IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALEXANDER WOMACK AND MAURICE WOMACK — APPELLANT

V. — NO. 2008-KA-0144-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Alexander Womack and Maurice Womack, Appellant
3. Honorable Eddie H. Bowen, District Attorney
4. Honorable Robert G. Evans, Circuit Court Judge

This the 12 day of August, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE ISSUES

ISSUE NO. 1: THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO USE UNVERIFIABLE PRETEXTUAL REASONING FOR USING ALL SIX OF ITS PEREMPTORY STRIKES AGAINST AFRICAN AMERICAN JURORS.

ISSUE NO. 2: THE TRIAL COURT ERRED IN DENYING ALEXANDER WOMACK AND MAURICE WOMACK'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Simpson County, Mississippi, and a judgment of conviction for the crime of Attempted Armed Robbery against the appellants, Alexander Womack and Maurice Womack. The trial judge sentenced the Appellants to five (5) years in the custody of the Department of Corrections. The conviction and sentence

followed a jury trial on September 20, 2007, Honorable Robert G. Evans, Circuit Judge, presiding. The Circuit Court of Simpson County, Mississippi, set a bond for their release from custody pending the decision of his appeal. Alexander Womack and Maurice Womack are presently out on bond awaiting the decision of his appeal.

FACTS

On or about December 30, 2006, Alexander Womack and Maurice Womack pulled into the parking lot of the Exxon Truck Stop in D'Lo, Mississippi. Tr. 110-11. The defendants testified they had been out looking for rabbits to hunt and stopped by the Exxon Truck Stop to get cigarettes. Tr. 95-96, 111. Maurice Womack had seen rabbits in his father's field and went to see if his cousin would go back with him to catch the rabbits. *Id.* Alexander Womack testified that he had been to a dance at a teen center in Magee, Mississippi earlier that evening and was dropping two other cousins off when Maurice Womack pulled in behind him. Tr. 95. According to Alexander, Maurice inquired about some cigarettes, told him about the rabbits and asked Alexander to go back out to the field with him. Tr. 95-96, 110-111. Alexander then took the car he was driving back to his mother's house and got in the car with Maurice. Tr. 111. The cousins then drove back out to the field where Maurice had seen the rabbits. Unable to find anymore rabbits, the two defendants proceeded to the store to get some cigarettes. Their first stop was the Conoco on Highway 49 in Mendenhall where neither defendant was able to purchase cigarettes. Tr. 96, 111.

At approximately 12:30, Alexander and Maurice arrived at the Exxon Truck Stop in D'Lo, Mississippi, to purchase some cigarettes. Tr. 96, 111. At this point Alexander

remembered that they had been riding around with the shotgun in the back seat of the car. Tr. 96-97, 111. Alexander told his cousin, Maurice, that he would put the gun in the trunk as soon as they parked. Tr. 97. Maurice testified that he parked on the side of the store so no one would be able to see Alexander putting the gun in the trunk. Tr. 112. When Alexander got out of the car with the gun, he noticed car lights coming from the back, but then the lights of the car went off. At this point he walked in front of the car so whoever was in the other vehicle would not see what he was doing. Tr. 97,112. However, when he realized it was a police car he had seen, Alexander panicked, dropped the gun on the ground and walked into the store. Tr. 97-98, 112. When Alexander came out of the store with the cigarettes, Officer Kennedy had Maurice handcuffed and on the ground. *Id.*

The testimony of the prosecution's witnesses were slightly different. Officer Kenny Kennedy, the arresting officer, testified that on December 30, 2006, at a little after midnight, he was out on patrol on Highway 49 checking on the Exxon Truck Stop. When he made the first entrance into the truck stop, he noticed a vehicle parked in an unusual area. Tr. 42. He says he saw a person standing outside the driver's side of the car with his face covered. *Id.* Officer Kennedy testified he then turned his headlights off and went down to the entrance where the 18-wheelers usually turn into the truck stop. *Id.* He drove around behind the truck stop to get a better look. *Id.* From this vantage point he noticed the person standing outside the car had his face covered with a red scarf and the driver of the vehicle also had a red scarf covering his face. *Id.* Officer Kennedy then testified he noticed the "driver" turn from the vehicle and walk towards the store with something down along his side. However, Officer

