IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 2000-KA-01022-COA

KEVIN TERRENCE DAVIS	**APPELLANT**
v.	
STATE OF MISSISSIPPI	**APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	04/23/1999
TRIAL JUDGE:	HON. KOSTA N. VLAHOS
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	FELICIA DUNN-COOPER BURKES
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	CONO A. CARANNA II
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	COUNT I BURGLARY OF A DWELLING; COUNT II RAPE; COUNT III ARMED ROBBERY; AND COUNT IV AGGRAVATED ASSAULT AND SENTENCE OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE FOR EACH COUNT TO RUN CONSECUTIVELY, TO BE SERVED IN THE CUSTODY OF THE MDOC
DISPOSITION:	AFFIRMED - 06/11/2002
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	7/2/2002

BEFORE SOUTHWICK, P.J., LEE, AND CHANDLER, JJ.

CHANDLER, J., FOR THE COURT:

¶1. Appellant Kevin Davis was indicted by a Harrison County grand jury for burglary of a dwelling, robbery, rape, and aggravated assault. Following a trial, a jury found Davis guilty of the crimes charged. The circuit court judge sentenced Davis to life without the possibility of parole pursuant to section 99-19-83 of the Mississippi Code. Aggrieved, Davis appeals, asserting that the trial judge erred when he denied Davis's peremptory strike of one of the jurors, finding that the strike was racially discriminatory and in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Davis also contends that the trial judge erred when

he permitted testimony of the victim's prior identification from a photographic lineup as the circumstances surrounding the identification were impermissibly suggestive. Finding no error, we affirm.

FACTS

¶2. On January 24, 1997, Jane Doe, a Vietnamese-American, and her three children were asleep in the living room area of their house when they heard a crashing sound come from the adjacent kitchen. Jane, startled by the unexpected noise, jumped to her feet and turned on a light. She could hear footsteps emanating from the kitchen. Within seconds, a knife wielding man appeared and demanded Jane give him all of her money; he threatened to kill her if she failed to comply.

¶3. Jane struggled with the man for several minutes until he cut her finger. She gave him all of the money and jewelry in the house. The assailant ordered her to rip the phone line from the wall and Jane complied. He then dragged her into a back bedroom where he forcibly raped her at knife point.

¶4. Following the rape, the man ordered Jane to put her clothes back on. He then grabbed two leather jackets from the closet, stuffed them into a bowling bag, and left through the back door.

¶5. Jane gathered her children and went to her aunt's house. She was then transported to the hospital. The physician in charge of examining Jane noted that certain marks on her body were consistent with those found on rape victims. The physician also collected tissue samples to be used in a DNA analysis.

¶6. Four days later, Jane identified her assailant from a photographic lineup. The police arrested Kevin Davis, the individual in the photograph. They recovered one of the stolen jackets from Doris Webb; Webb testified that Davis had given her the jacket. The results of the DNA test demonstrated that there was a 1 in 59 million chance that Davis was not the assailant.

I. DID THE TRIAL COURT ERR WHEN IT DENIED DAVIS'S PEREMPTORY CHALLENGE AS RACIALLY DISCRIMINATORY?

¶7. Davis contends that the trial court erred when it denied his use of a peremptory strike in violation of *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986). The record reflects that Davis used his first peremptory challenge to strike Sherwin Agustin, a juror who appeared to be of Asian descent. The prosecution challenged the strike, arguing it was merely a pretext for removing Agustin who, because of race, would be inclined to sympathize with the Asian victim. Davis maintains that the trial court lacked the authority to overrule his peremptory strike as the court never required the prosecution to make out a prima facie case of racial discrimination as required under *Batson*. In support of this contention, Davis points out that it was not even clear whether Agustin was Asian.

¶8. Determinations made by the trial judge under *Batson* are factual and largely based on credibility. *Puckett v. State*, 788 So. 2d 752, 756 (¶8) (Miss. 2001); *McGilberry v. State*, 741 So. 2d 894, 923 (¶118) (Miss. 1999). Accordingly, we afford the trial judge great deference and will not reverse unless the findings are clearly erroneous or against the overwhelming weight of the evidence. *Simon v. State*, 679 So. 2d 617, 622 (Miss. 1996). *See also Hughes v. State*, 735 So. 2d 238, 251 (¶37) (Miss. 1999) (noting that the trial judge, as a fact finder, is always in the best position to evaluate the credibility of the strikes).

