IN THE COURT OF APPEALS 1/31/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01105 COA

EDRICK DIXON

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. MELVIN KEITH STARRETT

COURT FROM WHICH APPEALED: LINCOLN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JACK G. PRICE

ATTORNEY FOR APPELLEE:

OFFICE OF ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: JERRY RUSHING ASSISTANT D.A.

NATURE OF THE CASE: TWO COUNTS OF AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: SENTENCED TO 17 YEARS ON EACH COUNT TO RUN CONCURRENTLY; DEFENDANT TO PAY A $1,000.00 FINE ON EACH COUNT; DEFENDANT TO PAY $500.00 ON EACH COUNT TO THE CRIME VICTIMS FUND

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

FRAISER, C.J., FOR THE COURT:

This case returns to us following the circuit court's entry of supplementary fact findings mandated by this Court to clarify ambiguity in trial court's denial of three of Dixon's peremptory challenges. The only issue remaining in this case is whether the trial court erred in denying Dixon's *Batson* challenges to three veniremen. Based on the supplemented record, we conclude that the trial court correctly denied Dixon's peremptory challenges and affirm the trial court judgment.

I.

PROCEDURAL HISTORY

On September 30, 1994, Edrick Dixon was convicted in the Lincoln County Circuit Court of two counts of aggravated assault for shooting Chris Smith and Jamie Robinson. The only issue remaining before us is Dixon's allegation that the trial court erred in denying three of his *Batson* challenges. As a result, we need only recite the procedural occurrences relating to the *Batson* issue.

During voir dire, the State invoked the *Batson* rule. *See Batson v. Kentucky*, 476 U.S. 79 (1986). The prosecutor established that Dixon was a black male and that Dixon’s counsel had exercised all five of his peremptory challenges against white males. Therefore, the trial court required Dixon’s counsel to present race/gender-neutral reasons for each challenge. Dixon’s counsel presented the following reasons for his peremptory challenges:

BY MR. PRICE: Mr. Floyd Clark. He seemed to be

looking awful hard at Mr. Dixon. I just -- I strike him

because I didn’t think that he would be fair and impartial.

It is not my fault he’s a white male. All we have got to deal

with are whites and they are going to be either white

males or white females, Your Honor.

BY THE COURT: The reason is not age or employment

status or anything like that? He looked hard at the

defendant?

BY MR. PRICE: Yes, sir.

BY THE COURT: What about Robert Easley?

BY MR. PRICE: Your Honor, Mr. Easley had been on a federal criminal jury. I cannot give you an exact reason, I just did not like him, don't want him. I cannot give you a gender specific --

BY THE COURT: I disallow that challenge. D-3, Gary Bales.

BY MR. PRICE: We have no explanation, Your Honor.

BY THE COURT: Disallow that challenge.

BY MR. PRICE: Same with Lewis Mazer. He was on a prior jury, criminal.

BY THE COURT: No other reason?

BY MR. PRICE: No, sir.

BY THE COURT: That was years ago, though.

BY MR. PRICE: Yes, sir.

BY THE COURT: Didn't he say fifteen years ago?

BY MR. PRICE: I believe so.

BY MR. RUSHING: Your Honor, I don't believe he made any comments as to whether that was a guilty verdict or a not guilty verdict, either; is that correct?

BY THE COURT: I disallow that challenge. Walter Costilow? If you have some reasons, Mr. Price, I will listen to them.

BY MR. PRICE: Well, we just don't like him. And he enjoined Batson and Batson requires more than that.

BY THE COURT: All right, disallow that challenge. Let's go back and look at the panel.

The first time this case was before us, we examined the trial transcript relating to the challenges to veniremen Easley, Mazer, and Clark. We found the trial record ambiguous and held as follows:

> As to veniremen Robert Easley and Lewis Mazer, Dixon argues that he offered a valid race-neutral justification for his peremptory challenges to each man in that both had previous jury experience. To be sure, previous jury experience can be a valid race-neutral reason for rejecting a juror. *Harper*, 635 So. 2d at 868. On the other hand, even a valid race-neutral reason may be a smoke screen for a racially motivated strike. *Id*. The record before us is ambiguous as to why the trial judge denied these two peremptory challenges. The only information we have to indicate why Easley was not peremptorily struck is the following:

BY THE COURT: What about Robert Easley?

