IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ASHANTE NEWBERRY — APPELLANT

VS. — NO. 2007-KA-0875

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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STATEMENT OF THE CASE

The exclusion of two (2) minority jurors, one Asian and the other African-American, allegedly in violation of the **Batson** decision; testimony allegedly suggesting appellant's involvement in prior drug sales; allegedly improper, but unobjected to, remarks made during the State's closing argument, and the admission of testimony allegedly hearsay, form the centerpiece of this appeal from a conviction, as an habitual offender, of the sale of cocaine.

ASHANTE NEWBERRY, a twenty-four (24) year old African-American male (R. 258-59), resident of Hernando (C.P. at 40), and felon twice or thrice previously convicted (R. 271), prosecutes a criminal appeal from his convictions of recidivism and the sale of cocaine following trial by judge and jury in the Circuit Court of DeSoto County, Robert P. Chamberlin, Circuit Judge, presiding.

Newberry and an unindicted co-conspirator were indicted in a two (2) count indictment returned on September 7, 2006, for conspiring to sell cocaine (Count 1) and for the sale of cocaine (Count 2).

Newberry was also charged with recidivism under Miss. Code Ann. §99-19-81. (C.P. at 7-8)

Following a trial by jury conducted on April 26, 2007, Newberry was convicted of the sale of cocaine charged in Count 2 of his indictment. (R. 240; C.P. at 84)

Count 1 of the indictment charging conspiracy wasn't prosecuted and was later "remanded to the files." (C.P. at 98)

Newberry was adjudicated an habitual offender under § 99-19-81 following a sentence-enhancement proceeding conducted on May 16, 2007. (R. 270; C.P. at 54) By virtue of his status as a repeat offender, the permissible punishment of thirty (30) years was also doubled by virtue of the sentence-enhancement provisions found in Miss.Code Ann. 41-29-139(a)(1).

Judge Chamberlin thereafter sentenced Newberry to serve sixty (60) years in the custody of the MDOC without the benefit of probation or parole. (R. 274; C.P. at 95)

Newberry was also ordered to pay a fine in the amount of $1,000. (C.P. at 95)

Newberry, it appears, seeks reversal of his conviction and a new trial or, if not, at least a remand for a **Batson** hearing. (Brief of Appellant at 13, 18)

We respectfully submit Newberry is entitled to neither.

Count 1 of Newberry's indictment charged, *inter alia*,

> " [t]hat ASHANTE NEWBERRY (and an unindicted co-conspirator) . . . on or about the 10th day of DECEMBER . . . 2005, . . . did wilfully, unlawfully and feloniously, corruptly agree, conspire and confederate, each with the other and with divers others to the Grand Jury unknown, to commit a crime, to-wit: Sale of a Controlled Substance, to-wit: cocaine, in direct violation of Section 97-1-1(a) . . . "

As stated previously, Count 1 was not prosecuted. It was remanded to the files May 25, 2007, a month post verdict. (C.P. at 98)

Count 2 of the defendant's indictment, omitting its formal parts, alleged

> "[t]hat ASHANTE NEWBERRY, . . . on or about the 10th day of DECEMBER, . . . 2005, . . . did wilfully, unlawfully and feloniously on or before the 10th [day of] February, 2002, . , knowingly and intentionally sell, barter, transfer, distribute or dispense a controlled substance, to-wit: Cocaine, to Danny Wilkey for $100.00, in direct violation of section 41-29-139(a)(1), Mississippi Code 1972 Annotated, as amended: (C.P. at 8)

Newberry was also charged, and later sentenced, as a repeat offender by virtue of the provisions of Miss.Code Ann. §41-29-147. Following trial by jury conducted on April 26, 2007, the jury returned a verdict of "We the jury find the defendant Guilty as charged." (C.P. at 84)

Newberry, as stated previously, was later adjudicated an habitual and second offender after a sentence-enhancement hearing conducted on May 16, 2007. (R. 247-276) He was sentenced to serve sixty (60) years in the custody of the Mississippi Department of Corrections without the benefit of probation or parole. (C.P. at 95-96)

Four (4) individual issues are raised by young Newberry on appeal to this Court:

I. Whether the State's purposeful exclusion of black jurors violated **Batson v. Kentucky** and thereby denied Newberry a fundamentally fair trial.

II. Whether the State violated Newberry's rights by going into "other" bad acts not charged in the indictment.

III. Whether Newberry was denied a fundamentally fair trial by the prosecutor's improper comments, remarks, opinions, and beliefs presented to the jury during closing argument.

IV. Whether the trial judge abused his judicial discretion in allowing hearsay evidence.

Neither Newberry's conviction nor his sentence as an habitual and repeat offender under Miss.Code Ann. §99-19-81 and 41-29-147, respectively, are issues in this appeal. The same is true with respect to the sufficiency and weight of the evidence proffered in support of the substantive offense.