¶9. The *Batson* line of cases prohibit the use of peremptory strikes as a vehicle for racial discrimination in criminal proceedings. *Stewart v. State*, 662 So. 2d 552, 557 (Miss. 1995). This purpose is effectuated

through a three step process:

> First, the defendant must establish a prima facie case that race was the criteria for the exercise of the peremptory challenge . . . . Second, should the defendant make such a showing, the striking party then has the burden to state a racially neutral explanation for the challenged strike. If a racially neutral explanation is offered, the defendant may rebut the explanation. Finally, the trial court must make a finding of fact to determine if the defendant has proved purposeful discrimination.

Magee v. State, 720 So. 2d 186, 188 (¶7) (Miss. 1998) (citations omitted).

A. Prima Facie Case

¶10. Before the trial court is required to conduct a *Batson* hearing, the opponent of the strike must make out a prima facie case of purposeful racial discrimination. *Puckett*, 737 So. 2d 322, 334 (¶30) (Miss. 1999). Traditionally, the *Batson* decision required the defendant to establish a prima facie case of intentional racial discrimination by showing: (1) that he is a member of a cognizable racial group; (2) that the proponent has exercised peremptory challenges toward the elimination of veniremen of his race; and (3) that the facts and circumstances raised an inference that the proponent used his peremptory challenges for the purpose of striking jurors on account of their race. *Sudduth v. State*, 562 So. 2d 67, 71 (Miss. 1990) (citing *Batson*, 476 U.S. at 96). These requirements, however, were revised in *Powers v. Ohio*, 499 U.S. 400 (1991), where the United States Supreme Court held that the defendant was entitled to challenge a peremptory strike, regardless of whether the excluded jurors were members of the defendant's race. *Powers*, 499 U.S. at 415. Moreover, in *Georgia v. McCollum*, 505 U.S. 42 (1992), the United States Supreme Court further amended the scope of *Batson*, holding that the rules prohibiting the racially discriminatory use of peremptory challenges applied to defendants as well as the prosecution. *McCollum*, 505 U.S. at 59; *Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992). These two cases, in effect, eliminate the first two elements that were originally required to prove a prima facie case of discrimination under *Batson*. *Bush v. State*, 585 So. 2d 1262, 1267-68 (Miss. 1991). Thus, in order to establish a prima facie case, the opponent must simply show that the facts and circumstances give rise to an inference that the proponent used his peremptory challenges for a racially discriminatory purpose. *Puckett*, 788 So. 2d at 757 (¶10).

¶11. After Davis used his first peremptory challenge against Agustin, the only Asian on the jury panel, both the trial judge and the prosecution raised a *Batson* objection. The trial judge expressed his concerns that Davis had used his strike as a means of excluding Asians from the jury; however, he did not, contrary to Davis's argument, require Davis to state race-neutral reasons for the strike. Instead, the trial judge told Davis that he could articulate his race-neutral reasons if he desired to do so. Davis did not put forward any reasons and the trial judge then permitted the prosecution to make out its prima facie case of discrimination. The record reflects the following exchange:

> Prosecution: Your honor, first I would submit that Mr. Agustin is the only person that appears to be of Asian background on the entire panel. We are dealing with a victim who is of Asian descent. I think that the fact that the very first strike, and a strike that the defense makes, is of an Asian ethnic background male, reaches the level where we don't have any other pattern to show. That she should be required to give a race neutral reason. . . . If we had one black person on this panel and that was it, out of 24, and we struck that person you can bet we'd be required to tell race neutral reasons.

> Defense: Your honor, again there is . . . nothing on this record to indicate other than your personal opinion or [the prosecution's] personal opinion what this individual's ethnicity is. And I exercised my strike without any thought of that. There is nothing in the record to inform me or any information that I can rely on in reaching the conclusion that this individual is or is not [Asian].

