not volunteer an answer to any of the questions asked by the State or the defense. JT 10-104. None of them said anything during the entire voir dire process. Yet despite all four of these jurors falling into the same alleged concern the State had for Juror Laroche, i.e., not participating or not paying attention, the State did not strike any of them. All four served on the jury. JT 104.

Like *Garrett* it is difficult to lend any credibility to the State's purported reasons for striking Juror Laroche when similarly situated white jurors were left on the jury.

Additionally troublesome is, despite the fact that counsel for Scott argued these discrepancies to the circuit court at the remand hearing, the State chose not to offer any explanation for the difference in treatment between Laroche and the similarly situated white jurors.

CONCLUSION

It is clear from the transcript and the memorandum decision in this case that the remand court only considered whether the State could prove that Juror Laroche had previously been charged with a crime, and once such proof was provided the Court ended

its analysis. Nothing in either the Findings of Fact, Conclusions of Law, or the Memorandum decision indicate that the court even considered the factors from *Cannon*, the fact that similarly situated white jurors were not struck by the State, or in any way weighed the evidence presented by the defense and the record indicating that the prosecutor's stated reason for striking Juror Laroche was pre-textual.

It has been long established that a defendant is denied equal protection of law when members of his race are purposely excluded from the jury. *Strader v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664(1880). The Equal Protection Clause is violated if even one juror is struck for a race based reason. *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987). Derrick Scott's rights under the Equal Protection Clause were violated as the State clearly struck Juror Laroche because of her race, while keeping similarly situated white jurors.

Scott respectfully requests that his conviction for Aggravated Assault be vacated and a new trial set.

REQUEST FOR ORAL ARGUMENT

Scott requests to present oral arguments on these issues.

Dated this _____ day of December, 2013.

Respectfully submitted,

_____
Paul Edward Pietz
Counsel for Defendant
and Appellant Derrick Scott

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,

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APPEAL FROM THE CIRCUIT COURT
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THE HONORABLE WALLY EKLUND
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed September 20, 2013

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Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Derrick P. Scott, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as the "State." All other individuals will be referred to by name. This is the second appeal in this case. The first appeal, *State v. Scott*, 2013 S.D. 31, 829 N.W.2d 458, will be referred to as *Scott I.* This appeal will be referred to as *Scott II.* Any exhibits referenced will be from the remand hearing. The various transcripts will be cited as follows:

Trial – January 4-5, 2012 .....JT

Remand Hearing – May 20, 2013.....RH

The settled record in the underlying criminal case, *State v. Derrick P. Scott,* Pennington County Criminal File No. 11-2509, will be referred to

as "SR." Reference to Defendant's brief will be designated as "DB." All references will be followed by the appropriate page designations.

JURISDICTIONAL STATEMENT

This is an appeal from the Memorandum Decision entered by the Honorable Wally Eklund, Seventh Judicial Circuit, on May 24, 2013, denying Defendant's *Batson* challenge. SR 174-76. The court entered judgment affirming Defendant's conviction after this Court remanded for a hearing to determine whether Defendant proved that the State was motivated by purposeful discrimination in striking Juror Tawnee Laroche (Laroche) from the jury. SR 174.

Defendant filed Notice of Appeal on September 20, 2013. SR 199-200. This Court has jurisdiction over the present appeal pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

ON REMAND, DID JUDGE WALLY EKLUND HAVE SUFFICIENT EVIDENCE AND OPPORTUNITY TO CONDUCT THE THIRD PRONG ANALYSIS OF *BATSON v. KENTUCKY* WHEN HE WAS NOT THE TRIAL JUDGE IN THE CASE?

After reviewing the evidence and hearing the arguments of both parties, Judge Eklund concluded he had sufficient evidence and opportunity to conduct the third prong analysis of *Batson*.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)

United States v. Rutledge, 648 F.3d 555 (7th Cir. 2011)

Thaler v. Haynes, 559 U.S. 43, 130 S.Ct. 1171, 175 L.Ed.2d 1003 (2010)

State v. Scott, 2013 S.D. 31, 829 N.W.2d 458

II

ON REMAND, DID THE COURT ERR IN ADMITTING AND CONSIDERING EVIDENCE PRESENTED BY BOTH PARTIES THAT WAS NOT PRESENTED AT THE TIME OF THE ORIGINAL *BATSON* CHALLENGE?

The remand court admitted evidence presented by both parties in conducting the third prong analysis of *Batson*.

State v. Cannon, 2002 UT App. 18, 41 P.3d 1153

State v. Pharris, 846 P.2d 454 (Utah Ct. App. 1993)

State v. Scott, 2013 S.D. 31, 829 N.W.2d 458

III

ON REMAND, DID THE COURT ERR IN CONDUCTING THE THIRD PRONG ANALYSIS OF *BATSON*?

The remand court conducted the third prong analysis of *Batson* and found the State had no racial motive in exercising its challenge and its reasons for striking Juror Laroche were not pretextual.

Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008)

Honomichl v. Leapley, 498 N.W.2d 636, 642 (S.D. 1993)

STATEMENT OF THE CASE

Jury trial was held on January 4 and 5, 2012. JT 1, 257. On January 5, 2012, the jury found Defendant guilty of Aggravated Assault, in violation of SDCL 22-18-1.1(1). SR 130. Defendant subsequently admitted to the Part II Information. JT 437.

The court held sentencing on February 14, 2012. SR 23. Judge Mary Thorstenson sentenced Defendant to eleven years in the South Dakota State Penitentiary. SR 23. Defendant filed Notice of Appeal on March 30, 2012. SR 140.

This Court filed a written opinion in *Scott I* on April 3, 2013, affirming Defendant's conviction on all issues except the *Batson* challenge. SR 149-65. This Court ordered a limited remand to allow the trial court to determine whether Defendant proved that the State was motivated by purposeful discrimination in striking Juror Laroche. SR 162; *Scott,* 2013 S.D. 31 at ¶ 23, 829 N.W.2d at 467.

Trial Judge Mary Thorstenson was unable to conduct the remand hearing as she had left the bench. *Id.* at ¶ 24, 829 N.W.2d at 467. Circuit Court Judge Wally Eklund was assigned to hear the case on remand. RH 2-3; SR 167.

