IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-01284 COA

HOWARD DENNIS ARMSTRONG, JR. **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

DATE OF JUDGMENT:	09/09/94
TRIAL JUDGE:	HON. BILL JONES
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ANTHONY N. LAWRENCE III
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: WAYNE SNUGGS
DISTRICT ATTORNEY:	DALE HARKEY
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	ARMED ROBBERY: SENTENCED TO SERVE A PERIOD OF 10 YEARS WITH 4 YEARS SUSPENDED LEAVING 6 YEARS TO SERVE IN THE CUSTODY OF MDOC; PAY ALL COSTS ACCRUED IN THIS PROSECUTION
DISPOSITION:	REVERSED AND REMANDED - 9/23/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/14/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

HERRING, J., FOR THE COURT:

The Appellant, Howard Dennis Armstrong, Jr., was convicted of armed robbery on September 2, 1994, in the Circuit Court of Jackson County, Mississippi. Thereafter, on September 9, 1994, the trial court sentenced Armstrong to serve ten years in the custody of the Mississippi Department of Corrections, with four years of the sentence suspended. Armstrong now appeals and cites the

following assignments of error:

I. THE COURT ERRED IN NOT ALLOWING THE DEFENSE FULL AND COMPLETE DISCOVERY IN ORDER TO PREPARE FOR THE DEFENSE.

(A) THE COURT ERRED IN NOT REQUIRING THE VICTIM OF THE ARMED ROBBERY TO PRODUCE THE NAMES OF INDIVIDUALS WHO PROVIDED HER INFORMATION IN REGARD TO THE ARMED ROBBERY IN QUESTION.

(B) THE COURT ERRED IN NOT REQUIRING THE STATE TO PRODUCE THE CONFIDENTIAL INFORMANT AT THE AUGUST 12, 1994 HEARING AND NOT REQUIRING THE STATE TO ABIDE BY THE COURT ORDERS AND PRODUCING SAME.

(C) THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL WHEN IT DISCOVERED DURING THE COURSE OF THE TRIAL THAT A THIRD PERSON WAS INVOLVED IN THE ARMED ROBBERY IN QUESTION.

(D) THE COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO THE STATE CALLING AN EXPERT RELATING TO GANG ACTIVITY AND THAT THE STATE NEVER PROVIDED THE NAME OR OPINIONS OF THE EXPERT IN DISCOVERY.

II. THE COURT ERRED IN OVERRULING *BATSON* OBJECTIONS BY THE DEFENDANT IN THAT THE STATE DID NOT PRESENT A RACE NEUTRAL REASON FOR STRIKING MEMBERS OF THE SAME RACE AS THE DEFENDANT AND THE REASONS PROVIDED BY THE STATE WERE IMPROPER AND UNCONSTITUTIONAL.

III. THE COURT ABUSED ITS DISCRETION IN OVERRULING THE DEFENDANT'S FOUR (4) MOTIONS FOR CONTINUANCES FILED AT VARIOUS STAGES THROUGHOUT PRE-TRIAL AND TRIAL PROCESS AS A RESULT OF THE STATE'S FAILURE TO ABIDE BY DISCOVERY OBLIGATIONS AND ORDERS OF THE COURT.

IV. THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION IN LIMINE TO EXCLUDE GANGS AS EVIDENCE AT THE TRIAL OF THIS CAUSE AND THE USE OF MONEY FROM THE ARMED ROBBERY IN QUESTION TO PURCHASE DRUGS. FURTHER, THE COURT ERRED IN DENYING DEFENSE INSTRUCTION NUMBER 8, RELATING TO THE GANG TESTIMONY.

V. THE COURT ERRED IN NOT ALLOWING THE DEFENSE FULL USE OF CROSS EXAMINATION WHILE QUESTIONING WITNESSES OF THE STATE.

VI. THE COURT ERRED IN NOT EXCLUDING THE IN-COURT IDENTIFICATION PRIOR TO TRIAL AND IN NOT GRANTING THE DEFENSE'S REQUEST FOR A LIMITING INSTRUCTION ADVISING THE JURY TO IGNORE THE IN-COURT IDENTIFICATION DUE

TO THE UNNECESSARY SUGGESTIVENESS OF SAID PHOTO LINEUP.