Kennedy could not tell what the person was carrying. He says the person standing outside the car spotted him, hesitated for a minute and went back to the vehicle. Tr. 42-43. Officer Kennedy states that the subject knelt down and threw the object under the car and took off in a fast pace towards the store. Tr. 43. Officer Kennedy then pulled in behind the car and turned his headlight on so he could see under the car. Tr. 45. Officer Kennedy stated that he noticed the object under the car appeared to be a long barrel shot gun. *Id.* At this time he says the driver, Maurice Womack, got out the car and started walking towards the store. Officer Kennedy then got out his unit and instructed him to get on the ground. Once he was on the ground, Officer Kennedy handcuffed him. Tr. 45-46. As Officer Kennedy called for backup, Alexander Womack came out the store and Officer Kennedy instructed him to get on the ground as well. Tr. 46. Officer Warren McClendon then arrived on the scene and Officer Kennedy asked him to look under the car. Officer McClendon pulled a shot gun from under the car. *Id.* When he opened the gun, Officer Kennedy could see it was loaded. *Id.* When Officer Kennedy searched the defendants, he found each to be in possession of a shot gun shell. Tr. 46. Officer Miller arrived next and handcuffed Alexander Womack. Tr. 69. The defendants were not questioned at the scene. Tr. 55. They were placed in the cars of other officers who had responded to the call for backup and were taken to the sheriff's department. *Id.* The case was turned over to the sheriff's department and the defendants were later charged with and convicted of attempted armed robbery.

SUMMARY OF THE ARGUMENT

During jury selection, the State used six peremptory strikes against African American

jurors, five of the strikes were based on the inattentiveness of the jurors. Tr. 23, 26, 31-32, 34. The reasoning behind the strikes made by the state were unverifiable and clearly pretextual. Furthermore, the evidence was insufficient and the verdict was against the overwhelming weight of the evidence and this was reversible error.

ARGUMENT

ISSUE NO. 1: THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO USE UNVERIFIABLE PRETEXTUAL REASONING FOR USING ALL SIX OF ITS PEREMPTORY STRIKES AGAINST AFRICAN AMERICAN JURORS.

"[A] trial court's determination of whether a showing of racial discrimination has been made will not be reversed unless it is 'clearly, erroneous, or against the overwhelming weight of the evidence.'" ***Johnson v. State***, 792 So. 2d 253, 256-57 (Miss. 2001)(citing ***Stewart v. State***, 662 So. 2d 552, 558 (Miss.1995)). The Mississippi Supreme Court "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." ***Manning v. State***, 765 So. 2d 516, 519 (Miss. 2000)(citing ***Thorson v. State***, 721 So.2d 590, 593 (Miss.1998).

Since ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and ***Taylor v. State***, 524 So. 2d 565, 566 (Miss. 1986), down through the present with cases such as ***Flowers v. State***, 947 So.2d 910 (Miss.2007), the basic rule has been that a defendant can challenge the composition of a petit jury on the grounds that his or her equal protection and fair trial rights are irreparably jeopardized by the unlawful exclusions of members of the defendant's race from the petit jury. ***Batson***, 476 U. S. at 95, 106 S. Ct. at 1722, 90 L. Ed. 2d at 88. A defendant establishes a *prima facie* case under ***Batson*** by showing that: (1) the

defendant is a member of a cognizable racial group; (2) that he prosecutor has exercised peremptory challenges toward the elimination of venire members in that group; (3) and the facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities. ***Snow v. State,*** 800 So.2d 472, 478 (Miss. 2001), ***Taylor***, 524 So. 2d at 566. "Once a prima facie case has been established, the party exercising the challenge has the burden to articulate a race-neutral explanation for excluding that potential juror." ***Hicks v. State***, 973 So.2d 211 (Miss. 2007), ***McFarland v. State***, 707 So.2d 166, 171 (Miss. 1997). In the case at hand, the burden shifted to the prosecution to give racially neutral explanations for each challenge. *Id.*

"After a 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." ***Hicks***, 973 So.2d at 219 (citing ***McFarland***, 707 So.2d at 171).

The Mississippi Supreme Court has identified five (5) indicia of pretext when examining race-neutral explanations of a peremptory strike:

> (1) disparate treatment, that is the 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, 765 So.2d at 519. "The burden remains on the opponent of the strike to show that

the race-neutral explanation given is merely a pretext for racial discrimination. Hicks, 973 So.2d at 219, Berry v. State, 802 So.2d 1033, 1037 (Miss. 2001).

During jury selection, the State used six peremptory strikes against African American jurors, five of the strikes were based on the inattentiveness of the jurors. Tr. 23, 26, 31-32, 34. Alexander and Maurice Womack challenged all six strikes based on ***Batson***. *Id.* The trial court attended to each strike on a case by case basis. The court required both the State and defense to cite race neutral reasons for each strike if when it was challenged. However, the reasoning behind the strikes made by the state were unverifiable and clearly pretextual. Another example of one of the exchanges is as follows:

> THE COURT: Amber Bagley
>
> MR. KING: Strike
>
> MR. WARE: We're gonna ask for Batson on that, Your Honor, whenever you get ready.
>
> THE COURT: Okay. Excuse Me.
>
> MR. KING: Do you want to do the Batson one at a time or just all when we get through, Judge?
>
> THE COURT: I can do it now if you want. Give me her race, gender and reason, please.
>
> MR. KING: The race is black. The gender is female. Even yesterday, Judge, when I was talking, she was not attentive. Especially today, she was not attentive. And I feel that's the reason that I'm striking her.