A remand hearing was held on May 20, 2013. RH 1. On May 24, 2013, Judge Eklund issued a Memorandum Decision finding the State was not motivated by purposeful discrimination in striking Juror Laroche and the State's removal of Juror Laroche was not pretextual but supported by the record. SR 174-76. The Court issued Findings of Fact and Conclusions of Law on July 16, 2013. SR 193-95. Judge Eklund signed and filed his Order on August 21, 2013, affirming Defendant's conviction for Aggravated Assault. SR 196.

Defendant filed Notice of Appeal on September 20, 2013. SR 199-200.

STATEMENT OF FACTS

The underlying facts of this case are set forth in *Scott I*. *State v. Scott*, 2013 S.D. 31, ¶¶ 2-9, 829 N.W.2d 458, 460. On July 15, 2011, Defendant brutally beat and choked his girlfriend inside her home, then drug her outside and continued beating her in the parking lot. *Id.* at ¶¶ 5-6, 829 N.W.2d at 461. Defendant punched and kicked the victim at least twenty times, causing her to become unconscious. *Id.* at ¶ 7, 829 N.W.2d at 461. Once the victim was taken to the emergency room, the nurse found a stab would on the victim's upper shoulder, as well as a laceration behind her ear. *Id.* at ¶ 8, 829 N.W.2d at 461. Because of the severity of the beating, the victim remained hospitalized for three days. *Id.* Defendant was arrested and charged with aggravated assault. *Id.* at ¶ 2, 829 N.W.2d at 460.

Based on the limited remand of this Court, only the facts from voir dire at trial are at issue. During the State's questioning during voir dire, Juror Laroche was asked the following set of questions:

> MR. HYRONIMUS: Who else would like to comment about that? Just anybody. I hate calling on people. They did it in law school and it still terrifies me. Ms. Laroche, do you feel the same way? Do you think a victim of a car theft, getting their stereo stolen, might react a little bit differently than victim of domestic abuse? Or do you think--like I said, be honest. I just want to know how you feel.
>
> PROSPECTIVE JUROR: Yes, I agree.

MR. HYRONIMUS: Okay. In what way? The same thing or?

PROSPECTIVE JUROR: The same.

JT 92. After both parties passed for cause, peremptory challenges were exercised. The State struck Juror Laroche, after which the following exchange took place outside the presence of the jury:

THE COURT: Ms. Fuller, objection?

MS. FULLER (Defense): Yes. Our objection is to I understand the State's number six was Tawnee Laroche and she's one of the three Native American people that were on the panel. I guess my--I would argue that that's the sole reason that they're striking her.

MR. HYRONIMUS (State): Personally, the State takes offense to that, I will state that, that we're striking her because she's a Native American. I asked her one question--defense never asked her a question, I don't think. But I asked her one question and I just didn't get a good feeling from her response.

I also know, it's my understanding that Ms. Laroche has recently, I believe, been involved in criminal activity wherein I think she was charged or at least investigated for like threatening behavior on a phone and I just--it's not because she's Native American. I just don't think she, based on her answers today and other reasons, I don't think that she would be a fair juror in this case.

THE COURT: All right. Ms. Fuller?

MS. FULLER (Defense): Well, one, I believe the one question he asked, she agreed with his comments on domestic violence, and I'm not aware and apparently I'm not privy to a lot of the other information that the State is suggesting they have on her.

THE COURT: But it does indicate that there is a non-racial or gender based exclusion if this is, in fact, the information. And we only have one person. There's not been a pattern here. It's just one.

> MR. VENHUIZEN (State): There were three, Your Honor, were Native.
>
> MR. PIETZ (Defense): Well, but it's the only basically Native American looking one in the bunch.
>
> THE COURT: Now--
>
> MR. PIETZ (Defense): And I want to comment that her juror questionnaire does not say that she's been involved with a crime or any kind of criminal activity, so if the State has got this information about jurors, they should have been providing that to us.
>
> THE COURT: It's available to anyone. I don't know, if she didn't write it down, what I am going to say? At this point, my concern is you're saying that because one of the Native American people is being removed from this jury, that that in and of itself is, in fact, showing a racial exclusion, and I don't know that one rises to that level given what the State has indicated as relevant, all the circumstances. There hasn't been a pattern of striking jurors of any certain categories in this. And I just--I'm not seeing purposeful discrimination.
>
> So with that, I guess we'll proceed.

JT 101-03, *Scott,* 2013 S.D. 31 at ¶ 15, 829 N.W.2d at 465. After this exchange, the trial court denied Defendant's challenge. JT 103.

On appeal, this Court issued a limited remand that directed the court to determine whether the State's removal of Juror Laroche was motivated by purposeful discrimination. *Id.* at ¶ 23, 829 N.W.2d at 467.

At the remand hearing, the State presented evidence revealing that Juror Laroche had been investigated and charged with threatening or harassing contact on May 12, 2011. RH 4-5; State's Exhibits A-E. An amended complaint was filed on May 13, 2011, by the same attorney that represented the State in this case. RH 5; State's Exhibits B. The

charge was dismissed when the victim refused to testify or cooperate with the prosecution. RH 7; State's Exhibit D. Based on all the evidence presented, the remand court found the reason offered for striking Juror Laroche was race neutral and not pretextual or designed to mask improper consideration of race. SR 195.

ARGUMENTS

Standard of Review

This Court reviews challenges to the State's use of peremptory challenges under the clearly erroneous standard, "for the finding of intentional discrimination is a factual determination." *State v. Owen*, 2007 S.D. 21, ¶ 11, 729 N.W.2d 356, 362, (citing *State v. Martin,* 2004 S.D. 82, ¶¶ 13, 16, 683 N.W.2d 399, 403, 405). Under the clearly erroneous standard, this Court's function "is to determine whether the decision of the lower court lacks the support of substantial evidence, evolves from an erroneous view of the applicable law or whether, considering the entire record, we are left with a definite and firm conviction that a mistake has been made." *State v. Roach*, 2012 S.D. 91, ¶ 32, 825 N.W.2d 258, 267 (citing *State v. Overbey,* 2010 S.D. 78, ¶ 11, 790 N.W.2d 35, 40 (quoting *In re H.L.S.,* 2009 S.D. 92, ¶ 11, 774 N.W.2d 803, 807–08)). As this Court noted in *Scott I,* "[a] court's findings are afforded great deference, as the analysis depends highly on credibility." *Scott,* 2013 S.D. 31 at ¶ 18, 829 N.W.2d at 466 (citing *United States v. Maxwell,* 473 F.3d 868, 872 (8th Cir. 2007)).

