

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**DAVID DORELL DORA**

**APPELLANT**

**VS.**

**NO. 2008-KA-1020**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**STATEMENT OF THE ISSUES**

- I. THE TRIAL COURT PROPERLY RULED THAT THE APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION AFTER HIS *BATSON* CHALLENGE.
- II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE PROPOSED JURY INSTRUCTION D-2.

**STATEMENT OF THE FACTS**

The Appellant, David Dora, was indicted for the crime of business burglary for breaking into Dan's County Line Grocery and stealing money from a poker machine. During jury selection, Dora made a *Batson* challenge arguing that "the State has used four out of its five peremptory strikes on members of the black race of people." (Transcript p. 72). The State responded by stating that it had not used all its challenges and had used one of its challenges to strike a white female. (Transcript p. 72 - 73). The State further noted that it tendered "several African American" potential jurors to

Dora. (Transcript p. 72). After setting forth the requirements for a prima facie case of discrimination, the trial court held that it did not “see where the State exercised its five peremptory challenges as exercised so far in a racially discriminatory manner.” (Transcript p. 73). The trial court then overruled Dora’s *Batson* challenge. (Transcript p. 73).

At trial, the State presented sufficient evidence establishing that Dora was guilty of business burglary including the testimony of two eyewitnesses who testified that they saw Dora breaking into the business in question. (Transcript p. 110 - 112 and 133 - 134). Dora was convicted and sentenced to serve five years in the custody of the Mississippi Department of Corrections with two years post-release supervision.

### **SUMMARY OF THE ARGUMENT**

The record does not provide sufficient information regarding the racial makeup of the venire as a whole or the selected jurors to establish that the trial court erred in denying Dora’s *Batson* challenge. Further, Dora did not establish a prima facie case of discrimination in the State’s selection of jury members and use of peremptory strikes.

The trial court did not err in refusing to grant Dora’s proposed jury instruction regarding the credibility of witnesses as the issue was covered elsewhere in the instructions. Moreover, even if it were error, there is no indication in the record that the failure to grant the instruction in any way prejudiced Dora’s defense.

## ARGUMENT

### I. THE TRIAL COURT PROPERLY RULED THAT THE APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION AFTER HIS *BATSON* CHALLENGE.

Dora first raises the following issue on appeal: “whether the trial court erred in ruling that the defense had failed to make a prima facie case of racial discrimination after the defense raised a *Batson* challenge to the State’s peremptory strikes made during jury selection.” (Appellant’s Brief p. 5). The standard of review in such cases is as follows:

Our standard of review requires reversal only if the factual findings of the trial judge are “clearly erroneous or against the overwhelming weight of the evidence.” *Tanner v. State*, 764 So.2d 385 (Miss. 2000). Any determination made by a trial judge under *Batson* is accorded great deference because it is “based, in a large part, on credibility.” *Coleman v. State*, 697 So.2d 777, 785 (Miss. 1987) (*disagreed with on other grounds*). In the *Batson* context, the term “great deference” has been defined as meaning an insulation from appellate reversal of any trial findings which are not clearly erroneous. *Lockett v. State*, 517 So.2d 1346, 1349-50 (Miss. 1987).

*Moore v. State*, 914 So.2d 185, 189 (Miss. Ct. App. 2005). As noted by this Court in *Knight v. State*, “[t]rust is placed in a trial judge to determine whether a discriminatory motive drives the reasons given for striking a potential juror” and “[o]ne of the reasons the trial court is afforded such deference when a *Batson* challenge is raised is because the demeanor of the attorney making the challenge is often the best evidence on the issue of race neutrality.” 854 So.2d 17, 22 (Miss. Ct. App. 2003) (quoting *Walker v. State*, 815 So.2d 1209 (Miss. 2002)). “Some of the time the unspoken intangible may be the judge’s perception of the prosecutor arising from past experience.” *Collins v. State*, 817 So.2d 644, 656 (Miss. Ct. App. 2002).

With that standard in mind, Dora is not entitled to reversal for two reasons: First, the record does not adequately establish the racial makeup of the venire as a whole or the chosen jurors. The only information in the record regarding the racial makeup of the selected jury and those potential

jurors who were stricken by the State is as follows:

- a. Four of the State's five peremptory strikes were against African American potential jurors. (Transcript p. 71 - 72).
- b. The fifth peremptory strike made by the State was against a Caucasian female. (Transcript p. 73).
- c. The State tendered "several" African American jurors to the defendant. (Transcript p. 72).