For the reasons stated in this opinion, we reverse and remand this action for a new trial.

I. THE FACTS

On the evening of March 31, 1992, Robin Johnson and Sue Gholar were working at the Little Merchant, a convenience store located in Moss Point, Mississippi. Gholar had been working behind the cash register for several hours, and Johnson had just come in to replace her when two young men entered the store at approximately 7:00 p.m. and demanded money. One of the two men, later identified by Johnson as Armstrong, was carrying a pistol and jumped the rail which divided the area of the store behind the cash register from that portion of the building designated for customers. Johnson panicked and tried to crawl under the cash register. However, when Armstrong put the gun in her face, she readily pushed the cash register button and gave him the money tray. Meanwhile, Sue Gholar had gone into a back room to avoid any further contact with the two assailants.

Armstrong and Dickerson took the money and fled. They were observed running away from the Little Merchant by several witnesses, and one witness saw the two men enter an automobile and speed away. Johnson and others heard shots fired outside the Little Merchant as Armstrong and Dickerson were leaving the scene.

Johnson later testified that she immediately recognized the unarmed assailant, later identified as Timothy Dickerson, whom she had seen as a student when she worked at Kreole Elementary School. Therefore, she paid close attention to the armed assailant, whose face was partially covered with a bandana, in an attempt to identify him. At close range, she was able to observe his eyes, his nose, and the fact that he had slashed eyebrows. At trial, Johnson positively identified Armstrong as the assailant with the handgun that robbed her place of employment and held her at gunpoint on the evening in question. She also stated that she had been informed by store customers that the robbery was part of a gang initiation ritual.

At some time after the robbery, Johnson was shown several photographs of possible suspects. She immediately identified Timothy Dickerson as one of the assailants and chose two other photographs of individuals who resembled the assailant with the handgun. One of the photographs was a picture of Armstrong.[(1)] Based upon Johnson's identification, as well as information furnished by confidential informants, Dickerson was arrested and charged with committing the robbery. He subsequently confessed and identified Armstrong as the assailant with the handgun. Dickerson eventually testified at Armstrong's trial and named Armstrong as his partner in the robbery. Armstrong testified in his own defense and denied having any involvement with the robbery. Nevertheless, the jury found him guilty of armed robbery. Dickerson was fifteen years of age, and Armstrong was twenty years old when the robbery was committed. Subsequently, Dickerson's case was remanded to the county's youth court. He was then sent to Oakley Training School and treated as a juvenile offender.

II. ANALYSIS

As stated above, Armstrong enumerated several assignments of error as grounds for his appeal.

I. DID THE TRIAL COURT ERR IN NOT REQUIRING JOHNSON TO PRODUCE THE NAMES OF THE PEOPLE WHO PROVIDED HER WITH INFORMATION IN REGARD TO THE ARMED ROBBERY?

At a pre-trial hearing, Robin Johnson testified that on the day after the robbery, the "street talk" from her customers was that Armstrong had committed the robbery. When asked by Armstrong's counsel who had made these statements, Johnson could not recall and generally expressed reluctance to get anyone else involved. From an examination of the record, it is arguable whether Johnson was evasive in responding to defense counsel's inquiry. However, the trial court ruled that such evidence was inadmissible and apparently was convinced that Johnson could not recall, two and one half years later, which customers were involved in the street talk. Armstrong contends that the trial court's failure to compel Johnson to reveal the names of her customers who identified Armstrong as her assailant was a violation of Rule 9.04(A)(1) of the Uniform Rules of Circuit and County Court Practice,[(2)] which states that the prosecution must provide to the defendant's attorney the following:

Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statement made by any such witness.

