IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID DORELL DORA — **APPELLANT**

V. — **NO. 2008-KA-1020-COA**

STATE OF MISSISSIPPI — **APPELLEE**

BRIEF OF THE APPELLANT

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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. David Dorell Dora, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable Lee J. Howard, Circuit Court Judge

This the 13th day of October, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: W. Daniel Hinchcliff

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE NO. 1 : 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.

ISSUE NO. 2 : WHETHER THE TRIAL COURT ERRED TO PROPERLY INSTRUCT THE JURY BY REFUSING TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION ON CREDIBILITY OF A WITNESS.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, and a judgement of conviction for the crime of burglary of a business against David Dorell Dora following a jury trial on September 6, 2006, Honorable Lee J. Howard, Circuit Judge, presiding. Mr. Dora was subsequently sentenced to a term of five (5) years incarceration in an institute under the control of Mississippi Department of Corrections with two (2) years of post release supervision.

FACTS

The trial began without objection three years after the date of the date of the indictment after multiple orders of continuance upon motion of the defendant. During jury selection, the defense

raised a *Batson* challenge, but the trial court found that the defendant failed to present a prima facie showing of discrimination. While four of five peremptory challenges exercised by the State were for African-Americans, the court found the State left other African-Americans on the jury, and did not use all its challenges.

Trial testimony began with Peggy Webber, the manager of "Dan's County Line Grocery" in Crawford, Mississippi. She closed the business around 7:00 p.m. on the evening of July 2, 2003. She did not turn on the alarm as it was broken, a fact known only to her, the owner, and the stock-boy, Robert Smith. (T. 92-95) Robert Smith is related to Appellant, David Dorell Dora, ["David Dora"]. (T. 101) As she left, the Dora was outside the business. (T. 95-96)

Early the next morning she got a phone call and rushed to the store. (T. 97) When she got there, "Tommy Earl [Dora] and Barbara [Lagrone]" were there along with a deputy. Tommy Dora and Barbara Lagrone lived in a trailer behind the business. (T.98) She entered the store and found a "big hole" in the wall across from gaming machines. Webber found fireworks on top of one of the machines. The store did not sell fireworks. She also observed that the store's surveillance camera was "pushed up." (T. 101)

Tommy Dora testified next (T. 105). He lived behind Dan's County Line Grocery with Barbara and his mother. Tommy Dora saw his cousin David Dora that day several times. Early in the day David brought Tommy some beer. He came by later and asked for "tools." (T. 106-108) Tommy noticed "skyrockets" in David's back pocket. (T. 109) Later that night Tommy heard "bamming." He looked out of the trailer towards the back of Dan's County Line Grocery and saw his cousin David "bamming" with something about forty yards away. He knew it was David, by his "Weyerhauser"shirt and Khaki pants . (T. 110-111) He next saw David leaving, "sort of like running." Tommy heard voices and what sounded like vehicles leaving. Tommy did not have a

phone so he left to find one to call 911. (T. 113-115)

Tommy admitted that he would not talk with David's attorney before the trial on cross examination, and that when he was talking with David's attorney the morning of trial, he walked off when the prosecutor asked to talk to him. (T. 116) He explained why he wouldn't sign a written statement, that David was family. (T. 119)

Barbara Lagrone lived with Tommy. She confirmed that she and Tommy saw David earlier in the day, once when he brought beer and once when he asked for a screw driver. (T. 131-132). She observed firecrackers in one of David's pocket. (T. 133) Later, as she and Tommy were watching "Jerry Springer" on television, she heard noise and she "peeped" out. She saw David laying on the ground messing with the store." (T. 133)

The defense brought out that she is currently on disability for depression. Although Tommy testified that David had mentioned something about David asking if Tommy needed any gas, she did not hear any discussion about propane. None of her testimony was disclosed to the police until February before the trial (T. 135-137)

Chad Bell was an investigator with Lowndes County. (T. 139) The call for Dan's County Line Grocery came in around 1:51 a.m. and he was dispatched to the scene. (T. 140).When he arrived, Tommy was waiting and Deputy Sims arrived shortly thereafter. (T. 140) Bell crawled through the hole into a junk room that contained a bunch of machines, the fronts of which were broken in. (T. 142) He found one exploded firework and several more on top of a machine. (T. 144)

He did not recall Tommy as entering the store and remembered that Tommy told him about the fireworks, not vice versa. (T. 148-150) Thereupon, the State rested. (T. 151) Dora's motion for a directed verdict was denied and the defense commenced its proofs.

