IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent	)	S126560
	)	Los Angeles County
vs.	)	
	)	NA051938-01
JAMELLE ARMSTRONG Defendant/Plaintiff	)	

APPELLANT'S REPLY TO RESPONDENT'S RESPONSE TO APPELLANT'S SECOND SUPPLEMENTAL BRIEF

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

On Automatic Appeal from the Judgment of the Los Angeles Superior Court, Honorable Tomson Ong, presiding.

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On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Tomson Ong, Judge.

I. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent's Supplemental Brief (RSB) filed March 14, 2016 does not respond to appellant's Second Supplemental Brief, which was essentially an update of the development of the "*Batson*" law in this Court since the time of the filing of appellant's Reply Brief on September 16, 2013. Instead, respondent used its Supplemental Brief to argue for the first time that the reasons that the

prosecutor gave at trial for excusing jurors Shawn Leonard and Roscoe Cook were race-neutral, hence, a legitimate exercise of prosecutorial advocacy.[1]

Respondent's Supplemental Brief first argued that the prosecutor had a race neutral reason for exercising a peremptory challenge of both jurors in question. (RSB at p.2 et seq.) Second, it argued that appellant's reliance in his Opening and Reply Briefs on comparative juror analysis regarding Mr. Leonard and Mr. Cook was incorrect in that the sitting jurors whose voir dire was used in the comparison were not, in fact, similarly situated to them. (RSB at p. 10 et seq.)

Regarding Mr. Leonard, respondent claimed that the prosecutor's race-neutral reason was based upon the jurors "ambivalent" feelings about the death penalty. (RSB p. 6.) That conclusion was supported by citations to his written questionnaire and oral voir dire. (RSB at pp. 6-7.) Respondent further pointed out that the trial court stated that the prosecutor's race-neutral motive to excuse this juror was based on her "perceived perspective of this juror's inability to impose death in the penalty phase." (*Ibid.*)

Regarding Roscoe Cook, respondent argued that his lack of opinion on the death penalty and which penalty was worse, his unwillingness to set aside his beliefs, and his failure to answer the prosecutor's questions or to answer them in a confusing or hostile manner were proper race-neutral grounds for the prosecutorial

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1. In the Response, respondent argued that the trial court was correct in ruling that trial counsel failed to establish a prima facie case of racial discrimination against said jurors, thereby obviating the need of a "third-step" *Batson* analysis for these jurors. Appellant replied to this argument in his Reply Brief. (ARB at pp. 50-55.)

strike. (RSB at p. 7-8.) In doing so, it referenced Mr. Cook's answers to written questions, as well as Mr. Cook's oral voir dire in which he stated he had no opinion on death penalty or which penalty was worse, and that he would not set aside his personal beliefs. (*Ibid.*) Respondent also cited to the acrimonious exchanges between the juror and the prosecutor, which it argued showed Mr. Cook's personal animosity toward her. (*Ibid.*) Respondent further stated that in allowing the strike, the trial court referred to all of these factors. (*Ibid.*)

Respondent also performed its own comparative jurors analysis to argue against appellant's claim that the prosecutor allowed jurors "similarly situated" to the four struck black male jurors to remain on the jury. (RSB at pp. 10-16.)

II. APPELLANT'S REPLY

A. INTRODUCTION

Respondent has fashioned its argument by both carefully selecting only those aspects of the record that support its position and by treating each of these selective aspects as if they can be considered on their own, without reference to the totality of the record. This approach not only attempts to obscure the overarching unconstitutionality of the prosecutor's actions, but contradicts the procedure that this Court has mandated for the analysis of *Batson* challenges.

While the application of the law is complex, the law itself is simple. The entire issue rests upon the credibility of the prosecutor's race-neutral explanations. (*People v. Johnson* (2015) 61 Cal.4th 734, 755; *People v. Williams* (2013) 56 Cal.4th 630, 653.) This Court must look at the "totality of the circumstances" of

the *entire case*, not just the voir dire, to judge that credibility. (*People v. Reynoso* (2003) 31 Cal.4th 903, 908; *Batson v. Kentucky* (1986) 476 U.S. 79, 96.) While there is a presumption that the prosecutor properly exercised its peremptory challenges, that presumption only applies if there is "substantial evidence" of race-neutral intent. (*People v. Williams, supra,* 56 Cal.4th at p. 650; *People v. Lenix* (2008) 44 Cal.4th 602, 613) and deference is only given "so long as the trial court makes a sincere and reasoned attempt to evaluate the nondiscriminatory justification for the challenge." (*People v. Burgenor* (2003) 29 Cal.4th 833, 864.

