

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00634 COA**

EDDIE BROCK A/K/A EDDIE BROCK, III

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

DATE OF JUDGMENT:	5/17/94
TRIAL JUDGE:	HON. ELZY JONATHAN SMITH, JR.
COURT FROM WHICH APPEALED:	BOLIVAR COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GLENN H. WILLIAMS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS, JR.
DISTRICT ATTORNEY:	LAURENCE Y. MELLE
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	UTTERING A FORGERY, FIVE COUNTS: SENTENCED TO FIFTEEN YEARS ON EACH COUNT
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Eddie Brock was convicted by a jury in the Circuit Court of Bolivar County of five counts of uttering a forgery. Brock challenges his conviction on these grounds: (1) a speedy trial violation; (2) *Batson* errors regarding State's peremptory challenges; (3) highly prejudicial, nonprobative evidence; (4) improper in-court identification; (5) denial of motions for judgment notwithstanding the verdict and new trial; and (6) invalid sentence under proportionality requirements. We reject each of these arguments and affirm.

FACTS

On June 30, 1993, Eddie Brock was arrested by the Bolivar County Sheriff's Department based on outstanding warrants from the Clarksdale Police Department. While Brock was in the Bolivar County Jail, George Serio, an investigator from the Cleveland Police Department, desired to question him on another offense. Serio took Brock to the Cleveland Police Department, informed him of his rights regarding interrogation, and inquired about several checks that were forged on the account of the Men's Fellowship Bible Class. Serio obtained handwriting samples, fingerprints, and a photograph of Brock, then returned him to the county jail. Later that day, Brock was served with an arrest warrant based on charges that are not related to the present appeal. Following an initial appearance on that other charge, Brock was released into the custody of the Clarksdale Police Department and transported to the Coahoma County Jail.

No charges were brought on the allegations involved in this case until April 11, 1994, when Brock was indicted by a Bolivar County Grand Jury on seven counts of uttering a forgery. The trial court granted the State's motion to dismiss one count of the indictment because of the unavailability of a witness, then peremptorily instructed the jury on another count. Following a trial on May 9, 1994, the jury found Brock guilty of the remaining five counts of uttering a forgery.

DISCUSSION

1. Speedy Trial

Brock asserts that the trial court committed reversible error by denying a motion to dismiss for lack of a speedy trial. Specifically, Brock contends that he was arrested on July 1, 1993 and was not tried until May 9, 1994. Brock asserts that this delay prejudiced his case and violated his constitutional right to a speedy trial. He makes no claim concerning the statutory 270-day rule under section 99-17-1 of the Mississippi Code.

The right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The constitutional right exists separate from the statutory right. ***Bailey v. State*, 463 So. 2d 1059, 1062 (Miss. 1985)**. Unlike the statutory right, the constitutional right to a speedy trial attaches at the time of a formal indictment or information, or when a person has been arrested. ***Perry v. State*, 419 So. 2d 194, 198 (Miss. 1982)**. In essence, the constitutional right attaches when a person has been effectively accused of the crime. ***Box v. State*, 610 So. 2d 1148, 1150 (Miss. 1992)**. Once this right has attached, this Court must apply the familiar balancing test announced in ***Barker v. Wingo*, 407 U.S. 514 (1972)** to determine whether the right has been denied. The four *Barker* factors, which must be balanced in light of all surrounding circumstances, are: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of the right to a speedy trial; and (4) prejudice to the defendant resulting from the delay. ***Id.* at 533**.

The first factor, the length of delay, is considered the triggering mechanism for an inquiry into the other factors. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." ***Id.* at 530**. Under Mississippi law, a delay of eight months or longer is presumptively prejudicial. ***Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989)**. Although the supreme court has on a few occasions observed that a seven-month delay was sufficient to merit an inquiry into the other *Barker* factors, this shorter time period has not become the rule. ***Adams v. State*, 583 So. 2d 165, 168 (Miss. 1991)**. The supreme court has continued to find that presumptive prejudice usually arises only after an eight-month delay. ***Herring v. State*, 691**

So. 2d 948, 955 (Miss. 1997); *Atterberry v. State*, 667 So. 2d 622, 626 (Miss. 1995).

