

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00754 COA**

DENISE TRIPLETT

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:	07/13/95
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	NESHOBA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES M. MARS II
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	KEN TURNER, MARK S. DUNCAN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	SALE OF COCAINE (2 COUNTS 2ND OFFENDER): CT I SENTENCED TO SERVE A TERM OF 25 YRS IN THE MDOC; CT II SENTENCED TO SERVE A TERM OF 5 YRS IN THE MDOC WITH THIS SENTENCE TO RUN CONSECUTIVE TO THE SENTENCE PRONOUNCED IN CT I
DISPOSITION:	AFFIRMED - 2/24/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/7/98

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

HINKEBEIN, J., FOR THE COURT:

Denise Triplett was convicted in the Neshoba County Circuit Court on two counts of selling cocaine. For her offenses, Triplett was sentenced to a total of thirty years in the custody of the Mississippi Department of Corrections, with twenty-five for count one and the additional five to be served

consecutively for count two. Aggrieved by her conviction, Triplett appeals to this court on the following grounds:

I. WHETHER THE STATE PROVED THE CHAIN OF CUSTODY OF THE COCAINE RECEIVED AS EVIDENCE.

II. WHETHER THE COURT ERRED IN OVERRULING DEFENDANT DENISE TRIPLETT'S MOTION TO QUASH THE JURY PANEL WHICH CONTAINED NO BLACKS, THE DEFENDANT BEING A BLACK FEMALE AND THERE BEING A SYSTEMATIC EXCLUSION OF BLACKS FROM THE JURY PANEL.

III. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Holding these assignments of error to be without merit, we affirm the judgment of the circuit court.

FACTS

On two separate occasions during January 1993, Stanley Wash, an undercover agent working for the Mississippi Bureau of Narcotics, traveled to an apartment complex in Philadelphia, Mississippi. On his first visit, Wash was introduced to a woman from whom he was able to purchase crack cocaine almost immediately. During his second visit, Wash again encountered the woman known to him only as "Necy" and once again bought illicit drugs from her. Based on Wash's subsequent identification of Triplett, she was indicted, tried and convicted for effecting both sales. **ANALYSIS**

I. WHETHER THE STATE PROVED THE CHAIN OF CUSTODY OF THE COCAINE RECEIVED AS EVIDENCE.

Triplett begins by suggesting that the State failed to prove a continuous chain of custody with regard to the cocaine. She starts from the premise that "the state of Mississippi must prove beyond a reasonable doubt, that there has been no substitution or tampering with the alleged crack cocaine." From there, Triplett claims that without both identifying each of the substance's various handlers as well as explaining "what was done with the evidence" during extended periods of storage, the prosecution necessarily failed to carry this burden. As such, she assigns error to the trial court's admission of both cocaine samples into evidence. In response, the State argues that, absent a suggestion of tampering or substitution from Triplett, the applicable standard of proof has been met. We agree with the State.

Contrary to Triplett's alleged "proof beyond a reasonable doubt" requirement, our law has never required a proponent of evidence to produce every handler of the evidence. *Ormond v. State*, 599 So. 2d 951, 959 (Miss. 1992) (citing *Butler v. State*, 592 So. 2d 983, 985 (Miss. 1991)). The prosecution must only "satisfy the trial court that there is *no reasonable inference* of material tampering with or (deliberate or accidental) substitution of the evidence." *Ormond*, 599 So. 2d at 959 (emphasis added). *See also Grady v. State*, 274 So. 2d 141, 143 (Miss. 1973) (describing the test as "whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence"). And in such matters, the presumption of regularity supports the official acts of public officers. *Lambert v. State*, 462 So. 2d 308, 313 (Miss. 1984). *See*

also Morris v. State, 436 So. 2d 1381, 1382 (Miss. 1983). Therefore, notwithstanding a "break" in the chain of custody, the introduction of demonstrative evidence without preliminary proof of its condition from the time of seizure until the time of examination by an expert witness is a matter for determination within the sound discretion of the trial court. *Lambert*, 462 So. 2d at 312 (citing *Wright v. State*, 236 So. 2d 408, 409 (Miss. 1970)); *Nalls v. State*, 651 So. 2d 1074 (Miss. 1995); *Wells v. State*, 604 So. 2d 271 (Miss. 1992). This Court will not reverse the trial court's ruling except where this discretion has been "so abused as to be prejudicial to the defendant." *Lambert*, 462 So. 2d at 312.

Because Triplett failed both at the trial level and again on appeal to offer any allegations of tampering or substitution, let alone direct our attention toward any evidence upon which reasonable inferences of such might be based, we must side with the State. Although the chain of custody may not have been thoroughly demonstrated, in the absence of any such contention, we are unable to conclude that the trial court abused its discretion in admitting the evidence. This assignment of error is therefore without merit.

