IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00597 COA

ALLEN TAYLOR A/K/A "MOOKEY" **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:	03/04/96
TRIAL JUDGE:	HON. C. E. MORGAN III
COURT FROM WHICH APPEALED:	CHOCTAW COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	C. HUGH HATHORN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	DOUG EVANS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I CONSPIRACY TO SELL COCAINE: CT II SALE OF COCAINE: CT I SENTENCED TO 20 YRS; CT II SENTENCED TO 25 YRS WITH 5 YRS SUSPENDED FOR 5 YRS FROM RELEASE; CT II CONCURRENT CT I; PAY $2,000 FINE ON EACH COUNT
DISPOSITION:	AFFIRMED
	MOTION FOR REHEARING FILED: 12/4/97
CERTIORARI FILED:	2/18/98
MANDATE ISSUED:	4/30/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

THOMAS, P.J., FOR THE COURT:

Allen Taylor appeals his conviction of sale of cocaine and conspiracy to sell cocaine, raising the following issues as error:

I. THE TRIAL COURT ERRED IN OVERRULING MR. TAYLOR'S MOTION FOR MISTRIAL ON THE BASIS THAT THE STATE OF MISSISSIPPI WAS PERMITTED

TO INTRODUCE EVIDENCE OF OTHER CRIMES ALLEGEDLY COMMITTED BY MR. TAYLOR BUT NOT CHARGED AGAINST HIM IN THE INDICTMENT.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO EXERCISE FIVE OF ITS SIX PEREMPTORY CHALLENGES TO REMOVE AFRICAN-AMERICANS FROM THE JURY PANEL.

III. THE TRIAL COURT ERRED IN PERMITTING AGENT JAMES CATALANO TO TESTIFY AS TO HIS "UNDERSTANDING" OF THE FACTS IN THIS CASE BASED UPON HIS VIEWING OF THE VIDEOTAPE AND NOT BASED UPON ANY PERSONAL KNOWLEDGE OF THE FACTS ACQUIRED BY THE WITNESS.

Finding no error, we affirm.

FACTS

James Catalano, with the Mississippi Bureau of Narcotics, testified that on April 27, 1995 he was assigned to the Choctaw County area. Catalano, Sergeant Charlie McVay, Agent Craig Taylor, Agent Derrick Holland, and two undercover agents, Charles Melvin and Marshall Pack, met to set up a controlled buy in an area called "The Hole" near Weir in the Kirkwood Community of Choctaw County. Catalano set up surveillance and installed a video recorder in an undercover car. Catalano listened over a transmitter to the entire transaction.

Agents Melvin and Pack drove the car to the area called "The Hole." Two males approached them, identifying themselves as David and Earl. The agents asked to purchase five hundred dollars worth of crack cocaine, and they told the agents to drive around while they got the crack cocaine. When the agents drove back, they purchased a hundred dollars worth of cocaine. David and Earl told the agents that they were waiting on their brother to get more and that their brother would only deal through them. Again they asked the agents to drive around. When the agents were pulling out they saw David and Earl talking with Allen Taylor. After the agents returned, Melvin saw Earl walk to Taylor and return with the cocaine. At the post-buy meeting, Agent Melvin identified Taylor from photographs.

Earl Kirkwood testified that he sold cocaine on April 27, 1995. He stated that Taylor had supplied the cocaine to him for whom he admitted he was working for at the time.

Taylor testified in his own defense. He denied furnishing cocaine to Earl Kirkwood or David Lawrence. He denied any knowledge of the events that led to his indictment.

The jury found Taylor guilty of both conspiracy to sell and sale of cocaine.

ANALYSIS

I.THE TRIAL COURT ERRED IN OVERRULING MR. TAYLOR'S MOTION FOR MISTRIAL ON THE BASIS THAT THE STATE OF MISSISSIPPI WAS PERMITTED TO INTRODUCE EVIDENCE OF OTHER CRIMES ALLEGEDLY COMMITTED BY MR. TAYLOR BUT NOT CHARGED AGAINST HIM IN THE INDICTMENT.

Taylor was charged by indictment with one count of conspiracy and one count of sale of cocaine.

During the testimony of Catalano and others, the State elicited testimony that Taylor had engaged in more than one sale of a controlled substance. Taylor's counsel moved for a mistrial over questions being asked and testimony elicited which showed Taylor being involved in more than one offense. The trial judge denied the motion reasoning that since Taylor was also charged with conspiracy, evidence of the other sale of a controlled substance was admissible to prove the conspiracy charge. Taylor argues that the evidence of drug sales other than the one for which he was charged was impermissibly suggestive and prejudiced him before the jury.

