IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFREY SHELLEY — APPELLANT

VS. — NO. 2008-KA-1284

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

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I. The trial court correctly denied defense counsel *Batson* Challenge and held that the State provided a race-neutral justification for striking Juror Number 126.

II. The trial court did not err in failing to object to "sua sponte" to remarks made during closing argument.

STATEMENT OF THE CASE

On or about October 31, 2007, the Warren County Grand Jury indicted Jeffrey Shelley for the sale of cocaine weighting 0.4 grams to a cooperating individual, in violation of Miss. Code Ann. § 41-29-139(a), of 1972 (as amended). (C.P. 4) Shelley was indicted as an habitual offender pursuant to Miss. Code Ann. § 99-19-81, of 1972 (as amended) since he had two previous convictions for felonies upon charges separately brought and arising out of separate incidents at different times, and has been sentenced to separated term of (1) year or more in a State or Federal Penal Institution. Shelley was convicted of the felony of Burglary of a Dwelling in the Circuit Court of Warren County, Mississippi on or about November 18, 2005, for which he was sentenced to serve a term of 16 years in the custody of the Mississippi Department of Corrections. Shelley was also convicted of the felony of Vehicle Burglary in the Circuit Court of Warren County and sentenced to served a term of four years in the custody of the Mississippi Department of Corrections. (C.P. 6) On June 27, 2008, Shelley was found guilty of sale of cocaine and sentenced as an habitual offender to twenty (20) years in the custody of the Mississippi Department of Corrections with fifteen (15) years to serve, five (5) years suspended on post-release supervision for a period of five (5) years. (C.P. 50)

STATEMENT OF THE FACTS

Officer Jeff Merritt of the Vicksburg Police Department testified that on July 27, 2007, he was conducted an undercover drug operation. (Tr. 51) To conduct the operation, Officer Merrit used a paid confidential informant, Christian Franklin Johnson. Merritt testified that Sergeant Wilson of the Warren County Sheriff's Department was working with him that day. The officers searched Ms. Johnson and made sure that the recording equipment was working. They maintained visual sight of the informant as far as possible, as well as monitoring by an audio device. (Tr. 55) The jury viewed video tapes of the transaction between Shelley and Ms. Johnson. Ms. Johnson told Shelley, "I need a 40," which Officer Merritt testified meant that she was looking for $40 work of crack cocaine. Ms. Johnson testified that to make the buy, she drove to the intersection of Farmer and Fayette. She met with Jeffery Shelley there. She recognized Shelley from a previous encounter (Tr. 73) Ms. Johnson said she greeted Shelley saying, "What's up? Long time no see." She then asked him if he knew where she could get a 40, to which he replied, "Yeah." Shelley walked around to the passenger side and got in Ms. Johnson's car. She took him to a carport beside a house. Johnson testified that she pulled up and Shelley got out. She gave him $40 in cash, city funds. Shelley then went to the back of the house where he met with someone else. They gave him the $40 crack cocaine, and he brought it back, handed it through the driver's window and put it in Ms. Johnson's hand. (Tr. 74)

SUMMARY OF ARGUMENT

The trial court correctly denied defense counsel's *Batson* challenge and held that the State provided a race-neutral justification for striking juror number 126. 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 clearly erroneous or against

the overwhelming weight of the evidence. The trial court did not err in failing to object to "sua sponte" to remarks made during closing argument. The prosecutor's statements were within the wide latitude attorney's are allowed in closing argument. Further, even if the prosecutor's statements constituted improper argument, they did not rise to the level required for the court object sua sponte. Consequently, Shelley's argument that the prosecutor made improper statements to urge the jury to "send a message" are procedurally barred because Shelley made no timely objections to the statements of the prosecutor.

ARGUMENT

I. The trial court correctly denied defense counsel Batson Challenge and held that the State provided a race-neutral justification for striking Juror Number 126.

Pursuant to *Batson*, this Court has acknowledged that there are infinite number of grounds upon which a prosecutor reasonably may peremptorily strike a juror so long as the prosecutor presents clear and reasonably specific explanations for those reasons. *Brewer v. State*, 725 So.2d 106 at 123 (Miss.1998) (citing *Batson*, 476 U.S. at 98 n. 20, 106 S.Ct. 1712). Indeed, "this Court has implicitly recognized that a prosecutor may follow his intuition so long as his judgment does not tell him that black jurors would be partial to the defendant because of their shared race." *Brewer v. State*, 725 So.2d at 123 (Miss.1998) (citations and quotations omitted). Among the reasons accepted as race-neutral are involvement in criminal activity, unemployment, employment history, relative of juror involved in crime, low income occupation, juror wore gold chains, rings and watch, dress and demeanor. *Foster v. State*, 639 So.2d 1263, 1280 (Miss.1994).