Brock asserted that the State was not zealous in their investigation and improperly failed to present the case to the October grand jury. Furthermore, Brock contends that the State failed to insure that the evidence was promptly processed by the Mississippi Crime Laboratory. After a hearing, the trial court concluded that Brock's motion to dismiss for lack of a speedy trial was without merit. The trial court found that the State was timely with their investigation and that the State did not delay in filing charges against Brock. The court held that the case was presented to the first grand jury that convened after the completion of the investigation.

Brock was indicted on April 11, 1994, and his trial commenced on May 9, 1994. Accepting Brock's contention that the case should have been ready for presentation to the October grand jury, we still conclude that there was not a violation of his right to a speedy trial. The time period from the October grand jury until the commencement of the trial accounts for only seven months. Consequently, Brock's alleged delay does not rise to a presumption of prejudice and thus does not warrant further inquiry into the other *Barker* factors.

One speculative method to calculate a delay of greater than eight months exists. Brock's arrest on July 1, 1993 on different charges meant that he was incarcerated prior to the eight month time period beginning. If at some time after July 1 and before eight months from trial he would have been arrested if not for the fortuity (from the State's viewpoint at least) of Brock's already being incarcerated, then perhaps a speedy trial claim could be raised. That circumstance is not before us, because the trial court found that the State had with reasonable dispatch been investigating the uttering crimes. If that is so, and if the State reasonably was not prepared to present the case to the October grand jury, that also means there was no basis to arrest Brock on these charges before October.

2. *Peremptory Challenges*

Brock next argues that the State exercised its peremptory challenges in an unconstitutional manner to exclude prospective black jurors from the jury. ***Batson v. Kentucky*, 476 U.S. 79 (1986)**. He contends that the trial court committed reversible error in finding that the State articulated a race neutral explanation for challenging each of the jurors.

In order to establish a prima facie case of purposeful discrimination in the selection of a jury, a defendant must show that: "(1) he is a member of a cognizable racial group; (2) that the prosecutor exercised peremptory challenges to excuse a venire person of the defendant's race; and (3) that there is an inference that the venire persons were excluded on account of their race." ***Id.* at 96**. Once this prima facie showing has been established, then the burden of production shifts to the State to come forward with a race neutral explanation for challenging the jurors. ***Id.*** The State's explanation need not rise to the level of justification as required for a challenge for cause. ***Harper v. State*, 635 So. 2d 864, 867 (Miss. 1994)**.

Additionally, the defendant is allowed to rebut the reasons which have been offered by the State. ***Bush v. State*, 585 So. 2d 1262, 1268 (Miss. 1991)**. However, if the defendant offers no rebuttal, the trial court is forced to examine only the reasons given by the State. ***Id.*** The trial court has sole discretion to determine whether a discriminatory intent is inherent in the State's explanation. ***Lockett***

v. State, 517 So. 2d 1346, 1350 (Miss. 1987). Consequently, on appeal, the trial court's findings are accorded great deference and will not be reversed unless they are clearly erroneous or against the overwhelming weight of the evidence. *Id.*

During the jury selection process, the State exercised six peremptory challenges against black veniremen. The record reflects that Brock objected to the peremptory challenges exercised against these prospective jurors. The trial court requested that the State provide race neutral reasons for the challenges even though the jury was about equally balanced between black and white jurors. The State submitted that the prospective jurors were challenged based upon: service on a criminal jury which returned a verdict of not guilty, unemployment status, conviction of a family member and service on a hung jury, and residence in a high crime area.

The trial court then offered Brock the opportunity to refute the State's explanations. Brock stated that he did not have any evidence to rebut the State's justifications, but he denied that living in a high crime area was a valid explanation. Upon further questioning by the court, Brock responded that he could not refute the truth of the State's explanations. The court found that the State submitted race neutral explanations and thus upheld the peremptory challenges.