I

JUDGE EKLUND HAD SUFFICIENT EVIDENCE AND OPPORTUNITY TO CONDUCT THE THIRD PRONG ANALYSIS OF *BATSON.*

The first issue is whether Judge Eklund had sufficient evidence and opportunity to make the necessary findings to complete the *Batson* analysis when he was not the trial judge in the case.

The trial judge, Judge Mary Thorstenson, was unable to preside over the hearing so a new judge was assigned to determine if Defendant proved the State offered pretextual reasoning for striking Juror Laroche. *Scott,* 2013 S.D. 31 at ¶ 24, 829 N.W.2d at 467. This Court recognized the difficulty of having another judge conduct the *Batson* analysis, noting, "[i]f the newly assigned judge determines that insufficient evidence exists to make the necessary findings, then a new trial must be ordered." *Scott,* 2013 S.D. 31 at ¶ 24, 829 N.W.2d at 467.

After taking this into consideration, this Court ordered,

> If the court finds no racial motivation, the judgment will stand affirmed, subject to Scott's right to appeal this finding. If the court concludes that Scott proved purposeful discrimination or the court is unable to reach a conclusion because of the passage of time, Scott's conviction should be vacated and a new trial ordered.

Scott, 2013 S.D. 31 at ¶ 23, 829 N.W.2d at 467 (citing *United States v. Rutledge,* 648 F.3d 555, 562 (7th Cir. 2011)).

Judge Eklund recognized the difficulties in this task, stating:

> Well, I think the plain language of the opinion in Paragraph 24 says, "We cannot remand the Circuit Judge Thortsenson who presided here because she has since left the bench to

> take another judicial position. In similar circumstances, other courts have remanded to a new judge to complete the required *Batson* analysis." So that's --if I determine I can do that, that's what I'm prepared to do.

RH 3. Defendant argues Judge Eklund sat in no better position than this Court to conduct the *Batson* analysis since he was unable to see the facial expressions and tones of the prospective jurors. DB 4-5. In *Scott I,* this Court noted these difficulties may exist but provided for a limited remand to explore whether the third prong of the *Batson* analysis could be addressed by another judge. *Id.* at ¶¶ 23-24, 829 N.W.2d at 467.

The United States Supreme Court has recognized that the *Batson* analysis involves more than just a juror's demeanor, stating:

> [W]here the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the *voir dire*. But *Batson* plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor.

(Emphasis in original.) *Thaler v. Haynes*, 559 U.S. 43, 48, 130 S.Ct. 1171, 1174, 175 L.Ed.2d 1003 (2010). The "feeling" the State had was based in part on Juror Laroche's demeanor and lack of interest when she was questioned during voir dire. JT 101-02. But the "feeling" also stemmed from the investigation and charges stemming from Juror Laroche's threatening use of a phone. RH 4-5; State's Exhibits A-E. Judge Eklund considered all of these reasons, using the trial transcript and additional details presented at a remand hearing, to determine

State presented race neutral and not pretextual reasons for striking Juror Laroche. SR 174-76. Judge Eklund, therefore, was in a position to make a credibility finding on the third prong of the *Batson* analysis.

This Court noted the difficulty with remanding to a new judge in *Scott I,* but allowed the limited remand with the caveat that it was up to the judge on remand to determine if he had sufficient evidence to conduct the *Batson* analysis. The remand court properly determined, after hearing the evidence and listening to the arguments, that sufficient evidence was presented at the remand hearing to allow it to fully complete the *Batson* analysis. SR 174-76, 193-96.

II

THE REMAND COURT PROPERLY ADMITTED AND CONSIDERED EVIDENCE THAT WAS NOT OFFERED AT THE TIME OF THE ORIGINAL *BATSON* CHALLENGE.

Defendant next argues the court erred in allowing additional evidence to be presented at the remand hearing. Defendant doesn't, however, offer any support for this argument. This Court remanded the case, directing the newely assigned judge to determine whether sufficient evidence exists to complete the required *Batson* analysis. *Scott,* 2013 S.D. 31 at ¶ 24, 829 N.W.2d at 466. As the State argued at the remand hearing, ". . . if this Court was to rely on the record only through transcripts and otherwise, I don't think there would be any purpose for the Supreme Court sending it back." RH 3.

Defendant argues that only the information that was available during voir dire should have been permitted at the remand hearing. DB 7. He challenges the information the State presented at the remand hearing, noting it was not available to the trial judge at the time the *Batson* analysis should have been fully completed. DB 7. The State did inform the trial court during voir dire, however, that it was aware of an investigation pertaining to Juror Laroche. JT 102. Although the prosecutor could not specifically recall every detail, he was aware of an investigation and even cited the nature of the crime alleged, threatening behavior on a phone. JT 102. Although the State did not have the Complaint and arrest report in hand during voir dire, this evidence was readily available to the court as the investigation and Complaint were both dated a year prior to Defendant's trial and the Complaint was filed with the Pennington County Clerk of Courts. State's Exhibits A-E.

Other courts have found that "[b]ecause of the necessity of evaluating the discrimination issue according to specific analytical guidelines, the trial court *must* create a complete record." *State v. Cannon*, 2002 UT App 18, ¶ 11, 41 P.3d 1153, 1157 (citing *State v. Pharris,* 846 P.2d 454, 464 (Utah Ct. App. 1993) (emphasis added)). Like the court in *Cannon,* this Court directed the remand court to "make specific findings on the basis for the State's 'feeling' toward Juror Laroche and the validity of the State's claim that Juror Laroche had been charged with or investigated for criminal behavior." *Scott,* 2013

S.D. 31 at ¶ 23, 829 N.W.2d at 467. The only additional evidence the State could offer to prove that it was not motivated by purposeful discrimination when it struck Juror Laroche was to offer the complaint and arrest report. State's Exhibits A-E. Allowing this supplemental evidence was proper as it fulfilled this Court's directive and allowed the lower court to make specific findings on the State's "feeling" towards Juror Laroche.

III

THE REMAND COURT PROPERLY CONDUCTED THE THIRD PRONG *BATSON* ANALYSIS.

