IN THE COURT OF APPEALS OF MISSISSIPPI

CASE NO. 2005-KA-01886-COA

CHARLES ISAAC FISHER, JR. APPELLANT

VERSUS

STATE OF MISSISSIPPI APPELLEE

APPEAL FROM

THE CIRCUIT COURT OF LOWNDES COUNTY

STATE OF MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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IN THE COURT OF APPEALS OF MISSISSIPPI

CHARLES ISAAC FISHER, JR.	**APPELLANT**
VERSUS	**CASE NO. 2005-KA-1886-COA**
STATE OF MISSISSIPPI	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

Charles Isaac Fisher, Jr., Appellant

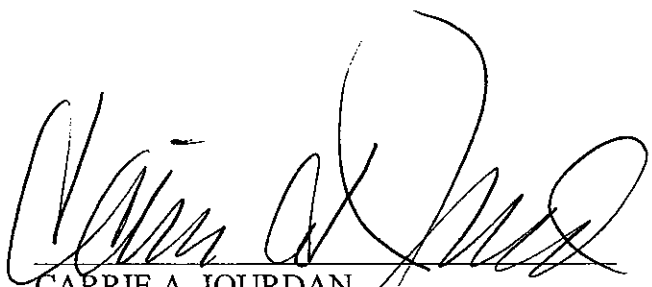
Carrie A. Jourdan, Attorney for Appellant (Public Defender, Trial Counsel)

Forrest Allgood, District Attorney

James M. Hood III, Attorney General

Honorable Lee J. Howard, IV, Trial Judge

Rhonda Hayes-Ellis, Assistant District Attorney



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STATEMENT OF THE ISSUE

I. WHETHER THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL BY UPHOLDING CERTAIN PEREMPTORY STRIKES OF POTENTIAL JURORS BY THE STATE WHEN SAID STRIKES HAD BEEN USED IN A RACIALLY DISCRIMINATORY MANNER?

STATEMENT OF THE CASE

This is a criminal appeal from the Lowndes County Circuit Court where Charles Isaac Fisher, Jr. was convicted aggravated assault(R.E. 6). He was sentenced to eighteen (18) years to serve in the Mississippi Department of Corrections on aggravated assault(R.E. 6). The trial court denied Charles Isaac Fisher, Jr.'s Motion for a New Trial and/or JNOV (R.E. 10). Aggrieved, he files this appeal.

On Thursday, August 19, 2004, Monessa Bardley was struck by the Buick automobile driven by Charles Isaac Fisher, Jr. near her apartment in Lowndes County, Mississippi. Ms. Bardley was hospitalized for over one month for treatment for injuries (T. 158). She suffered from painful, serious bodily injuries including the open fracture of her left foot, a fracture dislocation to her left ankle, a sacral contusion, and a pelvic fracture (T. 124).

Charles Isaac Fisher testified to the long, tempestuous relationship between himself and Ms. Bardley. They had co-habitated for about four years before the events in question. They are the parents to three children (T. 217). Mr. Fisher told the jury that, after an argument in May 2004, Ms. Bardley had taken her automobile, crossed the center line, and struck Mr. Fisher's vehicle head on (T. 218-9). Mr. Fisher then recalled a series of further altercations between himself and Ms. Bardley from the time of the head on collision until the events of the day in question where Ms. Bardley was struck (T. 221-2). These altercations happened, according to Mr. Fisher, because of the living conditions and environment in which his children with Ms. Bardley were living and Ms. Bardley's jealousy of Mr. Fisher's relationship and children with another woman (T. 222).

On August 19, 2004, as the arguments continued, Ms. Bardley pulled a knife on Mr. Fisher at Ms. Bardley's apartment (T. 224) Mr. Fisher obtained control of the knife and left (T.224-225). After an exchange of telephone calls during the day about the evening's activities (T.225-6), Mr.

