IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00652 COA

ALICE M. COVINGTON A/K/A ALICE MARIE COVINGTON

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. FORREST A. JOHNSON, JR.

COURT FROM WHICH APPEALED: FRANKLIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE F. WEST, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: RONNIE HARPER

NATURE OF THE CASE: CRIMINAL: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: GUILTY VERDICT AND SENTENCED TO TWENTY (20) YEARS IN PRISON WITH TEN (10) YEARS SUSPENDED AND FIVE (5) YEARS PROBATION UPON RELEASE

BEFORE FRAISER, C.J., KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Alice M. Covington was convicted of aggravated assault and sentenced to twenty years in prison. She appeals her conviction, contending that the rule expressed in *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986), and its progeny was violated. We disagree and affirm.

During Covington's jury selection, a venire including only two blacks was presented. The prosecution exercised three peremptory challenges--two against white females and one against a black male. When challenged by the defense, the prosecution explained that it struck the black male because, in a previous matter, he had served as a character witness for Covington. The prosecution accepted the other black member on the panel. Covington claims that these circumstances deny her the right to a fair trial under *Batson.*

In order for the defendant to raise a *prima facie* case that the state has improperly struck a potential juror on the basis of race, it must be shown (1) that he is "a member of a cognizable racial group;" (2) that the defendant is entitled to rely on the fact that peremptory challenges allow "those to discriminate who are of a mind to discriminate;" and (3) that "these facts and any other relevant circumstances raise an inference that the [state] used that practice to exclude the veniremen from the petit jury on account of their race." *Batson,* 476 U.S. at 96; *Powers v. Ohio,* 499 U.S. 400, 416 (1991). For purposes of our analysis, we assume that Covington makes a *prima facie* case. Where, as here, a trial court has accepted that a prosecutor's explanations were valid race-neutral reasons, the reviewing court will assume the *prima facie* requirement has been met. *Lockett v. State*, 517 So. 2d 1346, 1349 (Miss. 1987), *cert. denied,* 487 U.S. 1210 (1988). We note, however, the absence of a pattern of challenges by the prosecution against blacks on the panel. Nevertheless, because of the small number of blacks on the panel, analyzing the quantity of the prosecution's challenges of black venire members affords little assistance.

Accordingly, we are faced with determining whether the trial judge properly accepted the prosecution's reason for striking the black panel member. The trial judge is afforded ample discretion to determine whether the prosecution was motivated by a discriminatory motive when it struck the potential black juror. The determination of discriminatory intent will likely turn on a trial judge's evaluation of a presenter's credibility and whether an explanation should be believed. *Hernandez v. New York*, 500 U.S. 352, 365 (1991); *Batson*, 476 U.S. at 98. We will not overturn the judge's determination absent clear error. *Chisolm v. State*, 529 So. 2d 630, 633 (Miss. 1988).

With these standards in mind, we conclude that the trial court was correct in accepting the prosecution's stated reasons for striking one black juror. The juror was a character witness for Covington in an earlier murder trial. The defense failed to demonstrate that this position was without merit. The prosecution likely could have stricken the juror for cause. In any event, the trial court made the correct ruling.

Additionally, Covington appears to contend that her jury improperly failed to represent the racial composition of the county in which she was tried. There is no such requirement under state or federal law. However, we will be liberal in our interpretation and take her position to mean that she alleges

that blacks were deliberately excluded from the venire from which jury selection was made. This position has no merit. To establish such a claim "the defendant must show (1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Covington made no effort to present evidence supporting her assertion that African-Americans were under represented or suggesting that they had been systematically excluded. Therefore, the trial court properly rejected her claim.

THE JUDGMENT OF CONVICTION OF FRANKLIN COUNTY CIRCUIT COURT OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH TEN (10) YEARS SUSPENDED, AND FIVE (5) YEARS PROBATION UPON RELEASE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO FRANKLIN COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.