This Court found Defendant had established a prima facie case for purposeful discrimination, satisfying the first prong of the *Batson* test. *Scott,* 2013 S.D. 31 at ¶ 17, 829 N.W.2d at 466. In response, the State offered the race-neutral explanation that it did not get a good "feeling" from Juror Laroche based on her apparent lack of interest in the case and knowledge that she had been investigated and charged with threatening behavior. JT 101-02. This Court determined these explanations met the second prong of the *Batson* analysis. *Scott,* 2013 S.D. 31 at ¶ 15, 829 N.W.2d at 465. This Court noted, however, that the trial court "had the duty to assess the veracity of the State's race-neutral reasons . . ." *Scott,* 2013 S.D. 31 at ¶ 21, 829 N.W.2d at 466. Because the trial court did not address the third prong of the *Batson* analysis, this Court remanded the case to allow the court to find

whether the State was motivated by discriminatory intent based on the evidence. *Scott,* 2013 S.D. 31 at ¶ 21, 829 N.W.2d at 466.

The third prong of the *Batson* test is well established and outlined in *Scott I*: "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." *Scott,* 2013 S.D. 31 at ¶ 16, 829 N.W.2d at 465-66 (citing *Purkett v. Elem,* 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam); *Johnson v. California,* 545 U.S. 162, 168, 125 S.Ct. 2410, 2416, 162 L.Ed.2d 129 (2005)). The United States Supreme Court has explained this step further: "[s]tep three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility . . . and the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 1208, 170 L.Ed.2d 175 (2008) (citing *Hernandez v. New York,* 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)).

This third step hinges on the State's credibility in offering race neutral reasons for the strike. At trial, when questioned about the strike, the State responded,

> . . . I asked her one question and I just didn't get a good feeling from her response. I also know, it's my understanding that Ms. Laroche has recently, I believe, been involved in criminal activity wherein I think she was charged or at least investigated for like threatening behavior on a phone . . .

JT 102. To establish the validity of its reasoning, the State offered Exhibits A-E at the remand hearing, specifically the Complaint, Amended Complaint, Filing Documents list, Order Dismissing Complaint, and the Arrest Report for the criminal conduct alleged against Juror Laroche. State's Exhibits A-E. These exhibits show Juror Laroche was arrested on May 4, 2011, for Unlawful Use of the Phone.[1] State's Exhibit E. She was charged with Threatening or Harassing Contact by Amended Complaint on May 13, 2011. State's Exhibit B.[2] The Amended Complaint was signed by Todd Hyronimus, the same counsel that represented the State in this case. RH 1; State's Exhibit B. The charges against Juror Laroche were ultimately dismissed because the victim refused to cooperate. RH 7.

Based on the charges Defendant was facing, the court found the State's "feeling" was not pretextual but rather a reasoned concern about Juror Laroche's ability to be a fair and impartial juror. SR 174-75. The court concluded the evidence the State presented regarding Juror Laroche's criminal behavior was consistent with the statements the State made during the *Batson* challenge at voir dire. SR 195; Conclusion of Law 11. The court also concluded the "reason offered by the State was race neutral[,]" as well as "the reason offered for the strike

[1] Juror Laroche's own legal problems occurred two months before Defendant's aggravated assault. RH 5.

[2] This charged conduct is similar in nature to Defendant's charges.

was not pretexual [sic] or designed to mask an improper considering of race." SR 195; Conclusions of Law 12, 13.

To satisfy the third prong of the *Batson* analysis, Defendant must show that the State's explanation for the use of the peremptory challenge is "unworthy of credence by the court in that they are pretextual." *Honomichl v. Leapley,* 498 N.W.2d 636, 642 (S.D. 1993) (citations omitted). In doing so, he must show the peremptory challenged was based *solely* on race. *Batson v. Kentucky,* 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69, 83. Defendant has not done this. The State offered, and the court found, that race-neutral, non-pretextual explanations for striking Juror Laroche existed in this record. SR 195.

In *Snyder*, 552 U.S. 472, 128 S.Ct. 1203, the state gave two reasons for striking a minority juror: he looked nervous throughout questioning and he would have to miss class as a student teacher. *Id.* at 478, 128 S.Ct. at 1208. The second reason was suspicious to the Supreme Court, even likely pretextual, since the prospective juror's absence from school to serve on the jury would not seriously interfere with his ability to complete his required student teaching, leaving the Supreme Court with only the demeanor-based reason for a basis to strike the juror. *Id.* at 482–84, 128 S.Ct. at 1210-11. The Supreme Court held that the demeanor-based reasoning alone, which the state would not have been successful in alleging by itself to strike the juror,

was insufficient and the conviction was overturned. *Id.* at 485, 128 S.Ct. at 1212.

Here, there were two reasons given for striking Juror Laroche, one being partly a demeanor-based reason. On remand in this case, however, both explanations were valid, race neutral, and supported by the record. Even without the demeanor-based justification, Juror Laroche's inattention at trial, the State's criminal behavior explanation is supported by supplemental evidence. The State had charged Juror Laroche with threatening behavior, which is similar to the charges in this case (aggravated assault). The court found that reason to be credible, not suspicious, and not pretextual. SR 195.

Another reason for striking Juror Laroche was her silence during most of voir dire. She did not voluntarily answer any questions. The only time she spoke was when called upon and then her answers were minimal, only "yes" and "same," even when asked for more complete answers. JT 92; RH 4. This gave the State a "feeling" she was not interested and not paying attention. RH 4.

Defendant presents a number of comparisons to show how other jurors were treated differently. The United States Supreme Court has been hesitant to conduct such comparisons, stating, "an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." *Snyder,* 552 U.S. at 483, 128 S.Ct. at 1211.

The only substantial comparison Defendant notes is between Juror Laroche and Juror Russell Brown, a white man who sat on the jury even though he indicated he had been convicted of a crime. DB 13; Defendant's Exhibit 7. Juror Brown offered that he had been a nurse in a nursing home for 17 years, an occupation that may be helpful to the State in the underlying trial for aggravated assault. JT 60. In comparison, Juror Laroche indicated on her juror questionnaire that she is a house keeper. Defendant's Exhibit 7. During questioning, Juror Brown was asked questions about domestic violence and how it affects children. JT 88. Juror Brown elaborated his answer, stating, "Well, they see this happening in the home. They're not old enough to--sometimes they're not old enough to realize this isn't the way things need to be done." JT 88. When Juror Laroche was asked how a victim of car theft may react differently than a victim of domestic abuse, she simply stated, "The same[,]" without further elaboration. JT 92. Although Juror Brown admitted he had been convicted of a crime on his juror questionnaire, neither side questioned him about that crime or the circumstances surrounding it. No question regarding his capability to serve as a juror was raised by either side. In comparison, the State brought up its concern about Juror Laroche's investigation for threatening behavior. JT 101-02. Defendant's attempt to compare these two individuals fails as they are not similarly situated for the above reasons.