Tr. 23.

THE COURT: Number 16, William McGee

MR. KING: Your Honor, both yesterday and today Mr. Magee, even in my opening statement today, besides being inattentive, he has a kind of a scowl look when I'm talking It's –

THE COURT: Show me how he did.

MR. KING: Kind of like this. It wasn't a nod and smile like some jurors do to you. And it seemed like when Mr. Ware was talking, he showed more attention. He kind of puts his head to the side and –

MR. WARE: Again your Honor, I–

THE COURT: What's his race?

MR. KING: His race is black male.

Tr. 26.

THE COURT: Okay, we are one short. You owe one more, Mr. King. Charles Smith, 22.

MR. KING: Your Honor, I've already struck one fork lift operator and –

THE COURT: You sure did.

MR. KING: –I would strike No. 22.

THE COURT: Okay.

MR. WARE: Your Honor, we again raise the Baston challenge again, because it's pretextual. Because again, he's another black male.

THE COURT: All right, Mr. King. Gender and race.

MR. KING: Charles Smith is a black male.

THE COURT: Reason?

MR. KING: Well, there's actually two reasons, Your Honor. First, I've already struck one forklift operator, and also in the last two days Mr. Smith has not shown attention while I asked questions.

Tr. 31-32.

THE COURT: 23 to the State, Tiffany Norwood.

MR. KING: Strike, Your Honor.

THE COURT: 24, Charles Ayers to the State.

MR. KING: Strike, Your Honor.

MR. WARE: Again, raise Batson on both. Both are black, one female one male.

THE COURT: All right. Race gender reason for No. 23.

MR. KING: Your Honor, No. 23 is a black female. She works with the department of corrections, they could possibly be involved with them and that's the reason I'm striking her.

THE COURT: MR. WARE

Tr. 32.

As outlined above, inattentiveness was the dominating factor given in all of the State's strikes used against African American jurors. Although the Supreme Court recognizes inattentiveness as a valid reason to excuse a potential juror, the exchanges above can clearly be inferred as improper conduct by the State from the nature of the strikes and the explanations given for each.

In ***Flowers,*** the Mississippi Supreme Court concluded:

> "Though a reason proffered by the State is facially neutral, trial judges should not blindly accept any and every reason put forth by the State, especially where, as here, the State continues to exercise challenge after challenge upon members of a particular race."

Flowers, 947 So. 2d at 937.

In the case at bar, the trial court acknowledges it does not know how to measure inattentiveness in the following exchange:

> MR. WARE: How about Charles Ayers?
>
> THE COURT: Oh, Charles Ayers. Pardon me. Excuse Me.
>
> MR. KING:Charles Ayers is a black male. He was employed with the city of Jackson.
>
> MR. WARE: He's striking everybody that works with the City of Jackson.
>
> THE COURT: Don't interrupt.
>
> MR. WARE: I'm sorry, Your Honor.
>
> THE COURT: Don't do that again.

MR. KING: And again the reason is Mr. Ayers, yesterday and today on this panel, was inattentive to when I was asking questions and during my opening statement.

THE COURT: Mr. Ware.

MR. WARE: Your Honor, I think, again, it's just pretextual.

THE COURT: I'm going to allow the strike. Again, the supreme court has shown that inattentiveness is a general reason for a strike. I don't know how you measure it though.

Tr. 34.

The fact that the trial court admitted its inability to measure the attention of the jurors, but continued to blindly accept the state's recurring use of inattentiveness to strike African-American jurors is a clear violation of ***Flowers***. While the prosecutors used all of their peremptory challenges to strike African-American members of the venire, the trial court never gave pause as to how the only jurors being "inattentive" towards the State also happen to be African-American.

The Mississippi Supreme Court has stated that inattentiveness can be a race-neutral explanation of a peremptory strike. ***Horne v. State***, 825 So.2d 627, 636 (Miss. 2002)(citing ***Puckett v. State***, 788 So.2d 752, 760 (Miss. 2001)). However, the prosecutor went beyond the use of inattentiveness as an explanation. The situation is curious how only African-Americans were inattentive? That explanation is simply an excuse to kick African-American jurors off of the jury. The use of inattentiveness could be remedied by notifying the trial

judge during *voir dire* that a juror is being inattentive and allowing the judge to correct the problem. If then the juror is still being inattentive, then a valid reason would exist for the juror to be struck for inattentiveness.