In the instant case, the trial court held that a prima facie showing was made, triggering the mandate that the prosecutor present a clear and reasonably specific explanation of his legitimate reasons' for exercising five challenges to black jurors. As to Juror No. 29, the prosecution

offered for cause that the juror had a graduate degree but was working in a minimum wage job and had lived in Warren County for only two years. The trial court denied the State's challenge and seated Juror No. 29. (Tr. 31-32) As to Juror No. 97, the State offered for cause that the juror had worked as a security guard. The prosecutor noted that he routinely refused all jurors we worked as security guards. The trial court allowed the State's challenge as race neutral. (Tr. 33) As to Juror No. 99, the State offered as a race-neutral reason that the juror had made the statement that her brother was serving time in a federal prison and that she had been a witness in that case. The trial court allowed the State's challenge as race neutral. (Tr. 33) The State offered that it challenged Juror No. 118 because that juror was related to the victim in a case earlier that week and that the juror was heard to make comments that she did not want to be there and no one could make her stay. The defense attorney then stated that he had no objection to the State's challenge of Juror No. 118. The trial court held the prosecutor's reason for challenge was race neutral and that he would grant the challenge for cause. (Tr. 34) As to Juror No. 126, the prosecution offered that he challenged the juror because he wears his hair in long braids, and stated that he did not ever accept male jurors with long hair because it tends to show nonconformity. The trial court held that this was a race neutral reason and allowed the challenge. The final challenge for which the prosecutor offered his reasoning was a black female. The State offered that the challenge was due to her employment at Armstrong. The trial court noted that Armstrong is a large employer which employs hundreds of peoples and denied the challenge and seated the juror. (Tr. 36) Of the six challenges made by the prosecutor, the trial court allowed four (4) and denied two (2). The defense did not object to one of the four allowed challenges, since she was related to the victim in a previous case. (Juror No. 118).

Batson clearly places upon the trial court the duty to determine whether purposeful

discrimination has been shown. These findings largely turn on credibility and thus *Batson* states that "ordinarily," a reviewing court should give the trial court "great deference." *Id.* at 98, 106 S.Ct. at 1724, 90 L.Ed.2d at 89, n. 21.

"Great deference" has been defined in the *Batson* context as insulating from appellate reversal any trial findings which are not clearly erroneous. *United States v. Mathews*, supra; *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792, 794 (1987); *State v. Butler*, 731 S.W.2d 265, 271 (Mo.Ct.App.1987); *Yarbough v. State*, 732 S.W.2d 86, 91 (Tex.Ct.App.1987); *Rodgers v. State*, 725 S.W.2d 477, 480 (Tex.Ct.App.1987); *Chambers v. State*, 724 S.W.2d 440, 442 (Tex.Ct.App.1987).

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The juror who was struck because he wore a hat into the courtroom and appeared contemptuous of the proceedings is likewise controlled by our borrowed rationale of *Forbes*. An expression of contempt or hostility may reasonably be assumed to spell trouble for the prosecution. Such demeanor is a legitimate reason, related to any case, for a prosecutor to exercise a peremptory challenge. In so finding, we join other state courts who have found that demeanor may constitute a racially-neutral reason. *Lockett v. State*, 517 So.2d 1346 (Miss.,1987) See, e.g., *Taitano v. State*, 4 Va.App. 342, 358 S.E.2d 590 (1987) (dress and demeanor); *Chambers v. State*, 724 S.W.2d 440, 442 (Tex.Ct.App.1987) (body english); *Yarbough v. State*, 732 S.W.2d 86, 90 (Tex.Ct.App.1987) (demeanor); *Smith v. State*, 734 S.W.2d 694

(Tex.Ct.App.1987) (slouched, wore gold chains, rings and watch); *Grady v. State*, 730 S.W.2d 191, 194 (Tex.Ct.App.1987) (demeanor); *State v. Brown*, No. 51,279 (Mo.Ct.App., July 23, 1987) ("counsel must rely upon demeanor ...").

