IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHARLIE SAWYER a/k/a CHARLIE SAWYER, JR. — APPELLANT

VS. — NO. 2007-KA-0136

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

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STATEMENT OF THE CASE

Charles Sawyer is a criminal entrepreneur.

Prior to his conviction in the case at bar of armed robbery and possession of a firearm by a convicted felon, Sawyer had been previously convicted in Hinds County of armed robbery in 1990 and again in 1992. (R. 366-67) The record also reflects a rape and kidnaping charge was pending against Sawyer. (R. 373)

For whatever reason, Sawyer, on June 3, 2005, was out and about when he committed a third armed robbery.

The refusal of the trial court to sever counts or, alternatively, to stipulate to Sawyer's two prior convictions for armed robbery, and the exclusion of five (5) African American venire women allegedly in violation of *Batson v. Kentucky* [citation omitted] form the center piece of the present appeal.

CHARLIE SAWYER, an African-American male and former Mississippi inmate who served

three (3) years in the penitentiary from 1988 until 1991 (R. 366) and another ten (10) years from 1991 until 2001 (R. 368), prosecutes a criminal appeal from his convictions of armed robbery, possession of a firearm by a convicted felon and recidivism following trial by jury on September 28-29, 2006, in the Circuit Court of Hinds County, W. Swan Yerger, Circuit Judge, presiding.

Sawyer's indictment was returned on February 9, 2006, and reads as follows:

> That Charlie Sawyer a/k/a Charlie Sawyer, Jr. . . . on or about the 3rd day of June, 2005[,]
>
> **COUNT I:**
>
> did wilfully, unlawfully, and feloniously take or attempt to take from the person and from the presence of Alfred Jacobs, certain personal property, to-wit: $10.00 of good and lawful United States Currency and credit cards, or any other property, a more particular description being to the Grand Jury unknown, being then and there the property of Alfred Jacobs, against the will of the said Alfred Jacobs, by putting the said Alfred Jacobs in fear of immediate injury to his person by the exhibition of a deadly weapon, to-wit: a handgun, in violation of Section 97-3-79, Mississippi Code Annotated, 1972, as amended, and
>
> **COUNT II:**
>
> did wilfully, unlawfully, knowingly and feloniously have in his possession a certain firearm, to wit: an unknown caliber handgun, he, the said Charlie Sawyer a/k/a Charlie Sawyer, Jr. having been previously convicted of felonies, to-wit: the crime of armed robbery in the Circuit Court of the First Judicial District of Hinds County, Mississippi, on October 2, 1982, in Cause number 92-1-483 in said Court, and the crime of armed robbery in the Circuit Court of the First Judicial District of Hinds County, Mississippi, on March 19, 1990, in Cause number E-0527 in said Court, in violation of Section 97-37-5, Mississippi Code Annotated, 1972, as amended, and he, the said Charlie Sawyer a/k/a Charlie Sawyer, Jr., upon conviction hereof should be sentenced as a habitual offender as provided in Section 99-19-83, Mississippi Code of 1972 Annotated, as amended, in that he has been convicted at least twice previously of a felony or federal crime upon charges separately brought and arising out of separate incidents at different time and sentenced to and did serve separate terms of one (1) year [or] more in a state and/or federal penal institution, said convictions being as follows:

> The crime of armed robbery in the Circuit Court of the First Judicial District of Hinds County, Mississippi, on October 2, 1982, in Cause number 92-1-483 in said Court, and
>
> The crime of armed robbery in the Circuit Court of the First Judicial District of Hinds County, Mississippi, on March 19, 1990, in Cause number E-0527 in said Court, . . . (C.P. at 3-4)

Sawyer was charged and convicted as an habitual offender under the sentence-enhancement provisions of Miss.Code Ann. § 99-19-83. (C.P. at 3-4,50) Following a separate hearing conducted on October 3, 2006, Sawyer was adjudicated a recidivist, (R. 363-74) Sawyer was sentenced by Judge Yerger to life imprisonment to be served day-for-day without the benefit of probation or parole. (R. 372; C.P. at 50)

Sawyer, who assails neither the weight nor the sufficiency of the evidence, seeks a reversal of his convictions and sentence and a remand of the cause for a new trial. (Brief on the Merits By Appellant at 12)

Two (2) issues are raised on appeal to this Court:

I. Whether the trial court abused its judicial discretion when it denied Sawyer's motion to sever counts against Sawyer or, alternatively, to stipulate to the existence of two prior convictions for armed robbery. According to Sawyer, introduction of evidence of his two prior convictions for armed robbery was unduly prejudicial.

