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Case Number 368,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAVAGHN WAPLES,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 368, 2021
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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DATED: March 4, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

I. THE TRIAL COURT DENIED JAVAGHN WAPLES EQUAL PROTECTION OF THE LAWS WHEN, AFTER HE MADE A *PRIMA FACIE* SHOWING THAT THE STATE EXERCISED A PEREMPTORY CHALLENGE ON THE BASIS OF RACE, IT FAILED TO ASSESS THE STATE'S PROFFERED RACE-NEUTRAL REASON FOR STRIKING THE ONLY JUROR OF WAPLES' RACE TO DETERMINE WHETHER IT WAS A PRETEXT FOR PURPOSEFUL DISCRIMINATION.

Contrary to the State's tortured attempt to convince this Court otherwise, Waples did "present the specific *Batson* challenge presented here to the Superior Court in the first instance."[1] In fact, the State's claim is contradicted in the content of its own substantive argument. For example, it quotes the language from Waples' objection which is focused on the pattern of strikes.[2] While defense counsel noted that, "it is hard to show a pattern because there is only one" black juror, he did, in fact, go on to argue that striking that one black juror "is a 100-percent pattern."[3] In its brief, the State also points to the fact that "[t]he prosecutor denied any *Batson* equal protection violation" when he responded "'Your Honor, as to the striking of the one minority juror, the State does not contend that is a pattern at all.'"[4] Finally, the trial judge's denial of Waples' motion reveals that he also understood that *Batson* formed at least part of the basis of the claim:

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[1] State's Ans. Br. at p. 11.
[2] State's Ans. Br. at p. 10.
[3] A59.
[4] State's Ans. Br. at p. 10. In fact, in his argument, the prosecutor referred to the issue as a "*Batson* Challenge: "To consider that a pattern, striking one juror would have a convert [sic] effect on us having a juror based on their skin color. We believe that is not what a *Batson* Challenge is for." A60-61.

> at least now on the record we have [the prosecutor]'s explanation, which would ***appear to*** be satisfactory, ***arguably***, as a good reason to strike somebody even though this we don't know their reason to strike somebody when they are doing those strikes.[5]

The record reveals that the prosecutor and the trial judge both understood that Waples' Equal Protection claim regarding jury selection was based, at least in part, on *Batson*.[6] Thus, this Court must "review *de novo* whether the prosecutor offered a race-neutral explanation for the use of peremptory challenges."[7] If the trial court made any findings with respect to discriminatory intent, they are reviewed under a "clearly erroneous" standard of review. Nonetheless, even under a plain error standard, the interest of justice requires reversal so as to prevent the denial of equal protection of laws to a black defendant by putting him "on trial before a jury from which members of his race have been purposefully excluded."[8]

Perhaps the State sought to pursue its tortured "standard of review" argument so as to distract from its inability to counter the reality of the trial court's error. The trial court failed to conduct the required assessment of the persuasiveness of the State's purported race-neutral justification for the strike "by considering the 'totality

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[5] A62. (emphasis added).

[6] See *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 547 n.4 (Del. 2006) (finding, where appellant did not present clearly to the trial court the specific argument it raised on appeal, that issue was preserved because while it did not present that precise argument at the trial level, it did object generally and trial court appeared to understand basis of objection).

[7] *Jones v. State*, 938 A.2d 626, 631–32 (Del. 2007).

[8] *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). See U.S.Const., Amend. XIV.

of the relevant facts.'"[9] The State does not contest that Waples made a *prima facie* showing of purposeful discrimination. Instead, it spends quite a bit of time explaining how much discretion the trial court is given with respect to its findings. Yet, it makes a big leap to the thrust of its substantive argument which asserts that Waples' *Batson* claim fails since the trial court found the prosecutor's incantation of "criminal record" to be an "explanation, which would appear to be satisfactory, arguably, as a good reason to strike somebody."[10] This is hardly a finding of fact.

The trial court was required to assess the persuasiveness of the State's offered justification "by considering the 'totality of the relevant facts.'"[11] The judge acknowledged the "arguable" viability of the State's justification. However, he made no findings as to whether the peremptory strike was actually exercised for good reason *in this case*. Had the trial court conducted the required analysis, it would have found that Waples did meet his met his burden of persuasion" that the strike was the result of purposeful discrimination.

In its response, the State relies on *Dixon v. State* in a post hoc attempt to justify the prosecutor's decision to strike the black juror. The State claims that *Dixon*'s decision upholding the removal of two black jurors with criminal records necessarily ends the matter in our case. What the State appears to misunderstand is that the issue here is not whether

[9] *Jones*, 938 A.2d at 632.
[10] State's Ans.Br. at p.18.
[11] *Jones*, 938 A.2d at 632.

a black juror can be struck from jury service due to a misdemeanor record, it is whether Waples met his overriding burden of persuasion *in this case* that the misdemeanor record was offered as a pretext.

In *Dixon*, one of the black jurors was "arrested for misdemeanor theft and had been convicted of driving with a suspended license. This juror had also failed to answer a summons."[12] And, the other black "juror had been arrested for shoplifting. The prosecutor stated that it was his practice to strike jurors with any but the most insignificant criminal records, such as minor traffic violations. He also stated that he had struck a white juror because of his motor vehicle record. "[13] Here, on the other hand, the State never explained why that juror's misdemeanor record led to a "feeling" that she was "reflective of somebody" the State "wouldn't want on the jury panel" in this case. Unlike the prosecutor in *Dixon*, the prosecutor in our case was not required to identify the juror's prior convictions or to provide any information regarding whether other similarly situated non blacks had been struck. But, most significantly, the prosecutor in *Dixon* gave a cogent explanation as to his precise standard for striking jurors based on criminal records.

Had the trial court in our case conducted the analysis mandated under prong 3 of *Batson*, it would have found that Waples satisfied his burden of proving purposeful

[12] *Dixon v. State*, 673 A.2d 1220, 1224 (Del. 1996).
[13] *Id.*

discrimination when the State struck the only black juror from Waples' jury. This fundamental error requires this Court to remand Waples' conviction for a new trial.[14]

[14] *Harrison v. Ryan*, 909 F.2d 84, 88 (3d Cir. 1990) (reversing for a new trial due to "exclusion of one black juror from the jury on the basis of race").

CONCLUSION

For the reasons and upon the authorities cited herein, Waples' conviction must be reversed.

Respectfully submitted,

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DATED: March 3, 2022