The Mississippi Supreme Court has clearly stated that a showing of prejudice is not always required, in order to justify reversal, when the prosecution violates the trial court's discovery rules. *Robinson v. State*, 508 So. 2d 1067, 1070 (Miss. 1987). However, our supreme court has also said:

Our holding should not be misinterpreted as indicating that failure to make pretrial disclosure requires per se reversal. We have recognized that non-discovered evidence may be admitted at trial if the party against whom that evidence is offered is given a reasonable opportunity to make adequate accommodation.

Id. at 1071. In the case *sub judice*, the State never attempted to present as witnesses any of the street people or customers who identified Armstrong as the assailant. Thus, the requirements of Rule 9.04(A)(1) do not apply in this case. Moreover, there is no evidence that Armstrong was prejudiced by Johnson's failure to identify the individuals who repeated the rumors of Armstrong's involvement. This assignment of error is without merit.

II. DID THE TRIAL COURT ERR IN NOT REQUIRING THE STATE TO PRODUCE THE IDENTITY OF THE CONFIDENTIAL INFORMANTS AT THE AUGUST 12, 1994, HEARING, AND IN NOT REQUIRING THE STATE TO ABIDE BY THE COURT ORDERS TO PRODUCE THEM?

Prior to the trial of this action, which began on September 1, 1994, Armstrong filed two motions to compel the State to identify its confidential informants in this case. The first motion to compel was filed on July 13, 1994, and a hearing on this motion was held on August 12, 1994. Detective Danny Watson testified that an informant identified Timothy Dickerson as one of the assailants involved in

the robbery but that, to his knowledge, the unnamed informant was not an eyewitness to the incident which occurred at the Little Merchant. The motion to compel was denied by the trial court as a result of Watson's testimony. A second motion to compel the State to reveal the names of any confidential informants was filed on July 29, 1994, and arguments based on this motion were heard on Monday, August 29, 1994, one day before Armstrong's trial was set to begin. At this hearing, Armstrong's attorney stated that he received a telephone call from the district attorney's office on August 19, 1994, and was informed that one of the confidential informants was an eyewitness to the robbery after all. The defense attorney was instructed to contact Watson at the Moss Point Police Department to arrange a time to interview the informant. The attorney placed a telephone call to Watson to set up the interview and left his name and telephone number, but his telephone call was never returned.

At the August 29, 1994, hearing the informant was identified as Robert Kirkland. Armstrong requested a continuance of the trial to allow him time to interview Kirkland, but the State objected on the ground that it would not be calling Kirkland as a witness. By agreement, the trial was postponed until Thursday, September 1, 1994. However, the court instructed the parties to pick the jury on the following day, August 30, 1994, and also instructed the State to provide Kirkland to Armstrong's attorney by 2:00 p.m. on August 29, 1994, for an interview.

Prior to the voir dire, which was conducted on Tuesday, August 30, 1994, Armstrong renewed his motion for a continuance because the State had failed to provide Kirkland for an interview at 2:00 p.m. on August 29 as instructed by the court. Instead, Kirkland was presented to defense counsel for an interview at 10:00 a.m. on August 30, the morning when voir dire was to begin. In explanation, the prosecution stated that Kirkland could not be located until 8:00 p.m. on the night of August 29, 1994, and the district attorney's office was not informed of this fact until 8:00 a.m. on Tuesday, August 30. Meanwhile, the State apparently discovered that a second confidential informant, Joe Williams, was also an eyewitness to the robbery and provided his name to Armstrong's counsel on that same morning of August 30, 1994. The trial court again denied the motion for continuance and once again instructed the State to provide the informants for interviews by defense counsel. Both Kirkland and Williams were interviewed by defense counsel prior to trial which began on September 1, 1994. Neither Kirkland nor Williams were called as a witness by the State at Armstrong's trial. Rather, they were called as witnesses by Armstrong. Williams testified that he could not identify either robber, and Kirkland testified that he could only identify Dickerson.

Armstrong now contends that the State's actions as described above essentially denied him the ability to adequately prepare his case for trial and to properly defend himself. The Appellant further contends that the trial court's refusal to allow him a continuance compounded the problem. On the other hand, the prosecution asserts that its representatives provided the names of the confidential informants to the defense as soon as they became aware of the fact that the informants were eyewitnesses. Furthermore, the State asserts that Armstrong's attorney did have an opportunity to interview the two informants prior to the beginning of the trial and that Armstrong decided to call them as his own witnesses, thereby waiving any objection to the State's failure to identify the informants at an earlier time.