"Admissible evidence in a conspiracy case covers a wide range. Commission of an offense is admissible as showing the conspiracy, since what the defendant[] actually did is evidence of what [he] intended to do." ***Griffin v. State*, 480 So. 2d 1124, 1126 (Miss. 1985)** (citation omitted).

> Proof of another crime is admissible where the offense charged and that offered to be proved are so connected as to constitute one transaction, where it is necessary to identify the defendant, where it is material to prove motive and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge.

***Tucker v. State*, 403 So. 2d 1274, 1276 (Miss. 1981)** (citations omitted).

"Evidence of another offense is admissible when the offense is so clearly interrelated to the crime charged as to form a single transaction or closely related series of transactions." ***Mackbee v. State*, 575 So. 2d 16, 27 (Miss. 1990)** (citations omitted). "[T]he State has a 'legitimate interest in telling a rational and coherent story of what happened. . . .' Where substantially necessary to present to the jury 'the complete story of the crime' evidence or testimony may be given even though it may reveal or suggest other crimes." ***Mackbee*, 575 So. 2d at 28 (quoting *Brown v. State*, 483 So. 2d 328, 330 (Miss. 1986)).**

In this case when the agents were first approached by Taylor's co-conspirators', Earl and David, the agents asked for five hundred dollars worth of cocaine. Earl and David were unable to deliver such an amount the first time the agents asked for it, but were able to deliver some crack cocaine at that time. This is what the agents referred to as the "first buy." When Earl and David gave the agents the rest of the crack cocaine, a few minutes later, the agents called this the "second buy." The references made during trial to the first sale of cocaine were so interrelated to second sale that it completed the story of the crime. Because they integrally related the first sale of cocaine by time and place to the second sale of cocaine, Taylor's first assignment of error is without merit.

> **II.THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO EXERCISE FIVE OF ITS SIX PEREMPTORY CHALLENGES TO REMOVE AFRICAN-AMERICANS FROM THE JURY PANEL.**

Taylor, an African-American male, argues that since five of the State's six peremptory strikes were used against members of his race, that there was more than enough evidence to show racial discrimination in the jury selection process.

During the jury selection Taylor made a timely objection to the prosecutions use of its peremptory

challenges to exclude persons of his race. For each person stricken by a peremptory challenge, the trial court required both the State and Taylor to enunciate a reason for that strike. The trial court ruled that the reasons of both the State and Taylor were race neutral.

In ***Batson v. Kentucky*, 476 U.S. 79 (1986),** the United States Supreme Court established a three-step process for evaluating a claim that the State has exercised its peremptory challenges in a racially discriminatory manner. First, the defendant must establish a prima facie case of purposeful discrimination in the selection of the jury. Once the defendant establishes a prima facie case, the burden shifts to the State to articulate a race-neutral reason for challenging each of the venire persons in question. Finally, the trial judge must consider those explanations and determine whether the defendant has met his burden of establishing purposeful discrimination. ***Batson*, 476 U.S. at 96-98.** A prima facie showing of discrimination under *Batson* requires the defendant to demonstrate that relevant circumstances in the case raise an inference that the prosecutor exercised peremptory challenges to remove venire persons based on their race. ***Id.* at 96.** To make a prima facie showing of purposeful discrimination in the selection of a jury, a defendant must establish the following:

1. That his is a member of a "cognizable racial group";

2. That the prosecutor has exercised peremptory challenges toward the elimination of veniremen of his race; and

3. That facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities.

***Conerly v. State*, 544 So. 2d 1370, 1372 (Miss. 1989) (citing *Batson*, 476 U.S. at 96-97; *Lockett v. State*, 517 So. 2d 1346, 1349 (Miss. 1987)).**

The first factor to consider is whether the defendant and the excluded panel members share the same race. After Taylor raised the *Batson* issue, the State enumerated its reasons for striking three black panel members, Sylvia Denise Fair, Robert Lee Hatchett, and Dorothy Lee Miller. The State then raised a reverse *Batson* motion, and Taylor enumerated his reasons for his strikes. Thereafter, the State then used two more of its peremptory strikes against two black panel members, Christine Hunt and Andrea Meadow.

In *Batson*, the Court stated that once the defendant makes a prima facie showing, the burden shifts to the State "to come forward with a neutral explanation for challenging black jurors." ***Batson*, 476 U.S. at 97** (footnote omitted). The State challenged panel member Hatchett for several reasons. During voir dire Hatchett stated that he was close friends with Taylor's brother and that his cousin was a convicted felon. The State challenged panel member Fair because during voir dire she did not disclose that she had two relatives that had been convicted of criminal offenses. The State challenged panel member Miller because she did not respond during voir dire that her sister's son had been convicted of a criminal offense and she responded during voir dire that she was distantly related to Taylor. The State used its fourth peremptory strike on panel member Hunt. The prosecution stated that it had talked with law enforcement and that they informed the prosecution that Hunt knew Taylor and that she had a son arrested on felony charges and a son that at one point in time was a fugitive from justice. The State used its last peremptory strike against black panel member Meadow. During voir dire Meadow revealed that he had relatives incarcerated in the Choctaw County Jail.

