IN THE COURT OF APPEALS 7/2/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00778 COA

CHARLES PATRICK REAVES

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. L. BRELAND HILBUN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM B. KIRKSEY

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS

DISTRICT ATTORNEY: EDWARD J. PETERS

NATURE OF THE CASE: MURDER AND ROBBERY

TRIAL COURT DISPOSITION: VERDICT OF GUILTY ON BOTH COUNTS; SENTENCED TO LIFE ON THE CHARGE OF MURDER AND FIFTEEN YEARS ON THE CHARGE OF ROBBERY TO RUN CONCURRENTLY IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE THOMAS, P.J., BARBER, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

Reaves was convicted of murder and robbery and sentenced to life imprisonment. He appeals, assigning six issues as error: (1) whether the trial court erred in admitting the victim's out-of-court statement; (2) whether the trial court erred in admitting the identification testimony of a prosecution witness; (3) whether the trial court erred in granting the State's jury instruction on capital murder; (4) whether the trial court erred in refusing to grant Reaves' proposed jury instruction regarding the victim's out-of-court statement; (5) whether the prosecution improperly used its peremptory strikes in violation of *Batson;* and (6) whether the verdict of the jury was against the overwhelming weight of the evidence.

FACTS

On July 4, 1991, Hubert Alford was found bound and gagged in his home by officers of the Jackson Police Department. After his gag was removed, Alford told Officer Lundstrom that he had let a stranger named "John" into his home and that John had stolen his television, microwave, watch, ring, necklace and other items, including his car. Alford described his attacker as a white male named John, who had blond hair, a mustache, cracked teeth, and was approximately six feet tall. Although Alford's wounds did not appear serious, he was taken to the hospital where it was discovered that he had suffered injuries to his neck and spinal cord. Alford died on July 19, 1991.

On July 28, 1991, convicted felon Doug Kelly contacted the police department and informed it that Charles Reaves had committed the crime. The telephone call from Kelly led the police to Bobby Conners, who told the officers that Reaves had sold him a television and microwave on July 4, 1991, and that Reaves had been wearing jewelry matching the items stolen from Alford when he sold these items to Conners. Conners also stated that Reaves, whom he had never previously seen driving a vehicle, was driving a car matching the one stolen from Alford.

Alford's next door neighbor, Danielle Welch, told police that she had seen someone matching Reaves' description driving Alford's car away from his home on July 4, 1991. Welch correctly identified Reaves in a photographic array within one month of the crime.

ANALYSIS

I. DID THE TRIAL COURT ERR IN ADMITTING THE VICTIM'S STATEMENT ?

Reaves argues that the trial court improperly admitted into evidence the victim's statements to Officer Lundstrom. Officer Lundstrom testified that he found Alford while he was still bound and gagged on the floor of his home. Although Alford had spoken earlier in the evening with his neighbor, Clyde Goodnight, on the telephone requesting that Goodnight call the police for him, Officer Lundstrom was the first individual with whom Alford had an opportunity to speak about the crime. Alford told Lundstrom that an individual named John had come to his front door asking to use the telephone. Alford stated that as soon as he let John into his home, he was attacked and bound. He also told Lundstrom exactly what items were taken. Part of this conversation took place immediately

after Alford was released from his bonds and some of the conversation took place later at the hospital were Alford was taken for treatment.

Reaves asserts that this statement was improperly admitted because it does not qualify as an exception to the hearsay rule under Mississippi Rule of Evidence 803 (1) or Rule 804. There is no doubt that Alford's statement does not qualify as a dying declaration under Rule 804 (b) (2). Alford, who did not die until fifteen days later and whose only apparent wounds were bruises and contusions, clearly did not believe that he was in danger of imminent death. *Sherrell v. State*, 622 So. 2d 1233, 1236-37 (Miss. 1993); *Berry v. State*, 611 So. 2d 924, 926 (Miss. 1992).

