

**IN THE COURT OF APPEALS 2/25/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00977 COA**

**MARK KING**

**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. JOHN LESLIE HATCHER

COURT FROM WHICH APPEALED: TUNICA COUNTY CIRCUIT COURT

FOR APPELLANT:

ALLAN D. SCHACKELFORD

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: LAURENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL--FELONY

TRIAL COURT DISPOSITION: COUNT I--UTTERING A FORGERY; COUNT II--UTTERING  
A FORGERY; COUNT III--UTTERING A FORGERY; SENTENCED TO TEN YEARS ON  
EACH COUNT

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

THOMAS, P.J., FOR THE COURT:

King was convicted on three counts of uttering a forgery. He appeals, assigning four issues as error:

**I. WHETHER THE STATE'S BATSON OBJECTION WAS TIMELY;**

**II. WHETHER THE STATE PROVED A PRIMA FACIE CASE OF RACIAL MOTIVATION;**

**III. WHETHER THE TRIAL COURT ERRED IN SEATING A JUROR HE HAD PEREMPTORILY STRICKEN; and**

**IV. WHETHER THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

Finding no error, we affirm.

#### FACTS

On April 23, 1992, Pearlie Mosely, who held a joint checking account with her husband at First Tennessee Bank, stopped at a service station on Highway 61. After returning to her vehicle and continuing down the highway for approximately thirty minutes, she noticed that her purse, her checkbook and \$250 had been stolen from her car. She immediately placed a stop payment order on her checking account.

Three of Mosely's checks were subsequently presented to Fred's Discount Store in Tunica in exchange for merchandise and cash. After two checks were presented to employee Lashonda Hayes, the store manager, Brian Taylor, noticed that the checks looked "funny" and instructed the checkers not to accept any more checks on that account. The next day, King returned to Fred's and requested a cash refund on the merchandise he had purchased with the two checks. Taylor asked King for identification, but King told him that he did not have any identification with him. As soon as Taylor had given King a refund, one of the checkers informed him that King was the individual who had passed the two suspicious checks. Wanda St. Aubin, who was working at the customer service desk with Taylor, then informed Taylor that checker April Montgomery had accepted another check on the same account that morning. Taylor retrieved the third check, and as he approached King to question him about the check, King ran out of the store, down the street, and across Highway 61.

Taylor testified that he returned to the store and called the police. The next day, an officer brought a faxed copy of a photograph of King to the store, and Taylor and Montgomery positively identified King as the individual who had presented the checks. First Tennessee Bank refused to honor the

checks.

Prior to trial, Taylor, St. Aubin, Hayes and Montgomery identified King from a photographic array. All four witnesses also positively identified King at trial.

King was convicted of all three counts of uttering a forgery.

## ANALYSIS

### **I. WAS THE STATE'S *BATSON* OBJECTION TIMELY?**

King asserts that the State failed to make a timely *Batson* objection. During jury selection, the State tendered a complete panel to the defendant, and the defendant then made his peremptory challenges. As is the usual procedure, the State then made some peremptory challenges and again tendered a complete panel to the defendant. This proceeded until the entire jury had been selected. It was at this point that the State objected to King's exercise of four of his peremptory challenges in striking "all of the white jurors tendered to him."

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), a state is prohibited from peremptorily challenging a juror on the basis of race. The Supreme Court extended this holding to apply to criminal defendants as well as the states in *Georgia v. McCollum*, 505 U.S. (1992). See *Griffin v. State*, 610 So.2d 354, 356 (Miss. 1992).

King asserts that the State objected too late to the empaneling of the jury. However, the State objected prior to the court's empaneling the jury. A *Batson/McCollum* objection is timely when made prior to empaneling the jury. *Pickney v. State*, 538 So. 2d 329, 346 (Miss. 1988). There is no merit to this issue.

### **II. DID THE STATE PROVE A PRIMA FACIE CASE OF RACIAL MOTIVATION?**

King asserts that the State failed to show a prima facie case of racial motivation since only three of his six challenges were used to strike white jurors. King argues that since he used two challenges to strike black jurors after he struck the white jurors, he effectively "negate[d] any pattern which might have previously arisen."

