IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2017-KA-01722-COA

RODNEY DEWAYNE JOHNSON A/K/A RODNEY JOHNSON — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	12/13/2017
TRIAL JUDGE:	HON. CHARLES W. WRIGHT JR.
COURT FROM WHICH APPEALED:	LAUDERDALE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: JUSTIN TAYLOR COOK
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BARBARA WAKELAND BYRD
DISTRICT ATTORNEY:	BILBO MITCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 05/28/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

TINDELL, J., FOR THE COURT:

¶1. A Lauderdale County jury convicted Rodney Johnson of one count of forcible rape and two counts of statutory rape against Amy.[1] Miss. Code Ann. § 97-3-65(1)(b) & (4)(a) (Rev. 2014). The Lauderdale County Circuit Court sentenced Johnson to consecutive terms of forty years for the forcible-rape conviction and twenty years for each of the statutory-rape convictions, with all sentences to be served in the custody of the Mississippi Department of

[1] Because this case involves allegations of sexual abuse against a minor, we use fictitious names to protect the identities of the minor and her relatives.

Corrections (MDOC). The circuit court also ordered Johnson to pay $1,000 to the Children's Trust Fund for each conviction.

¶2. On appeal, Johnson argues the circuit court erred by denying his *Batson*[2] challenges to the State's use of its peremptory strikes and by admitting into evidence his *Miranda*-rights waiver form.[3] In the defense's posttrial motion, Johnson's trial attorney raised a claim of self ineffectiveness. Contending that the record is insufficient for this Court to determine such a claim, Johnson's new attorney on appeal asks to reserve Johnson's right to assert any ineffective-assistance claim in a future postconviction relief (PCR) motion after further development and investigation.

¶3. Finding no error, we affirm Johnson's convictions and sentences. In so doing, we find Johnson has preserved his right to raise any claim of ineffective assistance in a future PCR filing.

FACTS

¶4. Johnson dated Amy's mother, Ellen. In June 2013, Johnson moved into Ellen's home with Ellen and her four daughters. Initially, testimony reflected that Johnson and Amy, Ellen's oldest daughter, got along well with each other. Amy stated, however, that Johnson soon began to ask her questions that were sexual in nature. About a month after Johnson moved in, Amy testified that he started to sexually abuse her. Amy was only thirteen at the

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

time. Johnson was forty-three.

¶5. Amy stated that, after Ellen left for work around 5 a.m., Johnson would enter Amy's room and wake her by "touch[ing]" and "prob[ing]" her body with his hands. Although the lock to Amy's door had been removed, Amy explained that Johnson pushed her headboard against the door so no one could enter. Amy stated that Johnson would kiss various areas of her body and stick "his penis in [her] vagina." Amy testified the abuse happened pretty much every day unless Ellen was at home.

¶6. Amy denied ever willingly having sex with Johnson. Instead, Amy stated that she initially tried to stop the attacks but was unsuccessful because Johnson was too strong. Amy testified she eventually stopped resisting because nothing she did prevented Johnson's attacks. According to Amy, Ellen and Amy's three younger sisters knew nothing of the abuse because she hid it from them. Amy stated that Johnson threatened to kill either her or Ellen if she revealed Johnson's actions, and Amy testified that she believed Johnson's threats were genuine.

¶7. During her testimony, Amy recounted several specific dates when the sexual abuse occurred. Amy recalled that Johnson raped her on September 21, 2013, because her grandmother called soon afterward with the news that Ellen had been in a car accident. Amy also recalled that Johnson raped her on May 17, 2014, because that was the day Amy finally revealed the abuse to Ellen. According to Amy, Johnson raped her that morning, and then that evening, he drove her to her school dance. Amy's phone had been taken from her as a

disciplinary measure, and she instead had Ellen's phone with her. Amy testified that Johnson demanded the phone before Amy went into the dance, and when she refused, an argument ensued. After the dance, Ellen confronted Amy about her hostility toward Johnson. Amy testified that she finally revealed the sexual abuse to Ellen.

¶8. Ellen stated that she immediately confronted Johnson after Amy's disclosure. Ellen also called her godmother for help. Ellen's godmother arrived at the house and questioned Amy about the allegations. Ellen testified that each time Amy recounted the details of the abuse, her story was the same. Ellen took Amy to a doctor for a medical examination and to the Lauderdale County Sheriff's Department to press charges against Johnson. When Ellen and Amy went to the sheriff's department, they met with Investigator Gypsi Ward. During the meeting, Investigator Ward learned there was a possibility that Johnson's DNA might be on Amy's bedding. Pursuant to Investigator Ward's instructions, Ellen and Amy delivered the flat sheet, fitted sheet, and comforter from Amy's bed to the sheriff's department.

¶9. Investigator Ward testified that she took statements from both Ellen and Amy. Amy had indicated in her statement that Johnson had been abusing her for ten months, with the last incident occurring the previous Saturday. Investigator Ward inspected Amy's bedding with an alternative light source and found evidence of protein-based stains. Investigator Ward collected cuttings from the stained items and took them to the Mississippi Forensics Laboratory for analysis. The test results confirmed the presence of seminal fluid on Amy's

bedding. Based on the findings, Investigator Ward collected a DNA sample from Johnson for comparison. The forensic DNA analyst who performed the tests confirmed that Johnson's DNA sample was consistent with sperm cells found on Amy's bedding.

¶10. Johnson testified on his own behalf and denied ever sexually abusing Amy. Although Johnson offered no explanation for the presence of his sperm cells on Amy's sheets, he did attempt to explain the presence of his sperm cells on her comforter. Johnson stated that Amy's comforter was often stored in the hall closet. Because he and Ellen sometimes shared a room with Ellen's two youngest children, Johnson testified that he and Ellen used the comforter to make a pallet on the floor to have sex. Johnson stated that he and Ellen would then roll the comforter up and place it back in the closet. He also stated that he and Ellen only ever had sex in their room.

