IN THE COURT OF APPEALS 05/07/96

OF THE

STATE OF MISSISSIPP

NO. 93-KA-01169 COA

GEORGE NIXON, JR.

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R.I. PRICHARD, III

COURT FROM WHICH APPEALED: PEARL RIVER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM L. DUCKER

PURVIS, MISSISSIPPI 39475

ATTORNEYS FOR APPELLEES:

OFFICE OF ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: RICHARD DOUGLASS

NATURE OF THE CASE: CRIMINAL-SALE OF A CONTROLLED SUBSTANCE, SCHEDULE II (COCAINE)

TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF 25 YEARS IN THE MDOC

BEFORE FRAISER, C.J., BARBER, McMILLIN, AND SOUTHWICK, JJ.

McMILLIN, J., FOR THE COURT:

George Nixon, Jr. was convicted of the sale of cocaine, a Schedule II controlled substance, by a Pearl River County Circuit Court jury and sentenced to serve a term of twenty-five years in the custody of the Mississippi Department of Corrections. Thereafter, Nixon appealed to this Court, and the case was remanded to the Pearl River County Circuit Court with directions to the trial judge to conduct a *Batson* hearing on the record as required under *Batson v. Kentucky,* 476 U.S. 79 (1986).

On January 10, 1996, the Circuit Court of Pearl River County conducted the *Batson* hearing as required by mandate of this Court. In that hearing, the trial judge determined that nothing in the record indicated a showing of purposeful discrimination and further, that the reasons articulated by the State in challenging the two minority veniremen were race-neutral.

After review of the record of the *Batson* hearing, we determine that the trial court did not err in finding Nixon's *Batson* challenge to be without merit. We, therefore, affirm Nixon's conviction for the sale of cocaine, a Schedule II controlled substance, and sentence of twenty-five years in the custody of the Mississippi Department of Corrections.

I.

THE BATSON CHALLENGE

Nixon asserted, on appeal to this Court, that the trial court improperly denied him the opportunity to exercise his rights under *Batson v. Kentucky,* 476 U.S. 79 (1986), to explore any racial bias by the State in the exercise of its peremptory challenges. The trial court, in determining whether a party has improperly used peremptory strikes in a racially discriminatory fashion, must utilize the three-part test established by the Supreme Court. *Stewart v. State,* 662 So. 2d 552, 557 (Miss. 1995) (citations omitted). First, the party objecting to the strike is required to make a prima facie showing of purposeful discrimination, *i.e.,* that "race was the criteria for the exercise of the peremptory challenge." *Id.* If a showing of purposeful discrimination is established, the burden is shifted to the party attempting to exercise the peremptory challenge to offer a race-neutral explanation for the strike. *Id.* at 558. Finally, the trial court is required to determine "whether the objecting party has met their [sic] burden to prove there has been purposeful discrimination in the exercise of the peremptory." *Id.* In this third step, "the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett v. Elem,* 115 S. Ct. 1769, 1771 (1995). This burden, *i.e.,*"the ultimate burden of persuasion regarding racial motivation," remains with the opponent of the strike and never shifts. *Id.*

In the present case, the State exercised its first peremptory strike on Ms. Classie Jackson, a black female, stating as its race-neutral reason that Ms. Jackson lived on the same street, and was possibly related to, a group of Jacksons who had been in trouble with local law enforcement on numerous

occasions for the sale and possession of narcotics.

The State then tendered a panel of twelve jurors to the defense, which included a black female, Mrs. Queen Robinson, whom the State had accepted. Following defense strikes, Luther T. Jones, a black male, was tendered to the State as the twelfth juror. The State chose to exercise its final peremptory challenge on Mr. Jones, asserting as the race-neutral explanation for the strike Mr. Jones' arrest record with the Picayune Police Department for various charges over a course of time. Counsel for Nixon agreed that the reason asserted for exercise of a peremptory challenge on Ms. Classie D. Jackson was sufficient and accepted that strike without challenge. However, Nixon's counsel argued that the record of arrest of Luther Jones, without proof of conviction, was not, in and of itself, a racially-neutral use of a peremptory strike.