STATEMENT OF FACTS

This is another tale of a guy selling dope to an undercover agent for $100.00 in official state funds. Ms Wilson, the assistant district attorney, said it best during her opening argument: "This defendant right here sells misery and addiction by the gram." (R. 95)

Ashante Newberry, a prior convicted felon, is a twenty-four (24) year old high school graduate and purveyor of cocaine. (R. 258-59)

On December 10, 2005, at approximately 9:18 p.m. (R. 101), Danny Wilkey, an undercover agent with the DeSoto County Metropolitan Narcotics Unit, along with a not-so-confidential informant, went to a residence on Labauve Street in Hernando where Wilkey purchased $100 worth of powder cocaine from Newberry. (R. 105-06) There was no audio or video made of the transaction. (125-26, 146)

Danny Wilkey made an in-court identification of Newberry as the black male who sold him the cocaine on December 10, 2005, for $100. (R. 103, 106)

Jeremy Degan, at the time of the sale, was supervisor over the DeSoto County Metro Narcotics Unit. (R. 144) He monitored the transaction using his cell phone and Agent Wilkey's cell phone when the audio equipment wired for this transaction malfunctioned. (R. 145-47)

Erik Frazure, a forensic scientist specializing in drug analysis, testified the substance in question weighed 2.9 grams and contained cocaine salt. (R. 159)

At the close of the State's case-in-chief, Newberry moved for a directed verdict " . . . on the basis that the State has failed to make a *prima facie* case to get to the jury in this criminal matter." (R. 161-62)

Judge Chamberlin overruled the motion with the following rhetoric:

> BY THE COURT: The motion for directed verdict will be

> denied. The testimony before this Court is the testimony of the narcotics' agent who indicated that he did go in, that he identified Mr. Newberry, and that he purchased powder cocaine for $100 from Mr. Newberry, and it's been identified by Mr. Frazure as being actually powder or cocaine salt. Certainly, as in any case, the jury will decide the credibility of the witnesses, but taking the evidence in the light most favorable to the State, the Court will deny the motion for directed verdict at this time. (R. 162)

The defendant, Ashante Newberry, did not testify in this cause.

Newberry did, on the other hand, produce his aunt, Ruby Millon, and his mother, Verline Newberry, both as alibi witnesses. (R.167, 186)

Ruby Jean Millon, Newberry's aunt, testified that Newberry and his mother, Verline, arrived at her home in Memphis between 9:00 and 10:00 the night of December 10th. (R. 169, 171)

Verline Newberry, the defendant's mother, testified she and Ashante went to the home of Ruby Jean Millon between 9:00 and 10:00 in the morning on December 10th where they remained until Sunday morning. (R. 189-90, 192-93)

After being advised of his right to testify or not, Newberry personally elected to remain silent. (R. 200-01)

Peremptory instruction was subsequently denied. (C,P. at 81)

Following closing arguments, the jury retired to deliberate at 4:53 p.m. (R. 239) Twenty-two (22) minutes later, at 5:15 p.m., the jury returned a verdict of guilty as charged. (R. 240-41) A poll of the jury, individually by number, reflected the verdict was unanimous. (R. 241-42)

Newberry filed a motion for a new trial and a separate motion for judgment notwithstanding the verdict on May 2, 2007. (C.P. at 84-85) During a post-trial sentence-enhancement hearing conducted on May 16, 2007, both motions were denied. (R. 250; C.P. at 89)

Jack R. Jones, III, a practicing attorney in Southhaven, did a splendid job of representing

Newberry during the trial of this cause.

John M. Colette, a Jackson attorney, has been substituted on appeal. His representation has been equally effective.

SUMMARY OF THE ARGUMENT

I. The record does not reflect the racial composition of the jury. This observation, standing along, would appear to be fatal to Newberry's complaint. **Jackson v. State,** 684 So.2d 1213, 1224 (Miss. 1996) ["The record, however, does not reflect the racial composition of the jury as seated."]

In any event, the prosecutor gave viable race-neutral reasons for striking peremptorily juror number 69 (S-2), an unnamed African-American female, *viz.*, 22 month length of residency in the county and failure to make eye contact with the prosecutor during voir dire. (R. 76-77)

Although the trial judge made no on-the-record finding with respect to the race-neutrality of the S-2 challenge, we invite this Court to analyze it as a legal issue *de novo*. **United States v. Williams,** 264 F.3d 561 (5th Cir. 2001) citing **Hernandez v. New York,** 500 U.S. 352, 364-65, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); **United States v. Bentley-Smith,** 2 F.3d 1368 (5th Cir. 1993).

Notwithstanding decisions suggesting otherwise - *e.g.*, **Powers v. Ohio,** 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) -Newberry lacks standing and should be barred from assailing within the context of the **Batson** decision the State's S-1 challenge targeting juror number 60, Quang Van Dang. The record reflects Mr. Dang was an Asian male, i.e., an Oriental.

Newberry, on the other hand, is a member of the black race. Thus, it cannot be said the prosecutor exercised a peremptory challenge to remove from the venire a member of the defendant's race as required by the **Batson** decision. **Batson v. Kentucky,** 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, 87-88 (1986).