Fisher went to Ms. Bardley's apartment (T.227). Once there, Mr. Fisher discovered Ms. Bardley drinking alcohol on a neighbor's porch (T.227). Ms. Bardley, upon seeing Mr. Fisher approach, pulled a gun out of her purse (T.227). Attempts to dissuade Ms. Bardley from further displaying and threatening with the gun were unsuccessful (T.227-8). Ms. Bardley then ran to the back of the apartment complex (T.228). Mr. Fisher was afraid that Ms. Bardley and the children would be evicted from the apartment (T.228).

Mr. Fisher then drove the back of the complex in further attempts to diffuse the situation (T. 229). Ms. Bardley fired the gun, Mr. Fisher ducked down so that he could not see where he was going because he had to avoid the gunfire (T. 229). This was when Ms. Bardley was struck by an automobile (T.229). After stopping, Mr. Fisher saw Ms. Bardley lying on the ground trying to reach the gun (T. 230). Mr. Fisher kicked Ms. Bardley's arm to stop her (T. 230). After realizing how hurt she was, Mr. Fisher began to hug Ms. Bardley until the police arrived (T. 230).

Ms. Bardley has a substantially different account of the events before and on the day in question. Ms. Bardley noted that the relationship had grown discordant in the summer of 2004 (T.145). The head on collision that summer was described as, "We had had an argument. And I got behind his car, and I drove to Holman's Transmission, and I followed him over on sand Road. When I followed him, I stopped in the middle of the street to wait until he came-he went to the end fo the road, and I waited until he turned around. And when he came and turned around, we had a head-on collision." (T. 145). Other altercations during the summer of 2004 were described (T. 147-149).

The events of August 19, 2004, were then recounted (T. 149). Ms. Bardley admitted to arming herself with a gun in her purse because of her perception of the events the day before (T.150). Mr. Fisher called to her, but Ms. Bardley was afraid to approach (T.150-2). She then exhibited the weapon and told Mr. Fisher not to come any closer. (T. 152). Mr. Fisher retreated, apparently dialing

911 emergency services (T. 152). Ms. Bardley then walked behind her apartment building to await the police. (T.152-3). A friend, Tameka Leech, began screaming at Ms. Bardley (T. 153). The back area of the apartments was not designed for automobiles (T. 153). Ms. Bardley turned, and Mr. Fisher was there in his Buick automobile (T. 153). Ms. Bardley was displaying the gun and pulled the trigger in the general direction of Mr. Fisher (T. 153). Ms. Bardley testified she was hit, then fired the gun, and the gun flew out of her hand (T. 153-4).

Tameka Leech, Ms. Bardley's best friend, was also present at the scene on August 19, 2004 (T. 180-1). She testified that Mr. Fisher went onto the sidewalk and behind the building to follow Ms. Bardley (T. 182-3). Mr. Fisher accelerated and hit Ms. Bardley with his car (T. 183). The gun Ms. Bardley was brandishing then discharged either at the moment or just after impact (T. 184)

Trial was held on August 16 and August 17, 2005, in the Lowndes County Circuit Court. After trial by jury, Charles Isaac Fisher, Jr. was convicted of aggravated assault (R.E. 6).

On August 17, 2005, Charles Isaac Fisher, Jr. was sentenced to eighteen (18) years in the Mississippi Department of Corrections on the charge of aggravated assault (R.E 6).

On September 2, 2005, the Court entered its Order denying Charles Isaac Fisher's motion for a new trial or a judgment notwithstanding the verdict (R.E.10). From this Order, Charles Isaac Fisher appeals.

SUMMARY OF THE ARGUMENT

I. Charles Isaac Fisher, Jr's first assignment of error is that the trial court erred in upholding certain peremptory strikes of the State. These strikes were used to remove all black members from the venire. The State offered race neutral reasons of age and relationships to the parties to support the strikes. The Defendant refuted the claims of race neutrality and demonstrated the pretextual nature of at least some of the State's peremptory strikes by showing that the State did not strike other potential jurors of the same age as well as the State's failure to *voir dire* on characteristics it at least secondarily relied upon in its strikes. The trial court did not disallow the State from using these pretextual strikes. Therefore, unconstitutional racial discrimination occurred in the jury selection process. As such, the trial against the Defendant was unfair. The conviction should be set aide and a new trial ordered.