At that point in the hearing, the trial judge requested defense counsel to make out his *prima facie* case of purposeful discrimination as required under *Batson* before proceeding into a further inquiry of the State's reason for the challenge. Defense counsel argued to the court that Jones was the second black person to be struck from a possible pool of only four black jurors. Counsel for Nixon further argued that in counties with a low black population, such as Pearl River County, it is virtually impossible to show a pattern of discrimination due to the "statistically small number of black venire members." Based on that argument, the trial judge accepted defense counsel's proffer of discrimination and required the State to proceed with a race-neutral explanation for exercising the peremptory strike on Luther Jones. Therefore, we turn our focus to the second step in the *Batson* analysis, *i.e.,* the trial judge's findings relative to the race-neutral explanation offered by the State.

On review, this 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,* 662 So. 2d at 558. A trial judge's findings in regard to a showing of purposeful discrimination or the prosecution's use of peremptory strikes on minority veniremen will not be reversed unless they are clearly erroneous or against the overwhelming weight of the evidence. *Stewart,* 662 So. 2d at 558 (citing *Lockett v. State,* 517 So. 2d 1346, 1349-50 (Miss. 1987)); *Davis v. State,* 660 So. 2d 1228, 1242 (Miss. 1995) (citations omitted).

Following defense counsel's proffer of a *prima facie* showing of discrimination, the State presented further evidence of numerous arrests of Mr. Jones by the Picayune Police Department, citing as reasoning Jones' "unfavorable" contact with the Picayune Police Department, which was the arresting authority in the present case. Although defense counsel, in rebuttal, argued that an arrest, as opposed to a conviction, is not enough to taint a juror, the trial court opined that "common sense will tell everyone that someone who had been arrested would more probably than not have a bad rapport with that [law enforcement] agency and probably would not be a neutral, independent, fair-minded juror." The lower court found no purposeful discrimination on the part of the State in the use of its peremptory challenges, and stated that "the reasons articulated by the State in challenging the two minority venire members were, in fact, facially race-neutral." Based on our limited standard of review on such issues, we find the trial court was correct in its determination that the reasons offered by the State for the exclusion of Mr. Jackson were non-racial.

Applying the third prong of the *Batson* analysis, the trial judge then requested both the prosecution and defense counsel to present for the record any further evidence which might indicate racial

discrimination in the jury selection process. Hearing no additional evidence on the matter, the trial judge found that Nixon had not "carried his burden of proving purposeful discrimination" and affirmed the conviction of George Nixon, certifying the results of the *Batson* hearing to this Court. On review of the hearing, we cannot find error in the lower court's application of the three-part *Batson* test. There is nothing in the record to support a finding that the proffered explanations were merely a pretext to purposeful discrimination, and Nixon has failed to carry his ultimate burden of proving racially discriminatory motives in the prosecution's use of it's peremptory strikes. Accordingly, we affirm the conviction of George Nixon for the sale of cocaine, a Schedule II controlled substance, and resulting sentence of twenty-five years in the custody of the Mississippi Department of Corrections. *See, e.g., Abram v. State,* 606 So. 2d 1015, 1037 (Miss. 1992); *Bush v. State,* 597 So. 2d 656, 657 (Miss. 1992).

THE JUDGMENT OF THE CIRCUIT COURT OF PEARL RIVER COUNTY FINDING GEORGE NIXON, JR. GUILTY OF THE SALE OF A SCHEDULE II CONTROLLED SUBSTANCE AND SENTENCING HIM TO TWENTY-FIVE (25) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED TO PEARL RIVER COUNTY.

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

IN THE COURT OF APPEALS 5/7/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01169 COA

GEORGE NIXON, JR.