BY MR. PRICE: Your Honor, Mr. Easley had been on a

federal criminal jury. I cannot give you an exact reason,

I just did not like him, don't want him. I cannot give you

a gender specific --

BY THE COURT: I disallow that challenge.

> The trial judge may have found defense counsel's brief response a mere pretext. This is possible because during defense counsel's previous challenge to venireman Clark defense counsel stated "[i]t is not my fault he's a white male. All we have got to deal with are whites and they are going to be either white males or white females, Your Honor." The trial court may have interpreted this comment by defense counsel to indicate that all defense challenges rested, at least in part, on racially discriminatory reasons. There is also a possibility that the trial judge thought that past jury experience was not a valid race/gender-neutral justification for a peremptory challenge. To decide on this record why the trial judge disallowed Dixon's peremptory challenge would involve mere guesswork. The *Hatten* Court forbad such guesswork in *Batson* analysis . *Hatten*, 628 So. 2d at 298.
>
> The same vague reasons for the trial judge's action appear in Dixon's challenge to venireman Mazer. The putative reasoning advanced by defense counsel follows:

BY MR. PRICE: Same with Lewis Mazer. He was on

a prior jury, criminal.

BY THE COURT: No other reason?

BY MR. PRICE: No, sir.

BY THE COURT: That was years ago, though.

BY MR. PRICE: Yes, sir.

BY THE COURT: Didn't he say fifteen years ago?

BY MR. PRICE: I believe so.

BY MR. RUSHING: Your Honor, I don't believe he made any comments as to whether that was a guilty verdict or a not guilty verdict, either; is that correct?

BY THE COURT: I disallow that challenge. Walter Costilow? If you have some reasons, Mr. Price, I will listen to them.

> One could surmise from this colloquy that the judge believed that Dixon's allegedly race neutral reason was merely a pretext because Mazer's jury service was in the distant past, and the defense did not elicit whether the prior jury service was in a civil or criminal case. One could also speculate that defense counsel's challenge to venireman Clark was bleeding over into subsequent challenges leading the trial judge to conclude that defense counsel's arguments were all merely pretextual in light of the possible original rase based comment. It is also possible that the trial judge simply thought that past jury service was not an adequate race/gender-neutral justification for a peremptory challenge. Once again, we cannot resolve this case by guesswork. *Hatten*, 628 So. 2d at 298.

C. Venireman Clark

> Finally, Dixon argues that venireman Floyd Clark "seemed to be looking awful hard at Mr. Dixon," and that defense counsel thought that Clark would not be impartial. Mississippi has "joined a variety of other jurisdictions in accepting demeanor as a legitimate, race-neutral basis for a peremptory challenge." *Walker v. State*, No. 92-DP-00568-SCT, 1995 WL 598825, at *51 (Miss. Oct. 12, 1995). Here Dixon was clearly challenging the venireman because of his demeanor. The challenge was denied without comment by the trial court.
>
> We recognize that the trial judge may have determined that Dixon's counsel was using the demeanor explanation as a "smoke screen" to conceal his racially or gender motivated challenge; however, if such were the case, the trial judge was required to make such a determination on the record. *Hatten*, 628 So. 2d at 298. He did not.

> The challenges to veniremen Easley, Mazer, and Clark all lack a proper on-the-record determination by the trial court of its reasons for denying the peremptory challenges. Therefore, we must remand to the trial court for an in depth effort to develop a more complete record of why Dixon's peremptory challenges were denied. *Hatten* demands no less.

On May 7, 1996, this court remanded for a for further explanation of its findings of fact. Specifically, we asked the trial court to answer three questions: (1) "[d]id the trial court find Dixon's reason for peremptorily challenging Easley to be a pretext or legally insufficient"; (2) "[d]id the trial court find Dixon's reason for peremptorily challenging Mazer to be a pretext or legally insufficient"; (3) "[d]id the trial court find Dixon's reason for peremptorily challenging Clark to be a pretext or legally insufficient." We instructed the trial court that "[i]f the trial court finds that the answer to any of the above questions is that the challenge was legally insufficient or that the trial judge cannot remember, then the trial judge must order a new trial." However, "[i]f the trial court finds that all three of Dixon's challenges were pretextual then the court should enter its complete findings on the record as required by *Hatten v. State*, and certify such findings to this Court by way of a supplementation of the record for appropriate review."