ARGUMENT

I. Factual Background

On Thursday, August 19, 2004, Monessa Bardley was struck by the Buick automobile driven by Charles Isaac Fisher, Jr. near her apartment in Lowndes County, Mississippi. Ms. Bardley was hospitalized for over one month for treatment for injuries (T. 158). She suffered from painful, serious bodily injuries including the open fracture of her left foot, a fracture dislocation to her left ankle, a sacral contusion, and a pelvic fracture (T. 124).

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II. Argument

I. WHETHER THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL BY UPHOLDING CERTAIN PEREMPTORY STRIKES OF POTENTIAL JURORS BY THE STATE WHEN SAID STRIKES HAD BEEN USED IN A RACIALLY DISCRIMINATORY MANNER?

In 1986, the United States Supreme Court issued its landmark opinion in ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712 ,90 L.Ed. 2d. 69 (1986). ***Batson*** established that, against black defendants, prosecutors could not exclude, by the use of peremptory strikes, potential black jurors because of a belief of potential undue sympathy to a member of the same race from a trial jury. ***Batson,*** 476 U.S. 79, at 97-8. The Court reasoned that this was the State acting in a racially discriminatory manner, and the Equal Protection Clause forbids States from acting in such manner ***Batson***, Ibid. Prosecutors are, therefore, not going to freely admit that they have exercised their peremptory challenges in such a racially discriminatory manner.

The Mississippi Supreme Court requires that a party who objects to the peremptory strike "must first make a prima facie showing that race was the criteria for the exercise of the peremptory strike", citing ***Batson*** at 96-97, in ***McFarland v. State,*** 707 So.2d 166, 171 (Miss. 1997). In ***Snow v. State***, 800 So. 2d 472, 478 (Miss. 2001), the Mississippi Supreme Court established that a criminal defendant can establish a prima facie case of discrimination by showing: (1) that he is a member of a cognizable racial group; (2) that the prosecutor has exercised preemptory challenges to remove from the venire members of the defendant's race; (3) and the facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities.

Charles Isaac Fisher was identified as a member of the black race by the trial Judge (T. 95, 107), satisfying the first element. The State, with its second, third, fourth, and fifth peremptory strikes struck black veniremen (T. 107-108), satisfying the second requirement. The trial court appeared satisfied as to the third requirement, stating to counsel for the state (T.92), "... you must state race neutral reasons for the exercise of your peremptory challenges."

The state then offered the following race neutral reasons. As to its second strike, the veniremen was the same age as the defendant as the primary reason with secondary discussion of some prior relationship among the parties (T.92-93). The trial court accepted age as the primary reason offered by the State and found the reason to be race neutral (T. 93). As to the third strike, the State offered that the juror and the Defendant were the same age as well as some prior dealings with the Defendant. The trial court accepted age and prior altercations or dealings with this individual as race neutral reasons. For the fourth strike, the State offered that the veniremen had worked with the Defendant's mother (T. 96). This was deemed a race neutral reason by the trial court (T. 96). As the state's fifth strike, the State offered that the veniremen had a close friend or family member prosecuted by the District Attorney's office (T.96). This was deemed a race neutral reason by the trial court (T. 96).

McFarland v. State, 707 So.2d 166, 171 (Miss. 1997), requires that after the race-neutral explanation has been given, "the trial court must determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory" i.e., that the reason given was a pretext for discrimination. The Mississippi Supreme Court has recognized five indicia of pretext that are relevant when analyzing the race-neutral reasons offered by the proponent of a peremptory strike, specifically: (1) disparate treatment, that is presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the

challenge; (2) the failure to voir dire as to the characteristic cited, ... (3) the characteristic cited is unrelated to the facts of the case (4) lack of record support for the stated reason and (5) group-based traits. ***Manning v. State***, 765 So.2d 516, 519 (Miss. 2000)(internal citations omitted by appellant).