In *Lockett v. State*, 517 So. 2d 1346, 1356-57 (Miss. 1987), the supreme court presented a list of race neutral reasons accepted by other courts throughout the country in an effort to provide guidance to trial judges in this state. Since *Lockett*, the supreme court has determined that service on a hung jury or a jury which returned a not guilty verdict, unemployment, and conviction of a family member are all racially neutral explanations. See *Harper v. State*, 635 So. 2d 864, 868 (Miss. 1994) (mistrial or not guilty verdict); *Porter v. State*, 616 So. 2d 899, 907 (Miss. 1993) (unemployment); *Griffin v. State*, 607 So. 2d 1197, 1203 (Miss. 1992) (conviction of family member).

Although the supreme court has not specifically addressed whether living in a high crime area is a racially neutral explanation, the court, in the appendix to *Lockett*, did note that it has been recognized in another jurisdiction as a valid reason. *Lockett v. State*, 517 So. 2d 1346, 1356 (Miss. 1987). In *Taitano v. Commonwealth*, 358 S.E.2d 590, 593 (Va.Ct. App. 1987), the court upheld the prosecution's use of a peremptory strike to excuse a juror who resided in a high crime area. The court concluded that the prosecution's explanation was sufficient to rebut a prima facie case of purposeful discrimination. *Id.*

We find that striking a juror based upon residency in a high crime area is a race neutral explanation. Brock was given the opportunity to rebut the State's explanations. He did not offer any evidence after the State submitted neutral reasons and instead only alleged in general terms that the reasons were invalid. The trial court concluded that the explanations given by the State were race neutral and did not find that the reasons were mere pretexts. We find no error.

3. Admission of Evidence

Brock's next assignment of error is that the trial court improperly admitted evidence that was not relevant and that was highly prejudicial. On appeal, Brock also contends that the offending evidence was improper character evidence. However, that is not what was argued below, and we will not consider that point.

During the trial, the State introduced into evidence a diploma kit and a university degree. The envelope of the diploma kit was addressed to Brock and contained blank forms for a university degree. The State also presented Brock's social psychology degree from the University of Michigan. The State asserted that Brock used the diploma kit to forge his university degree. Furthermore, the State explained that the last name of the signatory on the degree, Rosenbalt, was the same name used on two forged checks. Consequently, the State contended that Brock forged the same name on the checks as he did earlier on the degree.

Brock objected to the admission of the diploma kit and the university degree on the grounds of relevancy and prejudice. The court found that the evidence was relevant to the case and that "it was not more prejudicial than it was relevant." Thus, the court admitted both the kit and the degree into evidence over Brock's objections.

Relevant evidence is any evidence having a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." **M.R.E. 401**. Relevant evidence is generally admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. **M.R.E. 403**.

The admission of evidence is within the broad discretion of the trial court and will not be reversed unless there was a clear abuse of discretion. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 260 (Miss. 1993). Given the contours of Rules 401 and 403, this Court does not find that there was a clear abuse of discretion. The diploma kit, in conjunction with the university degree, establishes the possibility of a forged degree. The university degree bears the same last name which was used on two forged checks. Thus, the university degree not only connects the name on the forged checks with the name on the degree, but it also links Brock with the forgery. This evidence meets the test of making the existence of a fact more probable. Furthermore, the probative value of the kit and the degree are not outweighed by the danger of unfair prejudice.

4. Testimony and Identification

Brock also contends that the trial court erred in allowing Gary Bowie and Robert Sanders to testify and to identify him during the trial. Brock asserts that the State failed to disclose that Bowie would identify him, and that the identification by Sanders was impermissibly suggestive.