Defendant also complains that the State offered additional explanations for striking Juror Laroche at the remand hearing that were not offered during voir dire. DB 13. A review of the jury transcript, particularly pages 101 through 103, reveals the State offered the same reasoning at both hearings. JT 101-03.

Defendant claims the State singled out two of the three Native Americans on the jury and only two other non-Native American people during voir dire in an attempt to evoke a certain response. DB 11. He elaborates that the "certain response" was simply being called upon to answer a question. DB 11. A review of the transcript shows the State directly asked questions of ten people, not only the four indicated: Juror Loren Wermers (JT 77), Juror Lindsay Thompson (JT 78), Juror Becky Drury (JT 84), Juror Michelle Lehmann (JT 85), Juror Brown (JT 88), Juror Daniel McDowell (JT 90), Juror Laroche (JT 92), Juror Peter Lien (JT 94), Juror David Spiers (JT 96), and Juror Pamela Fritz (JT 99). The State asked questions of these prospective jurors to get their view on different subjects in order to determine whether each individual could be fair and impartial, the purpose of conducting voir dire. No evidence has been presented that the State forced anyone to answer any questions or answer any question in a certain way.

Finally, Defendant compares Juror Laroche with four white, non-Native American jurors who did not answer any questions. DB 14.

This argument also fails as there is nothing in the record showing these jurors were accused or charged with a crime. Defendant's Exhibit 7.

After the State struck Juror Laroche and Defendant struck Juror Travis Lind, the only Native American left on the jury panel was Juror Michele Lehmann, who served on the jury. Juror Lehmann has never been convicted of a crime. Defendant's Exhibit 7. She is an EMT, another profession deemed helpful to the State in this case. JT 58-59, 102. She also elaborated on questions asked of her during voir dire. JT 58, 85-86. She was deemed qualified by both parties to sit on Defendant's case. JT 58, 85-86,102.

This case is similar to *Honomichl,* 498 N.W.2d 636, in which a prosecutor was attempting to remove Ben Cadotte, an American Indian, from a first-degree manslaughter case. *Id.* at 638. Cadotte had a "disorderly" pending in Charles Mix County at the time of the trial. *Id.* After a challenge for cause failed, the prosecutor exercised a peremptory challenge to remove Cadotte. *Id.* This Court held that the strength of the prosecutor's reason "for using a peremptory on the Indian Ben Cadotte is beyond question." *Id.* at 640. Since a disorderly charge was sufficient in a manslaughter case to remove a juror, threatening behavior should be sufficient to remove a juror in a domestic aggravated assault case as the charges are as similar in nature.

The "ultimate burden of persuading the trier of fact that the [prosecutor] intentionally discriminated against [Scott] remains at all

times with [Scott]." *Honomichl*, 498 N.W.2d at 639 (citing *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, 256, 101 S.Ct. 1089, 1093, 1095, 67 L.Ed.2d 207, 215, 217 (1981)); *State v. Farmer,* 407 N.W.2d 821, 823 (S.D. 1987). Defendant has failed to present evidence showing the State is not credible in its belief that Juror Laroche would not have been a fair and impartial juror. The State presented evidence that Juror Laroche had recently been charged with threatening behavior and appeared to lack interest in the trial.

CONCLUSION

The State respectfully requests that the remand court's decision, and accordingly Defendant's conviction, be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 4,684 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 22nd day of January, 2014.

_____
Bethanna M. Feist
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of January, 2014, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Derrick P. Scott* was served via electronic mail upon Paul Pietz at paul.pietz@renschlaw.com.

_____
Bethanna M. Feist
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #26819

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

DERRICK P. SCOTT,
Defendant and Appellant

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE WALLY EKLUND

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PRELIMINARY STATEMENT

Pursuant to SDCL § 15-26A-62 (in pertinent part), "The reply brief must be confined to new matter raised in the brief of the appellee . . . ." In keeping to his duty to only rebut "new matter," Scott will avoid merely re-hashing arguments set forth in his Appellant's Brief. Where the State's Appellee's Brief argues an issue that does not present "new matter" for Scott to rebut, he will note the same and move on to the next issue. By that, Scott does not mean he is abandoning the point of that issue, or conceding to the State its argument. References to the State's Brief will be noted with "SB" followed by a page number. References to the Remand Hearing will be noted with "RH" followed by a page number. References to the trial transcript will be referred to as "TT" followed by a page number. References to the Thorstenson trial court will be noted as "trial court" or "Judge Thorstenson", while the references to the remand hearing by Judge Eklund will be noted as "the Eklund court."

ARGUMENT

As a general housekeeping issue, counsel for Scott notes the State's error in the Statement of the Case section where it is indicated that this Court affirmed the conviction of Scott. SB, pg 9. This Court merely affirmed the trial judge's rulings on all issues but the *Batson* challenge. What was affirmed were certain rulings, hence the remand.

Standard of Review

The State points to cases indicating a standard of review of "clearly erroneous." Although Scott concedes this is normally the standard, his situation is unique in that all of the quoted cases deal with the findings of the "trial court" in which the judge who made the findings actually conducted the trial. As this Court realized in *Scott I*, Judge Thorstenson was no longer available to hear this case on remand. The clearly erroneous standard evolves from the fact that the findings of fact are a factual determination, and, as the State pointed out, normally given great deference. However that deference is afforded the trial court who witnessed the trial proceedings—something that did not occur here.

"Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations." *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 1041 (2003). In this instance, as Judge Eklund sits in no better position than the appellate court.

1. Due to the original trial judge leaving the bench, Judge Eklund did not have sufficient evidence, background, or opportunity to review the credibility of the struck juror and/or of the assistant state's attorney who stated his alleged non-pretextual reasons for striking the minority juror, in order to properly conduct an appropriate *Batson* hearing after remand.