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

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KING, J., CONCURRING:

I concur in the result reached in this case.

However, I write to express my concern with the process which brings us to this point.

This Court remanded this matter to the trial court for the purpose of conducting a post conviction Batson hearing, and then filing a supplemental record with this Court.

That has been done and the trial court has made an on the record finding that the Defendant failed to establish improper motive in the exercise of the State's challenges. Having made such a finding, this Court is obligated to give deference to that finding. *Davis v. State*, 660 So. 2d 1228, 1242 (Miss. 1995) (citations omitted).

Having read the record of that hearing, I am convinced that a trial court should not be asked to go back and attempt to reconstruct that portion of the trial. It cannot, and does not, result in a faithful reconstruction of the process.

If a new record is made, the reason for the challenge expands. In the present case I note that the challenge to one prospective juror was initially based upon a single arrest. The new record now has that challenge based upon numerous contacts with the law.

While, finding the reason for challenge expanding, no effort has been made to develop the impact, if any, upon the ability of the prospective jurors to render a fair and impartial verdict.

It would appear that the trial courts have not received sufficient guideline as to what their role should be in the Batson process.

If that role is as guardian of the rights of prospective jurors, then that responsibility must be exercised with appropriate diligence. This is particularly true where the protected class is very small, as in the present case.

If the trial court is to be an impartial arbiter, making its decision based solely upon what is placed in front of it by the litigants, then it should not stray beyond that role.

` But whatever the role of the trial court is, it must be consistent, it cannot serve as guardians in this process one day, and then umpire the next.

The responsibility for this failure must be shared by the trial courts and this Court.

To date, this Court has not adopted a consistent and even handed approach to the disposition of *Batson*/*McCollum* cases.

Until such time as we provide guidelines to the trial bench, I would suggest that these cases not be remanded for Batson hearings, but rather that this Court assume its responsibility and dispose of them

based upon the then existing record.

BARBER AND COLEMAN, JJ., JOIN THIS OPINION.

IN THE COURT OF APPEALS 10/31/95

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01169 COA

GEORGE NIXON, JR.

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEES

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TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF 25 YEARS IN THE MDOC

BEFORE FRAISER, C.J., BARBER, McMILLIN, AND SOUTHWICK, JJ.

McMILLIN, J., FOR THE COURT:

George Nixon, Jr. was convicted of the sale of cocaine, a Schedule II controlled substance by a Pearl River County Circuit Court jury. He appeals his conviction, asserting that the following issues require a reversal of his conviction:

(1) The trial court improperly denied him the opportunity to exercise his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986), to explore any racial bias by the State in the exercise of its peremptory challenges;

(2) The trial court erred in the handling of an attack by the State on the credibility of the defense's principal witness; and

(3) A perceived error in an instruction requested by the State and granted by the trial court setting out the elements of the crime.

We conclude the issues raised are not such as to require a reversal of the conviction; however, we find that the trial court improperly refused to consider *Batson* requirements in the State's exercise of its peremptory challenges and remand for further appropriate proceedings to determine if the error requires a new trial.

I.

FACTS

On the night of January 21, 1993, two undercover officers for the Picayune Police Department were traveling in an automobile when they were hailed by Rodney Ceasar, who offered to sell them drugs. The officers rejected Ceasar's initial offering as being of poor quality, whereupon Ceasar indicated his ability to obtain a better quality product. Another automobile approached and stopped at the rear of the officers' vehicle. Ceasar obtained a twenty dollar bill from one officer, was seen to go to the driver's side of the newly-arrived vehicle and deliver the bill. He promptly returned with a rock of crack cocaine. Poor lighting and the tint on the windows of the second vehicle prevented either

officer from seeing who the driver of the vehicle was at that time; however, when the second vehicle started to depart, the officers followed it. The officer who was driving testified that he lost sight of the vehicle for only three or four seconds while he turned his vehicle to start in the proper direction. The other officer testified that he lost sight of the vehicle for only about a second during the turning maneuver. The officers testified that a short time later the vehicle they were following stopped at a convenience store, at which time the defendant, George Nixon, Jr. emerged from the driver's side and Tino Causey, a juvenile, emerged from the passenger side. No arrests were made at the time, since the officers were interested in maintaining their cover; however, a few hours later the same car was stopped by arresting officers. Nixon was still driving the vehicle and Causey was still a passenger. The twenty dollar bill originally delivered to Ceasar was recovered from the possession of Causey at that time.