Rule 4.06(b)(2) of the Uniform Criminal Rules of Circuit Court Practice[(3)] sets out the procedure that is to be followed in matters such as this, and states as follows:

(2) Informants. Disclosure of an informant's identity shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose his or her identity will infringe the constitutional rights of the accused or unless the informant was an eyewitness to the event or events constituting the charge against the defendant.

In the case *sub judice*, the State did not attempt to call the informants as witnesses in support of its case against Armstrong. Thus, the issue before the Court is whether the State's delinquent compliance with the trial court's order to make the informants available for interviews by Armstrong's attorney effectively denied Armstrong's right to a fair trial. This problem has been addressed by the Mississippi Supreme Court on numerous occasions. "Unless manifest injustice appears to have resulted from the denial of the continuance, this Court should not reverse." *Lambert v. State*, 654 So. 2d 17, 22 (Miss. 1995). Moreover, " [a] denial of the continuance shall not be ground for reversal unless the supreme court shall be satisfied that injustice resulted therefrom." Miss. Code Ann. § 99-15-29 (1972). Furthermore, "[a] violation of Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice is harmless error 'unless it shall affirmatively appear, from the record, that such . . . has resulted in a miscarriage of justice.'" *Dennis v. State*, 555 So. 2d 679, 682 (Miss. 1989) (quoting *Buckhalter v. State*, 480 So. 2d 1128, 1128 (Miss. 1985)). Still, discovery violations by the State in cases such as this and "trial by ambush" have been a source of real concern to our supreme court, resulting in a number of cases where convictions at the trial court level have been overturned on appeal. See, for example, the following statement of the supreme court in *Coates v. State*, 495 So. 2d 464, 467 (Miss. 1986):

The practice of trial by ambush, however savored by the skillful advocate, has long since been discredited. A trial--particularly a criminal trial where one's liberty is at stake--is not a game. It is a purposeful effort to achieve justice, its possibilities of success enhanced in no small measure by a fidelity to procedural fairness. It is in this context that this Court has been required time after time in recent years to reverse criminal convictions because at trial the prosecution was allowed to use evidence which in discovery it was obligated to disclose to the defense but for whatever reason withheld.

(Citations omitted). *See also Robinson v. State*, 508 So. 2d 1067, 1071 (Miss. 1987); *Box v. State*, 437 So. 2d 19, 22-26 (Miss. 1983).

In the case *sub judice*, we are of the opinion that the State's delinquency in making the confidential informants available for interviews and the trial court's refusal to allow a continuance, while troubling, did not result in a miscarriage of justice, especially since the State did not attempt to use the informants as witnesses, whereas Armstrong did, in fact, call the informants as his own witnesses. Neither informant was able to identify Armstrong as a participant in the robbery. Moreover, the evidence presented against Armstrong was overwhelming. Robin Johnson identified him as one of her assailants in open court, and Timothy Dickerson, his partner in the robbery, did so as well. However, since this case is being reversed and remanded for a new trial on other grounds, this issue is moot.

III. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A MISTRIAL WHEN IT WAS DISCOVERED DURING THE COURSE OF THE TRIAL THAT A THIRD PERSON WAS

INVOLVED IN THE ARMED ROBBERY IN QUESTION?

During Armstrong's cross-examination, Timothy Dickerson admitted that he and Armstrong committed the robbery at the Little Merchant and informed the court and all parties, apparently for the first time, that a third party named Robert Earl was the driver of their getaway car. Dickerson further stated that he did not know how to locate Robert Earl, although he was probably in jail. Armstrong then moved for a mistrial, citing a violation of the trial court's discovery rules. The State responded that it had no knowledge of the existence of a third participant in the robbery until Dickerson's statement in court. Thus, it could not be held accountable for failing to reveal information which it did not have. We agree. There was no attempt by the State to present Robert Earl as a witness or to present any other evidence related to him, and no further discussion of our discovery rules is necessary on this issue. We find that this assignment of error has no merit.