Dora asserts in footnote 1 on page 6 of his brief that "the jury was predominantly white;" however, the State is unable to find in the record any indication of the racial makeup of the jury. Moreover, the record is silent as to the racial makeup of the venire as a whole. Thus, there is insufficient information in the record to support Dora's assignment of error on appeal. *See Mason v. State*, 440 So.2d 318, 319 (Miss. 1983); *Jackson v. State*, 684 So.2d 1213, 1223 -1224 (Miss.1996); and *Hansen v. State*, 592 So.2d 114, 127 (Miss. 1991). Furthermore, "there is a presumption that the judgment of the trial court is correct and the burden is on the Appellant to demonstrate some reversible error to this Court." *Acker v. State*, 797 So.2d 966, 971 (Miss. 2001) (quoting *Branch v. State*, 347 So.2d 957, 958 (Miss.1977)).

Second, Dora failed to establish there was a prima facie case of discrimination. In order to establish a prima facie case, Dora "was required to show: (1) that he is a member of a 'cognizable racial group;' (2) that the proponent has exercised peremptory challenges toward the elimination of veniremen of his race; and (3) that facts and circumstances raised an inference that the proponent used his peremptory challenges for the purpose of striking minorities." *Puckett v. State*, 788 So.2d 752, 756 (Miss. 2001) (quoting *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986)). "The pivotal question is 'whether the opponent of the strike has met the burden of showing that proponent has engaged in a pattern of strikes based on race or gender, or in other words, the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Id.* at

757. As this Court noted in *Chandler v. State*, the Fifth Circuit has held that:

To establish a prima facie case, a party is required to show that the circumstances surrounding the peremptory challenges raise an inference of purposeful discrimination. The trial court should consider all relevant circumstances in determining whether a prima facie *Batson* violation can be established. Factors that give rise to an inference of discrimination include, among others, a pattern of strikes against jurors of a certain race and the party's statements and questions during voir dire. "A prima facie case of racial discrimination requires a defendant to 'come forward with facts, not just numbers alone.' " In this circuit, a trial court's determination that a party has failed to make a prima facie showing is accorded a "presumption of correctness, which can only be rebutted by 'clear and convincing evidence.' "

967 So.2d 47, 52-53 (Miss. Ct. App. 2006) (quoting *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 561 (5th Cir. 2001)) (*Emphasis added*). Dora's only argument in support of his contention that the State was discriminatory in its use of peremptory strikes was the fact that "four of the five peremptory challenges exercised by the State were African American." (Appellant's Brief p. 5). However, as this Court held in *Gilbert v. State*, "[t]he number of peremptory strikes which the State used against the minority members, standing alone, is insufficient to establish an inference to a pattern of purposeful discrimination." 934 So.2d 330, 337 (Miss. Ct. App. 2006) (quoting *Dennis v. State*, 555 So.2d 679, 681 (Miss. 1989)). Moreover, as noted in *Collins v. State*, the test is simply whether Dora has shown that the State had an established "pattern of striking all or almost all of a certain racial group." 817 So.2d 644, 656 (Miss. Ct. App. 2002). The record does not indicate that Dora attempted to strike all or almost all of the African American prospective jurors. Additionally, the State did not use all of its peremptory challenges and tendered several potential jurors to Dora that were African American. (Transcript p. 72).

Accordingly, Dora's first issue is without merit as the record does not adequately establish the racial makeup of the venire as a whole or the chosen jurors and as Dora failed to establish that there was a prima facie case of discrimination.



**II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE PROPOSED JURY INSTRUCTION D-2.**

Dora also raises the following issue on appeal: “whether the trial court erred to properly instruct the jury by refusing to give the Defendant’s proposed instruction on credibility of a witness.” (Appellant’s Brief p. 7). Dora’s proposed instruction reads as follows:

Each person testifying under oath is a witness. You have the duty to determine the believability of the witnesses. In performing this duty, you must consider each witness’s intelligence, the witness’s ability to observe and accurately remember, the witness’s sincerity, and the witness’s demeanor while testifying. You must consider also the extent the witness is either supported or contradicted by other evidence; the relationship the witness may have with either side; and how the witness might be affected by the verdict. You must consider any evidence of the witness’s character for truthfulness.