After the defense rested its case, the State called two witnesses, Bowie and Sanders, to rebut Brock's testimony that he was outside the State of Mississippi until the early morning of June 29, 1993. Bowie testified that Brock entered the Frontier Spirit Package Store on June 22 and presented a check on the account of the Men's Fellowship Bible Class. Upon learning that the check was not valid, Bowie notified the Shaw Police Department. Bowie positively identified Brock in the courtroom as the suspect who entered the package store.

Brock objected to Bowie's testimony and in-court identification on the grounds that the State violated discovery. Brock asserted that the State failed to disclose that Bowie had previously identified Brock. However, the trial court overruled Brock's objection and found that the State was not under any obligation to disclose Bowie. The court concluded that Bowie was not a "witness in chief" but rather a rebuttal witness, and thus the State was not required to identify Bowie.

The trial court was correct in concluding that Bowie was a rebuttal witness. Bowie testified, contrary to Brock's assertion, that Brock was in the State of Mississippi prior to the early morning of June 29, and that Brock attempted to pass a check at the package store on June 22. Consequently, the State was not required to disclose Bowie prior to trial. **URCCC 9.04.**

Sanders, Chief of the Shaw Police Department, also rebutted Brock's testimony. Sanders testified that he responded to a call from Bowie at the package store. After questioning Bowie about what transpired, Sanders obtained a description of the vehicle and began to search for Brock. Shortly thereafter, Sanders stopped Brock, and after securing a positive identification from Bowie, Sanders transported Brock to the police department. Sanders testified that Brock later escaped from the police department. Like Bowie, Sanders also positively identified Brock in court as the suspect taken into custody on June 22.

Brock objected to the in-court identification by Sanders. Brock asserted that he was the only black male in the courtroom, and thus the identification was impermissibly suggestive. The trial court concluded that an officer could properly identify the suspect he arrested. Accordingly, the court allowed the testimony and identification by Sanders.

The key factor in determining the admissibility of an identification is reliability. *York v. State*, **413 So. 2d 1372, 1383 (Miss. 1982)**. An in-court identification by a witness is not precluded by an impermissibly suggestive pretrial identification unless: (1) from the totality of the circumstances surrounding the pretrial identification (2) it was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Id.* at **1383**. In evaluating the likelihood of misidentification, the following factors must be considered:

(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the time and the confrontation.

Neil v. Biggers, **409 U.S. 188, 199 (1972)** (numbers added).

Turning to the facts of this case, it must be noted that we are considering the reliability of an identification under peculiar circumstances. Typically, there is an arguably suggestive pre-trial identification that may taint the in-court identification. However, in this case the only identification made by Sanders occurred at the time of the trial. Nonetheless, we find that the *Biggers* factors are equally applicable here.

The first factor, the opportunity to observe, weighs in favor of the State. Sanders testified that he apprehended Brock and then transported him to the Shaw Police Department. Prior to departing for the police station, Bowie testified that Sanders returned to the package store with Brock to obtain a positive identification. Sanders stated that it was approximately five to ten minutes before he arrived at the police station with Brock and that he documented what transpired and the date of the incident. In relation to other observations, this is a relatively long period of time. *See Wilson v. State*, **574 So. 2d 1324, 1328 (Miss. 1990)** (three minutes); *Thompson v. State*, **483 So. 2d 690, 692 (Miss. 1986)** (one minute).

The second factor, attentiveness of the witness, was not specifically addressed in the record. However, the witness was not an unfortunate bystander or a casual observer but was the Chief of the Shaw Police Department. As a trained police officer, Sanders had every reason to pay close attention to detail. Moreover, the detention and transportation of Brock to the police department appears to have been a relatively calm incident. Contrary to many transactions, Sanders's attention was not distracted by the presence or threat of a weapon.

The third factor, the accuracy of the witness's prior description of the defendant, is not applicable in this case since there was only the in-court identification.

In regard to the fourth factor, Sanders testified that he would recognize Brock if he saw him again. Sanders seemed certain that the individual on trial was the same individual whom he detained and transported to the police department. Furthermore, Sanders correctly identified Brock in the courtroom. Although it requires very little imagination for a witness to peer across the courtroom and positively identify the individual sitting at the defense table with his counsel as the suspect, we cannot presume that Sanders committed perjury. Rather, the certainty demonstrated by Sanders was a factor within the province of the jury.