¶11. The jury found Johnson guilty of all three counts. Johnson filed a motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. The circuit court held a hearing on both Johnson's sentencing and his motion for posttrial relief. Following the hearing, the circuit court sentenced Johnson to consecutive sentences of forty years for Count I, twenty years for Count II, and twenty years for Count III, all to be served in MDOC's custody. The circuit court further directed Johnson to pay $1,000 to the Children's Trust Fund for each conviction. In addition, the circuit court entered an order to deny Johnson's posttrial motion. Aggrieved, Johnson appeals his convictions and sentences.

DISCUSSION

I. *Batson* Challenges

¶12. During jury selection, the State used all six of its peremptory strikes against African American jurors. Johnson argues the State's use of its peremptory strikes violated his constitutional right to a jury of his peers and established a prima facie case of racial discrimination. Johnson further asserts the State's proffered race-neutral reasons for using the peremptory strikes were clearly pretextual. As a result, Johnson asks this Court to reverse his convictions and to remand the case to the circuit court for a new trial.

¶13. Appellate courts "give great deference" to a ruling court's *Batson* decisions because they "are based largely on credibility." *Smith v. State*, 258 So. 3d 292, 301 (¶22) (Miss. Ct. App. 2018). An appellate court may not overrule a *Batson* determination unless the record indicates the ruling court's decision "was clearly erroneous or against the overwhelming weight of the evidence." *Id.* Mississippi caselaw establishes a three-part test for analyzing a *Batson* challenge:

> First, the defendant must establish a prima facie case of discrimination in the selection of jury members. The prosecution then has the burden of stating a racially neutral reason for the challenged strike. If the State gives a racially neutral explanation, the defendant can rebut the explanation. Finally, the trial court must make a factual finding to determine if the prosecution engaged in purposeful discrimination. If the defendant fails to rebut, the trial judge must base his decision on the reasons given by the State.

Id. at (¶23) (quoting *Berry v. State*, 802 So. 2d 1033, 1037 (¶11) (Miss. 2001)).

¶14. Here, the State submitted its first twelve jurors, going up through and including Juror 16. Out of these sixteen jurors, the State exercised four of its peremptory challenges to strike Jurors 1, 4, 8, and 12. At this point the defense raised a *Batson* challenge. Johnson's

attorney argued the State had "engaged in a pattern of exclusion" because all its strikes had been used against African American venire members. The defense asked that the circuit court require the State to provide a race-neutral reason for each of the strikes. Because the State had selected four other jurors who were African American, the circuit court found no apparent pattern of racial discrimination. Out of an abundance of caution, however, the circuit court still asked the State to explain the reasoning behind its use of the peremptory strikes.

¶15. With regard to Juror 1, the prosecutor said he wished to strike her because she had an incarcerated relative she believed the legal system had treated unfairly. As to Juror 4, a twenty-three-year-old female, the prosecutor explained he wished to strike her because of her age. The prosecutor stated he had tried a case the week before where a twenty-one-year-old juror, despite "overwhelming proof of guilt[, had] declined to vote guilty in a capital[-] murder case." As a result, the prosecutor had decided that, "no matter what[,]" he would strike anyone from the jury in Johnson's trial who was under the age of twenty-five. The prosecutor struck Juror 8 because his nephew had been convicted of a crime, and Juror 8 stated he did not feel his nephew had been treated fairly. The prosecutor likewise struck Juror 12 because her brother had been convicted of a crime.

¶16. The circuit court provided an opportunity for the defense to rebut the State's race-neutral reasons. While acknowledging that the prosecutor's explanations appeared facially race neutral, Johnson's attorney still asserted that the State had engaged in "pretextual

striking" and that the State's age-cutoff criterion was arbitrary. The defense offered no further rebuttal. After finding that the State's explanations were both reasonable and race-neutral rather than pretextual, the circuit court denied the defense's *Batson* challenge.

¶17. The defense then used two strikes on Jurors 2 and 6 and tendered Jurors 17 and 18 for the jury panel. While accepting Juror 17, the prosecutor used his remaining two peremptory strikes on Jurors 18 and 19 because the women were twenty-two and twenty-four years old, respectively. The prosecutor then submitted Juror 20 as the final panel member. Once again, the defense raised a *Batson* challenge on the basis that the State had used all six of its peremptory strikes on African American jurors. The circuit court denied the challenge, however, after again concluding that the prosecutor's age-based reason for striking Jurors 18 and 19 was race neutral.

¶18. On appeal, Johnson claims the record fails to support the State's reason for striking Juror 1. He also reasserts his trial argument that the State's age-cutoff criterion was arbitrary. During voir dire, Jurors 1, 8, and 12 all reported that they had a family member convicted of a crime. Juror 1 stated that her family member, like Johnson, had faced a statutory-rape charge. When the prosecutor asked if Juror 1 had formed an opinion as to whether her relative had been treated fairly by the legal system, she responded that he had not. Juror 1 then clarified, however, that the victim's family, rather than an officer of the court, had treated her relative unfairly. Despite Juror 1's clarification, the State exercised a peremptory strike against her. Similarly, the State later struck Jurors 8 and 12, who also had family

members convicted of crimes. The State used its other three peremptory strikes on Jurors 4, 18, and 19 because they were under the age of twenty-five. The prosecutor explained the reason for his age-based criterion and stated that he simply did not "want kids on this jury[.]"

