

IN THE COURT OF APPEALS 09/05/95

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00839 COA

GLEN RICE A/K/A GLENN RICE A/K/A GLEN L. RICE

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CLEVE MCDOWELL

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: HALLIE G. BRIDGES

NATURE OF THE CASE: CRIMINAL: POSSESSION OF A FIREARM BY A CONVICTED
FELON/SHOOTING A FIREARM INTO A DWELLING HOUSE

TRIAL COURT DISPOSITION: SENTENCED AS AN HABITUAL CRIMINAL TO THREE (3)
YEARS FOR COUNT I, POSSESSION OF A DEADLY WEAPON BY A FELON, AND TEN
(10) YEARS FOR COUNT II, SHOOTING INTO A DWELLING, SAID SENTENCES TO RUN

CONSECUTIVELY.

BEFORE BRIDGES, P.J., BARBER, AND DIAZ, JJ.

BARBER, J., FOR THE COURT:

On May 26, 1994, Glen Rice was convicted on two counts: Count I, possession of a firearm by a convicted felon, and Count II, discharge of a firearm into a dwelling house. He was sentenced as an habitual offender to three years on Count I and ten years on Count II, said sentences to run consecutively. Rice's motion for a new trial was denied. On appeal, Rice raises the following issues:

I. WHETHER THE JURY VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW?

II. WHETHER THE COURT ERRED BY DENYING ONE OF THE APPELLANT'S PEREMPTORY CHALLENGES?

We find that the appellant gave a race and gender neutral reason for his proposed peremptory challenge and that the trial court erred by denying the challenge. The judgment of lower court is reversed.

FACTS

On the evening of November 11, 1993, Cynthia "Punky" Lay and her two small children, DeShane and Ricco, were watching television with Lay's mother, Shirley Millsap, in Millsap's home. Timothy Johnson, who is DeShane's father, and Tracy Corner, who is a friend of Johnson's, were standing outside on the porch. Suddenly, a bullet broke a window pane, passed within an inch of one of the children, and landed on the floor. The women grabbed the children and ran into another room; neither of them looked outside. Johnson and Corner ran inside. No one inside the house saw the person who fired the shot.

The men who were outside at the time of the shooting gave two different versions of what happened. Tracy Corner, an eighteen-year-old who "ran the streets" with Timothy Johnson, testified that he was standing outside the house when he saw Glen Rice and three others across the street. Someone said, "There go Tracy Corner," and Corner said, "Yeah, here I go." At that point, Glen Rice "came up with a gun" and shot at Corner. Corner could not identify the type of gun, but he was certain that Glen Rice fired the weapon because there was a streetlight on the sidewalk where Rice was standing. The bullet went through the window, and Corner ran to get inside the house. According to Corner, Rice shot at him because there was "bad blood" between Rice and some of the boys Corner "hung out with." In addition, Corner's cousin had killed one of Rice's brothers.

On the other hand, the Rice brothers (Lorenzo, James, and Glen) all testified that they were just walking down the street when they heard a shot and ran. None of them fired the shot.

After running, the brothers decided to play pool at the Total Experience Lounge. The police arrested Glen shortly thereafter. There was contradictory testimony as to whether Rice tried to run from the police. It is, however, undisputed that the police had to fire into the air in order to apprehend Rice.

Glen Rice, an admitted felon, testified that he had been "jumped" one or two weeks before by some of Tracy Corner's friends. Indeed, Officer Charles Smith of the Indianola Police Department testified that Tracy Corner's friends had assaulted Glen Rice several times and that, as a result, Glen had been hospitalized at least twice. There was, however, no indication that Corner was involved in these attacks. Officer Smith also investigated the shooting in this case. He testified that there was a bullet hole in the window pane, but that no weapon was recovered.

ANALYSIS

I. WHETHER THE JURY VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW?

Rice contends that the verdict was against the overwhelming weight of the evidence. The basic thrust of his argument is that, based on the testimony given at trial, "fair-minded jurors could not have found the Appellant guilty on either count beyond a reasonable doubt." This, however, is a component of the standard of review for questions involving sufficiency of the evidence -- not the weight of the evidence. Because it is unclear whether Rice is arguing weight or sufficiency of the evidence, we address both. Regardless of the standard applied, however, Rice's first contention is without merit. The standard for reviewing the legal sufficiency of the evidence is as follows:

[W]e must, with respect to each element of the offense, consider all of the evidence--not just the evidence which supports the case for the prosecution--in the light most favorable to the verdict. The credible evidence which is consistent with the guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Wetz v. State, 503 So. 2d 803, 808 (Miss. 1987) (citations omitted).