In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate falsehood, and whether it pertains to a matter of importance or an unimportant detail.

You may accept all or any part of a witness’s testimony and you may reject part and accept other parts of a witness’s testimony.

After making your own judgment, you will give the testimony of each witness the credibility, if any, as you may think it deserves.

The weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

(Record p. 68). The trial court did, however, give the following instruction with regard to witness credibility and the jury’s role in that regard:

\* \* \*

It is your duty to determine the facts and to determine them from the evidence produced in open court. You are to apply the law to the facts and in this way decide the case. You should not be influenced by bias, sympathy, or prejudice. Your verdict should be based on the evidence and not upon speculation, guesswork, or conjecture. You are the sole judges of the facts in this case. Your exclusive province is to determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness in this case. You are required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case.

\* \* \*

(Record p. 58 - 59). In addressing this issue, it is first important to point out that the Mississippi Supreme Court recently held that “in determining whether error exists in granting or refusing jury instructions, the instructions must be read as a whole; if the instructions fairly announce the law and create no injustice, no reversible error will be found.” *Jones v. State*, 962 So.2d 1263, 1272 (Miss. 2007) (quoting *Martin v. State*, 854 So.2d 1004, 1009 (Miss. 2003)) (*emphasis added*).

Dora argues that he was entitled to a theory of defense instruction and that his “defense theory was that two witnesses who had motive to lie” testified that they saw Dora breaking into the store in question. (Appellant’s Brief p. 8). Mississippi law is clear that “[a] defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.” *Jones v. State*, 912 So.2d 501, 505-06 (Miss. Ct. App. 2005) (quoting *Harris v. State*, 861 So.2d 1003, 1012-13 (Miss.2003)) (*emphasis added*). The trial court instructed the jury regarding its duties in determining the credibility of witnesses as set forth above. Moreover, as set forth below, Dora was allowed to explore his theory of the defense - that these two witnesses had motive to lie - during both the cross-examination of the witnesses and during closing arguments.

Dora also argues that according to *Swann v. State*, 806 So.2d 1111, 1117 (Miss. 2002), the trial court’s instruction did not fully instruct the jury as did the instruction given in the *Swann* case. (Appellant’s Brief p. 7 - 8). However, the *Swann* case concerns the denial of an instruction regarding the testimony of a witness with prior inconsistent statements. The witnesses in the case at hand did not have prior inconsistent statements. Furthermore, Dora was given an opportunity to cross examine each of these witnesses about their alleged “motive to lie” (*see e.g.* Transcript p. 117, 123, 128 - 129, and 137) and was also allowed to discuss it in closing (*see e.g.* Transcript p. 207 - 209

and 214 - 215) just as the defendant in *Swann*. 806 So.2d at 1117. As such, “given the jury instructions, the cross-examination of [both witnesses], and [Dora’s] closing argument, it is reasonable to believe that the jury did take [the witnesses’ alleged motive to lie] into account.” *Id.*

Accordingly, not only did the trial court not err in refusing to grant Dora’s instruction but there is no evidence whatsoever from the record as a whole indicating that Dora’s defense was in any way prejudiced by the trial court’s decision to deny this instruction. Mississippi law is clear that in order for this Court to reverse a case there must be both error and a resulting injury. *Vardaman v. State*, 966 So.2d 885, 891 (Miss. Ct. App. 2007). In other words, “[a]n error is only grounds for reversal if it affects the final result of the case.” *Id.* Even after being confronted with Dora’s theory that these two witnesses had motive to lie during cross-examinations and during closing and with the instructions given in mind, the jury still found the witnesses believable and accepted their testimony along with the other evidence and found Dora guilty. Being instructed regarding the credibility of witnesses in a different way would certainly not have changed the outcome of this case. As there is no indication that the trial court’s holding with regard to this instruction affected the final outcome of the case, this issue is without merit.

## CERTIFICATE OF SERVICE

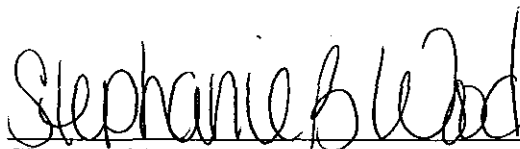
I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 22nd day of December, 2008.

A handwritten signature in black ink, reading "Stephanie B. Wood", written over a horizontal line.

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