After the State gave its neutral nonracial explanations for its peremptory strikes, Taylor made no argument in rebuttal.

"The defense may rebut the neutral nonracial explanation for the State's peremptory challenges. . . . The defendant, here, made no attempt to do so. In the absence of an actual proffer of evidence by the defendant to rebut the State's neutral explanations, this Court may not reverse on this point." ***Sudduth v. State*, 562 So. 2d 67, 71 (Miss. 1990)** (citations omitted).

Also, the trial court, experienced in conducting voir dire, and having observed the demeanor of these five prospective jurors during the voir dire proceedings, was in the best posture to decide whether these reasons given by the State were legitimate rather than pretextual. This Court has held that a circuit court's decision in this matter is entitled to great deference. We will reverse the circuit court's *Batson* findings only where those findings are clearly erroneous and against the overwhelming weight of the evidence. ***Lockett v. State*, 517 So. 2d 1346, 1350 (Miss. 1987).**

Due to the fact that Taylor failed to rebut the State's neutral nonracial reasons for its strikes and the court's finding that the challenges were race-neutral is not clearly erroneous, Taylor's second assignment of error has no merit.

III.THE TRIAL COURT ERRED IN PERMITTING AGENT JAMES CATALANO TO TESTIFY AS TO HIS "UNDERSTANDING" OF THE FACTS IN THIS CASE BASED UPON HIS VIEWING OF THE VIDEOTAPE AND NOT BASED UPON ANY PERSONAL KNOWLEDGE OF THE FACTS ACQUIRED BY THE WITNESS.

Taylor argues that the trial court erred in allowing the State to introduce evidence about Agent Catalano's understanding of what occurred during the cocaine sale rather than allowing him to testify strictly to what he heard and saw.

Catalano was the case agent who was in charge of surveillance and installed most of the technical equipment that evening. Catalano was not one of the agents who purchased the crack cocaine from Earl and David. During cross-examination Taylor's counsel asked Catalano:

> **Question:** And you never saw this Defendant place any cocaine in Agent Melvin or Agent Pack's hand and take any money for it, did you?
>
> **Answer:** No, sir.
>
> **Question:** In fact, that never happened. Based on what you know about this case now, this Defendant never placed any cocaine in Charles Melvin's hand, did he?
>
> **Answer:** As the facts that I understand it, no, he did not.

Question: Okay, and Agent Charles Melvin never gave this individual any money for cocaine, did he?

Answer: Not hand to hand, no.

Thereafter, the prosecution asked Catalano what the facts were as he understood them. Taylor's counsel objected, but the trial judge overruled the objection stating that counsel had opened the door.

Taylor cites ***Murphy v. State*, 453 So. 2d 1290 (Miss. 1984)** for the proposition that the door cannot be opened for the admission of hearsay and the state sit silently by and then rush through the opened door on redirect. The case of *Murphy*, however, can be readily distinguished. In *Murphy*, the hearsay that was offered purported to reveal eyewitness testimony to the killing, which testimony in itself would have been enough to convict the accused. ***Id.* at 1294.** There was no other eyewitness testimony ever produced in that case. ***Id.*** Such is not the case here; there were two other witnesses, Agent Melvin and Earl Kirkwood, who testified about what happened at the scene. The *Murphy* case stands for the proposition that if the testimony is merely collateral, irrelevant, or otherwise damaging, the door can be opened on cross-examination. ***Id.*** (citations omitted). ***See also Walker v. State*, 473 So. 2d 435, 441 (Miss. 1985).**

Taylor opened the door at trial for admission of Catalano's understanding of the events; however, even if we were to hold that Catalano's testimony was error, his testimony was merely cumulative to testimony received from the agent who was actually at the scene, Agent Melvin and co-conspirator Earl Kirkwood. As a result, Taylor's conviction and sentence are hereby affirmed.

THE JUDGMENT OF THE CHOCTAW COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I OF CONSPIRACY TO SELL COCAINE AND SENTENCE OF TWENTY YEARS; COUNT II SALE OF COCAINE AND SENTENCE OF TWENTY-FIVE YEARS WITH FIVE YEARS SUSPENDED FOR FIVE YEARS FROM RELEASE, WITH SENTENCE TO RUN CONCURRENTLY ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE ON EACH COUNT OF $2,000 IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO CHOCTAW COUNTY.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.