Ceasar testified for the defense that he did, in fact, conduct the drug transaction, but said he obtained the drug from Causey, who was the driver and sole occupant of the second vehicle at the time of the transaction.

II.

THE BATSON ISSUE

We deal in this case with another variation of the effect that *Batson v. Kentucky*, 476 U.S. 79 (1986), can have on jury selection resulting in a claim of reversible error. Upon inquiry from the trial court prior to jury selection, defense counsel indicated his intention to invoke *Batson* considerations if the State used its peremptory challenges to prevent the seating of blacks on the jury. The trial court informed defense counsel that if he proposed to make the State articulate race-neutral reasons for challenging black venire members, then the court would require defense counsel to articulate race-neutral reasons for challenging white venire members. Faced with this prospect, defense counsel withdrew his *Batson* objection.

We conclude that the trial court erred in two respects in its interpretation of what *Batson* and those cases that followed it require. In the first instance, the mere incantation of the name *Batson* does not automatically require the State to come forward with racially-neutral reasons for its challenges as the court's ruling seems to suggest. The United States Supreme Court decisions on the subject have been consistent in holding that the challenging party must make a prima facie showing that improper discrimination is being practiced before the court may compel the articulation of race-neutral reasons. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986)("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation

. . . ."); *Georgia v. McCollum*, 112 S.Ct. 2348, 2359 (1992) ("Accordingly, 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."). Such a preliminary requirement has been reaffirmed as late as *Purkett v. Elem*, when the Court said:

> Under our Batson jurisprudence, once the opponent of the peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to

the proponent of the strike to come forward with a race-neutral explanation (step 2).

Purkett v. Elem 115 S.Ct. 1769, 1770 (1995).

Secondly, while there is certainly authority that racially discriminatory motives in the exercise of peremptory challenges are as equally forbidden to the defendant as to the State (*See Georgia v. McCollum*, 112 S.Ct. 2348 (1992)), there is no authority for the trial court to raise such *McCollum* considerations *sua sponte* and to attach compliance with *McCollum* as a condition to permitting the defendant to proceed under *Batson.* The rights available to the defendant under *Batson* are not conditional.

Our next consideration must be to determine what prejudice, if any, the defendant suffered by the court's improper ruling. Certainly, by withdrawing his *Batson* objection, Nixon preserved all of his peremptory challenges since he was permitted to exercise them unfettered by any inquiry as to racial motivation in their exercise. Nevertheless, Nixon's essential complaint is that he was forced to pay too high a price for such privilege because he had to waive his rights under *Batson* to explore any improper racial animus on the part of the State. We find this proposition to have merit.

The proceedings during jury selection indicate that the venire, after all challenges for cause, contained four black prospective jurors. The State struck the first to come up, accepted the second, and struck the third. Apparently, the fourth was not reached. Although *Batson* issues were not being formally considered, it is evident that such factors were on the minds of those involved in the process of jury selection. The trial court appeared to be keeping a running record of the race of those jurors being struck by the State, and the prosecuting attorney, although under no compulsion to do so, proceeded in both instances of striking a black venire member proceeded to articulate his reasons. These facts permit this Court to engage in something more than an abstract analysis of the prejudice that accompanies an improper denial of a right to mount a *Batson* inquiry.