Alford's statement is admissible as a present sense impression under Rule 803 (1) or as an excited utterance under Rule 803 (2). Alford complained at the very first opportunity he had--while still bound on the floor of his home. To be admissible as a present sense impression or as an excited utterance, a statement does not have to be given at the precise moment the attack occurred. Spontaneity is the key, and there is nothing in the record to indicate that Alford's statement was not spontaneous. *Berry*, 611 So. 2d at 926; *Sanders v. State*, 586 So. 2d 792, 795 (Miss. 1991); *Harris v. Magee*, 573 So. 2d 646, 651 (Miss. 1990); *Evans v. State*, 547 So. 2d 38, 41 (Miss. 1989). The question of spontaneity is decided based upon the facts and circumstances of each case. This question is one for the trial judge and will not be overturned absent a finding by this court that under any and all reasonable interpretations of the facts of the case, the statement given could not have been spontaneous. *See Evans*, 547 So. 2d at 41 (implicitly adopting *Harris v. State*, 394 So. 2d 96, 98 (Ala. 1981) for the above proposition). The statement was properly admitted.

II. DID THE TRIAL COURT ERR IN ADMITTING THE IDENTIFICATION TESTIMONY OF A PROSECUTION WITNESS ?

Reaves asserts that the trial court erred in allowing the State's witness, Danielle Welch, to identify Reaves at trial. Welch, Alford's neighbor, told police officers that she had seen Alford's vehicle being driven away from his home by a tall, blond haired man on the evening of the attack. In August 1991, approximately one month after the attack, Welch was shown a photographic array, and she identified Reaves as the man that she saw driving Alford's car, stating, "If I had to pick one from these pictures, I would have probably picked [Reaves]." This was the only time that Welch saw Reaves prior to trial. During trial two years later, Welch was allowed to look into the courtroom in order to see Reaves, who was sitting at counsel's table with his two attorneys, a male and a female. Upon seeing Reaves, Welch stated that she recognized him but that Reaves seemed to have gained a lot of weight since she last saw him.

Reaves made a motion in limine that the trial court bar Welch from identifying Reaves in court. In denying the motion, the trial court ruled that although the identification of Reaves while sitting at counsel table was highly suggestive, since the witness had previously identified Reaves, her identification testimony was admissible, and the issue was one of credibility of her identification, which was a question for the jury. Reaves asserts that the admission of this testimony violated his constitutional right to due process under the Fifth and Fourteenth Amendments to the Constitution, as well as his constitutional right to counsel under the Sixth and Fourteenth Amendments.

A. DUE PROCESS

Reaves argues that Welch's viewing of him at counsel's table was impermissibly suggestive pre-trial identification under *Neil v. Biggers*, 409 U.S. 188 (1972) and *York v. State*, 413 So. 2d 1372 (Miss. 1982). There is no question that identification of an individual while seated in the courtroom at counsel's table is highly suggestive. *See Gayten v. State*, 595 So. 2d 409, 417 (Miss. 1992); *Hansen v. State*, 592 So. 2d 114, 137 (Miss. 1991). "However, an impermissibly suggestive pre-trial identification does not preclude in-court identification by an eyewitness who viewed the suspect at the procedure 'unless, (1) from the totality of the circumstances surrounding it, (2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Nicholson v. State*, 523 So. 2d 68, 72 (Miss. 1988) (citations omitted).

The standards for determining whether under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive are found in Neil v. Biggers. The factors to be considered in determining whether there is a substantial likelihood of misidentification are (1) the witness' opportunity to view the accused at the time of the crime, (2) the degree of attention of the witness, (3) the accuracy of the witness' prior description of the perpetrator, (4) the level of certainty of the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Scott v. State*, 602 So. 2d 830, 832 (Miss. 1992); *Nicholson*, 523 So. 2d at 72 (citations omitted).

In reviewing trial court rulings on this issue, this Court will disturb the trial court's determination only where there is an absence of credible evidence supporting the ruling. *Scott*, 602 So. 2d at 832; *Magee v. State*, 542 So. 2d 228, 231 (Miss. 1989); *Nicholson*, 523 So. 2d at 71. Under our scope of review, there was sufficient evidence to support the trial court's ruling allowing the in-court identification.

B. RIGHT TO COUNSEL

A defendant is entitled to have a lawyer present at a lineup if the lineup is held after adversarial proceedings are initiated against him. *Magee*, 542 So. 2d at 233; *Jimpson v. State*, 532 So. 2d 985, 988 (Miss. 1988). However, denial of the right to counsel mandates reversal of a subsequent conviction "only where it is shown that the accused experienced some untoward consequence flowing directly from denial of counsel." *Ormond v. State*, 599 So. 2d 951, 956 (Miss. 1992) (quoting *Wright v. State*, 512 So. 2d 679, 681 (Miss. 1987)).