The trial court promptly held a hearing at which counsel for Dixon and the State were present. As to venireman Easley, the trial judge stated "I find that the reason given was pretextual and not a legitimate reason and the challenge was disallowed." The court found similarly regarding venireman Mazer. The court stated, "[w]hat the court should have said and what the court found and did not say was that the reason was pretextual, and did not constitute a sufficient basis for a preemptory challenge and it was racially motivated and the challenge was disallowed, which is what was done." The court also clarified its findings to reflect that Dixon's challenge to venireman Clark was pretextual.

II.

DISCUSSION

The only issue remaining before this Court is whether Dixon's counsel gave race/gender-neutral reasons to support his peremptory challenges to veniremen Easley, Mazer, and Clark. Dixon argues that he offered sufficiently race-neutral reasons under *Batson* so that all of his peremptory challenges should have been granted. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

In *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992), the United States Supreme Court held that "if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must, articulate a racially neutral explanation for peremptory challenges." The trial court must then determine whether the State has met its burden to prove there has been purposeful discrimination in the exercise of the peremptory challenge. *Id.* at 58-59. In *Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992), the Mississippi Supreme Court acknowledged that *Georgia v. McCollum* applied the *Batson* principle to prohibit the defendant's racially discriminatory use of peremptory challenges.

The record reflects that Dixon, a black male, exercised all of his peremptory challenges against white

males. The trial court, considering all relevant circumstances, such as a pattern of exercising strikes from the venire on the basis of race and/or gender and the nature of Dixon's questions and statements on voir dire, decided that the State's showing created a prima facie case of discrimination. The burden then shifted to Dixon to come forward with a race/gender neutral explanation for each of the challenges. *Griffin*, 607 So. 2d at 1202; *see also Batson*, 476 U.S. at 97-98; *Davis*, 551 So. 2d at 170; *Chisolm v. State*, 529 So. 2d 630, 632-33 (Miss. 1988); *Johnson v. State*, 529 So. 2d 577, 583 (Miss. 1988); *Dedeaux v. State*, 519 So. 2d 886, 888 (Miss. 1988); *Lockett v. State*, 517 So. 2d 1346, 1349 (Miss. 1987).

While Dixon's counsel advanced facially race-neutral reasons for striking veniremen Easley, Mazer, and Clark, the trial court found that the reasons were in fact a pretext or smoke screen for discriminatory reasons. "Race-neutral explanations satisfy *Batson*, but only when they are not a smoke screen which . . . [a party] is , in reality, exercising discriminatory challenges." *Griffin v. State*, 607 So. 2d 1197, 1203 (Miss. 1992).

"[T]his Court affords the trial court great deference in determining whether the offered explanation under the unique circumstances of the case is truly a race neutral reason." *Stewart v. State*, 662 So. 2d 552, 558 (Miss. 1995) (citing *Lockett*, 517 So.2d at 1349-50). The Mississippi Supreme Court stated in Lockett:

> [A] trial judge's factual findings relative to a . . . [party's] use of peremptory challenges on minority persons are to be accorded great deference and will not be reversed unless they appear clearly erroneous or against the overwhelming weight of the evidence. This perspective is wholly consistent with our unflagging support of the trial court as the proper forum for resolution of factual controversies.

Id. at 1350. "One of the reasons the trial court is granted such deference in a Batson issue is because the demeanor of the attorney making the challenge is often the best evidence on the issue of race neutrality." *Stewart*, 662 So. 2d at 559 (citing *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). While the demeanor of the attorney making the challenge is often decisive, "the trial court must consider all the relevant circumstances, such as the way prior peremptory strikes have been used and the nature of the questions posed on voir dire." *Stewart*, 662 So. 2d at 559; citing *Griffin v. State*, 607 So.2d 1197, 1202 (Miss.1992).