II. Whether the trial court, in violation of **Batson v. Kentucky** [citation omitted], abused its judicial discretion in accepting as "race neutral" certain excuses given by the prosecution in the exercise of its peremptory challenges. Sawyer claims the trial judge erroneously accepted the State's race-neutral reasons for the exclusion of five (5) black females from the jury venire.

STATEMENT OF FACTS

As stated previously, neither the weight nor the sufficiency of the evidence has been assailed on appeal. Accordingly, the facts surrounding the actual robbery and assault on Alfred Jacobs are not outcome determinative with respect to the merits of Sawyer's appellate complaints.

It is enough to say the night of June 3, 2005, Alfred Jacobs, a Skytell employee working a second job as a realtor with Millenium Realty, was robbed at gunpoint by two men while waiting in the drive-thru of the Ellis Seafood Restaurant located on Woodrow Wilson Drive in Jackson. (R. 256-57) Following a brief scuffle bloodying Jacobs's lip and chipping a tooth (R. 223, 259), Jacobs, figuring discretion was the better part of valor, surrendered his wallet which contained both cash and credit cards. (R. 261)

Jacobs's version of the robbery is quoted as follows:

> Q. [DIRECT EXAMINATION:] Now on June the 3rd, 2005[,] what happened to you at the Ellis Seafood?
>
> A. Well, I pulled in, and I proceeded to go through to the drive-thru to place my order, and I pulled up. Wasn't nobody ahead of me. Wasn't no people outside. And I just proceeded to pull on up. And once I got to the ordering board, I kind of hesitated because I was looking for my wallet, and I had dropped my cell phone.
>
> And when I went to place my order and looked to my left, a guy was standing there with a gun. And so I looked to my right, and somebody else was standing there as well. And so I kind of tussled with the [sic] him, and the guy said, "Give me your wallet," and I was like, "I don't have a wallet." He was like, "Give me your wallet."
>
> Q. Okay, Let me stop you right there.
>
> A. Okay.
>
> Q. Which guy was demanding your wallet?
>
> A. The guy on my left side.

Q. And the left side would be the driver's - -

A. - - right - -

Q. Or passenger's side?

A. My driver's side.

Q. Okay. And are you - - did you see a gun?

A. Yes. (R. 257-58)

* * * * * *

Q. Okay. Let me show you State's Exhibit 1. I'm not asking you is this the gun, but does this look similar to the gun that was pointed to - - where was it pointed by the way?

A. He pointed it initially at my head.

Q. Does this appear to look like the gun that was pointed at your head on June the 3rd, 2005?

A. It could very well be.

* * * * * *

Q. Now, once this guy on the left on the passenger's side - - and was he the one with the gun or not?

A. Right. He had a gun as well.

Q. Did both of them have guns?

A. Yes.

Q. Once he began demanding your money or your wallet, what did you do?

A. I first told him I didn't have a wallet, and he kept persisting. Then he started using his hand that he didn't have the gun on to start reaching for my back pocket, and that's when I was kind of pushing his hand back.

And this other guy, who was on the right side, reached his

> hand in the window, and he was reaching for my front pocket. So I was kind of pushing both of them hands back telling them, you know, I didn't have a wallet.
>
> Then I realized, you know, I needed to give it up after I got hit in my mouth, and my teeth got chipped, and my lip got busted, and that's when I went ahead and gave them my wallet, and that's when they left. (R. 258-59)

Jacobs surrendered his wallet to " [t]he guy who was on my side of the car, which was the driver's side." (R. 261) This was the robber who pointed the gun at Jacobs's head. (R. 262)

> Q. [CROSS EXAMINATION BY DEFENSE COUNSEL:] The day - - that was the 3rd of June. On the 10th of June you couldn't describe the subjects because it happened so fast. You did say something about a silver gun. And then one day later after you couldn't describe anybody and said you didn't see them because it happened so fast you can go into a room with a six man photo lineup and pick out this man?
>
> A. [BY JACOBS:] * * * I didn't say I couldn't see him. I did see him. He was at my window, but it happened so quick I wasn't able to give a physical sketch of the guy But once Detective Brad showed me those photos, it was no question in my mind the guy who had robbed me. It was like everything came back, you know. It's like deja vu again. * * * (R. 278)

Seven (7) witnesses testified during the State's case-in-chief, including **Alfred Jacobs**, the victim, who positively identified Sawyer in court as one of the men who robbed him on June 3, 2005. (R. 272)

On June 11th, several days after the robbery, Jacobs identified Sawyer in a photographic lineup as well. (R. 269-71; 311-12)

Jacobs testified there was no doubt in his mind the person he picked out on June the 11th was the same man that "arm robbed" him on June 3rd at the Ellis Seafood establishment on Woodrow Wilson Drive. (R. 271)