Reaves' right to counsel had certainly attached while he sat at counsel's table prior to the beginning of his trial. However, as addressed above, Welch's in court identification testimony was not impermissibly tainted by her glimpse of Reaves sitting beside his attorney, precisely the place where he was seated when she took the stand. Welch had correctly identified Reaves when shown the photographic array two years prior to trial. Further, the amount of other evidence of guilt in this case more than amply supports the verdict. As such, the violation of Reaves' right to counsel is harmless error. *Magee*, 542 So. 2d at 233; *Jimpson*, 532 So. 2d at 989.

IV. DID THE TRIAL COURT ERR IN GRANTING THE STATE'S JURY INSTRUCTION ON MURDER ?

The wording of Reaves' assignment of error and argument thereon is confusing. Prior to trial, the State announced that it would not seek the death penalty but would proceed with attempting to prove both counts of the indictment. Regardless of whether the State sought the death penalty, count one charged Reaves with capital murder. Count two charged Reaves on the same robbery that comprises the underlying felony to the capital murder charge in count one.

The State submitted jury instruction S-1, a capital murder instruction. Over Reaves' objections, the trial court, after deleting the word "capital," granted the instruction as follows:

The Court instructs the Jury that if you unanimously believe from the evidence beyond a reasonable doubt that . . . Reaves, on or about July 4, 1991, . . . did . . . kill Hubert Alford, a human being, or commit any act which caused or contributed to the death of Hubert Alford, while said defendant, Charles Patrick Reaves, was engaged in the commission of robbery of Hubert Alford, . . . and there feloniously taking the personal property of Hubert Alford . . . from the presence of Hubert Alford, against the will of Hubert Alford, by putting the said Hubert Alford in fear of immediate injury to his person or by violence to his person, then . . . Reaves is guilty of murder and it is your sworn duty to so find.

Should the State fail to prove any of the above elements, you should find the defendant not guilty of murder and you may proceed in your deliberations to decide whether or not the defendant is guilty of any lesser offense as set forth in other instructions of the Court.

Even though the trial judge struck the word "capital," S-1 did in fact charge Reaves with capital murder. The trial court also granted jury instruction S-3, a simple murder instruction. The jury could have found Reaves guilty of capital murder or simple murder.

However a problem was created by the form of the verdict instruction, which read as follows:

The Court instructs the Jury that you are to return separate verdicts as to each Count. The counts and the possible forms for your verdict as to each are as follows:

(Count 1)

The Defendant is charged in Count 1 with having committed the offense of Murder. As to this Count, the Court instructs the Jury that if you find the Defendant guilty as charged in Count 1, the form of your verdict shall be as follows:

'As to Count 1, we, the Jury, find the Defendant guilty as charged of Murder.'

If you find the Defendant guilty of manslaughter as to Count I, your verdict shall be as follows:

'As to Count I, we, the jury, find the Defendant guilty of Manslaughter.'

If you find the Defendant not guilty as to Count 1, your verdict should be as

follows:

'As to Count 1, we, the Jury, find the Defendant not guilty.'

Your verdict as to Count 1 should be in one of the forms set forth above. (Count 2)

The Defendant is charged in Count 2 with having committed the offense of robbery. As to this Count, the Court instructs the Jury that if you find the Defendant guilty as charged in Count 2, the form of your verdict shall be as follows:

'As to Count 2, we, the Jury, find the Defendant guilty as charged.'

If you find the Defendant not guilty as to Count 2, your verdict should be as follows: 'As to Count 2, we, the Jury, find the Defendant not guilty.'

Your verdict as to Count 2 should be in one of the two forms set forth above.

You should return a separate verdict as to each of the two counts, written on a separate sheet of paper and need not be signed by you.

The jury returned a verdict of guilty of murder under count one and guilty of robbery under count two. As is readily apparent, we are unable to ascertain if the verdict of the jury was rendered under S-1, felony murder, or S-3, simple murder. We cannot say with certainty that the jury did not find Reaves guilty of murder without robbery, even though in count two the jury did find Reaves guilty of robbery.

