IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01157 COA

DARNELL BUMPHIS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. FRANK A. RUSSELL

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LEE COUNTY

ATTORNEY FOR APPELLANT:

SHELLY NICHOLS ELLIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: JOHN R. YOUNG

NATURE OF THE CASE: CRIMINAL: ARMED ROBBERY AND AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: CONVICTION: SENTENCED TO SERVE, AS AN HABITUAL OFFENDER, CONCURRENT TERMS OF THIRTY AND TWENTY YEARS, RESPECTIVELY, IN PRISON

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

This case returns to this Court following entry of findings by the circuit court that we mandated to resolve a dispute over jury selection. Upon the raising of a *Batson* challenge, the circuit court determined that the defense had failed to give adequate race-neutral reasons for striking the jurors. However, the court failed to make the necessary findings concerning the propriety of the challenges. We remanded the case, requiring the circuit court to make its findings consistent with the mandate of *Hatten v. State,* 628 So. 2d 294, 298 (Miss. 1993). We have reviewed the circuit court's findings concerning challenges made by the defense to two prospective jurors. Those findings are adequate to support the circuit court's refusal to grant the defense challenges at issue. Accordingly, we affirm Bumphis' conviction of armed robbery and aggravated assault.

We note the facts underlying the issue presented here by quoting from our original opinion in this case.

> When the panel was tendered to him, Bumphis peremptorily challenged six of the ten white veniremen. The State responded by calling the court's attention to *Griffin v. State*, 610 So. 2d 354 (Miss. 1992), the "reverse *Batson"* case, and contested Bumphis' challenge of "these who appear to be all white jurors." The trial required Bumphis to state his "non-racial reasons" for challenging these six white veniremen. After Bumphis stated his reasons, the trial judge granted five of the six challenges. It denied his allegedly racially neutral reason for peremptorily challenging one woman and she remained on the jury.
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> The State then tendered five more veniremen to Bumphis. Bumphis peremptorily challenged three of these five new names, and the court accepted his reasons for two of those peremptory challenges. However, it denied his third peremptory challenge of a venireperson who then remained on the jury. Ultimately, the trial judge granted all but two of Bumphis' peremptory challenges of white members of the venire panel and Bumphis exhausted all twelve of his peremptory challenges. The jury which convicted Bumphis consisted of four black persons and eight white persons.
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> . . . .
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> Looking at the reasons themselves, the first rejected challenge to a juror was because the juror was a bank employee. Another challenge was allowed to a second bank employee. However, the challenge that was accepted was when a venireman was both a bank employee *and* familiar with law enforcement officers. In contrast, the one which was rejected was when the venireman did not have familiarity with law enforcement.
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> The second challenge that was rejected was also based on knowledge of police officers. Additionally, the facial expression of the prospective juror had remained rigid during questioning. The defense counsel concluded his argument on why that juror should be rejected by stating "this is sufficient reason for peremptory challenge taken in light of the

fact that the State has not tendered any black jurors within this group, this last group of tendering."

The circuit court has answered our inquiry, stating that it rejected these two challenges because they were pretextual. This conclusion is not clearly erroneous. As to the first challenge, the circuit court found that the defense's assertion that it should have been granted because the venire-person was a bank employee was a mere "subterfuge" to facilitate discriminatory jury selection. The court based its conclusion on the demeanor of counsel in making the challenge, responses to questioning made during *voire dire*, and its conclusion that the reason offered for striking the juror was flimsy and that she was unbiased. As to the second challenge, the circuit court explained that it was convinced that the defense's reasons were pretextual because of the demeanor of counsel, because a majority of panel members knew someone in law enforcement yet were not challenged, and because the court did not observe anything out of the ordinary in the member's facial expression. The circuit court concluded its findings by giving its "opinion that although the reasons [for striking the jurors] given by the defense were race-neutral on their face, in actuality the reasons offered were pretextual and had discriminatory purposes."

In light of these findings, we cannot say that the trial court's refusal of the defense challenges was clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 364 (1991) (expressing clear error standard of review). In so doing, we are cognizant of our limited appellate role. *See id.* A trial court is permitted to reject as pretextual any explanations for challenges that are implausible, fantastic, or flimsy. *See Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995). Moreover, the trial court's determination of counsel's credibility in offering the challenge can be based on the demeanor of the attorney presenting the challenge, and we give findings on credibility great deference. *See Hernandez*, 500 U.S. at 364-70; *Stewart v. State*, 662 So. 2d 552, 559 (Miss. 1995) (citations omitted). We are not the trier of fact in the examination of whether Bumphis' challenges were impermissible under *Batson.*

We emphasize that a circuit judge is not entitled to reject a peremptory challenge for either side simply because the reason appears insubstantial. *Batson* does not create an intermediate category of justifications, between adequate cause to support some challenges and the boundless discretion for most peremptory challenges. Peremptory challenges are by definition challenges that are not for a recognized cause. A trial attorney's reasons can appear illogical or insubstantial, but so long as they are not race-based, *Batson* does not invalidate the challenge. What a trial judge is entitled to do, however, is conclude that the "implausible" nature of the justification given for a peremptory challenge is itself some evidence that the reason is only a pretext. *Purkett,* 115 S. Ct. at 1771. Similarly, just because an attorney justifies a challenge for a reason that appears logical, a trial court may, based on other factors, determine that the reason is only a pretext for discrimination. In other words, using a reason that has been found to be race-neutral in another case does not insulate that "legitimate" reason from being found a pretext. *See Lockett v. State*, 517 So. 2d 1346, 1352 (Miss. 1987), *cert. denied*, 487 U.S. 1210 (1988). That is one of the explanations for giving the trial court wide latitude in ruling on peremptory challenges.

In the absence of clear error, we affirm the conviction.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT OF CONVICTION AS A HABITUAL OFFENDER OF COUNT I: ARMED ROBBERY AND SENTENCE OF

THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND COUNT II: AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, SENTENCES TO RUN CONCURRENTLY, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LEE COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, AND McMILLIN, JJ., CONCUR.

KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY BARBER AND PAYNE, JJ.