¶19. The Mississippi Supreme Court has recognized "the criminal history of a potential juror's family member" as a race-neutral reason for exercising a peremptory strike. *Jones v. State*, 252 So. 3d 574, 581 (¶30) (Miss. 2018). Mississippi caselaw also holds that "[a]ge is a well-supported, race-neutral reason for a peremptory strike." *H.A.S. Elec. Contractors Inc. v. Hemphill Const. Co.*, 232 So. 3d 117, 138-39 (¶23) (Miss. 2016).[4] Here, Johnson bore the burden to demonstrate the State's race-neutral explanations for striking potential jurors were pretextual. *See Smith*, 258 So. 3d at 301 (¶28). However, other than merely asserting that the State's given reasons were pretextual, Johnson's attorney neither offered any evidence to support his rebuttal nor addressed any of the indicia of pretext discussed by

[4] While Mississippi caselaw recognizes age as a race-neutral reason for exercising a peremptory strike, we caution trial attorneys against using age alone as a carte-blanche rule for striking jurors. As Justice King noted in his dissent in *H.A.S. Electrical Contractors*, "[a]n attorney does not win his case by stating that he has good reasons. He must explain those reasons with evidentiary support." *H.A.S. Elec. Contractors Inc.*, 232 So. 3d at 144 (¶46) (King, J., dissenting). We therefore encourage trial attorneys to accompany any age-based reason for striking jurors with sufficient evidentiary support and explanation. *See also Wilson v. State*, 72 So. 3d 1145, 1155 (¶¶25-26) (Miss. Ct. App. 2011) (finding no abuse of discretion in the circuit court's determination that a juror's youthful age of twenty-one was an insufficient race-neutral reason for the defendant's peremptory strike of that juror since the juror had qualified to serve on a jury upon reaching age twenty-one and the defendant had asked the juror no questions on individual voir dire).

caselaw. *See id.* at 302-03 (¶28).[5] We therefore find no clear error in the circuit court's acceptance of the State's proffered nondiscriminatory reasons for striking the six potential jurors. Accordingly, we affirm the circuit court's denial of Johnson's *Batson* challenges.

II. *Miranda*-Rights Waiver Form

¶20. Johnson also contends the State violated his right to remain silent. Johnson first asserts "the State impermissibly commented on . . . [his] invocation of his . . . right to remain silent" by offering his *Miranda*-rights waiver form into evidence without also offering "any statement that happened subsequent to the giving of this waiver." In addition, Johnson takes issue with Investigator Ward's comment during her testimony that the authorities "tried to speak with him . . . ." According to Johnson, Investigator Ward's comment implied that the authorities "were unsuccessful in their interrogation[,]" which he argues resulted in another clear violation of his constitutional right to remain silent.[6]

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[5] As discussed in *Smith*, the five indicia of pretext for courts to apply in analyzing a race-based *Batson* challenge include:

> (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to voir dire as to the characteristic cited; (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits.

Id. at 302-03 (¶28) (quoting *Lynch v. State*, 877 So. 1254, 1272 (¶52) (Miss. 2004)).

[6] At the end of his argument on the alleged violation of his right to remain silent, Johnson refers to the waiver form as a "highly prejudicial piece of information[,]" and he questions the State's reason for offering the form into evidence. However, Johnson never clearly raises these issues as assignments of error on appeal, and he provides no supporting caselaw pertaining to his statements. We therefore decline to further address his comments

¶21. "An accused has the right to remain silent, guaranteed by the Fifth Amendment to the United States Constitution." *Swinney v. State*, 241 So. 3d 599, 608 (¶29) (Miss. 2018). "The *Miranda* warnings contain an implicit guarantee that 'silence will carry no penalty,' because 'it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.'" *Robinson v. State*, 247 So. 3d 1212, 1226 (¶28) (Miss. 2018) (quoting *Doyle v. Ohio*, 426 U.S. 610, 619 (1976)). Our supreme "[c]ourt has held that it is improper and, ordinarily, reversible error to comment on the accused's post-*Miranda* silence." *Id.* Contrary to Johnson's assertions, though, we find no such error occurred here.

¶22. On direct examination, the State asked Investigator Ward about the *Miranda*-rights waiver form she had Johnson sign before she interviewed him. The following exchange occurred:

> State: What, if any, further investigation did you do based on the information that you had?
>
> Ward: After we got back the forensics of the samples we sent in, we brought Mr. Johnson in and, obviously, *Mirandized* him.
>
> State: All right. Let me ask you this question about that.
>
> . . . .
>
> State: Do you have the *Miranda* form with you?
>
> Ward: Yes, sir, we do.

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on appeal. *See King v. State*, 239 So. 3d 508, 512 (¶18) (Miss. Ct. App. 2017) ("Failure to cite relevant authority obviates the appellate court's obligation to review such issues.").

State: All right. Pull out the one that you did, please, and let me ask you a question about it. First, let me show it to [defense] counsel.

Ward: This is the original one from the first time we tried to speak to him, and we also brought him back in on 8-3[-14.]

State: All right. That[first one is] done by somebody else. I'm talking about the one that you did[on August 3, 2014].

Ward: Right here.

¶23. Investigator Ward subsequently explained that the authorities twice read Johnson his *Miranda* rights—first on May 21, 2014, and then on August 3, 2014. With regard to the first date, Investigator Ward stated that another individual read Johnson his *Miranda* rights on May 21, 2014. When asked whether she was aware of any video recordings or written documents, such as a written statement from Johnson or an official report from a law-enforcement officer, about what occurred after Johnson waived his rights on May 21, 2014, Investigator Ward responded that she was not. Investigator Ward explained that the sheriff's department did not record its interviews.