The remaining factor is the length of time between the opportunity to observe and the identification. In this case, the in-court identification occurred fourteen months after Sanders first detained and transported Brock to the police station. It is clear that memory tends to fade with time. Consequently, this factor weighs in favor of Brock.

Under the totality of the circumstances, there was substantial credible evidence to support the trial court's admissibility of the identification.

5. Legal Sufficiency and Weight of the Evidence

A. Legal Sufficiency

Brock alleges that the trial court erred in denying his motion for a judgment notwithstanding the verdict. Brock contends that a witness was not certain about which corporation actually employed her, and thus the State failed to prove fraud as set forth in count five of the indictment beyond a reasonable doubt.

On appeal from the denial of a motion for a judgment notwithstanding the verdict, this Court reviews the sufficiency of the evidence in the light most favorable to the State. ***McClain v. State, 625 So. 2d 774, 778 (Miss. 1993)***. All credible evidence which is consistent with Brock's guilt must be accepted as true, and the State is given the benefit of all favorable inferences that may be reasonably drawn from the evidence. ***Id.*** Because matters concerning the weight and credibility of the witnesses are resolved by the fact finder, this Court will 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." ***Id.***

The indictment stated that Brock tendered a check to the Royal Oil Corporation which was doing business as the Dodge Store. The State's witness was unable definitely to confirm those company names. However, a copy of the check was attached to the indictment. The supreme court has held

that where a copy of the instrument alleged to be forged is set out in the indictment, there could be no possible danger of another prosecution for the same offense, and therefore, reversal is not required when an issue arises regarding the identity of the party receiving the check. *Stone v. State*, 242 So. 2d 127, 128 (Miss. 1970). Similarly, in this case, there is not the remotest possibility that Brock could be prosecuted again for uttering this forgery. This slight variance between the indictment and the testimony is immaterial. There was sufficient evidence to support Brock's conviction of uttering a forgery under count five of the indictment.

Additionally, Brock contends that the evidence presented by the State was insufficient to prove that he was the person who actually tendered each of the remaining forged checks. Brock asserts that the State presented no direct evidence that he was the individual who actually tendered, presented, and uttered the forgeries. He argues that the State failed to present evidence on each element and each count of uttering a forgery.

Brock is correct in his assertion that the State failed to present direct evidence on each element and on each count of the indictment, but direct evidence is not the only permissible proof. The State presented sufficient evidence on the remaining counts of uttering a forgery. The State introduced an abundance of circumstantial evidence relating to the transactions including positive handwriting and fingerprint identification, possession of other checks on the account, prior use of a forged name, and the testimony of several witnesses. In evaluating all of this evidence, the jury was entitled to draw reasonable inferences.

There was sufficient evidence to support Brock's conviction.

B. Weight of the Evidence

Brock also asserts that the verdict was against the overwhelming weight of the evidence, and thus the trial court erred when it refused to grant his alternative motion for a new trial. In *Jackson v. State*, 423 So. 2d 129, 131-32 (Miss. 1982), the supreme court provided a list of errors that must be brought to the attention of the trial court in a motion for new trial. The court included in this list a motion contending that the verdict of the jury is against the overwhelming weight of the evidence. *Id.* at 132. Consequently, we find that Brock's assignment of error is procedurally barred because it was not assigned as a ground for a new trial in the lower court.

6. Excessiveness of Sentence

Brock was found guilty on five counts of uttering a forgery and sentenced to forty-five years in prison. Brock asserts that this forty-five year sentence is both excessive and disproportionate. He contends that the sentence constitutes a denial of his rights under the United States Constitution.