Brad Davis, a detective with the Jackson Police Department testified he prepared the

photographic lineup and that "[a]fter [Jacobs] scanned all six pictures, he immediately went to Charlie Sawyer's picture and said this is the person. And I asked him at that time was this the person on the driver's side or the passenger's side with the weapon, and he said it was the driver's side. (R. 311-12)

> Q. [BY PROSECUTOR MANSELL:] No question?
>
> A. [BY JACOBS:] No question.
>
> Q. Now, Detective Davis, do you see Charlie Sawyer in the courtroom today?
>
> A. Yes, ma'am.
>
> Q. Charlie is a distinctive looking guy, isn't he?
>
> A. Yes, ma'am.
>
> Q. And is he the man that you saw on June the 11th when he was brought to the police precinct?
>
> A. Yes, ma'am.
>
> BY MS. MANSELL: Your Honor, can the record reflect that Detective Davis has identified Charlie Sawyer?
>
> BY THE COURT: The record may so reflect. (R. 311-12)

At the close of the State's case-in-chief, Sawyer made a motion for a directed verdict based upon the failure of the State " . . . to prove by a preponderance of the evidence his guilt in this matter." (R. 328)

The trial judge denied the motion as follows:

> THE COURT: Well, the Court denies the motion based upon the grounds asserted by the State, and there is clearly a *prima facie* case made pursuant to the indictment. So the motion is denied. (R. 329)

After being personally advised of his right to testify or not, Sawyer elected to remain silent. (R. 326-27, 29)

The defendant rested without producing a single witness. (R. 338)

Following closing arguments, the jury retired to deliberate at 12:10 a.m. (R. 358) Twenty-five (25) minutes later, at 12:35 a.m., the jury returned with dual verdicts on Counts I and II as follows:

> "We, the jury, find the defendant, guilty as charged." (R. 359-60; C.P. at 46-47)

A poll of the jury reflected both verdicts were unanimous. (R. 359-60)

A sentence-enhancement hearing was conducted on October 3, 2006, at which time the circuit judge adjudicated Sawyer an habitual offender within the meaning and purview of Miss.Code Ann. §99-19-83. (R. 363-73) Sawyer was sentenced " . . . to a term of life in prison without any eligibility for parole or probation." (R. 372)

On October 10, 2006, Sawyer filed a Motion for J.N.O.V. or, in the alternative, for a new trial. He alleged, *inter alia*, the court erred in denying his request to stipulate to the fact he was a prior convicted felon, and the jury was unfairly prejudiced as a result.

Sawyer also raised a *Batson* challenge. (C.P. at 54-55)

Frank McWilliams and Ginger Gibson, practicing attorneys with the Office of the Hinds County Public Defender, represented Sawyer very effectively during the trial of this cause.

Virginia Watkins, also a practicing attorney with the public defenders office, has been equally proficient in her representation of Sawyer in his appeal to this Court.

SUMMARY OF THE ARGUMENT

I. The trial judge, at the defendant's request, read to the jury at the proper time a limiting instruction targeting the testimony identifying the defendant's prior felony convictions. (R. 325) This admonishment was sufficient to neutralize, if not cure completely, any prejudice to Sawyer because it is presumed the jury follows the instructions given by the trial judge.

II. The trial judge found as a fact and concluded as a matter of law the prosecutor gave valid and viable race-neutral reasons for striking peremptorily five (5) black female members of the venire. This ruling by the trial judge was neither clearly erroneous nor manifestly wrong and is entitled to great deference by a reviewing Court.

No abuse of judicial discretion has been demonstrated here.

ARGUMENT

I.

THE GRANTING OF A LIMITING OR CAUTIONARY INSTRUCTION WAS SUFFICIENT TO PREVENT ANY PREJUDICE TO SAWYER.

IT IS GENERALLY PRESUMED THAT JURORS WILL OBEY AND APPLY THE INSTRUCTIONS OF THE TRIAL COURT.

Sawyer contends the trial court abused its judicial discretion in denying his motion to sever trial of the two counts levied against him or, " . . . alternatively, to grant a stipulation that he was a convicted felon for the purposes of establishing the necessary element of the crime of felon in possession of a firearm. (Brief on the Merits by Appellant at 6)

An essential ingredient of the offense of firearm possession by a convicted felon is proof beyond a reasonable doubt the defendant was a prior convicted felon. The fact of Sawyer's prior convictions charged in Count II were certainly admissible for this purpose.

We are aware of appellant's concern that a jury might be inclined to reason that Sawyer must be guilty "here and now" of the armed robbery charged in Count I because he had been twice previously convicted "then and there" of the armed robberies charged in Count II.