While defense counsel's arguments concerning refuting race neutrality and pretextual challenge became intermingled, after the trial court found valid race neutral reasons, defense counsel objected to them as pretexts for racial discrimination. The strongest evidence of the pretextual nature comes from the initial presentation of the State's strikes. The trial court requested the peremptory strikes from the state (T. 91-2):

Court: You want to submit 12.

DA (Ms. Hayes-Ellis): I got ahead of myself, Your Honor. S-1 is eight, and we submit through 16.

Court: What says the defendant?

DC (Defense Counsel Ms. Jourdan): Your Honor, D-1 is three. D-2 is six. D-4 is ten.

DA: Wait a minute.

DC: I'm sorry. That was three. I apologize.

Court: D-3.

DC: Number 11 is D-4.

Court: D-4 is 11.

DC: I apologize. What did she submit through?

Court: Sixteen. Any more through 16?

DC: No more through 16.

Court: Submit her four more beginning with –

DA: S-2 is 17. S-3 is 19. S-4 is 20. S-5 is 24.

Court; S-5 is 25. That carries us through 26.

DC: Your Honor, at this time I would like to raise a Batson objection. In support thereof, I would show that the State has submitted through 26 jurors. And all except one strike has been for members of the – of a none (sic) class which are black as well as women, and that she has struck them from the panel. I'd like to point out, Your Honor, in doing so that leaves the panel devoid of any minorities.

In review, the assistant district attorney first submitted twelve jurors for consideration, having stricken one. The Defense then struck four veniremen. The State then used its next four strikes consecutively to strike black veniremen. The State, by this action, struck all blacks from the venire. The State did not use its last available strike on any of the remaining white jury members until after the Defense exercised another strike, seemingly satisfied with its purge. The Defense counsel, as quoted above, immediately challenged the strikes as racially motivated.

The trial court, when considering the Defendant's challenges, seemed to impose two distinct *animus* requirements upon the Defendant. The trial court stated to the assistant district attorney, "Counsel, she (defense counsel) has accused you of race selection in exercising your challenges." (T. 92). In fact, the trial court was so concerned about what it had said, that after denying the Defendant's ***Batson*** challenges, it stated, "... And when we began that and the first Batson challenge was raised or the defense raised the Batson challenge, I made probably an improper statement. I said that the defense counsel had accused the assistant district attorney of racism. That's not correct. Had accused the assistant district attorney of exercising peremptory challenges to exclude members of the defendant's race." (T. 110). Later during the Batson colloquy the trial court stated, "... Now, also for the record, let's be clear about this. There are no racial issues that I'm aware of involved in this

case." (T. 95). The assistant district attorney then added, "The victim is black, and the defendant is black." (T. 95) During further argument the trial court again stated, ".. The defendant is a member of the black race, that the victim is also black, that there are no racial issues of any moment in this case nor are there are any allegations of racial motivation of anything of that nature."

First, it appears that the Defendant was being required to prove that the district attorney acted with animus to his racial group. Second, and more improbably, both the district attorney and the trial court seemed to be concerned that it was important in evaluating ***Batson*** challenges the race of the parties and whether race was a motive or at issue in the underlying criminal trial. In other words, unless race was an issue in some way in the trial, ***Batson*** challenges are not valid or at least subject to a much lower level of scrutiny. This is not a correct reading of ***Batson***.

The State exercises its power to control conduct in its criminal courts. All proceedings and rules of Court are derivative from that power. The State does not have the power to discriminate against its citizens on the basis of race, whether the citizen is a criminal defendant or a veniremen. Since the State does not possess that power, it cannot through its Courts rules and procedures grant the power to the district attorney (or, for that matter, a defense attorney), to act in a racially discriminatory manner. The race of the victim, the defendant, the trial judge, the court clerk, or the district attorney or whether race is an issue in the case is totally irrelevant. The only issue is whether the assistant district attorney in using the power of the State used it in a racially discriminatory manner. If it did so, no matter what the evidence showed, the trial was not consecrated in a permissible manner. If not so consecrated, the trial is tainted and the defendant could not have received a fair trial no matter what evidence was presented or argument made subsequently.