IV. DID THE TRIAL COURT ERR IN OVERRULING THE DEFENDANT'S OBJECTIONS TO THE STATE CALLING AN EXPERT RELATING TO GANG ACTIVITY SINCE THE STATE NEVER PROVIDED THE NAME OR OPINIONS OF THE EXPERT IN DISCOVERY?

Prior to trial, on August 12, 1994, the trial court denied Armstrong's motion to exclude any mention of Armstrong's gang activity prior to the robbery in question or that gang activity was the motivation for the robbery. When Armstrong later testified at his trial, he was cross-examined concerning his knowledge of gangs and his prior involvement in gang activity. Armstrong denied any involvement in gangs, although he admitted that the relative with whom he was living was a gang member. He was then requested by the State's attorney to roll up the sleeve of his shirt. When he did so, a tatoo of a heart and a pitchfork was revealed on his right arm. Armstrong then admitted without objection that this tatoo was the symbol of a gang known as the Black Gangster Disciples, also known as the "G's". Defense counsel then objected and moved for a mistrial, stating:

BY MR. ISHEE:

The prosecutor has solicited no information as to what that mark means, what it stands for. He has brought forth no expert testimony to testify on gang symbols. However, he simply states that there is a mark on his arm which is the symbol of the G's. That is highly prejudicial to the jury. There has been no proper predicate laid.

The State then informed the trial court that it would call an expert witness in rebuttal who could inform the court what the tatoo meant and what it meant for an individual to have such a tatoo on his arm. Armstrong then objected to the State being allowed to call such an expert to testify and further moved for a continuance in order to have time to find its own expert. The motion for continuance was denied, and Joe Sellers was ultimately allowed to testify for the State in rebuttal. Mr. Sellers was a resident of Jackson County and had made a study of the various gangs in the area while employed by both the police department and the local school system. Armstrong now contends that the trial court committed reversible error in allowing Sellers to testify, since neither the expert nor his opinions were disclosed to him prior to trial in compliance with the trial court's discovery rules. Furthermore, Armstrong contends that he should have been allowed a continuance in order to

adequately prepare for Seller's testimony and that the trial court further erred in denying his proposed instruction which stated:

INSTRUCTION NO. D-8

The Court instructs the jury you are not to consider the issue of the defendant, HOWARD ARMSTRONG, JR., being or not being in a gang as evidence on the issues of the crime charged in this case.

On the other hand, the State responds that there is no requirement that rebuttal witnesses such as Sellers be disclosed prior to trial. It is noteworthy that Armstrong's counsel was given the opportunity to interview Sellers the night before he testified. However, it is unclear as to whether the State consulted with Sellers prior to trial and was "holding him in reserve" for use as a rebuttal witness all along, or whether the State contacted Sellers for the first time during the course of the trial when it became apparent that Armstrong would testify. Armstrong correctly points out that the guidelines enunciated in *Box v. State,* 437 So. 2d 19, 22 (Miss. 1983) should be followed by the State, and the defense should have a reasonable opportunity prior to trial to know how the State will attempt to prove its case-in-chief. *See Acevedo v. State*, 467 So. 2d 220, 223 (Miss. 1985); *Darghty v. State* 530, So. 2d 27, 32-33 (Miss. 1988); *Duplantis v. State*, 644 So. 2d 1235, 1249 (Miss. 1994). It is also true that "rebuttal witnesses are a recognized exception to witness disclosure requirements." *Shavers v. State*, 455 So. 2d 1299, 1301 (Miss. 1984); *see also White v. State*, 566 So. 2d 1256, 1259 (Miss. 1990).