¶12. The court considered the arguments of both sides and made a finding on the record that the prosecution had made out a prima facie case of racial discrimination. We agree with the trial judge and find that an inference that Davis used his peremptory strike in a racially discriminatory manner could be made where both the victim and Agustin were Asian, Agustin was the only Asian on the jury, and Agustin was Davis's first strike. In reaching this decision, we emphasize that the trial judge, as the finder of fact, was in the best position to weigh the facts and circumstances of the peremptory challenge, including whether Agustin was Asian. The trial judge concluded that he was in fact Asian, or of Asian descent. There is no evidence in this record or Davis's briefs to contradict this finding; therefore, we cannot say that the trial judge acted erroneously in reaching this conclusion.

B. Race-Neutral Explanations

¶13. After the opponent of the strike establishes a prima facie case of discrimination, the burden shifts to the proponent to advance race-neutral reasons for striking a member of a distinct racial group. *Bush,* 585 So. 2d at 1268. The proponent, however, does not have to articulate the same degree of justification that would be required to satisfy a strike for cause. *Id.* Rather, "any reason that is not facially violative of equal protection will suffice." *Stewart v. State,* 662 So. 2d 552, 558 (Miss. 1995). *See also Randall v. State,* 716 So. 2d 584, 588 (¶16) (Miss. 1998) (stating that "[u]nless a discriminatory intent is inherent in the [proponent's] explanation, the reason offered will be deemed race neutral").

¶14. Davis argued that he challenged Agustin because "he did not respond verbally to any question during voir dire either from the Court, the State or myself." This was the only reason offered and the trial judge rejected it. The judge stated:

> It's always a tough call, but I can't think of that being a neutral reason that the juror didn't respond because I think that most jurors, or a good number of the jurors, certainly up to 50 percent of the jurors who are impaneled in my history, don't make any responses. So I'm going to find that that was not an ethnic neutral reason. We will just have to go on the record made and he will be placed in the box.

We agree with the trial judge and find that the reason given by Davis for striking Agustin was not race-neutral. As the trial judge pointed out, over half of those paneled for jury service do not respond to questions during voir dire. However, the trial judge admitted it was a close call, and that Davis's reason might, in some cases, be a valid consideration for striking a juror. This is the very reason that we invest a great amount of discretion in the trial judge under *Batson*; the trial judge is in the best position to weigh the given reason for the strike against all other relevant facts and circumstances. *See Stewart,* 662 So. 2d at 559 (stating that even the smallest details, such as the attorney's demeanor can be indicative of whether the strike is pretextual). Again, there is nothing in the record that gives this Court any reason to find that the trial judge acted in an erroneous manner when he concluded that the reason offered by Davis was not race-neutral.

II. DID THE TRIAL COURT ERR WHEN IT DENIED DAVIS'S MOTION TO

SUPPRESS EVIDENCE OF THE OUT-OF-COURT PHOTOGRAPHIC IDENTIFICATION MADE BY THE VICTIM?

¶15. The admission or exclusion of evidence is largely within the discretion of the trial court. *Hentz v. State*, 542 So. 2d 914, 917 (Miss. 1989). A trial court's ruling on the admissibility of a witness identification is reviewed for clear error. *Neil v. Biggers*, 409 U.S. 188, 200 (1972). This Court will not reverse a trial court's denial of a defendant's motion to suppress a pre-trial photographic lineup identification unless there was a substantial likelihood of irreparable misidentification. *Hansen v. State*, 592 So. 2d 114, 137 (Miss. 1991); *Wingate v. State*, 794 So. 2d 1039, 1042 (¶8) (Miss. Ct. App. 2001). In making this determination, we look to "whether or not substantial credible evidence supports the trial court's findings that, considering the totality of the circumstances, in-court identification testimony was not impermissibly tainted." *Gray v. State*, 728 So. 2d 36, 68 (¶159) (Miss. 1998). We will disturb the lower court's findings "only where there is an absence of substantial credible evidence supporting it." *Ray v. State*, 503 So. 2d 222, 224 (Miss. 1986).

¶16. Davis argues that the admission of the photographic identification was impermissibly suggestive and, therefore, amounted to a violation of his due process rights under the Fourteenth Amendment to the United States Constitution. Davis asserts that Jane, by her own admission, had few opportunities to view the assailant during the commission of the crime. Davis also points out that Jane's descriptions of the assailant were inconsistent. Finally, Davis asserts that the descriptions provided by Jane did not even match Davis's actual appearance. We disagree.

