

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-KA-00591 COA**

**ROCHESTER ATKINSON, JR.**

**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:	04/16/96
TRIAL JUDGE:	HON. L. BRELAND HILBURN JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GEORGE SCOTT LUTER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS
DISTRICT ATTORNEY:	EDWARD J. PETERS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	AGGRAVATED ASSAULT: SENTENCED TO SERVE A TERM OF 20 YRS IN THE CUSTODY OF THE MDOC 5 YRS SUSPENDED & 4 YRS SUPERVISED PROBATION & 15 YRS TO SERVE
DISPOSITION:	AFFIRMED - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

BEFORE THOMAS, P.J., KING, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

Rochester Atkinson, Jr. appeals his conviction of aggravated assault raising the following issues as error:

**I. THE TRIAL COURT IMPROPERLY ALLOWED THE STATE TO EXERCISE PEREMPTORY CHALLENGES WITHOUT OFFERING A RACE-NEUTRAL**

## **EXPLANATION FOR STRIKING SUCH POTENTIAL JURORS.**

### **II. THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE DEFENDANT'S MOTION FOR A J.N.O.V. OR NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

Finding no error, we affirm.

#### **FACTS**

On October 1, 1997, Rochester Atkinson, Jr. went to the G & G Shoppette in downtown Bolton, Mississippi. While there he came in contact with Robert Lawson. Conflicting testimony concerning why the two men were together exists, but suffice it to say words were exchanged between the two men and soon an altercation broke out. The two were eventually separated by others present at the G & G Shoppette. Atkinson then retreated to his car where he obtained a handgun. He then proceeded to walk up to the unarmed Lawson, whom he shot in the side. Lawson survived the resulting gunshot wound.

Trial on the matter was held in the Hinds County Circuit Court, Second Judicial District. Atkinson tried to show that he acted in self-defense, but after deliberations the jury returned a verdict of guilty of aggravated assault.

#### **ANALYSIS**

##### **I.**

### **THE TRIAL COURT IMPROPERLY ALLOWED THE STATE TO EXERCISE PEREMPTORY CHALLENGES WITHOUT OFFERING A RACE NEUTRAL EXPLANATION FOR STRIKING SUCH POTENTIAL JURORS.**

Rochester Atkinson, Jr. argues that the trial court erred when it failed to require the State to provide a race-neutral explanation for striking potential jurors as required by *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the United States Supreme Court established a three-step process for evaluating a claim that the State has exercised its peremptory challenges in a racially discriminatory manner. First, the defendant must establish a prima facie case of purposeful discrimination in the selection of the jury. Once the defendant establishes a prima facie case, the burden shifts to the State to articulate a race-neutral reason for challenging each of the venire persons in question. Finally, the trial judge must consider those explanations and determine whether the defendant has met his burden of establishing purposeful discrimination. *Batson*, 476 U.S. at 96-98.

A prima facie showing of discrimination under *Batson* requires the defendant to demonstrate that relevant circumstances in the case raise an inference that the prosecutor exercised peremptory challenges to remove venire persons based on their race. *Id.* at 96. To make a prima facie showing of purposeful discrimination in the selection of a jury, a defendant must establish the following:

1. That he is a member of a "cognizable racial group";

2. That the prosecutor has exercised peremptory challenges toward the elimination of venire men of his race; and
3. That facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities.

***Conerly v. State*, 544 So. 2d 1370, 1372 (Miss. 1989)** (citing *Batson*, 476 U.S. at 96-97; *Lockett v. State*, 517 So. 2d 1346, 1349 (Miss. 1987)).

Atkinson wants this Court to reverse on the ground the trial court failed to require the State to articulate race-neutral reasons for the use of peremptory challenges against three potential jurors, all of whom are of the black race. But before *Batson* requires such, it is up to the defendant to establish a prima facie case of purposeful discrimination in the selection of the jury. Then and only then does the burden shift to the State to articulate a race-neutral reason for challenging each of the venire persons in question.

To establish a prima facie case the defendant must establish three factors as outlined above. The first factor to consider is whether the defendant is a member of a "cognizable racial group." Here, Atkinson is a member of the black race. Next, it must be determined whether the prosecution used her peremptory challenges against members of the black race. The record shows that the State used five peremptory challenges, two on white prospective jurors and three on black prospective jurors. Finally, the facts and circumstances must raise an inference that the prosecutor used her peremptory challenges for the purpose of striking minorities. The records shows that the State had one additional peremptory challenge it did not use and the jury that was finally empaneled consisted of six whites and six blacks.

The record clearly shows that Atkinson failed to establish a prima facie case against the State. Although Atkinson meets the first two prongs to establish a prima facie case, he fails to meet the third prong. Atkinson attempts to meet the third prong by merely objecting to the fact that he is black and that the State exercised some of its challenges against black venire persons. Such an objection is insufficient to raise an inference that the "prosecution purposefully and intentionally struck potential jurors solely because they were black." ***Dennis v. State*, 555 So.2d 679, 681 (Miss. 1989)**.