¶24. As to the second date in question, Investigator Ward testified that she was the one to actually read Johnson his *Miranda* rights on August 3, 2014. After Johnson waived his rights, Investigator Ward interviewed him. Although the interview was not recorded and Johnson provided no written statement to authorities, Investigator Ward testified as to what Johnson told her during the interview. Investigator Ward stated that Johnson was cooperative and denied ever sexually abusing Amy. She further testified that Johnson never

indicated how his DNA could have gotten on Amy's bed sheets, and he denied ever having sex with Ellen on Amy's bed.

¶25. As Mississippi caselaw establishes:

> If the defendant does not take advantage of his right to remain silent, any statements he voluntarily makes can and will be used against him in a court of law. The United States Supreme Court's holding in *Doyle* simply reiterates that the defendant's silence cannot be used against him during cross-examination. However, because the defendant did not invoke his right to silence, and made voluntary statements, the *Miranda* and *Doyle* provisions do not apply. To hold otherwise would not only afford the defendant the right not to incriminate himself by remaining silent but would also afford him the right not to incriminate himself by making voluntary statements which are inconsistent with his testimony at trial.

Towles v. State, 193 So. 3d 688, 701 (¶35) (Miss. Ct. App. 2016) (quoting *Puckett v. State*, 737 So. 2d 322, 350-51 (¶85) (Miss. 1999)).

¶26. As the record here clearly reflects, Johnson chose not to remain silent during his interview with Investigator Ward on August 3, 2014. Although he never signed any written statement for the authorities, Johnson voluntarily gave Investigator Ward an oral statement after he waived his rights. We therefore find no merit to his assertion that the State improperly commented on his right to remain silent by offering into evidence his waiver form without also offering "any statement that happened subsequent to the giving of this waiver."

¶27. With regard to Investigator Ward's comment that the authorities "tried to speak with" Johnson, we disagree that the comment, when taken in context, necessarily implies the authorities were "unsuccessful" in a subsequent "interrogation." Investigator Ward made the comment in reference to Johnson's May 21, 2014 waiver of his rights, which she later

explained she did not facilitate. Further, the record fails to indicate that an interview actually occurred on that date—much less the success of any such alleged interview. We therefore decline to find reversible error on this basis.

III. Ineffective Assistance of Counsel

¶28. In the defense's posttrial motion, Johnson's trial attorney, John Helmert Jr., asserted that Johnson was denied effective assistance of counsel. In raising this claim, Helmert explained at the subsequent hearing that he did not mean to imply that he personally was ineffective. Rather, Helmert clarified that, when considering his caseload versus the amount of time, support, and compensation he received for each of his cases, he felt that no attorney could competently and adequately represent a client under such circumstances. Helmert therefore asked the circuit court to find that Johnson received ineffective assistance and to grant him a new trial. The circuit judge questioned Helmert to ascertain Helmert's trial experience and expertise. Based on Helmert's responses, the circuit judge concluded that Helmert was "an experienced counsel in the area of criminal defense . . . ." The circuit judge also stated that his review of the trial transcript failed to support a claim that Helmert rendered ineffective assistance. The circuit judge therefore denied the request for a new trial on the basis of ineffective assistance.

¶29. On appeal, Johnson is represented by a new attorney, who argues that the record is insufficient for this Court to determine whether ineffective assistance actually occurred. As a result, Johnson's appellate attorney asks this Court to reserve Johnson's right to raise any ineffective-assistance claim in a future PCR motion after further investigation and

development of the issue.

¶30. As our supreme court has explained:

> Ordinarily, ineffective-assistance-of-counsel claims are more appropriately brought during post-conviction proceedings. This is because during direct appeals the [appellate c]ourt is limited to the trial[-]court record in its review of the claim, and there may be instances in which insufficient evidence exists within the record to address the claim adequately. In such a case, the appropriate procedure is to deny relief, preserving the defendant's right to argue the issue through a petition for . . . [PCR].

Archer v. State, 986 So. 2d 951, 955 (Miss. 2008) (citation omitted).

¶31. Based on such precedent, we find any ineffective-assistance claim is more appropriately raised during PCR proceedings. We therefore decline to further address the issue here.

CONCLUSION

¶32. Because we find no error in the circuit court's judgment, we affirm Johnson's convictions and sentences. In so doing, we recognize Johnson has preserved his right to raise a claim of ineffective assistance in a future PCR proceeding.

¶33. **AFFIRMED.**

BARNES, C.J., CARLTON, P.J., GREENLEE, McDONALD, McCARTY AND C. WILSON, JJ., CONCUR. WESTBROOKS, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY McDONALD AND McCARTY, JJ.; TINDELL, J., JOINS IN PART. LAWRENCE, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY WESTBROOKS, McDONALD AND McCARTY, JJ.; TINDELL, J., JOINS IN PART. J. WILSON, P.J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION.

WESTBROOKS, J., SPECIALLY CONCURRING:

¶34. I write separately because I am deeply disturbed by the prosecutor's use of peremptory challenges against potential jurors under the age of twenty-five. I concur because I understand how the majority reached its conclusion based on the way the law is currently written. Johnson raises the question of age in the context of peremptory race strikes, but I look beyond that to consider "group-based traits" and in this case, specifically age, independently. While the written letter of *Batson* has not been extended to include discrimination on the basis of age, the prosecutor's unapologetic admission of "group based traits" discrimination violates the spirit of *Batson*. This course of use or misuse of peremptory challenges promotes "one-sided justice"[7] that should not be sanctioned by our courts.