¶17. As noted, we must determine whether, under the "totality of the circumstances," the identification was reliable. *Biggers*, 409 U.S. at 199; *York v. State*, 413 So. 2d 1372, 1383 (Miss. 1982). In resolving this issue, we consider the following factors:

1) The opportunity of the witness to view the accused at the time of the crime;

2) The degree of attention exhibited by the witness;

3) The accuracy of the witness's prior description of the criminal;

4) The level of certainty exhibited by the witness at confrontation; and

5) The length of time between the crime and the confrontation.

York, 413 So. 2d at 1383; *Biggers*, 409 U.S. at 199.

1) *Jane's opportunity to view Davis at the time of the crime*.

¶18. Jane had ample opportunity to view her assailant at the time of the crime. Jane testified that she immediately turned on the living room light when she heard the crashing sound come from the kitchen. Davis entered the room and confronted Jane. They struggled for several minutes and Jane admitted getting a good look at his face during the confrontation. Davis then took her to a backroom where he raped her. During the rape, Jane, pressed close to Davis, viewed his face. She also watched him go to the closet and pull out two jackets and try to stuff them into a bowling bag. Jane testified that they were in the bedroom for at least ten minutes; the bedroom lights, according to Jane, were on at least half of that time.

¶19. The Mississippi Supreme Court has held that this element of the *Biggers* test was satisfied where the sole witness, who was also the victim, testified to being in a well-lit area for several minutes. *White v. State*, 507 So. 2d 98, 100 (Miss. 1987). *See also Ray*, 503 So. 2d at 223 (noting that one minute is enough time for a victim to identify assailant). The facts in the case at bar, like the similar cases before, satisfy this first element.

2) *Jane's degree of attention during the crime.*

¶20. Although we can conceive of circumstances that would detract from the level of attention a victim might show towards his or her attacker, we do not find that to be the case here. Recognizing the evidence discussed under the first factor, we find that Jane viewed Davis several different times during the commission of the crime. Jane testified that she intentionally attempted to look at Davis every chance she had, noting any distinguishing features he might have had. As discussed under the third element, Jane's degree of attention was great as she was able to provide investigators with a detailed description of Davis, from his facial hair down to the type of shoes he was wearing.

3) *The accuracy of the witness's prior description of the criminal.*

¶21. While in the hospital, Jane told police that a black male wearing hiking boots, blue pants and a jacket had raped her. She described the assailant with great specificity, noting that he was in his mid-twenties or thirties, had a mustache and "a little goatee beard thing." Furthermore, she stated that the assailant was around 5' 5" in height and weighed 120-130 pounds. In subsequent interviews and testimony, Jane's description of the assailant remained consistent. Moreover, Davis's actual appearance, with a few minor exceptions, matched the descriptions Jane provided; therefore, this factor is satisfied.

4) *The level of certainty demonstrated by the witnesses at the confrontation.*

¶22. Jane was specific and certain in her descriptions of the assailant; only four days after the crime, she was able to pick him out of a photographic lineup. The record reflects that the police asked Jane to look through a book of photographs two days after the crime; she could not pick out the assailant. Two days later, the police came to her house with more photographs; this time, Jane picked out Davis from a group of six pictures. Officer Whitney Carvin, one of the policemen present at the identification, testified that Jane immediately pointed to the picture of Davis and stated that he was responsible for the crimes. She never identified another as the responsible criminal. Even the day prior to the trial, at the suppression hearing, Jane identified Davis, for the first time in person, as the individual responsible for the crime. Given Jane's unwavering certainty, we find this element of the test satisfied.

5) *The length of time between the crime and the confrontation.*

¶23. Only four days had passed from the time of the crime to the time when Jane identified Davis from the photographic lineup. This Court has held that an identification five to seven days following a crime was not significant, and certainly did not undermine the reliability of the identification. *See Esco v. State*, 755 So. 2d 1248, 1254 (¶29) (Miss. Ct. App. 2000).