Considering Dixon's attorney's comments "[i]ts not my fault he's a white male," and "I can't give you a reason, I just don't like him. I cannot give you a gender specific [reason]"; his demeanor; and the vague nature of his facially race-neutral reasons, we cannot conclude that the trial courts finding that Dixon's reasons were in fact a pretext for discrimination is clearly erroneous or against the overwhelming weight of the evidence.

The dissent argues that due to the racial composition the venire panel, Dixon could not have exercised his peremptory challenges in a racially discriminatory manner. This question was disposed of the first time this case was before us and is no longer an issue in Dixon's appeal. As we held in our original opinion, the protections of *Batson* apply to gender as well as race. *See J.E.B. v. Alabama*, 114 S. Ct. 1419, 1421 (1994). All of Dixon's challenges we against males. Thus, even if there were no blacks on the jury panel, Dixon would be required to present gender-neutral reasons for his challenges. Based on this reasoning, we disposed of the argument the dissent now asserts in our first

review of Dixon's appeal. This argument is no more forceful the second time around. Therefore, we affirm the judgement of the trial court.

THE JUDGMENT OF THE CIRCUIT COURT OF LINCOLN COUNTY OF CONVICTION OF AGGRAVATED ASSAULT ON COUNTS ONE AND TWO AND SENTENCES OF SEVENTEEN (17) YEARS ON EACH COUNT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND REQUIRING DEFENDANT TO PAY A $1, 000.00 FINE ON EACH COUNT AND $500.00 IN RESTITUTION ON EACH COUNT TO THE CRIME VICTIM'S FUND IS AFFIRMED. SENTENCES SHALL RUN CONCURRENTLY WITH THE LAST TWO YEARS SUSPENDED FOR FIVE YEARS. ALL COSTS OF THIS APPEAL ARE TAXED TO LINCOLN COUNTY.

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

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KING, J., DISSENTING:

I would respectfully dissent from the majority opinion written in this case. The majority's opinion affirms the action of the trial court by giving deference to its findings pursuant to *Stewart v. State,*

662 So. 2d 552 (Miss. 1995).

Even though the findings of the trial court are entitled to deference, the entitlement exists only where the action taken is built upon a sound foundation, so as not to be an abuse of discretion. *Davis v. State*, 660 So. 2d 1228, 1242 (Miss. 1995) (explaining that such findings will be reversed when it is evident that the trial judge's findings are clearly erroneous).

Because the jury selection was not done on the record, this court remanded this matter to the trial court for the purpose of supplementing the record regarding the jury selection process. The trial court reconvened this matter and working with the attorneys attempted to reconstruct the record of the jury selection process. It is this reconstructed record, which has been sent to this court as supplemental information.

The supplemental record reflected that the pool of potential jurors consisted of 24 persons.

The pool was seated as follows:

NAME RACE SEX	DISMISSED FOR CAUSE	PEREMPTORY STRIKES ATTEMPTED	PEREMPTORY STRIKES ALLOWED
1. Perry Gates B M			
2. Karen J. Redd W F			
3. Carolyn Allen B F	X		
4. Ruby C. Gayten B F			
5. Dangle Case W M			
6. Jim Stewart W M			

7. Floyd Clark W M		X	X
8. Robert Easley W M		X	
9. Betty Baker W F			
10. Gary Bales W M			
11. Lewis H. Mazer W M		X	
12. Minyon Robert s W M			
13. Walter Castilos W M		X	
14. Carlton Jerome Dyke W M			
15. Dalton Carkis W M			
16. Essie Westbrook W F			
17. Mary D. Smith B F	X		
18. Janice Sanders W F			

19. Mrs. Henry Phillip Allred W F			
20. Samuel Warren Brown W M			
21. Ralph William Rogers B M			
22. Malanie Hallman W F			

23. Wendell Brown W M			
24. Wilbert Watson B M			

Only three of the first 12 veniremen were Black.