There are any number of reasons to strike a juror that are legitimate and race-neutral and the prosecutor's explanation need not rise to the level of justifying exercise of a challenge for cause," *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88, but may not include the prosecutor's "assumption-or intuitive judgment-that they [black jurors] would be partial to the defendant because of their share race." *Id.* See also, *Williams v. State*, 507 So.2d 50, 52 (Miss.1987). Appellate courts have traditionally placed their trust in the trial judges to determine whether or not a discriminatory motive underlies the prosecutor's articulated reasons. The trial court in the instant case clearly gave considerable attention to the details of each challenge, and in fact denying two challenges as not sufficiently race neutral reasons for challenge. The trial court's allowance of the prosecution's challenge to Juror No. 126 is not clearly erroneous, and the trial court is entitled to great deference in it's ruling. Therefore, this issue is without merit and the jury's verdict and the rulings of the trial court should be upheld.

II. The trial court did not err in failing to object "sua sponte" to the prosecutor's closing argument, since the prosecutor's statements were within the parameters of the wide latitude allowed in closing argument.

Attorneys are allowed great latitude in closing arguments. *Clemons v. State*, 320 So.2d 368, 371 (Miss.1975). Trial counsel has an obligation, if he believes the prosecutor has violated the wide boundaries afforded counsel during closing argument, "to promptly make objections and insist upon a ruling by the trial court." *Johnson v. State*, 477 So.2d 196, 209-10 (Miss.1985). As a procedural matter, "contemporaneous objections 'must be made to allegedly prejudicial

comments during closing argument or the point is waived.' " *Dunaway v. State*, 551 So.2d 162, 164 (Miss.1989) (citations omitted). As in *Spicer*, Shelley did not object to the State's comments during its closing argument and is thus procedurally barred from appealing the issue. *Spicer v. State*, 921 So.2d 292 (Miss. 2006). Failure to make a contemporaneous objection waives an issue for purposes of appeal. *Williams v. State*, 684 So.2d 1179, 1203 (Miss.1996). Accordingly, Shelley is procedurally barred from raising this issue on appeal.

Shelley argues that the statements by the prosecutor in closing argument were so prejudicial that the trial court should have objected to them *sua sponte*. The standard of review for such statements is "whether the natural and probable effect of the improper argument of the prosecuting attorney [created] an unjust prejudice against the accused and [secured] a decision influenced by the prejudice so created" such that a new trial should be granted. *Craft v. State*, 226 Miss. 426, 435, 84 So.2d 531, 534 (1956). The prosecutor's remarks did not rise to a level that required the trial court to object *sua sponte*, and there is no reversible error, particularly in light of the evidence against Shelley.

Shelley identifies three statements made by the prosecutor in his closing argument and contends that the statements in closing argument were "send a message" statements to the jury. (Appellant's Brief, p. 7) However, there is no "send a message" argument in the identified statements. The prosecutor's message is clearly that the prosecution has done it's job, i.e., proven it's case, and that where the elements of the crime have been proven, it is then the jury's responsibility to find the defendant guilty. There is no part of any of the statements that equates to "send the community a message." All three statements revolve around the prosecution's successful proof of it's case and the jury's corresponding duty to convict where the crime has been proven.

Even if the Mississippi Court of Appeals were to find that the statements were improper, prosecutor in closing, this remark does not reach the level to which the trial court would be required to make a sua sponte objection. This assignment of error requires a contemporaneous objection to be preserved for appeal. *Alexander v. State*, 736 So.2d 1058, 1064 (Miss.Ct.App.1999) (citing *Marks v. State*, 532 So.2d 976, 984 (Miss.1988)). The Mississippi Court of Appeals has held that "[i]t is too late to make objections after the argument is complete." *Id.* When no objection is made to a remark, "this assignment of error is procedurally barred and precludes appellate review." *Id.*

Furthermore, the jury was instructed in part:

> Arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark.
>
> (C.P. 32)

Therefore, this issue is without merit. Juries are presumed to followed the instructions given by the trial court.

For the foregoing reasons, this assignment of error is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

CONCLUSION

The Appellant's assignments of error are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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STATE OF MISSISSIPPI

By: Laura H. Tedder

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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:

Honorable Frank G.Vollor
Circuit Court Judge
P. O. Box 351
Vicksburg, MS 39181-0351

Honorable Richard Smith
District Attorney
P. O. Box 648
Vicksburg, MS 39181

Erin E. Pridgen, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, MS 39201

This the 6th day of August, 2009.

Laura H. Tedder

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For the foregoing reasons, this assignment of error is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

CERTIFICATE OF SERVICE

I, Laura H. Tedder, 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:

Honorable Frank G.Vollor
Circuit Court Judge
P. O. Box 351
Vicksburg, MS 39181-0351

Honorable Richard Smith
District Attorney
P. O. Box 648
Vicksburg, MS 39181

Erin E. Pridgen, Esquire
Attorney At Law
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This the 6th day of August, 2009.

Laura H. Tedder

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