¶24. In light of the foregoing reasons, we conclude that substantial evidence supported the reliability of Jane's photographic identification of Davis, and the trial judge's admission of the identification did not amount to clear error. This issue is without merit.

¶25. **THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF COUNT I BURGLARY OF A DWELLING; COUNT II RAPE; COUNT III ARMED ROBBERY; AND COUNT IV AGGRAVATED ASSAULT AND SENTENCE OF LIFE ON EACH COUNT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITHOUT THE POSSIBILITY OF PAROLE IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.**

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, THOMAS, LEE, MYERS AND BRANTLEY, JJ., CONCUR. KING, P.J., CONCURS IN RESULT ONLY. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

IRVING, J., DISSENTING:

¶26. The majority finds that the strike of a single juror is sufficient to establish a prima facie case that race was the motivating factor for the exercise of the peremptory strike. The majority also finds that the trial court's refusal to accept, as race-neutral, Davis's reason for striking this juror was not clearly erroneous. I disagree with both of these finding. Accordingly, I respectfully dissent.

¶27. Davis used his first peremptory strike on juror Sherwin Agustin. The court responded, "If I may, I think she's a member of his [Davis's race]." Thereafter, the prosecutor stated, "He appears to be an Oriental male, Your Honor. We'd ask for a race neutral reason." Davis's attorney responded, "Well, Your Honor, first of all I don't think it's established that he is or is not an Oriental male or an Asian male based on appearances alone." The court then stated, "I don't think a prima facie showing has been made at this time, but if you want to state your race neutral reasons you may." Davis's attorney declined the court's invitation and argued that she did not believe she was required to put forth a reason because there was nothing in the record to indicate the juror's ethnicity.

> A *Batson* analysis is a three part inquiry. First, the objecting party is required to make a prima facie showing that peremptory strikes are being exercised on the basis of race. Second, after the [objecting party] makes such a showing the burden then shifts to the party exercising the strikes to offer a race-neutral reason for the challenge. Third, the court must determine if the opposing party has met the burden of proving that purposeful discrimination was the motive behind the challenges.

Taylor v. State, 733 So. 2d 252 (¶30) (Miss. 1999).

¶28. The record indicates both the trial court and prosecutor believed that Agustin is Asian. However, it is not disputed that the record does not contain any evidence from which an objective determination can be made. The opinion of the trial judge, as well as the prosecutor's, relative to Agustin's ethnicity was based on observation alone. The prosecutor argued that she had established a prima facie case that ethnicity was the basis for the strike because of two reasons: the venire did not contain any other Asians and the victim was Asian. The trial judge was convinced by this argument and reconsidered his opinion that a prima facie showing had not been met.

¶29. As previously observed, I do not believe a pattern of discriminatory peremptory strikes based on ethnicity can be ascertained from the exercise of a single strike. Having said this, I am keenly aware that *Batson* prohibits racial discrimination in the jury selection process, whether it is directed toward a single juror or several. Therefore, if Davis sought to strike Agustin because of Agustin's ethnicity, then that action

is prohibited by *Batson*. However, when, as here, the venire contains only one member of a particular ethnic group and that member has been struck, a finding that a prima facie case of ethnic discrimination has been established will always be inevitable if the exclusivity of the juror's ethnicity becomes the sole criterion for such determination. Without more, I do not believe that an opponent of a peremptory strike meets his burden as to the first prong of the *Batson* analysis. Nothing more was offered here other than the fact that the victim and the challenged juror appeared to share the same ethnicity.

¶30. Certainly, shared ethnicity between the victim and the challenged juror alone is not enough to establish a prima facie showing of discrimination based on race. If this were the case, a prima facie case of racial discrimination always will be met with the first strike of a juror who shares the same ethnicity as the victim. But more importantly, as a defendant is not entitled to a jury composed in whole or in part of persons of his own race (*see Batson v. Kentucky*, 476 U.S. 85 (1986)), neither is the State entitled to a jury composed in whole or in part of members sharing the same ethnicity as the victim. Yet, that is exactly what the State seemed to be aiming at when the prosecutor said to the court, "Your Honor, first I would submit that Mr. Agustin is the only person that appears to be of Asian background on the entire panel. We are dealing with a victim who is of Asia descent." The State, as well as the defendant, is entitled only to a jury whose members are chosen pursuant to nondiscriminatory criteria.