When viewed as a whole, the exchange between the trial court, Atkinson's trial counsel, Mr. Stribling, and the prosecuting attorney, Ms. Anderson, demonstrates this fact plainly:

MR. STRIBLING: I move that the State be required to give a racially neutral explanation as to why they made the peremptory challenges, which they challenged three blacks, and my client is also a black man. There are three jurors: Charles Bell, Marilyn Binion, and Caroline Richards.

MS. ANDERSON: Judge, the State used five challenges, two on white prospective jurors, three on black prospective jurors, and and [sic] it is our position that he has not shown any pattern or any pattern of striking blacks from the jury panel.

THE COURT: Mr. Stribling, I don't believe that the peremptory challenges as exercised by the State really fall within the parameters of the Batson decision in that I don't believe they exhibit a pattern which could be interpreted as an attempt to exclude black race from participation on the

jury. And I am not aware of how many black jurors remain on the jury, but--

MS. ANDERSON: The makeup, Your Honor, at this point is six black jurors, six white jurors, and one white alternate.

THE COURT: Plus there was additional peremptory challenge available to the State which was not exercised.

"The law does not proscribe the mere incidental exclusion of blacks from a jury." *Govan v. State*, **591 So. 2d 428, 430 (Miss. 1991)**. When we view the record of this matter as a whole there is simply an absence of any facts or circumstances which would tend to show that the prosecution excluded jurors on account of their race; therefore, Atkinson's *Batson* claim must fail. *Id.* at **431**. This assignment of error is without merit.

## II.

### THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE DEFENDANT'S MOTION FOR A J.N.O.V. OR NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Atkinson's motion for a J.N.O.V. challenges the sufficiency of the evidence supporting a guilty verdict. *Butler v. State*, **544 So.2d 816, 819 (Miss. 1989)**. Atkinson argues that the evidence presented at trial was insufficient to support a guilty verdict and as such the verdict should be reversed. When the legal sufficiency of the evidence is challenged we will not retry the facts but must take the view of the evidence most favorable to the State and must assume that the fact-finder believed the State's witnesses and disbelieved any contradictory evidence. *McClain v. State*, **625 So. 2d 774, 778 (Miss. 1993)**; *Griffin v. State*, **607 So. 2d 1197, 1201 (Miss. 1992)**. On review, we accept as true all evidence favorable to the State, and the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin*, **607 So. 2d at 1201** (citations omitted). We will reverse such a ruling only where "reasonable and fairminded jurors could only find the accused not guilty." *McClain*, **625 So. 2d at 778 (citing Wetz, 503 So.2d 803, 808 (Miss. 1987) ; Harveston v. State, 493 So.2d 365, 370 (Miss. 1986); Fisher v. State, 481 So. 2d 203, 212 (Miss. 1985))**.

Atkinson bases his insufficiency of the evidence argument on the fact that according to his own testimony, he was being advanced upon by the alleged victim, Lawson, who was a much larger individual than Atkinson, was in fear of his life, and shot because of such fear. Furthermore, according to Atkinson, Lawson was stating, "you got to shoot me mother f\*\*\*\*\*, you got to shoot me, mother f\*\*\*\*\*." However, the State presented testimony of the victim, Lawson, and at least three other witnesses which contradicts the testimony of Atkinson. Granted, Atkinson provided his own witnesses which corroborate his story, but it is the province of the jury to look at the evidence and decide which witnesses to believe and which not to believe. It is for the jury to determine if Atkinson was truly in danger and whether the force employed was reasonably necessary to prevent such danger.

The trial court also denied Atkinson's motion for a new trial. A motion for a new trial tests the weight

of the evidence rather than its sufficiency. *Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989). The Mississippi Supreme Court has stated:

As to a motion for a new trial, the trial judge should set aside the jury's verdict only when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence; this Court will not reverse unless convinced the verdict is against the substantial weight of the evidence.

*Id.* (quoting *Russell v. State*, 506 So. 2d 974, 977 (Miss. 1987)).

The lower court has the discretionary authority to set aside the jury's verdict and order a new trial only where the court is "convinced that the verdict is so contrary to the weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice." *Roberts v. State*, 582 So. 2d 423, 424 (Miss. 1991) (citations omitted). Based on the record before us, suffice it to say that the evidence was sufficient to allow the case to go to the jury, and the jury's verdict was not against the overwhelming weight of the evidence. Both assignments of error are without merit.

**THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH FIVE YEARS SUSPENDED AND FOUR YEARS SUPERVISED PROBATION AND FIFTEEN YEARS TO SERVE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO HINDS COUNTY.**

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**