In this case, however, we are faced with a situation where the State received a ruling from the trial court prior to trial that it could present evidence that the motive for the robbery was related to gang activity. Although the record is unclear, it is probable that the State contacted Sellers prior to Armstrong's testimony with the intent to possibly use him as an expert witness in regard to gangs and gang signs. Thus, we must determine whether the State violated Rule 4.06(a)(4) of the Uniform Criminal Rules of Circuit Court Practice when it waited until Armstrong testified to inform the Appellant that it had consulted with Sellers. Rule 4.06(a)(4) states that the prosecution shall, upon written request, furnish to the defense:

Any reports or statements of experts, written, recorded or otherwise preserved, made in connection with the particular case, and the substance of any oral statement made by any such expert.

We have failed to locate a Mississippi case which specifically deals with the question of whether the State has an obligation to disclose to the defense the name of an expert which the State identifies prior to trial and intends to call as a rebuttal witness. However, we hold that the failure of the State to disclose such an expert witness prior to trial is a violation of our discovery rules and could constitute reversible error. *See Hutchins v. Maryland,* 663 A. 2d 1281, 1285-86 (Md. 1995). However, since the case *sub judice* is being reversed on other grounds, it is unnecessary for the court to rule directly on this assignment of error.

Before finally disposing of this issue, however, we must consider for the benefit of a future trial whether evidence of Armstrong's possible affiliation with a gang was a violation of Mississippi Rule

of Evidence 404(b). Rule 404(b) states:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This issue is addressed in *Hoops v. State*, 681 So. 2d 521, 530 (Miss. 1996), where our supreme court observed that many courts throughout the United States have allowed the use of such evidence to show motive under certain circumstances. In *Hoops*, the supreme court allowed the gang affiliation of the defendant into evidence but issued the following admonition to trial judges in future cases:

To ensure that no unfair prejudice accrues to a defendant, a trial judge should administer the balancing test of Rule 403 under the Mississippi Rules of Evidence before admitting such evidence into the trial.

Id. at 530. In this case, as in *Hoops*, we are satisfied that the trial judge performed the proper balancing test. He heard arguments from both sides at the August 12, 1994, hearing as to whether such evidence was prejudicial and made his ruling accordingly.

V. DID THE COURT ERR IN OVERRULING *BATSON* OBJECTIONS BY THE DEFENDANT BECAUSE THE STATE DID NOT PRESENT RACE NEUTRAL REASONS FOR STRIKING MEMBERS OF THE SAME RACE AS THE DEFENDANT AND BECAUSE THE REASONS PROVIDED BY THE STATE ON BOTH RACE AND RELIGION WERE IMPROPER AND UNCONSTITUTIONAL?

In this assignment of error, Armstrong challenges the reasons given by the State for its peremptory challenge of three black jurors. According to *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, the State was required to provide a race-neutral explanation for challenging black jurors, once the appellant established a *prima facie* case of purposeful discrimination in the selection of petit jurors. *Id.* at 97. The prosecutor's race-neutral reasons with respect to each of the three jurors was as follows:

Mrs. Jimmerson (Juror Number 1)

[W]hen I checked the card that she had she is a twenty-nine year old female. The only employment she shows is having worked for three days. It's been my experience and my preference to pick people who have had a job in the community for some period of time, and generally that period of time to be somewhere around a year or more, because that proves to me that that person has a stable life and has some stake in the community. This individual has only been working, according to her card, for three days. Therefore, I felt she was not a very stable person and didn't feel that she would be someone good to put on the jury.

Ms. Rogers (Juror Number 2)

[H]er card shows no religious preference, and the majority of her card there were no marks or notations put in many of the blanks on her card. Again, it's my experience and my preference to put someone on the jury who has some type of religious preference because, again, I think that shows somebody that's stable and responsible. And that's the type of person I want to put on the jury. *And I don't want to put somebody on there who either has no religious preference or is agnostic or atheist.*

Mr. Jackson (Juror Number 3)

When I was doing my voir dire, Mr. Jackson was never-- he didn't appear to be hostile towards me. However, when counsel opposite got up and started doing his voir dire, Mr. Jackson appeared to me to be more receptive to him. I noticed he nodded his head a lot more, he laughed a lot more when counsel opposite was doing his voir dire. He just appeared to be more receptive to the Defendant and his attorneys than he did to me. And for that reason I struck him.