This danger was alleviated, if not, eradicated completely by a limiting or cautionary instruction which was read to the jury at Sawyer's request after Zach Wallace, Deputy Circuit Clerk for Hinds County (R. 320), testified about Sawyer's prior felony convictions. (R. 324-25)

The instruction read by Judge Yerger is quoted as follows:

> BY THE COURT: Members of the jury, the Court is going to give you what is known as a limiting instruction at this time.
>
> "You have heard testimony that the defendant Charlie Sawyer, Jr. has been convicted of one or more felonies. You may only use this testimony to determine whether or not Mr. Sawyer is a convicted felon for purposes of count two of the indictment, possession of a firearm by a convicted felon.
>
> The court instructs you that this testimony must not be used as evidence of guilt as to count one of the indictment, armed robbery." (R. 124-25; C.P. at 26)

We have said it before, and it bears repeating, that "[i]t is generally presumed that jurors will obey and apply the instructions of the [trial] court." **Branch v. State,** 882 So.2d 36, 76 (Miss. 2004).

This court has held on many occasions that when a trial court instructs the jury, it is presumed the jurors follow his direction. **Crenshaw v. State,** 520 So.2d 131 (Miss. 1988); **McFee v. State,** 511 So.2d 130 (Miss. 1987); **Johnson v. State,** 475 So.2d 1136 (Miss. 1985).

Stated differently, "[a]ppellate courts assume that juries follow the instructions." **Clemons v. State,** 535 So.2d 1354, 1361 (Miss. 1988). "Our law presumes the jury does as it is told." **Williams v. State,** 512 So.2d 666, 671 (Miss. 1987). "To presume otherwise would be to render the jury system inoperable." **Johnson v. State,** *supra*, 475 So.2d at 1142.

"The jury is presumed to have followed the admonition of the trial judge to disregard [a] remark." **Wheeler v. State,** 826 So.2d 731, 741 (Miss. 2002). In like manner, the jury is presumed to have followed the court's admonition concerning the limited effect of prior convictions.

Finally, we invite the attention of the Court to **Ferguson v. State,** 856 So.2d 334 (Ct.App.Miss. 2003), which we feel is dispositive of this issue. In **Ferguson** the Court of Appeals held that the trial court did not commit reversible error when it failed to issue a limiting jury instruction, *sua sponte*, regarding the defendant's prior felony convictions. "[W]hile giving a limiting instruction *sua sponte* may be the 'better practice,' when a request by defense counsel has not been made, failure to give a limiting instruction, *sua sponte*, is not always reversible error." *Id.*, 856 So.2d at 339.

In the case at bar, Sawyer requested and received a limiting and curative instruction thus at least minimizing or neutralizing, if not curing, any risk the jury would infer guilt on the charges from the fact of previous convictions on similar charges.

Judge Yerger, who was in the best position to determine any prejudicial effect of the prior convictions, did not abuse his judicial discretion in overruling the defendant's motion for severance or in denying Sawyer's request the State be compelled to accept the defendant's stipulation.

Given the strength of the prosecution's case against Sawyer - eyewitness identification by the victim who observed the defendant practically eyeball to eyeball - it is difficult to imagine how he could have been prejudiced one whit by the introduction of his prior felony convictions.

No abuse of judicial discretion has been demonstrated here.

II.

THE TRIAL JUDGE FOUND AS A FACT AND CONCLUDED AS A MATTER OF LAW THE PROSECUTOR GAVE VIABLE RACE-NEUTRAL REASONS FOR STRIKING PEREMPTORILY FIVE (5) BLACK FEMALES FROM THE VENIRE. HIS FACT-FINDING WAS NEITHER CLEARLY ERRONEOUS NOR MANIFESTLY WRONG. ONCE AGAIN, NO ABUSE OF JUDICIAL DISCRETION HAS BEEN DEMONSTRATED.

First, some facts.

The defendant is a member of the black race.

The racial composition of the jury selected to try this case was seven (7) white jurors and five (5) black jurors. One alternate juror was white while the other was black. (R. 255)

According to Judge Yerger, who placed in the record the racial composition of the jury, " [t]here are seven women of whom four are black, three white, five men, four white, one black, a total of seven white and five blacks. The first alternate is a black female. The second alternate is a white male." (R.255)

If this is not a jury representative of a fair cross-section of the community in which the crime took place, we don't know what is.