II. WHETHER THE COURT ERRED IN OVERRULING DEFENDANT DENISE TRIPLETT'S MOTION TO QUASH THE JURY PANEL WHICH CONTAINED NO BLACKS, THE DEFENDANT BEING A BLACK FEMALE AND THERE BEING A SYSTEMATIC EXCLUSION OF BLACKS FROM THE JURY PANEL.

Next, Triplett alleges under representation of blacks on Neshoba County jury venires in violation the Sixth Amendment as made applicable to the states by the Fourteenth. According to Triplett, her constitutional right to an impartial fact-finder was violated because, although blacks comprise 18.59% of the county's population, none appeared either on the venire or the resulting jury. The State, however, claims that Triplett, through her ineffective assertion of this right at trial, failed to create a record upon which such a determination might now be made. Although we feel compelled to address Triplett's contention on the merits, we agree with the State's conclusion.

At trial, Triplett held her venire-related objection until after the jury had been selected. Due to this awkward timing and a poor presentation on Triplett's part, the record is muddled. While it reveals the ultimate selection of an all white jury, the makeup of the venire from which these individuals were chosen is not entirely clear. The responsibility for this confusion lies with Triplett because, as the legal principles relied upon by the State indicate, such appellants bear the burden of making sure that the record contains sufficient evidence to support their assignments of error on appeal. *Hansen v. State*, 592 So. 2d 114, 127 (Miss. 1991). This Court "must decide each case by the facts shown in the record, not assertions in the brief . . ." *Id.* See also *Jackson v. State*, 684 So. 2d 1213, 1224 (Miss. 1996) (rejecting the appellant's allegation of a *Batson* violation because the record failed to reflect the racial composition of the jury as seated). However, we would expect a conscientious trial judge to have taken notice if indeed Triplett's claim that "there [were] no black females presented to her on [sic] this entire selection process nor black males" had been wholly inconsistent with the facts. Because we opt to err on the side of caution, we proceed with Triplett's allegations.

Despite the timing of her objection at trial, Triplett appears to present a *Swain v. Alabama*, 380 U.S. 202 (1965), systematic exclusion rather than a *Batson v. Kentucky*, 476 U.S. 79 (1986), issue. See, e.g., *Harris v. State*, 576 So. 2d 1262, 1264 (Miss. 1991) (noting the autonomous nature of the two

while finding no support for a finding of systematic exclusion); *see also Hatten v. State*, 628 So. 2d 294, 307 (Miss. 1993) (Banks, J., dissenting) (commenting on the "four distinct grounds" where race-based jury selection has been held unconstitutional by the United States Supreme Court). The applicable line of cases, in addition to *Swain*, includes opinions such as *Duren v. Missouri*, 439 U.S. 357 (1979) and *Taylor v. Louisiana*, 419 U.S. 522 (1975) wherein the United States Supreme Court has required the presence of a fair cross section of the community on the venires from which petit juries are drawn. However, "the Sixth Amendment [guarantee of an impartial jury in criminal convictions] has never been held to require that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Britt v. State*, 520 So. 2d 1377, 1379 (Miss. 1988) (citing *Taylor*, 419 So. 2d at 538). Therefore, as a practical matter, officials need only ensure that jurors are in fact and in good faith selected without regard to race. *Harper v. State*, 251 Miss. 699, 710, 171 So. 2d 129, 134 (1965). *See also Carr v. State*, 655 So. 2d 824 (Miss. 1995); *Simon v. State*, 688 So. 2d 791, 806 (1997) (both holding that the county to which venue is transferred does not have to have a racial composition similar to that of the transferring county).

Because the oft-employed random drawing from voter registration lists is generally considered an acceptable method of selection, the party claiming systematic discrimination in jury selection practices bears the burden of proof. *See Harris*, 576 So. 2d at 1264; *Page v. State*, 369 So. 2d 757 (Miss. 1979). Therefore, in *Lanier v. State*, 533 So. 2d 473 (Miss. 1988), our supreme court outlined the elements necessary to establish a prima facie violation of the fair cross-section requirement for an impartial jury:

- 1) the group alleged to be excluded is a "distinctive" group in the community;
- 2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
- 3) this under representation is due to systematic exclusion of the group in the jury selection process.

Lanier, 533 So. 2d at 477 (quoting *Duren*, 439 U.S. at 364). Traditionally, the evidence necessary for fulfillment of the final requirement has, at a minimum, included census figures demonstrating the jurisdiction's racial composition as well as numbers reflecting the historical configuration of local jury pools. *See, e.g., Harper*, 251 Miss. at 706, 171 So. 2d at 132. But where neither the record nor the briefs reveal any such showing, the burden of rebuttal never shifts to the State. *Id.* *See also Harris*, 576 So. 2d at 1264. The case sub judice presents a prime example of this.