Finally, the record supports a finding that at least two of the three African-Americans on a venire consisting of thirty (30) potential jurors, were seated on the jury that convicted Newberry. (R. 78-79) **Harris v. State,** 901 So.2d 1277, 1281-82 (Ct.App.Miss. 2004), reh denied, cert denied ["Among the facts to be considered is the service of four African Americans on this jury."]

II. Newberry opened the door to evidence of the prior contacts between the agent and the defendant which was proffered to establish the agent's ability to identity Newberry as the actual seller. The accuracy of the agent's identification of Newberry was a hotly contested issued in this case. (R. 228-29, 235, 249)

Even if not, the evidence was admissible by virtue of exceptions found in Miss.R.Evid. 404(b).

III. The portions of the closing argument criticized here were neither objectionable nor objected to; rather, they constituted perfectly legitimate oratory focusing upon the credibility of the witnesses.

Contemporaneous objection to allegedly prejudicial remarks during closing argument is required else the objection is waived. **Scott v. State,** Cause No. 2002-CT-00798-SCT decided May 15, 2008 (¶9), slip opinion at 4 [Not Yet Reported], citing **Spicer v. State,** 921 So.2d 292, 309 (Miss. 2006).

IV. The trial court did not abuse its judicial discretion in admitting testimony concerning bits and pieces of a cell phone conversation with two male voices. The testimony assailed here was already in evidence and did not involve or implicate Newberry; rather, the conversation complained about was between Wilkey and the unidentified, unindicted black male who sold the crack cocaine.

Given its limited context, admission of this testimony did not affect a substantial right and was

harmless beyond a reasonable doubt.

PRE-ARGUMENT

Appellant states in his brief the following:

> "If there were ever a case of starting out on the wrong foot and finishing with both feet kicked out from underneath you, your defendant's trial surely qualifies. *Defendant Newberry's day started with being held in contempt by the trial judge, for not appearing in court when he was supposed to appear,* despite his being incarcerated. And that was just the beginning of what could be described as a *tragedy of errors,* resulting in your defendant being sentenced to serve sixty (60) years in prison." (Brief of Appellant at 12, 27; emphasis in original)

Newberry's "day" did not begin with a citation for contempt or bond revocation. Not unless Newberry's definition of a "day" is the equivalent of several "months."

His contempt of court hearing was held December 8, 2006, nearly seventeen (17) months prior to Newberry's trial on April 26, 2007. (R. 2-8) Newberry gave the judge the following explanation for his incarceration, to-wit: " [M]y old lady had me in jail on a trumped up charge." (R. 4)

Newberry's bond revocation hearing was held on February 26, 2007, two (2) months prior to his trial for the sale of cocaine. (R. 9-21) Judge Chamberlin found that under the facts, Newberry was not entitled to bond. (R. 18)

We say all that to say this: Newberry's reference to a "tragedy of errors" is an extravagant exaggeration of fact.

ARGUMENT

I.

THE PROSECUTOR GAVE VIABLE RACE-NEUTRAL REASONS FOR STRIKING PEREMPTORILY JUROR NUMBER 69, AN AFRICAN-AMERICAN FEMALE, AND JUROR NUMBER 60, AN ASIAN MALE.

First, some fast facts gleaned straight from the record.

The defendant is a member of the black race. (R. 72)

The venire of potential jurors present for Newberry's trial consisted of thirty (30) people. (R. 68) Among the thirty (30) were three (3) blacks, 10% of the total venire from which to select a jury. (R. 70) Judge Chamberlin addressed this matter and specifically noted " . . . that [these jurors] are chosen at random, and it's my understanding this is close or existent to the current makeup of DeSoto County." (R. 70)

One (1) of the six (6) peremptory strikes allotted to the State (S-2) was exercised against an African-American. (R. 72)

A second strike (S-1) was exercised against an Asian. (R. 72-73, 75)

Following Newberry's general objection voiced on **Batson** grounds, the trial judge ruled the defendant had not at that point made out a *prima facie* case of purposeful discrimination based on race. (R. 73, 75) Nevertheless, as was his customary practice, Judge Chamberlin required the State to give its reasons for its two (2) strikes, S-1 and S-2, targeting minorities. (R. 73-74)

The racial composition of the jury selected to try this case is not reflected by the record. We only have their names and numbers. (R. 81) Nevertheless, the State tendered to the defendant as potential jurors two African-American veniremen. (R. 78-79) A rational inference to be drawn from this observation is that the final jury (R. 81) consisted of ten (10) whites and two (2) blacks.

The race of the alternate juror is, likewise, not reflected by the record. (R. 81)

Finally, the record reflects the two late-appearing African-American veniremen who were not seated " . . . came during the middle of the voir dire examination." (Judge Chamberlin - R. 70)

The State's S-1 challenge was used to strike peremptorily juror number 60, an Asian or Oriental male and an "IT specialist" (R. 72, 74)