NAME RACE SEX	DISMISSED FOR CAUSE	PEREMPTORY STRIKES ATTEMPTED	PEREMPTORY STRIKES ALLOWED
1. Perry Gates B M			
2. Karen J. Redd W F			

3. Carolyn Allen B F	X		
4. Ruby C. Gayten B F			
5. Dangle Case W M			
6. Jim Stewart W M			
7. Floyd Clark W M		X	X
8. Robert Easley W M		X	
9. Betty Baker W F			
10. Gary Bales W M			
11. Lewis H. Mazer W M		X	
12. Minyon Robert s W M			

Carolyn Allen, one of the three Blacks included among the first 12 veniremen was excused for cause. With Carolyn Allen having been stricken, only 2 Blacks were among the first 12 veniremen

NAME RACE SEX	DISMISSED FOR CAUSE	PEREMPTORY STRIKES ATTEMPTED	PEREMPTORY STRIKES ALLOWED
1. Perry Gates B M			
2. Karen J. Redd W F			
3. Ruby C. Gayten B F			
4. Darryl Case W M			
5. Jim Stewart W M			
6. Floyd Clark W M		X	X
7. Robert Easley W M		X	
8. Betty Baker W F			
9. Gary Bales W M		X	
10. Lewis H. Mazer W M		X	
11. Minyon Robert W F			
12. Walter Costilow W M		X	

It was from this panel of 10 Whites and 2 Blacks that the Defendant, Dixon was required to exercise any peremptory strikes. Of the first 12 veniremen submitted to the defendant for consideration, only 2, or 16.7% were Black, and 83.3% were White.

In considering whether a party has exercised his peremptory challenges in a manner inconsistent with *Batson* the trial judge is obligated to look at the entire picture.

First, he must look to determine whether there is a discernable pattern in the exercise of peremptory strikes.

Second, if there is a discernible pattern, whether that pattern appears to be inconsistent with the prohibitions of *Batson.*

Third, if that pattern seems to violate the prohibitions of *Batson,* what is the race of the persons, who would replace the challenged individuals. If they are of the same race as the challenged individual, the party is entitled to a rebuttable presumption that his actions are not violative of *Batson. Compare Mack v. State,* 650 So. 2d 1289, 1299 (Miss. 1994) (prima facie case of discrimination was weak where victim and defendant were black, jury seated was 75% black, and venire selected for jury was 56% black, which was approximate percentage of total venire).

To overcome this presumption, very specific evidence of discriminatory motives must be shown.

In the absence of such a showing, the trial court cannot preclude the exercise of those challenges. To do so, is an abuse of discretion.

If the trial court had allowed all five of Dixon's attempted peremptory strikes, the resulting composition of the jury would have been identical to that the first 12 veniremen, submitted to the defendant, 10 Whites (83.3%) and 2 Blacks (16.7%).

NAME RACE SEX	DISMISSED FOR CAUSE	PEREMPTORY STRIKES ATTEMPTED	PEREMPTORY STRIKES ALLOWED
1. Perry Gates B M			
2. Karen J. Redd W F			

3. Ruby C. Gayten B F			
4. Dangle Case W M			
5. Jim Stewart W M			
6. Betty Baker W F			
7. Gary Bales W M			
8. Minyon Robert s W M			
9. Carlton Jerome Dyke W M			

1O. Dalton Carlisle W M			
11. Essie Westbrook W F			
12. Janice Sanders W F			

Under these circumstances to hold, without any specific proof of racial motivation, that Dixon's actions were racially based, is an abuse of discretion. Such findings are not entitled to deference. *Govan v. State*, 591 So. 2d 428, 431 (Miss. 1991) (stating that a Batson claim must fail in the absence of any facts or circumstances which would tend to show that jurors were excluded on account of race).

The defendant's obligation under Batson was to state reasons which were on their face racially neutral. This he did. His reasons are not required to be matters of perfect logic, *Chisolm v. State*, 529

So. 2d 635, 639 (Miss. 1988).

It defies all logic to suggest that a Defendant exercised his peremptory challenges in a racially discriminatory manner when he is presented a jury of 10 Whites and 2 Blacks, and subsequently uses his peremptory challenges in such a manner as to get a jury of 10 Whites and 2 Blacks. When 83.3% of the jury tendered to the defendant is White and 100% of the remaining veniremen, within reach are White, ruling that defendant exercised his peremptory challenges in a racially discriminatory manner defies reason and logic. Such a ruling is an abuse of discretion and is not entitled to deference. For these reasons, I would reverse and remand.

COLEMAN AND PAYNE, JJ., JOIN THIS OPINION.