Although trial judges are afforded great deference in their ***Batson*** rulings, as this Court stated in ***Flowers***, neither prosecutors nor defense counsel should be allowed to manipulate ***Batson*** to the point where voir dire is simply an exercise in finding race neutral reasons. ***Flowers***, 947 So.2d at 937.

It is the appellant's position that the State should have been required to substantiate its claims of inattentiveness with more concrete evidence than was provided. By not requiring this, the appellant was prejudiced by a denial of fundamental due process in the selection of the jury.

The remedy in this situation has usually been a remand for a hearing requiring the State to establish racial neutrality and if they fail to do so, a new trial should follow. See, ***Kolberg v. State***, 704 So.2d 1307, 1314 (Miss. 1997) and ***Thorson v. State***, 653 So.2d 876, 896 (Miss. 1994). There is no reason why the same result would not apply in the present case. Therefore, Alexander and Maurice Womack ask this Court to remand this case back to the trial court for a ***Batson*** hearing.

ISSUE NO. 2: THE TRIAL COURT ERRED IN DENYING ALEXANDER WOMACK AND MAURICE WOMACK'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In trial counsel's Motion for Judgment Notwithstanding the verdict or in the alternative a New Trial, trial counsel specifically argued that the jury's verdict was against

the overwhelming weight of the evidence. C.P. 45, R.E. 14. The trial judge denied this motion. (Attachment to Motion to Supplement the Record). The trial judge erred in refusing to grant this motion.

In ***Bush v. State***, the Mississippi Supreme Court set forth the standard of review as follows:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. ***Herring v. State***, 691 So.2d 948, 957 (Miss.1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. ***Amiker v. Drugs For Less, Inc.***, 796 So.2d 942, 947 (Miss.2000). However, the evidence should be weighed in the light most favorable to the verdict. ***Herring***, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005) (footnotes omitted).

In the present case, Alexander and Maurice Womack are at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. Officer Kennedy's testimony was the only evidence that Alexander and Maurice Womack were in the process of attempting to rob the Exxon Truck Stop in D'Lo, Mississippi. Alexander testified that he was going to put the gun in the trunk of the car. Tr. 96-97, 111.

Alexander and Maurice Womack had been riding around looking for rabbits to hunt, and decided to stop and get cigarettes. Tr. 95-96, 111. When they got to the truck stop, Alexander did in fact go in and purchase some cigarettes. 97-98, 112. Clearly, it would sanction an unconscionable injustice to allow the Appellants to be convicted of this crime.

As set forth in the indictment, the State was required to show that Alexander and Maurice Womack had (1) an intent to commit a particular crime, [take the personal property of Exxon Truck Stop] and (2) a direct ineffectual act done toward its commission; and (3) the failure to consummate its commission. ***Ishee v.*** State, 799 So.2d 70, 73 (Miss. 2001). Other than the testimony of Officer Kennedy, the State presented no evidence that Alexander and Maurice Womack were attempting to rob the Exxon truck Stop. Besides the testimony of Officer Kennedy, the State presented no evidence that Alexander and Maurice Womack had any intent to go into the truck stop with a gun and demand money.

Officer Kennedy testified that he noticed a vehicle parked in an unusual area. Tr. 42. He continued to stated he noticed the driver walking to the store with something along his side and his face was covered. *Id.* Officer Kennedy stated that he could not tell what the person was carrying. *Id.* The item that the drive had carried along his side was a shotgun. Tr. 45. Just because someone has a shotgun in the parking lot of a truck stop does not necessarily mean that someone is going to rob the store. Neither Alexander nor Maurice went into the truck stop with the gun and demanded money.

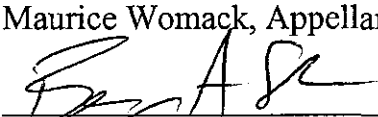
The verdict was clearly against the overwhelming weight of the evidence. Alexander and Maurice Womack therefore respectfully asserts that the foregoing facts demonstrate that

the verdict was against the overwhelming weight of the evidence, and this Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See* ***Hawthorne v. State***, 883 So.2d 86 (Miss. 2004).

CONCLUSION

The Appellants contend that the verdict was against the overwhelming weight of the evidence; therefore, the Court should reverse and remand for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Alexander Womack and
Maurice Womack, Appellants

BY: 

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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Alexander Womack and Maurice Womack, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Honorable Eddie H. Bowen
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This the 12 day of August, 2008.

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