It is, and had consistently been, appellant's argument that this presumption has been fully rebutted by the totality of the circumstances of this particular case. In his concurring opinion in *People v. Harris* (2013) 57 Cal.4th 804, 892, Justice Liu specifically cited to 102 consecutive cases since 1993 in which this Court has denied *Batson* relief. There have been 11 more since *Harris.* [2] After a review of all of these cases, appellant can state with confidence that in none of those cases exist the confluence of circumstances that exists in the instant case. This case is unique, and it is in the uniqueness of its circumstances where respondent's argument founders.

Of all of the *Batson* cases reviewed by this Court, this case was perhaps

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2. *People v. O'Malley* (2016) 62 Cal.4th 944, 971; *People v. Johnson* (2015) 61 Cal.4th 944, 734, 755; *People v. Cunningham* (2015) 61 Cal.4th 609, 658; *People v. Scott* (2015) 61 Cal.4th 366, 379; *People v. Hensley* (2014) 59 Cal.4th 788, 802; *People v. Trinh* (2014) 59 Cal.4th 216, 240; *People v. Chism* (2014) 58 Cal.4th 1266, 1310; *People v. Montes* (2014) 58 Cal.4th 809, 847; *People v. Duff* (2014) 58 Cal.4th 527, 544; *People v. Williams* (2013) 58 Cal.4th 197 280; *People v. Manibusan* (2013) 58 Cal.4th 40, 75.

the most overtly racially based crime. According to the prosecutor, a group of three young black men alleged set upon a white woman, sexually abused her, and stomped her to death. It was the testimony of appellant that the incident was precipitated by the woman's multiple use of the word "nigger" directed at him and his companions. (AOB at pp. 19-21.) Appellant was of the same cognizable group as the excused jurors and except for one African American woman, all the sitting and alternate jurors were members of the victim's group. Further, the prosecutor struck *each and every* member of appellant's cognizable group. This Court has unambiguously stated that the existence of these factors logically lead to a "suspicion" that the challenges were racially motivated. (*People v. Bell* (2007) 40 Cal.4th 582, 597; see *People v. O'Malley* (2016) 62 Cal.4th 944, 980.)

Appellant recognizes that such "suspicion" is insufficient, standing alone, to rebut the presumption of propriety to a preponderance of the evidence. To fully explore this ultimate question, this Court has set forth factors that should be taken into account. These include the demeanor of prosecutor, including misrepresentation of jurors positions, the inherent reasonableness of the prosecutor's explanations, whether the prosecutor's proffered rationale has a logical relation to his trial strategy, comparative juror analysis (*People v. Johnson, supra,* 61 Cal.4th at p. 775) and the relative intensity of the questioning. (*People v. Bonilla* (2007) 41 Cal.4th 313, 342.)

B. SHAWN LEONARD

The circumstances surrounding the voir dire of Mr. Leonard are without

parallel in the prior 113 *Batson* cases decided by this Court. Before the challenge was even made the prosecutor theatrically informed the trial court that she was so offended by the defense suggestion that she would exclude a prospective juror for racial reasons she needed a recess to recover her composure. (AOB at p. 169.) Yet, a few minutes later she excused her first of all four members of appellant's cognizable group. (AOB at pp. 169-170.)

After appellant's counsel objected to the challenge, the prosecutor again expressed her shock and chagrin, this time asking that appellant's counsel be sanctioned for "miscited" law that stated no *Batson* motion can be made after a single prosecutorial strike. (AOB at p. 170.) In this, the prosecutor misled the trial court. This Court made it abundantly clear several time prior to appellant's trial that such a challenge was perfectly permissible and a single improper challenge will result in a reversal. (*People v. Reynoso*, *supra,* 31 Cal.4th at p. 934; *People v. Howard* (1992) 1 Cal.4th 1132, 1158.)