Sawyer, however, argues on appeal the trial judge committed reversible error when he accepted the State's race-neutral reasons for excluding five (5) black females from the jury panel, namely: Corvettia Gray (R. 168-69, 197), Maxine Johnson (R. 181-82), Stacy Wilson (R. 183-85), Reshemia Ratliff (R. 186-92) and Estell Kelly. (R. 192-94) According to Sawyer, "i]t was an error of fundamental proportions to accept the pretextual reasons offered by the prosecution in exercising her peremptory challenges in a racially discriminatory manner to strike African-Americans from the

jury." (Brief on the Merits by Appellant at 12)

Put another way, Sawyer contends the State of Mississippi was guilty of purposeful discrimination when it used nine (9) of eleven (11) peremptory challenges to strike members of the defendant's race and thereafter proffered "pretextual reasons" for their exclusion.

Following Sawyer's *Batson* objection, Judge Yerger ruled that Sawyer had made out a *prima facie* case of purposeful discrimination requiring the State to give race-neutral reasons for its strikes. We quote:

> BY THE COURT: * * * All right. Now a challenge has been made, *Batson* challenge based on race has been made by the defense to the State's challenges, and, statistically, at least it appears to be a *prima facie* case to establish the *Batson*, so we'll have to proceed through the State's [challenges] to see if there were racial and/or gender reason sufficient shown. (R. 168)

Gender discrimination was not an issue at trial and is not an issue on appeal. (R. 171) Sawyer, on the other hand, suggests the state's explanations for using five (5) of nine (9) challenges to strike black jurors did not meet the race-neutral requirements found in **Taylor v. State,** 733 So.2d 251, 258 (Miss. 1999); **Collins v. State,** 691 So.2d 918, 926 (Miss. 1997) and **Griffin v. State,** 607 So.2d 1197, 1203 (Miss. 1992).

To the surprise of no one, we simply disagree.

Applicable here is the following similar **Batson** scenario found in **Harris v. State,** 901 So.2d 1277, 1281-82 (Ct.App.Miss. 2004), reh denied, cert denied, where we find this language:

> The state exercised five out of six peremptory strikes to exclude African American jurors, after which Harris raised a *Batson* objection The circuit court ruled that a *prima facie* case of discrimination had been established, and directed the state to provide race-neutral reasons for the peremptory strikes. The reasons offered by the State were (1) Juror 14 had never been gainfully employed and was not a student, and was believed to have concealed her knowledge of the defendant, (2) Juror 17 had grown up with the defendant, had

> a family member involved in a crime, and was believed to be mentally slow, (3) juror 30 was unemployed and believed to be an alcoholic, and (4) Juror 24 responded to no questions. The circuit court accepted the State's reasons as race neutral. Upon appeal, Harris does not contend the circuit court erred in any procedural way, but contends that the race neutral reasons accepted by the court were "speculative or illusory."
>
> The supreme court has stated a number of reasons a challenge may be seen as race-neutral.
>
> > "Included among those reasons: age, demeanor, marital status, single with children, prosecutor distrusted juror, educational background, employment history, criminal record, young and single, friend charged with crime, unemployed with no roots in community, posture and demeanor indicated juror was hostile to being in court, juror was late, short term employment."
>
> *Davis v. State,* 660 So.2d 1228, 1242 (Miss. 1995).
>
> The reasons given by the State would appear to fall within the above noted group. Findings of fact concerning whether the stated reasons are race neutral are given great deference and will not be overturned unless clearly erroneous or against the overwhelming weight of the evidence. Tanner v. State, 764 So.2d 385, 393 (¶14) (Miss. 2000) Among the facts to be considered is the service of four African Americans on this jury. Under the facts of this case, we can not say that the trial court abused its discretion.

We contend the reasons given by Rebecca Mansell, the assistant district attorney, were sufficiently race-neutral, and the trial judge made an on-the-record finding of fact and concluded as a matter of law the reasons passed muster under the **Batson** criteria. Judge Yerger's determinations and findings of fact, based largely upon credibility and the prosecutor's trustworthiness, were neither clearly erroneous nor manifestly wrong and are entitled to great deference by a reviewing court. **Caston v. State,** 823 So.2d 473 (Miss. 2002); **Thomas v. State,** 818 So.2d 335 (Miss. 2002), reh denied.

" 'Great deference,' has been defined in the **Batson** context as insulating from appellate

reversal any trial findings which are not clearly erroneous.' " **Hatten v. State,** 628 So.2d 294 (Miss. 1993).

In the case at bar, Judge Yerger, who listened carefully to arguments presented by both litigants, explained his rulings and acted well within his discretion in finding as a fact the State's reasons were not pretextual but race-neutral.

[1] Corvettia Gray - Length of Employment.