¶35. In January 2015, Johnson was indicted on one count of forcible rape and two counts of statutory rape. In September 2017, Johnson had a jury trial facing the three counts. During jury selection, Johnson questioned the prosecutor's use of peremptory strikes, stating that all were used on black jurors and requesting that the State give a race-neutral reason for each strike. In explaining why he struck juror number four, the prosecutor responded that in the prior week, he tried a case where a twenty-one year old juror declined to vote guilty in a capital murder case with "overwhelming proof of guilt." He further stated that his

[7] Judge Carlton W. Reeves, Defending the Judiciary: A Call for Justice, Truth, and Diversity on the Bench, Prepared Remarks upon Receiving the Thomas Jefferson Foundation Medal in Law (Apr. 11, 2019) (quoting Hon. Thurgood Marshall in Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences 243 (Mark V. Tushnet, ed., 2001)).

intentions were to strike everyone under the age of twenty-five from the jury. The circuit court accepted this argument, and the jury was seated without those jurors. Ultimately, Johnson was convicted of one count of forcible rape and two counts of statutory rape, and he was sentenced to serve forty years in the custody of the Mississippi Department of Corrections. On appeal, Johnson asserts that the circuit court erred in denying his *Batson* challenge and in admitting his *Miranda* waiver form into evidence.

¶36. I believe that the circuit court's decision to allow the prosecutor to discriminate and arbitrarily strike potential jurors predicated on immutable "group based traits" should rise to the level of plain-error. The Mississippi Supreme Court has stated:

> The Mississippi Rules of Appellate Procedure provide that [an appellate court] may, at its option, notice a plain error not identified or distinctly specified. We previously have stated that, in certain contexts, this Court has noted the existence of errors in trial proceedings affecting substantial rights of the defendants although they were not brought to the attention of the trial court or of this Court. When an error impacts a fundamental right of the defendant, procedural rules give way to prevent a miscarriage of justice, requiring this Court to address issues on plain-error review and correct any fundamental violations.

Cozart v. State, 226 So. 3d 574, 580-81 (¶22) (Miss. 2017) (internal quotation marks omitted). Furthermore, "[p]lain-error review is properly utilized for 'correcting obvious instances of injustice or misapplied law.'" *Id.* at (¶23) (quoting *Smith v. State*, 986 So. 2d 290, 294 (¶10) (Miss. 2008)). I believe that allowing the State to arbitrarily strike individuals under the age of twenty-five was an "instance of injustice." *Id.*

¶37. I acknowledge that Mississippi caselaw holds that "[a]ge is a well-supported, race-

neutral reason for a peremptory strike." *H.A.S. Elec. Contractors Inc. v. Hemphill Constr. Co.*, 232 So. 3d 117, 138-39 (¶23) (Miss. 2016). But I do not believe there is ever an acceptable time to strike a potential juror simply because of age. Age, like race, is an immutable characteristic that should never be used as a sword to exclude members of our society from participating in our judicial procedures.

¶38. The Mississippi Supreme Court has agreed that "[t]he purpose of *Batson* was to 'eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.'" *H.A.S. Elec. Contractors Inc.*, 232 So. 3d at 128 (¶36) (quoting *Batson* 476 U.S. at 85)). Similarly, I believe that justice demands we also eradicate age discrimination in the procedures used to select members of the venire. This is especially so when age is used as a "group based trait" for peremptory challenges. We should strive to select juries that reflect a cross-section of the communities they reside—man or woman, young or old, black or white. When we begin to exclude members based on innate traits, we move further from the pursuit of justice. "*Batson* makes it clear that each juror must be evaluated on his/her own merits and not on supposed group-based traits or thinking." *Flowers v. State*, 947 So. 2d 910, 938 (¶70) (Miss. 2007).

¶39. Individuals under the age of twenty-five and young people in general have a valuable perspective to add to our judicial proceedings. They see the world with fresh eyes that an older generation may have taken for granted. Also, as they are the leaders of tomorrow, we need to nurture their inclusion in our government, not discourage it. Diversity, including age

diversity, is never a bad thing because it brings different perspectives and opinions into the jury room. It has the potential to eliminate ignorance and biases and yields impartiality and a fair result.

¶40. "Under Mississippi law, any person not disqualified under Mississippi Code Annotated Section 13-5-1 (Rev. 2012), who will make oath that he or she is impartial, is competent to sit as a juror." *NRG Wholesale Generation LP v. Kerr*, 258 So. 3d 278, 284 (¶21) (Miss. 2018). Mississippi Code Annotated section 13-5-1 grants individuals over the age of twenty-one the right to serve on a jury if they also meet the other requirements listed. Furthermore, the United States Supreme Court has held that every group has "the right to participate in the overall legal processes by which criminal guilt and innocence are determined." *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972). This right should be protected, and in this present case, particularly for the group of potential jurors who were under twenty-five because this right was infringed upon.

¶41. When we allow prosecutors, or any member of the bar, to strike jurors based on any group-based trait we are not only violating their rights but also potentially subjecting the parties, especially the defendant, to an unfair trial. This Court has held that "in the selection of a jury, a defendant does have the right to be sure that potential jurors are not excluded from service for improper reasons, such as race or gender." *Trevillion v. State*, 26 So. 3d 1098, 1102 (¶13) (Miss. Ct. App. 2009). *See also Simmons v. State*, 746 So. 2d 302, 308 (¶23) (Miss. 1999). I believe that when used as a group-based trait, age should also be

classified as an "improper reason." *Id.*

¶42. As members of the judicial system, judges have a duty to protect the rights of all who come before the courts whether they are defendants, jurors, or other members of the bar. As a result, I believe it is my duty to dissuade overt discrimination of any immutable trait or characteristic and specifically in this case—age.