Rice was convicted of possession of a firearm by a felon and shooting into an occupied dwelling. By his own admission, Rice is a convicted felon. Tracy Corner testified that Rice had a gun and that he fired the gun through the window of Shirley Millsap's home. He was certain that Glen Rice fired the weapon because there was a streetlight on the sidewalk where Rice was standing. Cynthia Lay and Shirley Millsap testified that they were inside the house with two small children and that a bullet came through the window. Officer Smith testified that there was a bullet hole in the window. It is

undisputed that the police had to fire into the air in order to apprehend Rice.

When we: (a) consider this evidence in the light most favorable to the verdict, (b) accept as true the officers' credible testimony, which is consistent with Rice's guilt, and (c) give the prosecution all favorable inferences that may be reasonably drawn from this evidence, the evidence is such that reasonable and fair-minded jurors could find the accused guilty.

Rice contends that the case of *Ashford v. State* dictates that his conviction be reversed. See *Ashford v. State*, 583 So. 2d 1279 (Miss. 1991). However, *Ashford* is clearly distinguishable from the case at hand. In *Ashford*, the Mississippi Supreme Court held that the evidence was legally insufficient to convict the defendant. *Id.* at 1282. In that case, *Ashford* was convicted of the sale of cocaine. The only eyewitness was a paid confidential informant. Despite the fact that he had consistently identified the drug dealer as being fifty pounds lighter and several inches shorter than *Ashford*, the informant identified *Ashford* in court. *Id.* In the case at hand, however, Corner consistently identified the shooter as Glen Rice. He knew Rice. The area was well-lit. There is no discrepancy between Corner's description and Rice's actual appearance. Rather, Corner consistently and adamantly identified Rice as the person who discharged the weapon.

Rice also argues that the verdict was against the overwhelming weight of the evidence. Matters related to the weight of the evidence "[implicate] the trial court's sound discretion." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). The question in these cases is whether the trial court abused its discretion in denying the appellant's motion for a new trial. "New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State." *Id.* (citing *Wetz*, 503 So. 2d at 807-808). Based on the testimony discussed above, the trial court judge did not abuse his discretion in denying the motion for a new trial.

II. WHETHER THE COURT ERRED BY DENYING ONE OF THE APPELLANT'S PEREMPTORY CHALLENGES?

Rice's second argument is that the trial judge erred by denying a peremptory challenge during jury selection. This argument is meritorious, and requires reversal of Rice's conviction.

Upon the conclusion of the consideration of the challenges for cause, and before the peremptory challenges were made, the trial judge instructed the attorneys that he would "require counsel for the State and the defendant to give [him] a race and gender neutral reason for any peremptory challenges." While Rice's attorney, Cleve McDowell, was exercising the defense's peremptory challenges, the following transpired:

BY MR. McDOWELL: D-2 would be . . . #7. His wife works at the Department of Corrections. And, I believe that would influence him.

BY THE COURT: Why is that?

BY MR. McDOWELL: They tend to ==

BY MS. BRIDGES: She is a secretary, isn't she?

BY MR. McDOWELL: Yes, but she still works in the system and I believe she would exert influence on him in terms of her being employed by the State and he has a direct interest in her income. And, I believe that her employment by the State and in Law Enforcement would influence him.

BY THE COURT: If she was a prospective juror, I might be more inclined to grant it. I am more inclined to believe that this is an attempt to strike a white male because that is what all you defense lawyers try to do. I don't buy it. And, I am not going to grant it.

BY MR. McDOWELL: We do have to take exceptions to that for the record?

BY THE COURT: Duly noted. And, I regard the usual defense tactic of trying to strike all white males as being both race and gender based. So, on two counts it violates the Supreme Court decision.

BY MR. McDOWELL: My notes indicate that others would be good jurors. I will accept the remaining ones.

Thereafter, Venireman #7 did serve on the jury. Rice argues that he gave a sufficiently race-neutral reason under *Batson*. See *Batson v. Kentucky*, 476 U.S. 79 (1986). That is, Rice argues that the peremptory challenge to Venireman #7 should have been granted because his wife worked at the Mississippi Department of Corrections, which would influence and prejudice him against Rice.

