IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEFFREY SHELLEY — APPELLANT

V. — NO. 2008-KA-1284-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

On Appeal from the Circuit Court of Warren County, Mississippi

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Erin E. Pridgen, [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Jeffrey Shelley

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JEFFREY SHELLEY **APPELLANT**

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STATE OF MISSISSIPPI **APPELLEE**

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. Jeffrey Shelley, Appellant
3. Honorable Richard Smith, District Attorney
4. Honorable Frank G. Vollor, Circuit Court Judge

This the 4th day of May, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Erin E. Pridgen

ERIN E. PRIDGEN
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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STATEMENT OF ISSUES

I. THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S BATSON CHALLENGE AS THE STATE PROVIDED INADEQUATE RACE-NEUTRAL JUSTIFICATION FOR STRIKING AN AFRICAN- AMERICAN VENIRE MEMBER.

II. THE TRIAL COURT ERRED IN FAILING TO OBJECT, SUA SPONTE, TO THE STATE'S INFLAMMATORY "SEND A MESSAGE" REMARKS MADE DURING CLOSING ARGUMENTS.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Warren County, Mississippi, where Jeffrey Shelley was convicted of the sale of cocaine. The Honorable Frank G. Vollor, Circuit Court Judge, presided over the two-day jury trial. The court sentenced Shelley to twenty (20) years under the supervision 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. The court also ordered Shelley to receive drug and alcohol counseling while incarcerated. The court ordered Shelley to serve this sentence consecutive to the sentence Shelley received in an unrelated matter.

Shelley is currently incarcerated with the Mississippi Department of Corrections. He filed his motion for a new trial, or in the alternative, motion for JNOV on July 7, 2008. Shelley timely filed this appeal on July 28, 2008.

STATEMENT OF FACTS

Jeffrey Shelley was a family man and jack of all trades. He worked jobs ranging from construction to roofing to offshore welding. Unfortunately Shelley, a father of two and a husband, suffered from a drug addiction. His drug of choice was crack cocaine. Shelley would often use money from his wife to support his habit. His addiction was quickly taking a toll on his family – so much that Shelley found himself seeking help from the dreaded disease. However, it was not long before Shelley found himself again in the dreaded cycle of addiction.

On July 27, 2007, Shelley was off of work and visiting friends in the area of Farmer and Fayette Streets in Vicksburg, Mississippi. While shooting water guns with the neighborhood children, Christina Johnson Franklin (Franklin) approached Shelley in her vehicle. This meeting would change Shelley's life forever.

Shelley had known Franklin for about five years. Franklin was an admitted crack cocaine user. Shelley and Franklin would often use drugs together. What Shelley did not know was that Franklin worked with Vicksburg Police Department as a paid confidential informant. The Vicksburg Police Department hired Franklin to perform drug buys in the community. Franklin performed between two to four drug buys a week and supplemented most of her income with the money she received from the drug buys.

While Shelley was outside with the neighborhood kids, Franklin drove up in a car outfitted with video and audio surveillance devices maintained by the Vicksburg Police Department. Franklin approached Shelley and asked him if he knew where she could buy forty dollars ($40) worth of crack

cocaine. Franklin knew Shelley as a fellow drug user. She had never before purchased any drugs from Shelley. Shelley told Franklin that he did not have any drugs on him. In an effort to help Franklin, Shelley got into Franklin's car and directed her to where she could purchase drugs.

There is conflicting testimony as to what happened after Franklin and Shelley arrived at their destination. Franklin handed Shelley $40 and the video surveillance showed that Shelley exited the vehicle, walked up to the house, and returned within minutes. Shelley testified that, when he returned to Franklin's car after visiting the house, he handed Franklin a phone number and told her to call the number later because he was unable to help her get the drugs at that time. However, Franklin testified that when Shelley returned to her car after walking from the house, he handed her two crack rocks of cocaine – the equivalent of $40 worth of the drug. The police later arrested Shelley on the charge of the sale of cocaine.