¶43. I believe peremptory challenges, when used properly, can insure a fair trial. But when peremptory challenges are flagrantly misused based on unsupported notions like the one purported by the prosecutor in this case, it gives credence to the proposition that peremptory challenges should be eliminated from the judicial system altogether. Justice Thurgood Marshall's concurring opinion in *Batson* made his view clear on that point:

> The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available. I nonetheless write separately to express my views. The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

Batson, 476 U.S. at 102-03. Justice Marshall pointed out that excluding blacks from a jury, solely because of race, can be no more justified by a belief that blacks are less likely than whites to consider a case fairly than it can be that blacks lack intelligence, experience, or moral integrity. He further opined that he would go further and fashion a remedy adequate to eliminate discrimination because merely allowing defendants the opportunity to challenge

the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of peremptory challenges. *See id*. at 104-06.

¶44. It is clear from the record that the prosecutor selected jurors using a similar rationale. He made it clear that anyone under the age of twenty-five he considered a kid lacking maturity and that he was going to strike them no matter what. What is fallible and illogical about that way of thinking is that it is contrary to how our society operates today. Adults under the age of twenty-five are deemed mature enough to serve in the military, serve as first responders, and establish multi-million dollar companies like Facebook, Apple, and FUBU; which all required a certain amount of discipline and maturation. Moreover, when it serves the prosecutorial purpose, this same group—and even younger—are deemed to have the maturity and readiness to be held responsible for committing felonious criminal acts. We cannot have it both ways.

¶45. In this case, the defendant failed to make a prima facie case of race discrimination at the time he asserted his challenge. Four African American jurors were tendered and accepted by the prosecution. Plus, there is little support that the age-based strikes were a cover for race-based strikes. The only reference is Johnson's counsel who made this comment, "And I would say that the State, having said that they want to get rid of black people under the age of 25, apparently as to Juror Number 10, it's apparent that they don't care if they're white and 25 and under." But, he did not mention which caucasians were kept or not stricken within the same age group nor does the record reflect it. Because it is not documented in the record,

we cannot adequately address whether the State violated the expressed principles of *Batson*.

¶46. Justice Marshall's supposition was thoroughly discussed by the Mississippi Supreme Court in *Flowers*, 947 So. 2d at 937-39. Although called extreme, the court, through the opinion of Justice James Graves, did warn that if attorneys of this state persist in violating the principles of *Batson* [by racially profiling jurors] the court would be inclined to consider such options like abolishment or limited voir dire. The majority opinion ended with this forewarning:

> Because it is well recognized that the right to an "impartial jury and fair trial" is guaranteed by our Constitution, but that "the right of peremptory challenge is not of constitutional magnitude," we would be well within our authority in abolishing the peremptory challenge system as a means to ensure the integrity of our criminal trials.

Id.

¶47. For the foregoing reasons, I write separately.

McDONALD AND McCARTY, JJ., JOIN THIS OPINION. TINDELL, J., JOINS THIS OPINION IN PART.

LAWRENCE, J., SPECIALLY CONCURRING:

¶48. I concur with the majority's result, but I write separately to address the prosecution's blanket use of peremptory strikes in this trial for anyone under the age of twenty-five. I write separately not because I believe the majority erroneously interpreted the law, but to express my opinion that trial courts should be more diligent in following the procedure set forth in *Batson*.[8] And I write to explain why I think it is time for a renewed examination of existing

[8] *Batson v. Kentucky*, 476 U.S. 79 (1986).

authorized race-neutral reasons—especially age-alone strikes when these strikes could be construed to violate the laws of this State.

¶49. The United States Supreme Court has held that potential jurors cannot be discriminated based on race or gender. *Batson v. Kentucky*, 476 U.S. 79, 81 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding modified by *Powers v. Ohio*, 499 U.S. 400 (1991)). The purpose of *Batson* was to not only protect the defendant's right to a jury of his peers, but also preserve a juror's opportunity to serve on a jury free of historical discrimination.

¶50. The Mississippi Supreme Court has held that "age is a well-supported, race-neutral reason for a peremptory strike." *H.A.S. Elec. Contractors Inc. v. Hemphill Const. Co.*, 232 So. 3d 117, 138 (¶23) (Miss. 2016).[9] In this case, the prosecutor did not mince words about the reason for striking juror number four, a twenty-three-year-old black female. The defense objected under *Batson* and claimed age was a pretext for the real reason for the strike—the race of the juror. While the court found no "pretextual strikes," the court nonetheless

[9] As noted by the majority, this Court dealt with a juror being stricken simply because of his age in *Wilson v. State*, 72 So. 3d 1145 (Miss. Ct. App. 2011). In *Wilson*, the defense counsel used a peremptory challenge on a Caucasian man "on the ground of his youthful age of twenty-one years old." *Id*. at 1155 (¶25). The State argued that the race-neutral reason was pretextual. *Id*. The circuit court noted that defense counsel asked the juror no questions on voir dire and ultimately found the race-neutral justification insufficient. *Id*. The juror was returned to the jury. Wilson was convicted and appealed asserting the trial court erred in handling the juror age issue. This Court affirmed the trial court's action in ruling a juror's age was pretextual and not a sufficient race-neutral reason in that case. *Id*.

required the prosecutor to proffer a race-neutral reason for the strike.[10] The prosecutor made the following response:

> S-2, I struck her because she's 23 years old, and I tried a case last week with Mr. Helmert where a 21-year-old juror in a case of overwhelming proof of guilt declined to vote guilty in a capital murder case. And so, I just—anything under 25, I was going to strike them from this jury no matter what.
>
> 25 is an age in which I feel like they're bound to be more mature than they were at 21, 22, or 23 or even 24. And that's my criteria. That's why they call them "peremptory strikes." I'm entitled to my criteria as to why I exercise these strikes, Your Honor. My criteria is, I don't want kids on this jury . . . .