Tommy Cooper, was the investigator on this case. He too was dispatched to the scene at 1:51

a.m.. He talked the three deputies and wrote a "synopsis." (T. 155-158) Barbara Lagrone would not talk to him at that time; but did finally tell him her version when he took her statement almost three years later. (T. 159). He took pictures of the hole but did not measure its dimensions. (T. 160-163) He could not recall if it appeared to be beaten in. He found no tools. He didn't ask for a description of what David was wearing. (T. 164) He acknowledged that his report showed Tommy as having found the fireworks, contrary to Tommy's testimony. (T. 167) He arrested David the following day, but didn't conduct any search of his room. (T. 168) He took no fingerprints. (T. 168-169) He was forced to agree that his investigation consisted of little more than taking pictures and talking to Tommy. (T. 170)

The State's attorney attempted to rehabilitate this lack of investigation, by giving Cooper the opportunity to explain why he didn't believe he could recover usable prints. (T. 173) He believed he could not search David's room. (T. 174) Chad bell climbed through the hole, giving him some indication of the size of the hole. (T. 180) He had a picture of David, so he didn't concern himself with the clothes he had on. (T. 184-185)

The parties then worked on jury instructions. There was no objection to either the court's or the state's instructions. However, one of the proposed defense instructions was refused. (T. 191, C.P. 68, R.E. 8) Closing statements were made and the case went to the jury. After a guilty of verdict, a date for sentencing was set, and David Dora was then sentenced to five years with two additional years of supervision.

SUMMARY OF THE ARGUMENT

The defense tendered an instruction on weighing the credibility of a witness which was refused by the court for the reason that it was iterative of the court's instructions and would therefor draw attention or "highlight" the testimony of the State's witnesses. The defense theory of the case

is the unreliability of the State's case which consisted on eyewitness testimony and the virtual absence of further investigation.

The State exercised our of its five peremptory challenges in selecting the jury on veniremen of the same "cognizable racial group" as the defendant. The record of voir dire reveals no reason that said jurors were stricken. The trial court's ruling that the defense had failed to make a prima facie case was contrary to the record.

ARGUMENT

ISSUE NO. 1 : 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

During jury selection, the State exercised four of five peremptory challenges to strike African-Americans from the jury panel. The defendant is an African-American, a racially cognizant group. The defense raised a timely objection to the exclusion of jurors based on race as prohibited by *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712 (1986)

The first step when a "*Batson*" challenge is made is that the defendant "establish a prima facie case that race was the criteria for the exercise of the peremptory challenge." *Magee v. State,* 720 So. 2d 186, 188 (Miss. 1988)

> To do this, the defendant must show: 1) that he is a member of a "cognizable racial group;" 2) that the prosecutor has exercised peremptory challenges toward the elimination of veniremen of his race; and 3) that facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities.

Magee , Id. at188 . As the trial court noted the defendant was a black male. (T. 72) The defense made a record that four of the five peremptory challenges exercised by the State were African-American. Accordingly the first two steps for making a prima facie case has been met. The third prong was

denied by the trial court, ruling that: "I can't see where the State has exercised its five peremptory challenges... in a racially discriminatory manner." (T. 73) However, it argued here, that the record paints a very different picture

The State exercised its first challenge on juror number 4. This juror responded to the prosecutor's inquiry as to whether the juror had any connection with an charge or conviction and would seem to provide a race neutral reason for the jurors exclusion, but the State ignored similarly situated jurors. (T. 35-38) Jurors numbers 2, 7, 14, 15 and 21 all had someone involved with a crime. The court was clearly in a position to take note of these failures to challenge other jurors. Juror 14, Mrs. Love answered at least two voir dire inquiries, but again, both responses were also made by several accepted jurors. Whereas Mrs. Love knew someone in the Office of the District Attorney, so did accepted jurors 6 and 13. And she was also one of those jurors that had some familial criminal connection. The three remaining jurors answered no voir dire questions found by this writer in this record. Therefore the record clearly revealed a pattern of discrimination.[1]

Although great deference is afforded the trial court in deciding whether a prima facie case has been made, the use of seven peremptory challenges out of ten has invoked the next phase of *Batson, Id.,* that of shifting the burden to the State to provide race neutral reasons. *Walters v. State,* 720 So. 2d 856,865 (Miss. 1998) In fact, even one clearly improper peremptory challenge has been held to be sufficient to show an intent to discriminate and to require, according to *Batson, Id.*, that the discrimination be purged or the case reversed. *McGee v. State,* 953 So. 2d 211, 216 (Miss. 2007)

> Because McGee's right to equal protection was violated, the entire judicial process was infected, and we must reverse the judgment of

[1]The record is silent to the race and gender of the specific named jurors and jurors on the panel. As four of the five stricken were African-American and the jury was predominantly white, some logical inferences must be made in this argument.

conviction and remand for a new trial.

McGee, Id.