Therefore, at the very outset of the jury selection process we not only see the suspicious circumstances of *Bell,* but two examples of attempts of prosecutorial intimidation, which included the outright misstatement of the law to the trial judge. This set of circumstances does not exist in any of the 113 cases.

Nor does the prosecutor's reason that Mr. Leonard wasn't paying attention during the voir dire. The logical absurdity of this rationale was fully discussed in both the AOB and the ARB. (AOB at pp. 170-171, 196; ARB at pp. 71-75.) In

addition to what was therein stated, this transparent excuse begs the question as to how the prosecutor was even able to make such an observation. The courtroom was full of prospective jurors. They were addressed one at a time. Presumably, all eyes were on the prospective juror being interrogated at any given time.

In its latest Brief, respondent maintained that the striking of Mr. Leonard was due to his views on the imposition of the death penalty. (RSB at p. 2.) At the risk of repetition, the validity of this reasoning must be analyzed in light of the totality of the record. However, even without such an analysis, it is clear that respondent's argument was based upon a highly selective list of Mr. Leonard's statements both in the questionnaires and the oral voir dire. As fully argued in appellant's Opening Brief (AOB at pp. 196 et seq), after all the prosecutor's artifices[3] directed to get him to say otherwise, Mr. Leonard fully endorsed the California death penalty scheme and would have no hesitation in condemning appellant to death.

Respondent's argument that appellant thought that life in prison was "worse" than the death penalty also fails because of respondent's selective editing. Mr. Leonard made it unmistakably clear that such *might* be the case for a person like himself, who would have been consumed with remorse. (AOB at pp. 200-201; ARB at pp. 60-62.) However, he never suggested that this speculation would

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3. The entire "hateful decisions" and "first time evil" line of questioning was clearly a pretext. As stated in appellant's Opening Brief, while the prosecutor stated she considered it a prime reason to excuse this very qualified black man, she never once raised the subject with any of the sitting jurors. (AOB at pp. 197-199.)

affect him in his deliberations. As stated in appellant's Opening Brief, this entire "which is worse for you" inquiry has been severely criticized by the United States Supreme Court for this reason; it is never more than speculation. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 246-242; AOB at pp. 200-201.

Again, according to Court rule, there is not enough time herein to discuss all of Mr. Leonard's answers. Appellant is confident in referring this Court to its Opening Brief at pp. 146-150 and Reply Brief at pp. 59-68 to prove that the respondent's categorization of Mr. Leonard's position was inaccurate.

B. ROSCOE COOK

Once again, respondent invited this Court to look at the prosecutor's interactions with Mr. Cook in a vacuum, seeing only Mr. Cook's "aggressive behavior" toward the prosecutor. Appellant will not waste the Court's time with a "he said, she said" argument. Once again, appellant is content to let the record speak for itself. Not only was the prosecutor's attitude toward Mr. Cook unique to the jurors in this case, it was unique to any juror in any *Batson* case ever heard by this Court.

Further, the argument that Mr. Cook could not be trusted because he had no opinion of the death penalty and indicated he would follow his own set of values is once again based upon the editing and tailored selection of a stricken juror's remarks. As stated in the appellant's Opening Brief at pp. 215-222 and

Reply Brief at pp. 78-83, Mr. Cook made it clear over and over again[4] that what he meant was he had no personal stake in the death penalty and, as such, was completely free to follow the law. Further, he made it clear that his own belief system was that the law had to be followed to the letter. (AOB at p. 225.) As such, he was a perfect juror except for his race

C. COMPARATIVE JUROR ANALYSIS

Regarding respondent's comparative juror analysis argument, appellant has discussed this matter fully in both his Opening (AOB at pp. 202-209; 223-225) and Reply Brief (ARB 63-67.) Appellant is aware of this Court's reluctance to use a comparative juror analysis, standing alone, to order a reversal on *Batson* grounds. (*People v. O'Malley, supra,* 62 Cal.4th at p. 977.) However, as argued in all of appellant's briefing, the circumstantial evidence above and apart from such an analysis shows the pretexual nature of the prosecutor's reasons for the strikes. The comparative juror analysis in this case is simply a part of the totality of the circumstances that proves well beyond a preponderance of evidence that appellant merits a new trial.