¶51. Thereafter, the court found as follows:

> I would note that I do not feel that the State has engaged in any pretextual strikes, as you like to use that word . . . . I also make note that it's been my history with this prosecutor that he does not engage in such kind of conduct, the court does consider that. I feel he has given race neutral reasons, and I think it is reasonable, too to consider a person's age . . . . The court finds that there is no pretextual strikes that have been involved.

¶52. The *Batson* analysis has three distinct steps. This process was created to prevent peremptory strikes from being used in a racially discriminatory manner; it was also intended to prevent erroneous assertions of discrimination if no prima facie case has been proven. *Pitchford v. State* 45 So. 3d 216, 224 (¶14) (Miss. 2010), clearly set forth the three steps:

> First, the party objecting to the peremptory strike of a potential juror must make a prima facie showing that race was the criterion for the strike. Second, upon such a showing, the burden shifts to the State to articulate a race-neutral reason for excluding that particular juror. Finally, after a race-neutral explanation has been offered by the prosecution, the trial court must determine

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[10] Our supreme court has held that the trial court must first determine if a prima facie case was proven and not just whether a discriminatory pattern was proven. *See H.A.S. Elec. Contractors Inc.*, 232 So. 3d at 124 (¶20).

> whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory strike, i.e., that the reason given was a pretext for discrimination.

Normally, this Court would begin its review with step one and ask whether the challenging party established a prima facie case that race was the reason for all three strikes. *See H.A.S. Elec. Contractors Inc.*, 232 So. 3d at 123 (¶15). The circuit judge, however, disregarded the fact that step one remained unproven and moved to step two. The United States Supreme Court has held that, "once reasons are offered by the proponent [of the strike], the issue of whether a prima facie case of discrimination has been developed is moot." *Hernandez v. New York*, 500 U.S. 352, 355-59 (1991) (citing *Hughes v. State*, 735 So. 2d 238, 250 (Miss. 1999). So the focus shifts to step two, when, in fact, it never passed step one. *Id*.

¶53. "In the absence of a prima facie showing, the inquiry terminates." *H.A.S. Elec. Contractors Inc*., 232 So. 3d at 127 (¶33) (Randolph, J., concurring). If the court finds, as here, the party objecting failed to prove a prima facie case of purposeful discrimination, the inquiry should end and no longer should parties be required to offer race-neutral reasons as a legal exercise. *See supra* ¶5 (stating the three steps). Such a process invites further complications in the record and misguided applications of law to a process already dangerously close to potential manipulation by attorneys. It is not hard to find transcripts of trials where parties raise *Batson* issues for sport and without proof. In those instances, where race is alleged by a party without cause, courts, as here, often find no discriminatory intent for a strike. That finding of fact is set out on the record by trial judges all over the State.

Instead of, as the law provides, ending the inquiry, those same trial judges then stop a trial and require proffers of race-neutral explanations in an effort to disprove something the court has already found not to exist. If a prima facie case of discrimination has not been proven by the party objecting to the peremptory strike, then parties should not have to face false accusations of purposeful discrimination and then be required to defend against such an accusation. Although I understand *Batson* challenges are made by attorneys on the "spur of the moment" in open court in an effort not to waive those potential objections, it is imperative that if we, as a members of the justice system, are to move from the tragedies of our past, we must reserve our scrutiny and condemnation to those times when a party has been shown to have allegedly engaged in unconstitutional discrimination. It is understandable that attorneys are compelled to protect their clients' interest in making certain objections, but legal jousts of words as to race-neutral reasons should be reserved for those times when a potential violation has been found. We must guard against efforts to manipulate the *Batson* procedure for adversarial sport and ensure that it is used as it was intended—to assure a fair and constitutional trial, free of illegal discrimination.

¶54. In that same regard, I write separately to express my concern for age as a sole and singular basis for striking otherwise qualified jurors (hereinafter referred to as "age-alone" strikes). The United States Supreme Court has held that "a state court is entirely free to read its own State's constitution more broadly than [the United States Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the Supreme Court] in favor

of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle Inc*., 455 U.S. 283, 293 (1982) (citing Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977)). Section 264 of the Mississippi Constitution states that "[t]he Legislature shall, by law, provide for the qualifications of grand and **petit jurors**." (Emphasis added). The Mississippi Legislature, fulfilling its constitutional duty, enacted Mississippi Code Annotated section 13-5-1 (Rev. 2012):

> Every citizen **not under the age of twenty-one years**, who is either a qualified elector, or a resident freeholder of the county for more than one year, is able to read and write, and has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard, **is a competent juror.**

(Emphasis added).

¶55. As result, the laws of the State of Mississippi clearly provide that all persons twenty-one years of age or older are deemed competent jurors. The United States Supreme Court has instructed us that "[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial." *Batson*, 476 U.S. at 88. Granted, just because a person is competent to serve certainly does not mean a party must accept that juror. Here, however, the State's only explanation for striking the juror in question flew directly in the face of, and contrary to, the law of this State. By preserving in the record that the only reason for striking the juror in this case was due to her age being under twenty-five years, it could be argued that the State effectively changed the law as to that particular case. The State's attorney, for personal reasons from a previous

trial, stated no juror would be accepted unless he or she had reached the age of twenty-five years or older. That policy statement by an individual attorney essentially changed the law of this State in that case and raised the age of a competent juror to twenty-five instead of twenty-one. No one player in the criminal justice system should have such power.