"*Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), requires that when prosecutors exercise peremptory challenges against members of a distinct racial group, the state must advance articulable and racially neutral reasons for doing so." *Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992). In *Georgia v. McCollum*, the United States Supreme Court held that *Batson* applies to both prosecutors and defendants; that is, defendants must also give race-neutral reasons for exercising their peremptory challenges. See *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992); *Griffin*, 610 So. 2d at 356. The United States Supreme Court has recently extended the *Batson* analysis to hold that parties must also give gender-neutral reasons for exercising their peremptory challenges. See *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1422 (1994); *Simon v. State*, 633 So. 2d 407, 410 (Miss. 1993), *vacated*, *Simon v. Mississippi*, 115 S. Ct. 413 (1994) (Mississippi Supreme Court judgment that gender-neutral reasons need not be given for peremptory challenges was vacated and remanded by the United States Supreme Court for further consideration in light of *J.E.B. v. Alabama*).

The standard of reviewing the trial judge's decision as to whether a party has given a race/gender neutral reason is highly deferential. See *Batson*, 476 U.S. at 98 n. 21; *Russell v. State*, 607 So. 2d 1107, 1111 (Miss. 1992). "Determining whether there lies a racially discriminatory motive under the . . . articulated reasons is left to the sole discretion of the trial judge." *Harper v. State*, 635 So. 2d 864, 868 (Miss. 1994) (citing *Lockett v. State*, 517 So. 2d 1346, 1350 (Miss. 1987)). The Mississippi Supreme Court "has adopted the 'clearly erroneous/overwhelming weight of the evidence' standard

when reviewing such findings." *Davis v. State*, 551 So. 2d 165, 171(Miss. 1989); *see also Lockett*, 517 So. 2d at 1350.

The central issue in the case sub judice is whether the reason given by the defense attorney for exercising a peremptory challenge against a white, male juror was race and gender neutral.

"In *Lockett v. State*, 517 So. 2d 1346 (Miss. 1987), [the Mississippi Supreme Court] presented a list of reasons accepted as race neutral by other courts in an effort to provide guidance on this issue to the trial judges in this state." *Foster v. State*, 639 So. 2d 1263, 1280 (Miss. 1994). One of the reasons listed is "employment of spouse." *Lockett*, 517 So. 2d at 1356 (citing *People v. Cartagena*, 513 N.Y.S.2d 497, 498 (N.Y. App. Div. 1987)). The Mississippi Supreme Court has not given any such guidance on gender-neutral reasons for peremptory challenges; by analogy, however, it seems clear that the reason given by defense counsel in this case was also gender-neutral. That is, there is nothing inherently gender-biased about peremptorily striking a prospective juror because his or her spouse is employed by the Mississippi Department of Corrections.

Because the reason given by the defense attorney for exercising the peremptory strike was both race and gender neutral, the finding of the trial judge to the contrary was clearly erroneous. Therefore, the judgement of the trial court should be reversed and remanded for a new trial.

THE JUDGMENT OF THE SUNFLOWER COUNTY CIRCUIT COURT OF CONVICTION AS AN HABITUAL OFFENDER FOR POSSESSION OF A DEADLY WEAPON BY A FELON AND SHOOTING INTO A DWELLING IS REVERSED AND REMANDED. COSTS ARE ASSESSED AGAINST SUNFLOWER COUNTY.

BRIDGES, P.J., COLEMAN, DIAZ, KING AND PAYNE, JJ., CONCUR. THOMAS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., MCMILLIN AND SOUTHWICK, JJ.

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THOMAS, P.J., DISSENTING:

I respectfully disagree with the analysis the majority relies upon to reverse this case under the authority of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986). Although I agree with the majority that the defense's proffered reason for excusing juror #7 was race neutral, that does not end the inquiry. It is apparent from his comments that the trial court made a finding that the proffered reason given was pretextual, and that defense counsel was in fact trying to remove white males as a group. The trial court did what it was required to do under *Batson* and its progeny. Normally, we would give great deference to said factual finding subject only to our abuse of discretion standard of review. My only reluctance in totally affirming this case is the terminology used by the trial court, namely, the singular versus the plural. If the trial court meant by its comments that defense counsel *in this case* was deliberately trying to exclude all white males from the venire then such a finding is one which we must give due deference. If the trial court meant that it found *all* defense counsels, *in all cases*, always attempting to exclude white males from jury venires, then such a finding could result in a different view of what we should do with this case.

For the reasons stated herein, I would remand this case to the trial court for an on the record clarification of the trial court's comments made while disallowing juror #7. I would direct this be done within sixty days of our remand, absent a reasonable request for more time, and direct the record be transcribed and forwarded to us for final review.

FRAISER, C.J., AND SOUTHWICK, J., JOIN DISSENT