Although stricken jurors Walters and Payne were not mentioned in respondent's last Brief, the propriety of the challenges to Mr. Leonard and Mr. Cook cannot be examined without reference to the prosecutor's actions in striking Mr. Walters and Mr. Payne. The totality of circumstances standard requires that

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4. It was this repetitive, almost taunting questioning by the prosecutor that caused Mr. Cook's eventual frustration. Mr. Cook was prodded and poked until he snapped back, giving the prosecutor her "race-neutral reason for his excusal."

an analysis of any given strike must be done in light of other strikes. (See *People v. Scott* (2015) 61 Cal.4th 363, 392.)

The impropriety of the Walters and Payne strikes has been discussed in detail in prior briefings. (AOB at pp. 227-246; ARB at pp. 83-101.) However, appellant redirects this Court's attention to the remark the prosecutor made about Mr. Payne surely hanging the jury as perhaps the most telling of all of the circumstantial evidence of race-based striking. There was not a single fact adduced during the voir dire that would lead to such a conclusion. Yet, counsel effectively suggested that there was some sort unspoken conspiracy going on between Mr. Payne and appellant and his defense team by which counsel could count on Mr. Payne to hang the jury. (AOB at pp. 240-241; ARB at pp. 96-97.) While she did not give the reasons for this baseless accusation, her unspoken reasoning could not have been more obvious. Mr. Payne was an African-American male, as were appellant and his attorneys, hence, jury nullification was assured. Thus, the prosecutor ended her purge of black male jurors with an argument that has no place in civil discourse let alone in an American courtroom. Nothing like this argument was ever employed in any of the *Batson* cases reported by this Court.

III. CONCLUSION

At one point during the trial argument as to the striking of Mr. Payne, in the defense of the strike the prosecutor emotionally told the court that she was very upset at its suggestion that she was a racist. (AOB at p. 240; 16 RT 3481-

3481.) The resolution of this issue by this Court should have nothing at all to do with whether the prosecutor was a "racist," or any consideration whether a reversal on these grounds would be an affront to the integrity of this prosecutor. The problem here was not that the prosecutor was a racist. If the trial was about a group of white men attacking and murdering a black woman, appellant suggests that the prosecutor would have done everything in her power to see that these four jurors would all have been on that jury. It wasn't that she didn't like black men. She simply wanted to win so badly she maximized her chances of winning by unconstitutionally excluding these four men thereby violating Mr. Armstrong's constitutional rights.

The best evidence of discriminatory intent will most often be the conduct and actions of the prosecutor. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477.) It is upon that conduct and actions that the disposition of this case rests.

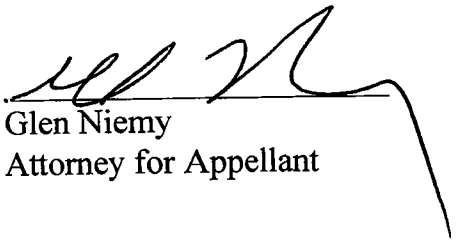
May 11, 2016

Glen Niemy
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Opening Brief was composed in a 13 point font, Times New Roman Type and consists of a total of 2,761 words.

May 11, 2015



Glen Niemy
Attorney for Appellant

DECLARATION OF SERVICE

re: People v. Jamelle Armstrong
Superior Court NA051938
Superior Court S126560

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 3375, Portland, ME 04104. I served a copy of the attached **Appellant's Reply to Respondent's Response to Appellant's Second Supplemental Brief** to each of the following by placing the same in an envelop addressed (respectively)

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Each envelop was then on May 11, 2016, sealed and placed in the United States

mail at Portland, Maine, County of Cumberland, the county in which I have my office, with the postage thereon fully prepaid. I declare under the penalty of perjury and the laws of the states of California and Maine that the foregoing is true and correct this May 11, 2016 at Portland, ME.

May 11, 2016

Glen Niemy