The Supreme Court established a three-step process for determining whether a party has exercised its peremptory challenges in a racially discriminatory manner against potential jurors. *Batson*, 476 U.S. at 96-98. The party objecting to the peremptory challenge must first make a prima facie showing that race was the criterion for the exercise of the peremptory challenge. *Id.* at 96-97. If such a showing is made, the party desiring to exercise the peremptory challenge has the burden of offering a race-neutral explanation for striking the potential juror. *Id.* at 97-98.

The trial court must then determine whether there has been purposeful discrimination in the exercise of the peremptory challenge. *Id.* at 98. See *McCollum*, 505 U.S. at 58-59; *Stewart v. State*, 662 So. 2d 552, 558 (1995); *Griffin v. State*, 610 So.2d 354, 356 (Miss.1992).

In order to show a prima facie case of racial discrimination in exercising peremptory challenges a

party must show that:

[H]e is a member of a cognizable racial group, [citation omitted] and that has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

*Harper v. State*, 635 So.2d 864, 867 (Miss. 1994) (citations omitted).

Since King used four of his six peremptory challenges to strike white jurors, and apparently struck every white juror on the venire, the State met its initial burden of showing a prima facie case of discrimination. The trial court did not err in requiring King to specify his race neutral reasons for his peremptory challenges.

### **III. DID THE TRIAL COURT ERR IN SEATING A JUROR**

#### **THAT THE DEFENDANT HAD PEREMPTORILY STRICKEN?**

King also argues that he provided a sufficient race neutral reason for his peremptory challenges and that the trial court erred in seating one of the jurors he had originally struck. The trial court determined that only one of King's four challenges was racially discriminatory and seated the juror. After being required to specify race neutral reasons, King stated that he struck one white juror because she was a teacher. After the State noted that King had previously accepted a black juror who was a teacher, the trial court reinstated the juror.

One indicium of a pretextual reason for striking a juror is disparate treatment of jurors such as the presence of unchallenged jurors of the opposite race who share the characteristic given as the reason for the challenge. *Mack v. State*, 650 So. 2d 1289, 1298 (Miss. 1994).

Determining whether there is a racially discriminatory motive underlying the articulated reasons for the strike is left to the sound discretion of the trial judge. *Harper v. State*, 635 So. 2d 864, 867 (Miss. 1994). The trial court's findings are given due deference and will not be overturned on appeal unless there is error that is against the overwhelming weight of the evidence. *Id.* at 868. The trial court acted properly within its discretion in finding that King's challenge was racially motivated and reinstating the juror. There is no merit to this issue.

### **IV. WAS THE VERDICT OF THE JURY AGAINST**

#### **THE OVERWHELMING WEIGHT OF THE EVIDENCE?**

King asserts that the verdict of the jury was against the overwhelming weight of the evidence. King was convicted of three counts of uttering a forgery. The Mississippi Code provides that

Every person who shall be convicted of having uttered or published as true, and with intent to defraud, any forged, altered, or counterfeit instrument . . . knowing such instrument . . . to be forged, altered, or counterfeited, shall suffer the punishment herein provided for forgery.

Miss. Code Ann. § 97-21-59 (1972).

To test the sufficiency of the evidence of a crime, this Court must

[w]ith respect to each element of the offense, consider all of the evidence - not just the evidence which supports the case for the prosecution - in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may 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 (Miss. 1987) (citations omitted).

The jury had more than sufficient evidence to convict King. There is no merit to this issue.

**THE JUDGMENT OF THE CIRCUIT COURT OF TUNICA COUNTY OF CONVICTION OF THREE COUNTS OF UTTERING A FORGERY AND SENTENCE TO TEN YEARS CONSECUTIVELY ON EACH COUNT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY RESTITUTION ON EACH COUNT IS AFFIRMED. SENTENCES IMPOSED SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS ARE ASSESSED TO TUNICA COUNTY.**

**BRIDGES C.J., McMILLIN, P.J., BARBER, COLEMAN, DIAZ, PAYNE, AND SOUTHWICK, JJ., CONCUR.**

**KING, J., CONCURS WITH RESULT ONLY.**

**HERRING, J., NOT PARTICIPATING.**