The State claims that Judge Eklund recognized the difficulties of the task. SB, pg. 9. The statement of Judge Eklund, quoted by the State, was in direct response to the

State's argument that Judge Eklund was able to take new evidence. RH, pp. 3-4. The statement in no way indicates that Judge Eklund realized the "difficulties of the task." In fact, Judge Eklund did not address the issue being objected to by counsel for Scott, whether the remand order allowed for new evidence.

The State devotes the majority of the argument in this section to the proposition that this Court and Judge Eklund realized the potential difficulties involved with remanding to a different judge sixteen months later. However, they do little to refute the argument put forth by Scott in Appellant's Brief, i.e., that Judge Eklund sits in no better position than does this Court.

This is not simply the contention of Scott, but rather was specifically recognized by the court in *State v. Cannon,* which this Court relied on, in part, in remanding in *Scott I.* See *State v. Scott*, 2013 S.D. 13, ¶24, 829 N.W.2d 458. As the Utah appeals court in *Cannon* stated in footnote 3 when explaining the practical difficulties a different judge would have at a remand hearing:

> "Perhaps chief among the practical difficulties on remand is the fact that the trial judge who initially oversaw this case has retired and is not eligible to sit in any capacity. *Therefore, on remand, the trial court will be in a position not unlike that which we occupy, having not been present during the first trial*." (Emphasis added)

State v. Cannon, 2002 UT App. 18, ¶17 n.3, 41 P.3d 1153, 1158.

The State does not at all address the fact that Judge Eklund did not have the opportunity to view the demeanor of the prosecutor or the demeanor of the jurors, specifically Juror Laroche. The State immediately moves to *Thayler v. Haynes*, 559 U.S.

43, 130 S.Ct. 1171 (2010), to contend that a demeanor-based reason should not be rejected simply because the judge did not observe or recall the juror's demeanor. However, this does not mean that those observations, if made by a trial judge, are of great value in determining whether the prosecutor's proffered reason is or is not a pretext.

As the Court stated in *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 1208 (2008):

> In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "peculiarly within a trial judge's province, " ibid. (quoting *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)), and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]."

This passage demonstrates that which is common sense to most. That when judging credibility being able to see the speaker at the time of their statement, or at the time of their actions, is most critical. Judge Thorstenson had the ability and opportunity to judge the demeanor of the prosecutor at the time of the objection to the State's strike. She made no findings to this effect. Judge Thorstenson had the ability and opportunity to observe Juror Laroche (as well as the other jurors) to determine if Laroche's demeanor credibly could be said to be the basis of the strike. Judge Thorstenson made no findings

as to this either. Therefore the record is of no help to Judge Eklund. Judge Eklund had no opportunity to make these first-hand observations, which the Court in *Snyder* noted are of great importance in determining credibility. Nor can they be gleaned from a cold record, or re-created sixteen months later.

The State also fails to recognize that the judge in *Thayler* conducted the strike portion, but not the voir dire, and heard the arguments of counsel immediately following the voir dire—not sixteen months later. *Thayler v. Haynes*, 559 U.S. 43, 44, 130 S.Ct. 1171, 1172 (2010). Therefore Judge Wallace, the judge presiding over the peremptory challenges, still had the benefit of judging credibility of the prosecutor at the time the objection to the strike was made, which put Judge Wallace in a better position for a credibility determination than Judge Eklund. Further, Judge Wallace never had the opportunity to view the juror's demeanor. Judge Thorstenson did. However by not doing so due to the improper application of the law at the time of the challenge, Scott was denied this evidence. We do not know, nor will we know, if Judge Thorstenson observed Laroche, or the other white jurors who answered no questions, and what effect that may have had on a proper analysis of the third prong of the *Batson* challenge.

Additionally, the State never truly gave Judge Thorstenson the chance to make a finding as to Juror Laroche's inattentiveness, or lack of interest in the process, because they never made these claims to Judge Thorstenson. The totality of the State's claim for the strike to Judge Thorstenson, on the issue of Juror Laroche's demeanor, was as follows:

> "I asked her one question that - - defense never asked her a question, I don't think. But I asked her one question and I just did not get a good feeling from her response." TT, pg 101.
>
> "I just don't think she, based on her answers today and other reasons, I don't think that she would be a fair juror in this case." TT, pg 102.

At no time, during the discussion with Judge Thorstenson, does the State mention that Juror Laroche's demeanor or lack of interest when she was questioned. In fact, the State indicated it was "based on her answers today," and that "feeling" was from her response not her demeanor. The claims of inattentiveness and lack of interest were not actually argued by the State to Judge Thorstenson. This was a product created and produced for the first time before Judge Eklund—an argument that Judge Eklund had absolutely no evidence to base a decision of purposeful discrimination upon because he was not the trial judge. Judge Thorstenson never made any findings on Laroche's demeanor, due to the State's failure to describe their "feeling."

As the State has not forwarded any argument as to why Judge Eklund sat in a better position that the appellate court, and could legitimately step into the shoes of Judge Thorstenson, nor disputed or addressed the lack of evidence of first hand observation, we will not address it further.

Finally, the State offers no actual reason that Judge Eklund would be capable of filling this role sixteen months later. They simply state that Judge Eklund considered all of these reasons, using the trial transcript, and additional details presented at the hearing, to make a determination and therefore he was in position to make a credibility finding.

SB, pg 10-11. This is not reasoned argument, it is simply a conclusion without a stated basis and without legal authority.

2. **The remand court improperly admitted and considered evidence that was not offered at the time of the original *Batson* challenge.**

Despite the State's claim that the Defendant offers no authority for the contention that new evidence should not have been admitted, the State then goes on to do the same in support that it is proper to submit and admit new evidence.

The State reveals its fundamental misunderstanding of this Court's remand instructions, which in turn caused the trial court to violate Scott's fair trial rights by re-opening the trial record and accepting new evidence to supplement and bolster the State's position.