Gray was struck because she had only been employed at the same job for five (5) months. (R. 168-69, 197)

> [BY THE PROSECUTOR:] Your Honor, it doesn't matter. My race neutral reason is length of employment. I can go up and get the book and read the case to you, but it is clear that a race neutral reason is length of employment. She put five months [on her juror questionnaire.] That's my race neutral reason that she's only been employed for five months at the same job. I like people that have been employed for long periods of time at the same job. (R. 168-69)

The case relied upon by the prosecutor is **Berry v. State,** 802 So.2d 1033, 1040 (¶24) (Miss. 2001) ["employment history or lack thereof"], citing **Manning v. State,** 735 So.2d 323, 340 (Miss. 1999); **Woodward v. State**, 726 So.2d 524, 530 (Miss. 1997); and **Foster v. State,** 639 So.2d 1263, 1279-80 (Miss. 1994).

Following the defendant's rebuttal, Judge Yerger ruled on this strike as follows:

> [BY THE COURT:] * * * Anyway, based on the representation of the State relating to Corvettia Gray, the Court finds that there were race neutral reasons. (R. 197)

[2] Maxine Johnson - Employment History.

Johnson was struck because her juror questionnaire reflected she was 54 years of age and unemployed despite appearing healthy and able bodied to the prosecutor. (R. 181-82)

> [BY THE PROSECUTOR:] * * * Ms. Maxine Johnson is

> unemployed. That would fall under the employment history. I am not going to put someone on my jury that's not working. She seems able-bodied. She's 54. She's not too old to be working or not working.
>
> She didn't put retired, which everybody else that's retired put retired. She put unemployed. I don't want people that aren't working that can work that don't work for whatever reason. (R. 181-82)

Following the defendant's rebuttal, during which defense counsel lamented the fact the prosecutor had never asked Johnson why she was unemployed, the trial judge found that the State has provided a race neutral reason for that strike, and that strike is allowed. (R. 182-83)

[3] Stacy Wilson - Employment History.

Wilson was struck because she was 33 years old, unmarried, and wrote "not applicable" in the space provided on the juror questionnaire requesting the juror's occupation. (R. 183-84)

> [BY THE PROSECUTOR:] Your Honor, if someone puts not applicable where it says your occupation, that means it's none of our business, and I'm not going to sit around and say, oh, do you work? Oh, you're unemployed. Why don't you work? Are you just too lazy? I mean, you know, she's the one that chose to put not applicable.
>
> * * * * * *
>
> She's not married, and she doesn't work, so how does she support herself? That would be a good question for me. She's obviously not married because she put not applicable on that box, too. So how does she support herself if she's 33 years old and doesn't work and doesn't have a husband? That is not the kind of juror I want. (R. 184-85)

Following rebuttal by defense counsel, the trial judge found as a fact and concluded as a matter of law this was a sufficiently race-neutral reason. (R. 185)

[4] Reshemia Ratcliff - Body Language - Inattentiveness.

Ratcliff was the target of a peremptory challenge because it appeared to the prosecutor she

was unhappy and inattentive to the prosecutor's questions. (R. 186-87, 190)

> [BY THE PROSECUTOR:] Body language can happen in an instant. When I was talking to Mr. Anderson, she did not seem like she was happy with the fact that I kept questioning him. I don't want someone on my jury that doesn't seem happy with me.
>
> * * * * * *
>
> But that is my race-neutral reason that she did not seem like she appreciated the fact that I kept talking to Mr. Anderson. I don't know, but I don't want someone on my jury that can't pay attention or doesn't seem like she's receptive to what I'm saying, and I don't even talk for 45 minutes. (R. 191)

Following rebuttal from Sawyer's attorney, the circuit judge ruled as follows:

> [BY THE COURT:] Well, it's borderline. * * * [B]ut I think the body language of being disinterested, looking away maybe when you're trying to talk with them, and they look like they've not even interested in you or responding to the question, than that . . . will be a race-neutral reason acceptable at this time for this case. (R. 192)

[5] Estelle Kelly - Body Language - Inattentiveness - Sleeping During Voir Dire.