(emphasis added). It is noteworthy that the State also struck some white jurors and accepted one black juror. As stated in *Hatten v. State*, 628 So. 2d 294, 299 (Miss. 1993), once the State announces its race-neutral reason for exercising its peremptory challenge, the trial judge,

in determining which explanations are sufficiently race-neutral and which are not, should give an equally "clear and reasonably specific" explanation for his ruling. As we also stated in *Lockett*, "[t]his perspective is wholly consistent with our unflagging support of the trial court as the proper forum for resolution of factual controversies."

Id. (quoting *Lockett v. State*, 517 So. 2d 1346, 1350 (Miss. 1988)). When such a determination is made by the trial court, appellate reversal will not occur unless the trial court's findings are clearly erroneous or against the overwhelming weight of the evidence. *Bounds v. State*, 688 So. 2d 1362, 1367 (Miss. 1997).

The *Bounds* case, following *J.E.B. v. Alabama*, 511 U. S. 127 (1994), extended the requirements and protections of *Batson* to gender as well as race. *Bounds*, 688 So. 2d at 1366. In that case, the trial judge failed to state on the record his basis for denying a peremptory strike after gender-neutral reasons were given. Instead, he simply stated that he was denying the challenge. The supreme court, in addressing this situation, stated:

In light of this Court's previous rulings interpreting *Batson*, which is now applicable not only to race but also to gender as a result of *J.E.B.*, the trial judge committed reversible error in not giving clear and reasonably specific explanations for his denial of *Bounds'* peremptory strikes.

Id. at 1367. Unfortunately, the trial court in the case *sub judice* made the same error that occurred in *Bounds*. Instead of giving a basis for his acceptance of the State's race-neutral reasons for striking the three black jurors in this case, the following dialogue occurred between the trial court and the

attorneys:

BY THE COURT: Anything on behalf of the Defense?

BY MR. ISHEE: No, sir, Your Honor. We would just ask that the Court consider placing these people back on under this case of Batson vs. State of Kentucky.

BY THE COURT: The Court will overrule the motion. Anything further, gentlemen?

BY MR. MILLER: No, sir.

BY MR. LAWRENCE: No, sir, Judge.

BY THE COURT: You may bring the jury back in.

When this issue arose later during the hearing on Armstrong's motion for a new trial, the court once again gave no basis for its acceptance of the State's race-neutral reasons for striking the jurors. Thus, following the requirements of *Hatten* and *Bounds,* we have no choice but to reverse and remand this case for a new trial.

It is arguable whether the *Bounds* decision is distinguishable from the case *sub judice* since the trial court in *Bounds* failed to give an explanation for its denial of the defendant's peremptory challenges. In this case, the trial court *approved* the strikes and merely accepted the prosecutor's reasons for his peremptory challenges without comment. Thus, it could be argued that by accepting the prosecutor's reasons for the challenges without comment, the trial court was implicitly adopting those reasons as its own. Nevertheless, because the prosecutor's reasons for peremptorily striking the witnesses appear to be weak, it is the Court's opinion that the trial judge, following *Bounds* and *Hatten*, should have given a clear and reasonably specific explanation for its ruling in approving the peremptory challenges.

Before we leave this issue, it may be helpful in a future trial to address the fact that the State raised a juror's lack of religious beliefs as a race-neutral reason for peremptory challenge. To date, the protections of *Batson* and *J.E.B.* have not been extended to prohibit peremptory strikes based upon religion. *See Davis v. Minnesota*, 511 U.S. 1115 (1994), where the United States Supreme Court denied a petition for certiorari on this issue from the Supreme Court of Minnesota. However, in dissent, Justices Scalia and Thomas were of the opinion that *J.E.B.* extended *Batson's* "equal protection analysis" to peremptory strikes based on religion. *J.E.B.*, 511 U.S. at 160; *see also U.S. v. Somerstein*, 959 F. Supp. 592 (E.D.N.Y. 1997); as well as, Barton, *Religion Based Peremptory Challenges after Batson v. Kentucky and J.E.B. v. Alabama: An Equal Protection and First Amendment Analysis*, 94 Mich. L. Rev. 191 (1995).