In *State v. Piper*, the Court discussed the scope of remand when a defendant attempted to withdraw his guilty plea for the first time at the remand hearing. The *Piper* Court held that on remand the circuit court's jurisdiction must conform to the dictates of the Supreme Court's opinion. 2014 S.D. 2, ¶ 10, — NW2d —. The Court stated that if a circuit court's original jurisdiction could spontaneously resurrect on remittal, the defined roles of the tiered judicial system and the judicial certainty and efficiency they foster would be nullified. *Id.* at ¶ 10. The Court went on to state that their directives on remittal are clear on the face of the opinions. *Id.* at ¶ 11. After discussing both affirmance and general remand the Court stated:

> Between these two extremes is the limited remand, for which our instructions must exactly govern. "When the scope of remand is limited, the entire case is not reopened, but rather, the lower tribunal is

> only authorized to carry out the appellate court's mandate." (Quoting *In re Conditional Use Permit Granted to Van Zanten*, 1999 S.D. 79, ¶ 13, 598 N.W.2d 861, 864 (citing 5 Am.Jur.2d Appellate Review § 787 (1995)).

Piper, at ¶11.

In *Scott I*, this Court's remand instruction was clear:

> We remand to the circuit court to determine if Scott proved that the State was motivated by purposeful discrimination. The court is directed to make specific findings on the basis for the State's "feeling" toward Juror Laroche and the validity of the State's claim that Juror Laroche had been charged with or investigated for criminal behavior.

Scott I, 2013 S.D. 31 at ¶23.

The remand was for the limited purpose of determining if Scott proved that the State was motivated by purposeful discrimination. Clearly the trial court was to complete the third step of the *Batson* analysis as evidenced by the Supreme Court's statements, "But the circuit court here never reached the third step and thus made no findings on whether the State was motivated by discriminatory intent based on all the evidence." *Scott I,* at ¶20. "Under *Batson*, the circuit court had the duty to assess the veracity of the State's race-neutral reasons and determine whether Scott met his burden of proving purposeful discrimination." *Scott I,* at ¶20. At no time did this Court indicate that the remand was to involve the addition of new evidence.

When this Court has allowed an evidentiary hearing on remand, it has been very specific in its instructions. One such example is the recent case of *Humble v. Wyant*,

2014 S.D. 4, — N.W.2d —. In *Humble*, this Court remanded the case to the circuit court stated:

> We therefore remand for findings of fact, conclusions of law, and reconsideration of specific performance under this exception. The Court must consider: (1) whether Humble partially performed: and if so, (2) whether Wyant is capable of being fully compensated for Humble's failure to perform. We remand for further proceedings consistent with this opinion.

Humble, at ¶37.

The Court in *Humble*, as in *Scott I*, was aware that the original judge may not be available since Judge Bastian had retired. However, unlike in *Scott I*, the Court specifically stated they would allow additional evidence to be considered if Judge Bastian was unable to hear the matter. *Humble*, at footnote 8. No such allowance was granted here to Judge Eklund on remand.

The present case involves the substantially important Constitutional right of a minority defendant to a fair trial consisting of a jury of one's peers, including minority jurors not struck by the government in a pretextual effort to prevent an acquittal or hung jury. The importance of this right is greater than that of a person in a domestic protection order case, or civil litigants for monetary damages. Thus, if civil litigants on the short end of summary judgment do not get a "second bite of the apple" when they are found to have failed to have produced evidence when the time was initially before them to do so, then certainly a criminal defendant clothed with Constitutional rights is entitled to more protection from the government during a *Batson* remand.

A significant difference exists between remanding to allow new evidence to be asserted, and remanding to permit the trial court—based on the trial record as it already existed—to supplement that record with proper findings and conclusions explaining an order. A finding of fact, and a conclusion of law drawn from it, derive from the evidence that has already been presented. It is not itself new evidence.

This Court's directive in remanding Scott also makes this clear: "If the newly assigned judge determines that insufficient evidence **exists** to make the necessary findings, then a new trial must be ordered." *Scott I,* at ¶24. (Emphasis added.) The word *exists* indicates evidence already in existence, not new evidence being presented.

3. Did the remand court fail to engage in a proper analysis of the third prong of an appropriate *Batson* challenge?

The State immediately misstates the record. The State claims that the prosecutor did not get a good "feeling" based on Juror Laroche's apparent lack of interest in the case. SB 13. The State then references pages 101-102 of the jury trial transcript. A review of those pages indicate that the prosecutor's feeling was "I asked her one question and I just didn't get a good feeling from her response." JT 101. The prosecutor ended his reasoning with the statement, "Based on her answers today and other reasons, I don't think she would be a fair juror in this case." JT 102. At no time in the jury trial transcript does the prosecutor claim inattentiveness or lack of interest. In fact, demeanor is not mentioned at all. The State did not attempt to inject the "demeanor" reason until the hearing before Judge Eklund. This is likely due to the fact that Juror Laroche's one answer to a State's question was positive for them, and therefore could not provide the

basis for this "feeling" as originally claimed. As this Court stating in *State v. Martin*, 2004 S.D. 82, ¶11, 683 N.W.2d 399, 402, once a prima facie case has been established by the defendant the State can rebut the presumption by articulating a clear and reasonably specific [gender] neutral explanation for using its peremptory challenge. This "feeling," unexplained in any way before Judge Thorstenson, is hardly specific. Furthermore, "[I]f these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." *Batson v. Kentucky,* 476 U.S. 79, 98, 106 S.Ct. 1712, 1724 (1986).

The State goes on to indicate that the question hinges on the demeanor of the attorney who is exercising the challenge. SB 14. Though this is a correct statement, the State fails to recognize that the only person who could gauge that demeanor was Judge Thorstenson. Any demeanor of the prosecutor sixteen months later, with time to prepare for a hearing and hone their responses, will have a much different demeanor. Therefore, demeanor is little help to the prosecutor's credibility here since the trial court made no such findings.

The State claims that Scott must show the strike was based *soley* on race. Although this may have been a quote from *Batson*, the State twists this to mean that if the State can show proof of one of their proffered reasons, then the strike cannot be *solely* based on race. However, the State misses the idea of a "pretext." If a reason is pre-textual, it is not the actual reason for the strike, but rather a fabrication to protect the true reason.