The record reveals that the threshold of a prima facie case was met. This failure to find a prima facie case of racial discrimination in picking Dora's jury deprived him of a fundamentally fair trial, and therefore the judgment of the lower court should be reversed.

ISSUE NO. 2 : WHETHER THE TRIAL COURT ERRED TO PROPERLY INSTRUCT THE JURY BY REFUSING TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION ON CREDIBILITY OF A WITNESS.

Dora's attorney tendered an instruction on the credibility of the witnesses. (C.P. 68, R.E. 8) It was in the form offered by the Mississippi Model Jury Instructions, §1:13. It offered very specific instruction in the proper considerations for weighing the credibility of a witness. The trial judge rejected the instruction, although it correctly stated the law and was essential to Dora's defense. The trial court ruled that the instruction was covered in the court's instructions and would draw attention to the State's witnesses as they were the only fact witnesses.

The State's only instruction on credibility is Instruction C.01 (C.P. 58, R.E. 5). As suggested by the following, such a banal instruction on credibility is not sufficient:

> The refusal of proposed Instruction D-11 would be error if no other instructions regarding the believability of Poe's testimony were provided to the jury. However, the jury did hear other instructions regarding the credibility of the witnesses and the consideration of conflicts in their testimony. "A [trial] court must view jury instructions as a whole, and not individually, in order to decide whether the jury was adequately instructed." Chatman v. State, 761 So.2d 851, 855 (Miss.2000); Bell v. State, 725 So.2d 836, 848-49 (Miss.1998). Furthermore, a trial judge is not under an obligation to grant redundant instructions. Davis v. State, 568 So.2d 277, 280-81 (Miss.1990). Instruction 13(D-4) provided the following:
>
> As the sole and exclusive judges of the facts, it is for you, and you alone, to determine the credibility or believability of the evidence. It

> is for you to determine what witness or witnesses, or other forms of evidence, you will believe, **either in whole or in part**. If upon a consideration of the evidence in this case, you find that there is a conflict in the testimony of the witnesses, it is your duty to settle this conflict. In doing so, you should consider all the factors relevant to determining credibility.
>
> In passing upon credibility, you may consider all the facts and circumstances of the case, **the witness' manner of testifying and demeanor on the stand, their intelligence, their interest or lack of interest, their means and opportunity for knowing the facts to which they testify, the nature of the facts to which they testify and the probability or improbability of their testimony. You may also consider their personal credibility in so far as it may legitimately appear from the trial of this case.**

Swann v. State, 806 So.2d 1111, 1117 (Miss. 2002) The minimal and very elementary instruction given by the court only informed the jury that they were the determiner of facts and had the exclusive duty of determining credibility. The trial court did not give an instruction that even remotely resembled "Instruction 13 (D-4)" as set out above.

It is essential to a fair trial that a jury be instructed in the law and that the jury be instructed in the defendant's "theory" of the case. *Manuel v. State,* 667 So. 2d 590 (Miss. 1995) In the case at bar, the defense theory was that two witnesses who had motive to lie (one of whom only came forward shortly before the trial) and gave impeached and somewhat improbable testimony, combined with an absence of meaningful police investigation created intrinsically reasonable doubt.

Given the critical nature of the credibility of the State's two eyewitnesses under the defendant's theory of the case and the absolute right of a defendant to have a jury that is fully instructed in the law, including the law as it pertains to credibility, it was error to refuse the proposed instruction on credibility. While jury instructions are read as a whole, the case should be reversed where the jury instructions do not fairly and adequately instruct the jury. *Moore v. State,* 755 So. 2d

1276 (Miss App. 2000)

In making this argument we are not incognizant of *Randolph v. State*, 924 So. 2d 636 (Miss. App. 2006). However, as is often the case, the credibility issue in *Randolph, Id.* concerns the credibility of the defendant who testifies and denies his prior confession. Here you have two witnesses, essentially joined at the hip, their interest being so similar, who constituted the entirety of the State's case against Dora and who had a clear, and admitted evidence, reason for on pinning this crime on someone else, "because everybody going to figure that my family, or me, done did something." (T. 114)

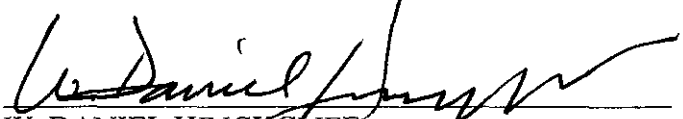
It is accordingly urged that, because credibility of the State's two witnesses was the vast bulk of the State's case, and the cornerstone of the theory of defense, the trial court erred in denying Dora's proposed credibility instruction and thus this case should be reversed and remanded.

CONCLUSION

For the reasons set forth in the foregoing argument, this cause should be reversed and remanded.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for David Dorell Dora, 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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