Following her delayed motion to quash the panel, the trial court offered Triplett the opportunity to present testimony on these points. She first responded with a plea for additional preparation time: "I didn't know it was coming to this point. I can put on testimony, if the Court will give me a little time." She then announced very simply that "[blacks] are systematically excluded in that there are none available to her. There are almost always none available in this County to black defendants. I don't know why that is. That's the way it is though." While observing the expediency with which Triplett might have learned the venire's make-up and the many hours foregone as a result of her improvidence, the judge responded to Triplett's request in the negative.

Under the circumstances, we cannot characterize the decision as an abuse of discretion. Even the most elementary analysis of Triplett's evidence, when measured against the above tests leads us to the conclusion, and we so hold, that the evidence offered by Triplett was totally insufficient to support her claim. *See Lanier, 533 So. 2d at 477.* There simply was no proof that Neshoba County's method of drawing veniremen was discriminatory. Moreover, the remarks made by Triplett's counsel strongly suggest that in the event Triplett's request for more time had been granted, she would not have produced the type of proof historically required. Consequently, the only relevant objection and contention of error is the proportionality of blacks to whites on this jury. As should be clear from the case law described, such claims are, without more, unfounded. Whatever the composition of the venire, this assignment of error is without merit.

III. WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In her final assignment of error, Triplett claims that a "substantial degree of uncertainty" lies with Agent Wash's identification of her since he initially arrested another for these crimes. Consequently, according to Triplett, reasonable and fair minded jurors could have only found that Wash had mistakenly named her as the source of the cocaine. In response, the State contends that there is in the record substantial evidence upon which the guilty verdict might rest, especially since Agent Wash denied the occurrence of such an incident. Although the label used by Triplett announces only allegations of prejudice or bias, her argument actually vacillates between those and claims of insufficient evidence. While we pause to demonstrate the distinctive character of these assertions, the outcome remains the same. We agree with the State on either basis.

The motion for judgment of acquittal notwithstanding the verdict tests the legal sufficiency of the evidence supporting the verdict of guilty. *McClain v. State, 625 So. 2d 774, 778 (Miss. 1993).* Where the defendant has moved for JNOV, the trial court must consider all of the credible evidence consistent with the defendant's guilt. *McClain, 625 So. 2d at 778.* The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from this evidence. *Id.* This Court is authorized to 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. *Wetz v. State, 503 So. 2d 803, 808 n.3 (Miss. 1987).*

Only a slightly greater quantum of evidence favoring the State is necessary to withstand a motion for new trial. As distinguished from the motion for JNOV, the defendant here is asking that the jury's verdict be vacated on grounds related to the weight of the evidence, not its sufficiency. *May v. State, 460 So. 2d 778, 781 (Miss. 1985).* The Mississippi Supreme Court has repeatedly held that the jury bears sole responsibility for determining the weight and credibility of evidence. *May, 460 So. 2d at 781.* Therefore, we are without the power to set aside a guilty verdict unless we are convinced it is the result of prejudice, bias, fraud, or is manifestly against the weight of the credible evidence. *Pearson v. State, 428 So. 2d 1361, 1364 (Miss. 1983).* We will reverse and order a new trial only upon a determination that the trial court abused its discretion, accepting as true all evidence favorable to the State. *McClain, 625 So. 2d at 781.*

From the record it appears that Wash repeatedly identified Triplett as "Necy," the source of the cocaine, during the course of these proceedings. His testimony suggests that he did so initially at the

time of arrest and a second time from a photographic line-up approximately one month later. And despite a vigorous cross-examination by defense counsel, Wash continued to adhere to his unequivocal in-trial identification of her. Triplett's attempt to inject uncertainty into his recollection justifiably accomplished little. Her testimony that another had initially been identified by Wash lost much of its weight when she admitted to having no personal knowledge of such. Moreover, Wash's unequivocal denial that he accused anyone else thereafter contradicted the rumors upon which her assertions were based. Because the totality of this evidence overwhelmingly suggests guilt beyond a reasonable doubt, this assignment of error is also without merit.

THE JUDGMENT OF THE NESHOPA COUNTY CIRCUIT COURT OF CONVICTION ON TWO COUNTS OF THE SALE OF COCAINE (REPEAT OFFENDER) AND SENTENCE OF TWENTY-FIVE (25) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ON COUNT ONE WITH FIVE (5) YEARS TO RUN CONSECUTIVELY ON COUNT TWO IS AFFIRMED. COSTS ARE ASSESSED AGAINST NESHOPA COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., CONCURS IN RESULTS ONLY.