Racial discrimination is not the display of animus to a group. It is simply the use of race as a basis for the decision to chosoe or not to choose a member of one race over another. No *animus*

is required. The Constitution forbids the choice being made in that manner no matter the reason. No rational prosecutor will say, "I struck all of race "X" because the veniremen were members race "X", thus, the requirement of articulation of race neutral reasons and the challenge to them as pretextual. The quotations from the trial court above indicate to the appellant that the trial court was insufficiently suspect of the State's reasons when the court evaluated them as being pretxtual. The very way the State exercised and explained of happenstance simply strains credibility.

Manning v. State, 765 So.2d 516, 519 (Miss. 2000) outlined some of the indicia of pretext a party challenging a peremptory strike may use to rebut given racially neutral reasons. Most direct to this Defendant is disparate impact, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge. Strikes S-2 and Strikes S-3 were struck primarily because their closeness in age to the Defendant and would arguably be, therefore, sympathetic to the Defendant. Defendant's counsel called to the Court's attention a problem with these "race-neutral reasons". She stated, " ... I would just point out to the Court, you know, the other members on the jury panel the same age as Mr. Fisher (one of the struck jurors); for example the white gentlemen, Mr. Patrick Austin Hayes. I believe he appears to be approximately the same age as Mr. Fisher as well as Mr. Alsup Your Honor. ... this objection as to age is clearly pretextual." (T. 105-106).

should've included his age

The State, though not primarily, offered other reasons to support its S-2 and S-3 strikes--namely that these particular veniremen had had prior dealings or relationships with the victim. Defendant's counsel reminded the trial Court, "Your Honor, this juror (Billups, S-3) was voir dired extensively about whether she knew the defendant, the victim, whether she had been involved in a criminal prosecution or member, friend of family, and she responded to all of those no." (T. 94) The State never particularly voir dired veniremen Billups (S-3) about her supposed prior dealings with

S-3

the victim despite two opportunities to do so. Ms. Billups was not questioned during the State's voir dire about the relationship with the victim nor in another voir dire session granted the State after general voir dire. (T. 89) This special examination was to determine if another veniremen, Juror #30, had answered questions correctly about relationship with the Defendant after the assistant district attorney consulted with the victim after voir dire and before the exercise of peremptory strikes. If the assistant district attorney had information she needed to voir dire about, she should have done so.

Since she did not voir dire the veniremen subject to the S-2 and S-3 strikes about alleged relationships with the victim, and, having specifically voir dired another veniremen about his relationship with the defendant, the second ***Manning v. State***, 765 So.2d 516, 519 (Miss. 2000) factor is clearly violated. The State failed to voir dire about characteristics cited as to the veniremen it struck when it did not strike someone it did specifically voir dire. As the United States Supreme Court said in ***Miller-El v. Dretke***, 125 S.Ct. 2317, 2328 (2005) citing approvingly ***Ex parte Travis***, 776 So. 2d 874, 881 (Ala. 2000), "[T]he State's failure to engage in any meaningful voir dire examination on subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination."

The trial court made a final ruling as to the pretextual nature of the State's peremptory strikes. The Defendant never challenged the claims concerning S-1 and S-6. As to Strikes S-4 and S-5, though the Defendant believes, since all black members of the venire were removed and the clearly pretextual reasons presented for S-2 and S-3 makes strong evidence of racially discrimination in this case, procedurally, given the evidence in the record, the appellant is unlikely to overcome the standard established in ***Thorson v. State***, 721 So. 2d 590, 593 (Miss. 1998). Specifically, in reviewing a ***Batson*** violation, the ***Thorson*** court held "we will not overrule a trial court on a ***Batson***

ruling unless the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence".