Regardless on which theory of murder the jury relied, the robbery conviction cannot stand. First, courts may not impose more than one lawfully prescribed punishment for one de jure offense. If a defendant is charged with two offenses and no further evidence is needed to establish the lesser offense than is needed to establish the greater offense, punishment for the lesser included offense are barred. *Meeks v. State*, 604 So. 2d 748, 752 (Miss. 1992) (applying *Blockburger v. United States*, 248 U.S. 299, 303 (1932)). Robbery is obviously a lesser included offense of felony murder, where the underlying felony is robbery. If the jury found Reaves guilty of felony murder, then a separate conviction and punishment for the lesser included offense is barred. *Id*. at 751. *Meeks* is directly on point.

Second, if the jury found Reaves guilty of simple murder, it necessarily found him not guilty of felony murder with its underlying felony of robbery. Reaves cannot be twice placed in jeopardy for the robbery. Regardless of the verdict, Reaves was first placed in jeopardy for robbery when robbery was used to elevate the homicide to capital murder. Reaves could not be then separately convicted and sentenced for the robbery. *Id.* Reaves' robbery conviction must be reversed.

IV. DID THE TRIAL COURT ERR IN DENYING THE PROPOSED JURY INSTRUCTION REGARDING THE OUT-OF-COURT STATEMENT OF THE VICTIM ?

Reaves asserts that he was entitled to a jury instruction informing the jury that Alford's statement was not entitled to the same credit and force as if Alford were alive and testifying in person in front of the jury and that his statement was "naturally weaker" than if Alford were present in the courtroom. Such instructions have been occasionally granted when the statement was admitted as a dying declaration. *See Watts v. State*, 492 So. 2d 1281, 1288 (Miss. 1986); *Canon v. State*, 141 So. 2d 251, 254 (Miss. 1962). However the trial judge ruled that the factual situation in *Canon* which necessitated the granting of such an instruction was not applicable in the instant case. We have been cited to no case authority wherein the requested instruction was granted when such a statement was admitted as a present sense impression or as an excited utterance. Further, the trial court should refuse to grant instructions which place undue prominence on particular portions of the evidence. *Sanders v. State*, 586 So. 2d 792, 796 (Miss. 1991). There is no merit to this issue.

V. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN PERMITTING THE STATE TO EXCLUDE BLACKS FROM THE JURY ?

Reaves claims that the State improperly used its peremptory challenges to strike veniremen on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). There is a three step process for evaluating the use of peremptory challenges. "First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991) (citations omitted).

To prove a prima facie case under *Batson*, Reaves must show that (1) the State used its peremptory challenges to remove potential jury members; (2) Reaves is entitled to rely on the fact that peremptory challenges allow parties who are of mind to discriminate to so do; and (3) these facts and other relevant facts or circumstances raise an inference that the State used peremptory challenges to exclude veniremen on the basis of race. *Batson*, 476 U.S. at 96; s*ee also Harper v. State*, 635 So. 2d 864, 867 (Miss. 1994).

Once the defendant has established a prima facie case of discrimination to the satisfaction of the trial court, then the prosecution must supply race-neutral reasons for its challenges. *Harper*, 635 So. 2d at 867 (citations omitted); *Hatten v. State*, 628 So. 2d 294, 298 (Miss. 1993). A trial court's factual findings are given due deference and will not be overturned on appeal unless there is an error that is against the overwhelming weight of the evidence or is clearly erroneous. *Harper*, 635 So. 2d at 868 (citations omitted); *Hatten*, 628 So. 2d at 298; *Chisolm v. State*, 529 So. 2d 630, 633 (Miss. 1988).

The State used eleven of its twelve peremptory strikes, all of which were used against blacks. Reaves used ten of his strikes to exclude white persons from the jury. Both parties objected to the other's peremptory challenges. The trial court overruled both parties' motions, holding in effect that neither the State nor Reaves had made a prima facie showing under *Batson*. The seated jury was comprised of four blacks and eight whites. Reaves is white, and the victim of the attack was white. Reaves

offered no basis at trial or on appeal to this Court for his objection to the prosecution's use of its peremptory challenges other than the fact that all eleven of the State's challenges were of blacks.

The trial judge was present during voir dire and observed the jury selection process. He heard the questions asked of the venire and observed the demeanor and responses of the potential jurors. He also observed the demeanor of the parties. He could also rely upon his previous observations of and dealings with trial counsel. Although these impressions are not stated in the record, the trial judge was entitled to consider these factors in ruling on the validity of Reaves' and the State's *Batson* challenges. We cannot hold that the ruling of the trial court was clearly erroneous when we examine all of the facts and circumstances surrounding this case. *See Dennis v. State*, 555 So. 2d 679, 681 (Miss. 1989) (the Mississippi Supreme Court found that the defendant failed to prove a prima facie case of discrimination where five of seven peremptory challenges were used on black jurors).