Kelly was the target of a peremptory strike because she appeared to be asleep or, if not, at least inattentive when the prosecutor asked a question about a civil jury. (R. 193). *See* **Berry v. State,** *supra*, 802 So.2d 1033, 1043 (¶¶35-36) (Miss. 2001), It took her much longer to respond, and the prosecutor was concerned that Kelly was not listening to her questions. (R. 194)

Defense counsel rebutted by stating that Kelly " . . . may have been a little confused about what civil or criminal meant or something like that. She did take a moment to answer, but she did not at all appear to be asleep." (R. 194)

Following this rebuttal from the defendant, the prosecutor made the following additional comments:

> [BY THE PROSECUTOR:] Your Honor, again, that's my race neutral reason. I thought she was asleep or had difficulty understanding my question or whatever it may be I mean even if she

> has a lack of comprehension according to the defense, apparently there was a lack of comprehension, so I don't want someone on my jury that can't even comprehend my questions or what I'm saying because I'm going to be the one asking all the questions to these witnesses. (R. 194)

The trial judge thereafter made the following findings of fact:

> [BY THE COURT:] All right. I'm going to go ahead and accept this based on what State's counsel has represented to the Court, but in the future I'm going to be much tougher on these situations. (R. 196)

We respectfully submit the circuit judge followed the guidelines provided by this Court to the proverbial "T." He made "clear and specific" rulings as to the State's use of its peremptory strikes of black female jurors.

We are aware that a trial judge should make a clear and reasonably specific explanation for his ruling on a **Batson** related claim. **Edwards v. State,** 823 So.2d 1223 (Ct.App.Miss. 2002). The trial judge should " . . . make an on-the-record, factual determination, of the merits of the reasons cited by the State for its use of peremptory challenges against potential jurors." **Hatten v. State,** *supra,* 628 So.2d 294, 298 (Miss. 1993).

He did.

Sawyer's claim, to be sure, is controlled, by **Harris v. State,** *supra,* 901 So.2d 1277, 1281 (¶14) (Ct.App.Miss. 2004), quoted earlier in our brief. The language relied upon is worth repeating here.

> The supreme court has stated a number of reasons a challenge may be seen as race-neutral.
>
> > 'Included among those reasons: age, demeanor, marital status, single with children, prosecutor distrusted juror, educational background, employment history, criminal record, young and single, friend charged with crime, unemployed with no roots in

> community, posture and demeanor indicated juror was hostile to being in court, juror was late, short term employment.'
>
> The reasons give by the State would appear to fall within the above noted group. Findings of fact concerning whether the stated reasons are race-neutral are given great deference.' * * * * * *

Same here.

It was also noted in **Harris** that under the totality approach a relevant fact to be considered was " . . . the service of four African Americans on the jury." 901 So.2d at 1282.

Again. Same here where five (5) African Americans served on Sawyer's jury.

We note that two of the ladies challenged by the State - Johnson and Wilson - listed their occupation as "unemployed" while a third juror - Gray - had only been employed for five (5) months. (R. 181, 183-84, 168-69)

A jurors employment history has always been a legitimate concern for prosecutors in the selection of a jury. Unemployment has been held to be a sufficiently viable race-neutral reason. **Lockett v. State,** 517 So.2d 1346, 1356-57 (Miss. 1987), Appendix I. *See also* **Bowie v. State,** 816 So.2d 425 (Ct.App.Miss. 2002) [Prosecutor's use of a peremptory strike to reach a white juror who was unemployed was race-neutral.]

In addition, "unresponsiveness" of a prospective juror on a juror information card has been held to be a sufficient race-neutral reason for a peremptory strike. **Horne v. State,** 825 So.2d 627 (Miss. 2002). *See also* **Bolton v. State,** 752 So.2d 480 (Ct.App.Miss. 1999), reh denied.

The mental acumen or lack of comprehension of Kelly and the inattentiveness of Ratcliff were of legitimate concern and not a subterfuge or pretext for purposeful or intentional discrimination.

A defendant is allowed to rebut the reasons which have been offered by the prosecution as

race-neutral during a **Batson** hearing. **Walker v. State,** 815 So.2d 1209 (Miss. 2002). Sawyer did so in the case at bar. Nevertheless, Sawyer and his two lawyers, their commendable efforts notwithstanding, failed to meet their burden of successfully demonstrating the State's explanations were pretextual.

Judge Yerger did not abuse his judicial discretion in finding the defendant failed to convincingly and successfully rebut the reasons offered by the prosecution. In the final analysis, the five female jurors in question were challenged, not because of their race but for valid race-neutral reasons that had nothing to do with the color of their skin.

In **Batson v. Kentucky,** 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, 87-88 (1986), the Supreme Court of the United States held that in order to make a *prima facie* showing of purposeful discrimination in the selection of a petit 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 to remove from the venire members of the defendant's race;

3) 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. *See also* **Caston v. State,** 823 So.2d 473 (Miss. 2002), reh denied; **Thomas v. State,** 818 So.2d 335 (Miss. 2002), reh denied; **Walker v. State**, 740 So.2d 873 (Miss. 1999); **Fleming v. State**, 732 So.2d 172 (Miss. 1999); **Gibson v. State**, 731 So.2d 1087 (Miss. 1998); **Magee v. State**, 720 So.2d 186 (Miss. 1998); **Duplantis v. State,** 644 So.2d 1235 (Miss. 1994); **Benson v. State,** 551 So.2d 188 (Miss. 1989); **Conerly v. State,** 544 So.2d 1370 (Miss. 1989); **Wheeler v. State,** 536 So.2d 1347 (Miss. 1988); **Taylor v. State**, 524 So.2d 565 (Miss. 1988); **Lockett v. State,** 517 So.2d 1346 (Miss. 1987).