As a general rule, the supreme court has held that a sentence will not be disturbed on appeal so long as it does not exceed the maximum term allowed by statute. *Hopson v. State*, 625 So. 2d 395, 404 (Miss. 1993); *Edwards v. State*, 615 So. 2d 590, 597 (Miss. 1993). However, a sentence which is "grossly disproportionate" to the crime committed is subject to attack on the grounds that it violates the Eighth Amendment prohibition of cruel and unusual punishment. *Wallace v. State*, 607 So. 2d 1184, 1188 (Miss. 1992).

In *Solem v. Helm*, 463 U.S. 277 (1983), the United States Supreme Court enunciated a three-prong test for evaluating proportionality. The *Solem* factors include: (1) the gravity of the offense and the harshness of the penalty; (2) a comparison of the sentence imposed with sentences imposed on other criminals in the same jurisdiction; and (3) a comparison of the sentences imposed for the commission of the same crime in other jurisdictions. *Id.* at 290-91.

As a habitual offender, Brock could have received a mandatory sentence of seventy-five years in prison. *See Miss. Code Ann. §§ 97-21-59, 99-19-81 (Rev. 1994)*. However, the trial court only sentenced Brock to fifteen years on count one; fifteen years on count three, to run consecutively with the sentence in count one; fifteen years on count four, to run consecutively with the sentence in count three; and fifteen years each on counts five and six, to run concurrently with the sentence in count three. Thus, Brock received a cumulative sentence of forty-five years which is significantly less than the maximum sentence allowed for his offenses.

In regard to the remaining two factors, Brock has not produced any evidence concerning sentences in this or other jurisdictions. Therefore, "in the complete absence of facts showing that [Brock's] sentence exceeds others imposed for the same crime in either the same or other jurisdictions, it is impossible for this Court to hold the second and third prongs of the *Solem* test favor reversal of [Brock's] sentence." *Wallace v. State*, 607 So. 2d 1184, 1189 (Miss. 1992).

We conclude that the trial court did not abuse its discretion because the sentence imposed by the trial court did not exceed the limits fixed by statute. Furthermore, the sentence was not "grossly disproportionate" as to warrant its reversal.

THE JUDGMENT OF THE BOLIVAR COUNTY CIRCUIT COURT OF CONVICTION AS A HABITUAL OFFENDER OF FIVE COUNTS OF UTTERING A FORGERY AND SENTENCE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO FIFTEEN YEARS ON COUNT ONE; FIFTEEN YEARS ON COUNT THREE, TO RUN CONSECUTIVELY WITH THE SENTENCE IN COUNT ONE; FIFTEEN YEARS ON COUNT FOUR, TO RUN CONSECUTIVELY WITH THE SENTENCES IN COUNTS ONE AND THREE; FIFTEEN YEARS ON COUNT FIVE, TO RUN CONCURRENTLY WITH THE SENTENCES IN COUNTS ONE, THREE, AND FOUR; AND FIFTEEN YEARS ON COUNT SIX, TO RUN CONCURRENTLY WITH THE SENTENCES IN COUNTS ONE, THREE, FOUR, AND FIVE IS AFFIRMED. THE SENTENCES SHALL RUN CONSECUTIVELY TO ANY PREVIOUSLY-IMPOSED SENTENCES. ALL COSTS OF THIS APPEAL ARE TAXED TO BOLIVAR COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, AND HINKEBEIN, JJ., CONCUR.

KING, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY HERRING AND PAYNE, JJ.

KING, J., CONCURRING:

I concur in the result reached in this case. However, I write separately to express my reason for that result.

While Virginia has adopted the position that being a resident of a high crime area is automatically a race neutral reason to strike a potential juror, I am not prepared to do so. Given existing housing patterns and common sense, there are generally, common racial characteristics shared by persons , who reside in so-called high crime areas. To accept without reservation, a strike which on its face, appears geared towards a racially identifiable group, has the potential for great mischief.

In the present case, the defendant made no effort to show this reason as being pretextual. Because of this failure ,I would affirm.

HERRING AND PAYNE, JJ., JOIN THIS SEPARATE OPINION.