Moreover, as the 9th Circuit Court of Appeals stated, "'[a] court need not find all nonracial reasons pretextual in order to find racial discrimination' with respect to any particular juror, and the exclusion of any one juror in violation of *Batson* requires reversal of the verdict." *Ayala v. Wong*, 730 F.3d 831, 859 (9th Cir. 2013). The State's position does not even meet a simple logic test. If the strike must be *solely* based on race, then a prosecutor could state, "I struck him judge because he is black, and I didn't like his shoes." Under the State's position, since the strike was not solely based on race, but also on shoes, then it does not violate *Batson.*

The State also claims that this Court warned about an appellate court conduction comparisons, as exploration of those similarities may have shown the jurors were not similar. First, the State is making Scott's point in the first part of this argument—if Judge Eklund cannot make a comparison of jurors since it was not done at trial, then through Judge Thorstenson's incorrect "pattern" ruling Scott was denied his evidence of discrimination. Only Judge Thorstenson knows if—based upon her personal observation of the jurors in question, and the credibility of both the prosecutor's explanation and the demeanor of the jurors—if the only reason that she had to deny the *Batson* challenge was upon "pattern," and that except for that basis she would have granted the *Batson* motion. Judge Eklund should not have received new evidence to fix that situation, nor was he legally capable of properly conducting the third prong of the analysis since he was not the trial judge. Second, although the Supreme Court warned about comparisons in *Snyder*, it is important to note that Snyder's case was heard *ten years* after the trial. Obviously that

passage of time would make even the actual trial judge, as well as all the other participants, foggy as to what transpired.

Much more recently, the United States Supreme Court has stated:

> More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.

Miller-El v. Dretke, 545 U.S. 231, 241, 125 S.Ct. 2317, 2321 (2005).

This Court and the federal Eighth Circuit of Appeals have similarly recognized a value with comparisons:

> The Eighth Circuit Court has held that the determination whether an explanation is neutral "is a question of comparability. It is well-established that peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged." *Devose v. Norris*, 53 F.3d 201, 204 (8th Cir. 1995)

State v. Martin, 2004 S.D. 82, ¶16, 683 N.W.2d 399.

It is important to note that at the remand hearing the State made no argument against the comparability of the jurors when presented by defense counsel. The State now wants to presents reasons why Juror Brown and Juror Laroche were not comparable. However, the question is whether the strike made by Mr. Hyronimus also applied to another juror similarly situated. Juror Brown noted that he had a conviction on his

record. If the State's claimed problem with Laroche was that she had once been charged with a crime, then Juror Brown should be a concern. The State now wants to argue that the reason Brown was not struck and Laroche was struck is due to the fact that Brown worked in a nursing home and Laroche worked as a house keeper. SB 18. They also address the different answers that were given. Again, the State misses the point. Mr. Hyronimus never offered these reasons for keeping Juror Brown and striking Juror Laroche when challenged at the remand hearing. The State cannot now manufacture these reasons and claim that was the prosecutors thought process.

The fact is that Mr. Hyronimus claimed that he struck Juror Laroche because she had been charged or investigated for a crime. Juror Brown had been convicted of a crime. Therefore, the prosecutors proffered reason for striking a minority juror (criminal record) applied equally to a white member of the panel that was not struck.

The State further contends that the prosecutor directly questioned ten jurors, not two as claimed by Defendant in his brief. This position demonstrates the difficulty of a person who was not present at the time being able to step into another's shoes who was actually present. Jurors often raise their hands when they have a response to a question. The questioning attorney, in order to establish a solid record, will call on them by name. This is the case with Ms. Drury (JT 84), Mr. Spiers (JT 94-96), and Ms. Fritz (JT 99). Mr. Lien may have already in the discussion with the prosecutor when he was called by name. It is the cold record that makes this determination difficult, as Defendant pointed out in his brief that Mr. Spiers and Mr. Lien may have been called on.

The State misses two points here. One, in order to establish that a juror is biased against a party for a particular reason, questions should be asked. As the Court in *State v. Pharris,* 846 P.2d 454 (Utah Ct. App. 1993) stated:

> The trial court must discount justifications if the prospective juror was (1) not shown to share an alleged bias, (2) not examined or subjected to perfunctory examination by the prosecutor when neither the trial court nor the defense had questioned him or her, (3) singled out for questioning to evoke a specific response, (4) challenged for a reason unrelated to the trial, or (5) challenged for reasons equally applicable to other jurors not similarly challenged.

Pharris, at 464.

The record is clear that Juror Laroche had been hardly asked any questions. This was even pointed out by the State to Judge Thorstenson. JT 101. If the prosecutor had a "feeling" about Juror Laroche, why did he not question her more? If the prosecutor was concerned about her potentially being biased due to being charged with a crime in the past, why not ask? Why did the prosecutor not question Juror Brown at all? Not only has the State not established that Juror Laroche shared the bias as in #1 above, the State was perfunctory in its questioning as in #2, and challenged Juror Laroche for a reason equally applicable to Brown, a white juror, as in #5. These are "or" conditions, meaning one is enough for the trial court to discount the reason. Even if Juror Laroche was not singled out, she still meets at least three of the other conditions.

The State compares Laroche to *Honomichl v. Leapley,* 498 N.W.2d 636 (S.D. 1993). SB 20. There the court found that a juror currently charged with a crime of disorderly

conduct to be a valid non-racial reason for the strike. A true comparison however would be that Laroche, who had a charge dismissed against her, was in a less biased position than *Honomichl*, who had a charge actually pending. *Honomichl* was in an even less biased position than Juror Brown in Scott's case, as he had actually been convicted of a crime.

The comparison here is more to *Snyder* than *Honomichl.* Since the trial court (Thorstenson) never credited the "feeling" as being a valid reason for the strike, we cannot do so now. The fact that four white jurors who had answered no questions at all were not challenged only goes to show that Juror Laroche would not be struck for this reason alone, even if the trial court had credited it. Therefore they are left with only one reason, that Laroche was charged with a crime. Brown was convicted of one. As in *Snyder*, where the struck student teacher had less important obligations than white jury members, the reason was deemed pretextual.

The State also speaks to the fact that Juror Lehman remained on the jury. This is irrelevant. No prosecutor, after hearing a judge state she is looking for a pattern, would strike the last Native American.

The State also mentions that the exhibits entered at the remand hearing support the non-racial reason for the strike. However, as argued in Defendant's brief, since none of that information was actually know to the prosecutor at the time, it cannot be a basis of the proffered reasons.

CONCLUSION

Appellant Scott respectfully requests that this Court grant to him reversal of his conviction, and/or further remand for a new trial.

Respectfully submitted this _____ day of February, 2014.

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