The **Batson** rational has also been extended to gender discrimination. **Bounds v. State,** 688 So.2d 1362 (Miss. 1997); **Jackson v. State,** 684 So.2d 1213 (Miss. 1996). *Cf.* **Powers v. Ohio,** 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) [White criminal defendant has standing to raise objection to prosecutor's race-based exercise of peremptory challenges to exclude black prospective jurors.]

It is only after the defendant (or the State) presents a *prima facie* showing of a **Batson** violation that the burden " . . . shifts to the State (or the defendant) to come forward with a race-neutral explanation for challenging the jurors." **Mack v. State,** 650 So.2d 1289, 1297 (Miss. 1994).

"[T]he trial court has no authority to initiate a *Batson* hearing without a *prima facie* showing of discrimination." **Hughes v. State,** 735 So.2d 238, 250 (Miss. 1999).

Stated somewhat differently, before the trial judge is required to conduct a *Batson* hearing, it must be shown that a *prima facie* case of purposeful discrimination exists. **Puckett v. State,** 737 So.2d 322 (Miss. 1999). "[I]t would seem appropriate to examine the *prima facie* case element prior to examining the reasons proffered by the State." **Hughes v. State,** *supra,* 735 So.2d at 250.

In **Collins v. State,** 691 So.2d 918, 926 (Miss. 1997), we find the following language applicable here:

> The "pivotal inquiry then is whether the State was able to present a race-neutral explanation for each of the peremptory strikes." *Griffin v. State,* 607 So.2d 1197, 1202 (Miss. 1992). **Determining whether there lies a racially discriminatory motive under the State's articulated reasons is left to the sole discretion of the trial judge.** *Lockett v. State,* 517 So.2d 1346, 1350 (Miss. 1987) Moreover, **"a trial judge's factual findings relative to a prosecutor's use of peremptory challenges on minority persons are to be accorded great deference and will not be reversed unless they appear to be clearly erroneous or against the overwhelming weight of the evidence."** *Id.* At 1350. [emphasis ours]

See also **Taylor v. State,** 733 So.2d 251, 258 (Miss. 1999).

When a **Batson** challenge is made, the trial judge sits as finder of fact. **Robinson v. State,** 726 So.2d 189 (Ct.App. Miss. 1998). Judge Yerger found as a fact and concluded as a matter of law the prosecutor's reasons were race-neutral and in compliance with the **Batson** decision.

In the final analysis, the factual findings made by the circuit judge who saw with his own eyes, heard with his own ears, and placed his observations in the record, were not clearly erroneous; rather, his findings were supported by both substantial and credible evidence. No abuse of judicial discretion has been demonstrated by Sawyer.

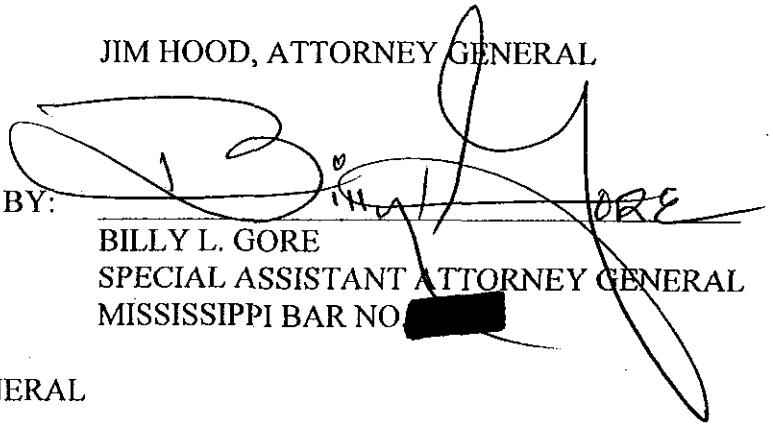
CONCLUSION

Appellee respectfully submits that no reversible error, if error at all, took place during the trial of this cause.

Accordingly, the judgments of conviction of armed robbery, possession of a firearm by a prior convicted felon and recidivism, together with the life sentence without parole imposed by the trial judge, should be forthwith affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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