Other courts have recognized that "other relevant circumstances" regarding a prima facie case under *Batson* include the following situations: whether the defendant and the excluded potential juror were of the same race, the level of the excluded race's representation in the jury panel as compared to the final jury, the race of the defendant and the victim, and the race of the witnesses. *See, e.g., People v. Mayes*, 630 N.E.2d 878, 882 (Ill. App. Ct. 1993).

Since the trial judge held that Reaves did not establish a prima facie case under *Batson*, the State did not need to give its reasons for its peremptory strikes. Subsequent to trial, the Mississippi Supreme Court mandated that a trial court dictate into the record a factual determination of the merits of the reasons cited by a party as the basis for its peremptory challenges. *Hatten*, 628 So. 2d at 298. The *Hatten* court did not specify whether this requirement was invoked merely by the use of peremptory challenges by one party and an objection by the other party or whether the trial court must first find a prima facie violation of *Batson.* In other words, it is unclear whether the Mississippi Supreme Court has shifted the initial burden from the objecting party to the party using a peremptory challenge, thereby doing away with the requirement of proving an initial prima facie case of discrimination. However, we need not reach this issue since *Hatten* is prospectively applied, and the instant case was tried prior to the ruling in *Hatten*. *Id.*

Further, even had the trial court found that Reaves had proven a prima facie case of discrimination, the State articulated its race-neutral reasons into the record out of an abundance of caution, and we find that those reasons were sufficient to hold that the State did not discriminate in its use of peremptory challenges. The State dictated into the record its reasons for its peremptory challenges as follows:

> State 1, which is Juror 7-1, was 23 years of age, single with two children 6 and 3 years old, was pregnant at the age 16. She has a cousin who is in the state penitentiary for killing someone; she's a good friend of that cousin, and doesn't believe that he is guilty. The Hinds County District Attorney's office prosecuted the case at trial. The juror is opposed to the death penalty.
>
> State 2, Juror 7-7, Thurman--and Juror 7-1 is Harris. This juror was a witness for a victim in a police brutality trial against law enforcement. This juror thought police didn't do a thorough job when he was a house burglary victim. He is a convicted ABC violator, a convicted drug violator, and he is opposed

to the death penalty.

Challenge S-3, which is Juror 7-9, Washington, was challenged peremptorily for all of the reasons stated in the challenge for cause, and in addition to that, the juror wore sunglasses the entire time of voir dire, and worked in a local nightclub for many years.

State 4, Juror 8-3, Payne, has a nephew serving time for a drug violation. He brought up the issue of the fact that a person testifying while incarcerated would be doing so to save his own skin--could be doing so to save his own skin. He was upset with the court system in a slip-and-fall verdict against him in civil court in Hinds County.

Challenge S-5, Juror 8-4, Byrd. Gave rambling, confusing answers; is unemployed; kept her eyes closed during much of voir dire; had a fixed opinion and said she would be reluctant to change it, and was very wordy about this. Her brother was murdered, and she was upset because the District Attorney's office didn't prosecute the case, and in fact, dismissed it. And she has a friend who laundered money or who was charged with laundering money.

Challenge S-6, Juror 8-7, Williams. On his jury questionnaire form, he stated--she stated, "My opinion is that God is the ultimate judge of all things, and we are to be led by him in our decisions." She was totally unresponsive to any questions asked during voir dire over a two-day period. She was opposed to the death penalty.

Jury Challenge S-7 on Juror 8-8, Lowe. Was a 24-year-old individual who was unemployed. She was with her cousin, who was a known active shoplifter by past convictions, when her cousin was arrested. It's a known that shoplifters work in pairs, and it's unclear whether she was working with her cousin in that shoplifting case. She lives in project apartments here in the highest crime area in Jackson, and said she didn't know anyone else who had ever been charged with a crime. She's unmarried with two children, 10 and 2 years of age. She was pregnant at the age 13. She's opposed to the death penalty.