Evidence of pretext exists as to Strikes S-2 and S-3. This evidence consists of (1) the striking of the venire of all four potential black members; (2) the disparate treatment of veniremen subject to the S-2 and S-3 strikes as to age versus accepted members of venire; and (3) the failure of the State to voir dire as to the characteristics it alternatively relied upon for its S-2 and S-3 strikes when the State specifically conducted voir dire with accepted members of venire for the same characteristics. This evidence demonstrates that the trial court was clearly erroneous and acted against the overwhelming weight of the evidence in failing to disallow the peremptory strikes S-2 and S-3 made by the State in this case. Therefore, the trial was not conducted in a fair manner. The Defendant was denied a fair trial. As such, this Court must vacate the Defendant's conviction and remand this case for a new trial.

CONCLUSION

The Appellant, Charles Isaac Fisher, Jr., submits to this Court that the Circuit Court of Lowndes County erred in failing to disallow certain peremptory strikes of veniremen proposed by the State of Mississippi. These strikes were used in a racially discriminatory manner without sufficient non-pretextual race neutral reasons offered to support the strikes, and, therefore, should have been disallowed. This error prevented him from obtaining a fair trial. Therefore, this Court should vacate the conviction remand for a new trial.

Dated: September 25, 2006.

Respectfully Submitted,

Charles Isaac Fisher

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CERTIFICATE OF SERVICE

I, Carrie A. Jourdan, attorney for the Appellant, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief to the following:

Honorable Forrest Allgood
District Attorney
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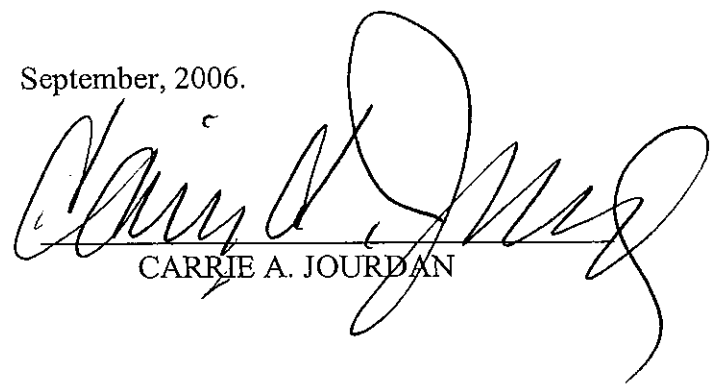
Honorable James M. Hood III
Attorney General
P.O. Box 220
Jackson, MS 39205-0220

Honorable Lee J. Howard
Circuit Court Judge
P.O. Box 1344
Starkville, MS 39760

This the 25th day of September, 2006.

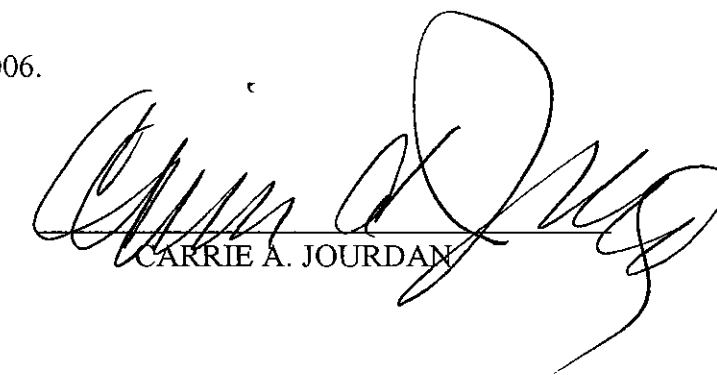


CARRIE A. JOURDAN

CERTIFICATE OF MAILING

I, Carrie A. Jourdan, attorney for the Appellant, do hereby certify in accordance with M.R.A.P. 25 (a), that I am this day depositing in the United States Mail, first class, postage-prepaid, one original and three copies of the Brief and Record Excerpts in the matter of *Charles Isaac Fisher, Jr. (Appellant) versus State of Mississippi (Appellee)*, case number 2005-KA-01886-COA, for filing with the Clerk of the Supreme Court/Court of Appeals.

This the 25th day of September, 2006.



CARRIE A. JOURDAN