When reduced to its simplest terms, the issue we deal with is whether the State was acting under improper racial motives in peremptorily removing two of the three black venire members tendered for consideration. We find that issue to be unresolved at present, since the trial court did not act further on the non-racial motives articulated by the State. However, the present state of the record suggests both the necessity and the possibility of further inquiry. We find it appropriate to remand this case for further hearing on the *Batson* issue to permit the trial court to determine, first of all, whether the reasons articulated by the State for challenging the two minority members were, in fact, facially race-neutral. If the court so finds, then it should proceed further to determine whether these facially acceptable reasons were merely pretextual to disguise an underlying purpose of improper discrimination. If, based on these considerations, the trial court determines that Nixon has "carried his burden of proving purposeful discrimination," then the trial court should set aside the conviction and order a new trial. *Purkett v. Elem,* 115 S. Ct. at 771. If the trial court finds that Nixon has failed in this burden, then the court should enter its findings on the record as required by *Harper v. State,* 510 So. 2d 530 (Miss. 1987), and certify such findings to this Court by way of a supplementation of the record for appropriate review.

III.

THE ATTEMPT TO IMPEACH RODNEY CEASAR

Nixon claims reversible error arose by virtue of certain comments made by the trial court during the testimony of Rodney Ceasar, who testified for the defense and admitted selling the drug to the undercover agent, but denied having obtained the drug from Nixon. The State's witnesses had indicated that Ceasar, after receiving the purchase money from the undercover agent, went to the driver's side of a nearby automobile where he exchanged the money for the drug. The State's witnesses testified that they were, at that time, unable to positively identify the person in the driver's seat, but were subsequently able to identify the driver as Nixon by following the automobile for a time until it stopped again and Nixon emerged from the driver's side. Ceasar claimed that when he went to the car to obtain the drugs for the transaction, Nixon was not an occupant of the car. During cross-examination, Ceasar admitted that a brief time earlier he had told the prosecutor in an interview that he had the drug in his possession all the time and had mentioned nothing about obtaining it from Causey after receiving the undercover officer's money. Ceasar freely admitted that this was at variance with his testimony from the stand. He explained his contradictory interview statement by saying, "Because I'll tell you anything." The State then sought to interrogate the witness as to whether he had been receiving periodic updates on the course of the testimony from certain spectators during recesses in the trial. The State apparently was attempting to show that Ceasar was tailoring his testimony to fit, insofar as possible, the scenario testified to by the State's witnesses while preserving the one vital distinction that the individual in the driver's seat of the vehicle was someone other than Nixon.

As a prelude to such investigation, the State asked for the removal of the suspect individuals. The State represented to the court that it had been informed that these persons were, in fact, briefing Ceasar as to the course of the testimony. The court agreed to the request, apparently relying upon Rule 615 of the Mississippi Rules of Evidence in that these spectators, as to this issue, were potential witnesses. After the removal of the spectators, the State resumed its interrogation. Ceasar admitted to having conversations with the persons, but denied that the subject matter was in any way related to the trial. At that point, the trial court interrupted the prosecution and proceeded to advise Ceasar as to the penalties attached to committing perjury and suggested that the witness had the option of retracting his testimony on this point or invoking his rights against self-incrimination under the Fifth Amendment and refusing to answer further questions on the subject. The witness proceeded to invoke the Fifth Amendment, and the prosecution moved on to another subject. The excused spectators were subsequently permitted to return to the courtroom and were never called.

Nixon registers a general and somewhat unfocused complaint that the entire episode was prejudicial to his defense so as to deny him a fair trial. The removal of potential witnesses from the courtroom immediately upon the discovery that they might be witnesses under Rule 615, in and of itself, does not appear to be prejudicial in any way to the defendant. Nixon cites no authority for the proposition and his argument is not compelling. We, therefore, decline to consider this issue under the line of authority discussed in *Allman v. State,* 571 So. 2d 244, 254 (Miss. 1990) and *Kell v. State,* 463 So. 2d 1070, 1072 (Miss. 1985).