¶56. Notably, the judge specifically found that the prosecutor's reason for striking the juror in question was not a pretext and did not otherwise have a discriminatory purpose. In fact, after a review of the record, no such discriminatory purpose appears to exist. The prosecutor in this case tendered several African-American jurors in its first tender of twelve jurors to the defense. To be clear, I write not to allege the prosecutor was wrong under our existing law in doing what was done. I write to express concerns that, in other cases, in other courtrooms, with other parties, the use of age-alone strikes could be used as a guise to discriminate against those classes of jurors who have been given protected status.

¶57. The Mississippi Legislature has created protection for certain classes of potential jurors: "A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status." Miss. Code Ann. § 13-5-2 (Rev. 2012). Noticeably, age is not a listed class under that public policy statement. However, other states have similar public policy statutes, and some have broadened the protective scope even further to include age as a protected class from discrimination for the purposes of jury selection.[11]

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[11] *See, e.g.*, D.C. Code Ann. § 11-1903 (Rev. 1986); Me. Rev. Stat. title 14, § 1202-A (Rev. 2017); Minn. Prac., Gen. Rules of Prac. Ann. R. 809 (June 2018); Iowa Code Ann.

¶58. Further, age has been long been a protected class for purposes of general anti-discrimination statutes all over our country. The United States Congress has passed legislation to protect individuals from age discrimination, namely the Age Discrimination in Employment Act of 1967 (ADEA) and The Age Discrimination Act of 1975. The ADEA restricts employers of twenty employees or more, who are engaged in interstate commerce, from discriminating against employees who are age forty or older. *See* 29 U.S.C. §§ 621-634. In addition, the Age Discrimination Act prohibits discrimination on the basis of age in programs and activities receiving federal financial assistance. *See* 42 U.S.C. §§ 6101-6107.

¶59. It is true that no court which has considered extending *Batson* to cover age discrimination in jury selection has done so. The federal circuit courts of appeals have generally refused such application based on age alone.[12] While I certainly understand the

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§ 607A.2 (Rev. 1986); Wis. Stat. Ann. § 756.001 (Rev. 2018).

[12] *See United States v. Helmstetter* (10th Cir. 2007) (citing *United States v. Cresta*, 825 F.2d 538, 544-45 (1st Cir. 1987) (prosecutor's challenge of potential jurors aged 18 to 34 does not violate equal protection)); *United States v. Bryce*, 208 F.3d 346, 350 n.3 (2d Cir. 2000) (peremptory strike based on youth of juror permissible race-neutral justification); *Pemberthy v. Beyer*, 19 F.3d 857, 870 n.18 (3d Cir. 1994) (Alito, J.) (age-based peremptory challenges are subject to rational-basis scrutiny and are likely to be held rationally related to the legitimate objectives of jury impartiality and the appearance of impartiality); *Howard v. Moore*, 131 F.3d 399, 408 (4th Cir.1997) (en banc) (age is acceptable race-neutral factor under *Batson*); *United States v. Jimenez*, 77 F.3d 95, 100 (5th Cir.1996) (same); *United States v. Maxwell*, 160 F.3d 1071, 1075-76 (6th Cir. 1998) (*Batson* inapplicable to peremptory challenges of young adults); *United States v. Jackson*, 983 F.2d 757, 762 (7th Cir. 1993) ("[N]o court has found a Fourteenth Amendment equal protection violation based upon the exclusion of a certain age group from the jury."); *Weber v. Strippit Inc*., 186 F.3d 907, 911 (8th Cir. 1999) (declining to extend *Batson* to peremptory challenges removing jurors over 50); *United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993) ("[Y]oung adults do not constitute a cognizable group for purposes of an equal protection challenge to

reasoning of such opinions, I write to sound a warning that preserving the equal protection of jurors and parties' rights under the United States Constitution and Mississippi Constitution may soon require a closer look at age-alone strikes during jury selection.

¶60. Plainly stated, my concern is that if one prosecutor is allowed to strike all those under age twenty-five, then why may another not be allowed to strike all those under twenty-seven, or thirty, or some equally arbitrary standard depending on how a particular venire appears on the day of jury selection? There must be some protection in our jurisprudence from allowing legal, race-neutral reasons, in this case age, from being manipulated into masking unconstitutional discriminatory strikes.[13] Age-alone strikes have the potential to be grossly abused and manipulated into violating our *Batson* law, which is designed to ensure compliance with Supreme Court precedent and the demands of its constitutional interpretation. It may be time to reconsider the striking of jurors for no other reason than they are of a certain age, whether it be too young or too old depending on who represents the parties in that particular trial. Since the legislature has set the age of competency for jurors at the age of twenty one, the use of another arbitrary age to summarily strike jurors has too

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the composition of a petit jury."); *United States v. Helmstetter*, 479 F.3d 750, 754 (10th Cir. 2007) (declining to extend *Batson* to age-based peremptory strikes); *United States v. Williams*, No. 06-13793, 2007 WL 140997, at *1 (11th Cir. Jan.22, 2007) (unpublished decision) (peremptory strike on basis of youth permissible); *see also United States v. White*, 899 F.2d 52, *1 (D.C. Cir. 1990) (per curiam) (unpublished table decision) (young, black males not a cognizable racial group under *Batson*).

[13] Again, it is important to note that the actions of the prosecution in this case was in no way discriminatory as clearly shown by the record.

great of potential to become purposeful discrimination and is easily cured by requiring some other race-neutral explanation to justify the strike. While peremptory strikes are an essential and important tool in ensuring fair and impartial juries, the use of peremptory strikes should not run counter to constitutionally required legislative enactment. Surely, the demands of truth and justice and judicial consistency require a more balanced and protective approach to picking jurors who will decide a fellow citizen's guilt or innocence.

WESTBROOKS, McDONALD AND McCARTY, JJ., JOIN THIS OPINION. TINDELL, J., JOINS THIS OPINION IN PART.