¶31. In reconsidering his initial decision that a prima facie case had not been met, the trial court appeared persuaded by the State's argument that Mr. Agustin's ethnicity should be accorded greater weight in the weighing process because he and the victim share the same ethnicity. This is what the court said: "I have reconsidered, and I think that given that he's the only one that even appears to be that [of Asian decent] certainly you can go ahead and make your race neutral reasons known to the court or ethnicity neutral reasons or ethnic neutral reasons."

¶32. After being compelled to give her race-neutral reason for striking Mr. Agustin, Davis's counsel offered the following:

> Well, Your Honor, in light of the fact that based on my recollection, and the Court's may be different, Mr. Agustin did not respond verbally to any question during voir dire either from the Court, the State or myself. The court rejected the reason as not being race-neutral.

¶33. The majority does not find the court's decision to be clearly erroneous or against the overwhelming weight of the evidence. I respectfully disagree. To elucidate my reasons for disagreeing on this point, I quote directly from the record:

> BY THE COURT: That's the only basis, Ms. Burkes, that he didn't respond?
>
> BY MS. BURKES: Yes, sir. His absolute lack of response to any question from either the Court, the District Attorney or defense counsel during voir dire. Your Honor, there are two other witnesses -- two other prospective jurors who would fall into that same category or being nonresponsive. 1-6, Peggy King, and I'm trying to find this one, Sallie Ober, 1-12. I'm not sure how to pronounce it.
>
> BY THE COURT: Ober.
>
> BY MS. BURKES: Yes, sir. We would strike all three because of their lack of response to any questions.

> BY THE COURT: It's always a tough call, but I can't think of that being a neutral reason that the juror didn't respond because I think that most jurors, or a good number of the jurors, certainly up to 50 percent of the jurors who are impaneled in my history, don't make any responses. So I'm going to find that that was not an ethnic neutral reason. We will just have to go on the record made and he will be placed in the box.

¶34. The case of *Taylor v. State*, 733 So. 2d 251 (Miss. 1999), provides insightful guidance with respect to the appropriate analysis of a *Batson* challenge. In *Taylor*, the trial court refused to accept as race-neutral the reasons the defense gave for striking two jurors. The defense had sought to strike two jurors "because they may be needed at their places of employment." *Id*. at 259 (¶36). This Court upheld the trial court's decision, but the Mississippi Supreme Court reversed this Court and the trial court and remanded the case for a new trial. In doing so, the *Taylor* court pointed out that in evaluating the nature of the explanation necessary to survive a *Batson* inquiry, the second step does not demand an explanation that is persuasive, or even plausible. All that is required is the facial validity of the explanation. *Id*. at (¶34). In this case, the reason offered for striking Mr. Agustin clearly passes the facially-valid test. Thus, it became the responsibility of the State, in the third prong of the analysis, to prove that purposeful discrimination was the motive behind the challenge.

¶35. As to the third prong, the State offered nothing in rebuttal that arguably indicates that the reason given for the strike was pretextual. In fact, the State seeks to use the shared ethnicity of the victim and of the juror to prove both the first and third prongs of the *Batson* analysis. As previously discussed, this certainly is insufficient to sustain a *Batson* challenge. Otherwise, a sustainable *Batson* challenge will always exist when a juror, who shares the same race or ethnicity as the victim, is struck, notwithstanding the facially-valid reason for the strike.

¶36. In this case, Davis's counsel struck every juror who was nonresponsive to questions from the court and counsel. How then can it be legitimately argued that purposeful discrimination was the motive behind counsel's action in striking Mr. Agustin? The trial judge determined that the reason given for striking Mr. Agustin -- he did not respond to questions from either the court or counsel -- was not an ethnic-neutral reason. This finding is clearly erroneous. Perhaps, the court meant that it was pretextual. Even in that event, a finding that the reason was pretextual would be clearly erroneous and against the overwhelming weight of the evidence, given the fact that Davis's counsel struck all jurors similarly situated. Therefore, I would reverse and remand for a new trial.

¶37. For the reasons presented, I respectfully dissent.