We now consider the impact of the trial court's remarks to Ceasar in the presence of the jury concerning perjury. We must admit to grave reservation as to the propriety of a trial judge warning a witness in the presence of the jury of his right under the Fifth Amendment to refrain from testifying further on a subject when it is evident that the court's concern is the possibility that the witness may be committing perjury. It is normally not within the province of the trial court, either directly or indirectly, to comment on the credibility of a witness. *See* Miss. Code Ann. § 99-17-35; *Stallworth v. State*, 310 So. 2d 900, 902 (Miss. 1975). The court's comments in this case seem to carry with them the necessary implication that the trial court had some measure of reservation as to the veracity of the witness. The Mississippi Supreme Court has reversed a criminal conviction in a case where the trial court ordered the immediate arrest of a defense witness as he left the stand in a situation where it was evident that the trial court thought the witness had committed perjury. *Johnson v. State*, 141 Miss. 49, 105 So. 851, 852 (1925). In *Stallworth v. State*, the Supreme Court reversed a conviction when, at the conclusion of a defense witness's testimony, the witness requested the opportunity to add something to his testimony. The trial court responded, "No, you better go on down with your lawyer. You are not on trial here; but if I catch you telling an untruth here, you will be in front of me here." *Stallworth*, 310 So. 2d at 901. Both these cases deal with the issue of the impropriety of the trial court, directly or by insinuation, conveying to the jury the court's impression as to the credibility of a witness. The decisions noted the inherent capacity residing in the trial court to influence the jury. The *Johnson* Court stated that "[t]he trial judge cannot be too careful and guarded in his language and conduct in the presence of the jury. The trial judge s have, and deserve to have, great influence with the juries. Juries are on the lookout for their leaning one way or the other. . . ." 105 So. at 852. Likewise, the *Stallworth* Court said that "[t]he officers of a court, and especially the judge, district attorney and sheriff, because of the attributes of the offices they hold, unconsciously exert tremendous influence in the trial of a case, and they should be astutely careful so that unintentionally the jurors are not improperly influenced by their words and actions." 310 So. 2d at 902 (quoting *Roberson v. State*, 185 So. 2d 667 (Miss. 1966)).

Nevertheless, it does not appear that every improper comment by the trial court on the weight of the evidence automatically compels a reversal. In *Wilson v. State*, the Supreme Court considered a case where the trial court had improperly commented on the factors determining the weight the jury should give to a previously-introduced confession. The Court reversed in that case, but extended the possibility that a "corrective instruction given to inform the jury of its function of determining the weight and credibility of the confession . . ." might have produced a different result. *Wilson v. State*, 451 So. 2d 724, 727 (Miss. 1984).

In this case, the jury was instructed at the conclusion of the proof that "It is the duty of the judge to be completely fair to both sides in this trial, and if any instruction, ruling or statement by the Court seems to indicate to you that the Court has any opinion about the case or any particular fact, such indication would be completely false, and you must disregard it." This would appear to be more than adequate to meet the instruction requirements suggested in *Wilson*. The issue with which we must deal, then, is whether the instruction was sufficient to overcome the prejudicial impact of the trial court's remarks. First of all, we acknowledge the proposition that the jury is assumed to follow the instructions it is given "so as to dissipate any prejudicial effect." *Crenshaw v. State*, 520 So. 2d 131, 134 (Miss. 1988) (citations omitted). Secondly, we consider that the issue prompting the trial court's remarks was certainly collateral to the central facts of the case. The court's comments could not be

interpreted to extend to Ceasar's previous testimony on the operative facts of the case except indirectly through the doctrine of *falsum in uno, falsum in omnibus*. There is no evidence in the record that the prosecution attempted to capitalize on the court's action by asserting such an argument. The witness's testimony had already been impeached by his ready admission to making a prior inconsistent statement to the prosecuting attorney only minutes earlier under circumstances that indicated a certain disdain for the truth. Recognizing that the Mississippi Supreme Court has called such comments by the trial court "hazardous to affirmance on appeal," and without condoning the propriety of the remarks in any way, we nevertheless conclude that Nixon was not so prejudiced by the events that took place in the presence of the jury that he was denied a fair trial.