Challenge S-8 on Juror 8, Panel--Panel 8, Juror 9, which is 8-9, Wells. Was totally unresponsive, with his arms folded the entire voir dire, and staring toward the wall or the ceiling. The only time he was responsive to any question was when he was asked directly about being a victim of a crime, and he said that the police could have done more when his auto was stolen, and that he and his friends had to find it. He didn't like that. He was opposed to the death penalty.

Challenge S-9, 8-10, Davis. He is a friend of Thurman, who was previously challenged by the state, S-2, Panel 7, Juror 7, and visited with him during the entire two days that they were here, and stated on the record that they were friends. Thurman, as stated previously, has been convicted of ABC and drug

> violations. He also had a weird beard, which indicated to the state that he was a strong individualist and non-conformist and dissenter. He left his employment blank on the jury questionnaire form. He voted for a defense verdict in a civil action on a close issue. He said that it was a hard decision for the jury to reach, which indicated that it was a close issue, and in the close issue, he went for the defense.
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> Challenge S-10 on Juror 9-7, Smith, was made because he voluntarily raised the issue that if someone gave evidence against another in a plea bargain, that he could have read about the facts in the newspaper, which is the exact contention of the defense in this case, and by doing so, he fabricated a version that could be given by the defense, which is to be given by the defense. He did this on his own, thus dreaming up a doubt for the defense, and indicated to the state that he would be attempting to dream up a doubt.
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> Challenge S-11, Juror 10-1, Brown. It's the position of this District Attorney's office that if a person is opposed to the death penalty, they are prone to be opposed to prosecution and defense-oriented jurors. This has been borne out by numerous studies by independent psychiatrists, psychologists, and other type studies. This was a major factor also in excluding Juror 7-1, 7-7, 8-7, 8-8, and 8-9.
>
> Of all of the jurors on the entire venire opposed to the death penalty, this juror expressed the strongest opposition, which was, "I'm totally against it." Further, her entire jury questionnaire form is virtually blank being "no" or "n/a" for everything except her personal statistics. Also, she has been employed in her present position only three months, and there is no information as to the length of her one prior employment. She's 37 years of age. She's never been more than a babysitter at age--excuse me--36, and is an unwed mother of an 11-year-old child and apparently has never been married.

The reasons required to justify a peremptory challenge do not have to rise to the level required of a challenge for cause. *Chisolm*, 529 So. 2d at 632. We find that the reasons given by the State were sufficiently race neutral. *See Foster v.* State, 639 So. 2d 1263 (Miss. 1994); *Griffin v. State*, 607 So. 2d 1197, 1202-03 (Miss. 1992); *Abram v. State*, 606 So. 2d 1015, 1036-37 (Miss. 1992); *Turner v. State*, 573 So. 2d 657, 662-63 (Miss. 1990); *Bradley v. State*, 562 So. 2d 1276, 1283 (Miss. 1990); *Conerly v. State*, 544 So. 2d 1370, 1371-72 (Miss. 1989)*; Wheeler v. State*, 536 So. 2d 1347, 1351 (Miss. 1988); *Johnson v. State*, 529 So. 2d 577, 585 (Miss. 1988); *Lockett v. State*, 517 So. 2d 1346, 1349 (Miss. 1987). This issue is without merit.

VI. WAS THE VERDICT OF THE JURY CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE ?

Reaves asserts that there was insufficient evidence to convict him of murder and robbery on account of the contradictory testimony at trial and the "caliber" of the witnesses, one of whom was a convicted felon. However Reaves fails to point out any contradictory testimony to this Court. This Court has repeatedly recognized that the credibility of witnesses is a question solely for the jury. *Doby v. State*, 532 So. 2d 584, 590 (Miss. 1988); *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983).

Our scope of review on appeal of a challenge to the weight of the evidence supporting a jury verdict is very limited. This standard had been stated many times and need not be restated here. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Nicolaou v. State*, 612 So. 2d 1080, 1083 (Miss. 1992); *McFee v. State*, 511 So. 2d 130, 133-34 (Miss. 1987). Suffice it to say that the weight of the evidence supports the jury verdict, whether under the theory of felony murder or simple murder.

THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF MURDER AND SENTENCE OF LIFE IMPRISONMENT, AS AN HABITUAL OFFENDER, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. THE JUDGMENT OF CONVICTION OF ROBBERY AND SENTENCE OF FIFTEEN YEARS CONCURRENT WITH THE LIFE SENTENCE IS REVERSED AND RENDERED. ALL COSTS ARE ASSESSED TO HINDS COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.