We have reviewed the other assignments of error raised by Armstrong and find that they have no merit. However, for the reasons stated, we reverse and remand this case for a new trial consistent

with the terms of this opinion.

THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR A NEW TRIAL CONSISTENT WITH THE TERMS OF THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED TO JACKSON COUNTY.

COLEMAN, DIAZ, KING, AND SOUTHWICK, JJ., CONCUR. McMILLIN, P.J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, C.J., THOMAS, P.J., HINKEBEIN, AND PAYNE, JJ.

McMILLIN, P.J., CONCURRING:

I concur in the result reached by the majority in this case. I concur in the reasoning of the majority on all issues discussed except the rationale regarding the *Batson* challenge. I would not agree that the failure of the trial court to articulate its reasons for permitting the State's peremptory challenges in the face of a *Batson* challenge, standing alone, is reversible error. Nevertheless, I would hold that the reasons offered for two of the challenges are so insubstantial that the trial court abused its discretion in failing to hold the reasons offered to be pretextual.

I realize that the Mississippi Supreme Court announced a prospective rule in *Hatten v. State* that, in resolving Batson issues, the trial court must make on-the-record findings for its ruling. *Hatten v. State*, 628 So. 2d 294, 297 (Miss. 1993). However, in this instance the State announced its reasons, and the defense offered no rebuttal evidence or argument before the court accepted the reasons. In such a case there is implicit in the court's ruling a finding that the reasons offered were both facially race-neutral and non-pretextual, since those are the only legitimate considerations before the court. The verbal announcement of those findings, inherent in the court's ruling, do nothing to aid an appellate court's review of the issue on appeal. Such a ritualistic exercise would be no more useful than having the trial court, when ruling on a hearsay objection, state, "Sustained, because I find this to be a statement made by a person other than this witness, and offered to prove the truth of the matter asserted." In that situation, the word "Sustained" does quite nicely.

Nevertheless, I would conclude that the reasons offered for striking two of the minority jurors were so contrived that the trial court abused its discretion in failing to hold them pretextual. At the third stage of a *Batson* analysis, the trial court must deal with silly, superstitious, implausible and fantastic reasons. *Purkett v. Elem*, 514 U.S. 765 (1995). At that point, the court must consider whether the reason offered is so suspect as to force a conclusion that it must be a pretext for purposeful discrimination. *Id.*

Even conceding the necessarily broad discretion given to the trial court in these matters, I am satisfied that the reasons offered to challenge two of the jurors in question are so patently unbelievable as to compel a finding of pretext. To say that a failure to indicate a religious preference on a juror questionnaire is the equivalent of a profession of atheism or agnosticism is more than a bit difficult to swallow. Additionally, to claim that, during voir dire, the prosecutor was able to single out one particular venire member and observe that member's subtle reactions to the competing

performances of the attorneys during voir dire strains credulity. In the post-*Batson* world of jury selection, if the issue of pretextual reasons is to have any effect at all, then it would seem to me that this is such a case.

I would conclude that the reasons offered for striking these two jurors were so implausible that the trial court should have disallowed them on a finding that they were pretextual. I would reverse and remand for a new trial on this basis, rather than for a perceived violation of the rule announced in the *Hatten* case.

BRIDGES, C.J., THOMAS, P.J., HINKEBEIN AND PAYNE, JJ., JOIN THIS SEPARATE OPINION.

1. It is noteworthy that Johnson later testified that she immediately recognized Armstrong's photograph as the picture of her armed assailant, but did not positively identify him at that time because she was afraid that he, or someone else, would return and do her bodily harm.

2. Rule 4.06(A)(1) of the Uniform Criminal Rules of Circuit Court Practice, which is identical to Rule 9.04(A)(1) of the URCCC, was actually in effect at the time of the trial of this action.

3. Rule 4.06(b)(2) was superceded by Rule 9.04(B)(2) of the Uniform Rules of Circuit and County Court Practice, which became effective after the date of the trial in this action.