In order for the testimony of Ceasar to have been sufficient to acquit the defendant, the jury would have had to believe either that Nixon appeared from some unknown location in the minutes after the transaction and, in the space of something less than three or four seconds, replaced Causey as the driver of the vehicle, or that Officers Wheat and Jones were both perjuring themselves when they indicated that Nixon emerged as the driver of the vehicle when it stopped at the convenience market shortly after the drug transaction. The jury was certainly entitled to reject either alternative as being improbable, uninfluenced by the trial court's concern that the witness might also be misrepresenting the subject of his conversations with several trial spectators.

IV.

JURY INSTRUCTION S-3

The defendant claims reversible error by the trial court when it granted Instruction S-3 in the following form:

The defendant's complaint on the instruction is not completely clear. He claims it to be a mixture of a statement of the law and a comment on the testimony, and says it is "an absolute convictor." The instruction appears to this Court to be a proper instruction on the general principle that one participating in the commission of a crime by aiding or abetting another is guilty in the same degree as the principal perpetrator. Such an instruction was necessary since the State's theory of the case

suggested that one or more of the vital elements of the crime were actually performed by Rodney Ceasar. The instruction then defines with some particularity what facts the State claims to have proved that showed the defendant's acts in aid of the commission of the crime. This is entirely proper and is not an improper comment on the testimony. The defendant complains that the instruction fails to mention an alternate set of facts asserted by the defense that the cocaine was supplied by another person. It is not the duty of the State in proposing instructions to incorporate as an alternative any competing theories propounded by the defense. It was entirely within the discretion of the defense to propose an instruction to the effect that, if the jury believed that the cocaine sold to the undercover agent had been obtained from someone other than the defendant, then, to that extent, the defendant had not aided and abetted in the commission of the crime and such a finding could constitute grounds for acquittal.

The instruction was not defective for any of the reasons assigned on appeal. This issue is without merit.

THIS MATTER IS REMANDED TO THE PEARL RIVER COUNTY CIRCUIT COURT FOR A PERIOD OF NINETY (90) DAYS WITHIN WHICH THE TRIAL COURT IS DIRECTED TO CONDUCT A *BATSON* HEARING. IF THE TRIAL COURT FINDS DISCRIMINATION IN JURY SELECTION IN VIOLATION OF THE REQUIREMENTS OF *BATSON*, THE TRIAL COURT IS DIRECTED TO ORDER A NEW TRIAL. IF A NEW TRIAL IS ORDERED OR THE CASE IS OTHERWISE FULLY DISPOSED OF AT THE TRIAL LEVEL, THE TRIAL COURT SHALL FORWARD TO THIS COURT A CERTIFIED COPY OF THE ORDER FOR A NEW TRIAL OR OTHER DISPOSITION. IF, AFTER THE *BATSON* HEARING, THE TRIAL JUDGE DETERMINES THERE WAS NO DISCRIMINATION, THE TRIAL JUDGE SHALL CERTIFY THE MATTER TO THIS COURT WITH A TRANSCRIPT OF THE *BATSON* HEARING, WITH FINDINGS OF FACT STATED ON THE RECORD OR SEPARATELY ENTERED IN WRITING. UPON REVIEW OF THE ORDER AND TRANSCRIPT OF THE *BATSON* HEARING, THIS COURT WILL RESUME PROCEEDINGS ON APPEAL. IF ADDITIONAL TIME IS NEEDED TO CARRY OUT THIS JUDGMENT, THE TRIAL COURT SHALL CERTIFY TO THIS COURT THE REASON FOR THE NEED AND LENGTH OF ADDITIONAL TIME NEEDED.

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