The court held Shelley's trial on June 26, 2008. During jury selection, the State used all six of its peremptory challenges to strike African-Americans from the venire. The defense counsel made a ***Batson*** challenge based on the peremptory strikes. The trial court ruled that a prima facie case was established under *Batson* and then required the State to provide race-neutral reasons for its challenges. The trial court denied four of the defense counsel's challenges to the African-American jurors and granted two challenges. Two venire members were placed on the jury panel.

Following the State's strikes, the defense counsel exercised its peremptory challenges. The defense made a reverse-Batson challenge, alleging the state used all six of its challenges on Caucasians. The trial court required the defense to prove race-neutral reasons for the challenges. (Tr. 38) The court accepted four of the defense race-neutral reasons and granted two of the State's challenges.

After jury deliberations, Shelley was convicted on one count for sale of cocaine. Shelley timely appeals this conviction.

SUMMARY OF THE CASE

Jeffrey Shelley's trial was prejudiced from the start. During jury selections, the defense properly raised a *Batson* challenge to the State's improper use of peremptory strikes to exclude African-American jurors. The State failed to provide an adequate race-neutral reason for one of the jurors. The trial court erred in accepting the State's justification for the exclusion of this juror.

The errors in Shelley's trial did not end here. During closing arguments, the State repeatedly made inflammatory statements to the jury. On three separate occasions, the State urged the jury to "send a message" to the drug dealers in the community. The trial court erred in failing to object, sua sponte, to the State's inflammatory "send a message" closing arguments.

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S *BATSON* CHALLENGE AS THE STATE PROVIDED INADEQUATE RACE-NEUTRAL JUSTIFICATION FOR STRIKING AN AFRICAN- AMERICAN VENIRE MEMBER.

i. Standard of Review -

The trial court's finding of whether or not a peremptory challenge was race-neutral requires a clearly erroneous standard of review. *Walker v. State,* 815 So. 2d 1209, 1214 (¶10) (Miss. 2002). The trial court's finding will be overruled if the Court finds that the *Batson* ruling was clearly erroneous or against the overwhelming weight of the evidence. *Id.*

ii. The State failed to provide an adequate race-neutral reason for striking an African- American venire member.

Under the Equal Protection Clause, parties may not use peremptory strikes to exclude potential jurors based solely on their race or the assumption that African- American jurors as a whole

could not fairly consider the State's case when there is an African-American defendant. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). Once a party objects to peremptory strikes based on *Batson*, it must then make a prima facie showing that race was the reason that the opposing party used the peremptory strike. *Flowers v. State*, 947 So. 2d 910, 917 (¶9) (Miss. 2007).

After the *prima facie* showing of *Batson* is established, the burden shifts to the State to provide neutral explanations for challenging African-American jurors. *Davis v. State*, 551 So. 2d 165, 170 (Miss. 1989) (citing *Batson*, 476 U.S. at 97-98, 106 S.Ct. at 1723-24)). The State's explanation does not have met the same standards that are required for jury challenges for cause. *Id.* However, the court must determine whether the reasons given for the peremptory challenge would still violate the Equal Protection Clause as a matter of law. *Hernadez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866 (1991). " Equal Protection analysis turns on the intended consequences of the government's classifications. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 362.

Mr. Spates

The State's justification for striking Mr. Spates, Juror # 126, was an inadequate race-neutral reason and the trial court erred in denying the defense's *Batson* challenge as to this juror. The following colloquy occurred during the *Batson* challenge hearing.

PROSECUTOR: Mr. Spates wears his hair in long braids. I don't accept jurors - - male jurors with hair longer than my co-counsel. It tends to show nonconformity. And for the record, I also don't accept male jurors that wear earrings. That's - - and the Supreme Court has said that dress, hairstyle and appearance are race-neutral reasons.

[. . .]

DEFENSE: Your Honor, as someone who doesn't style myself to the standard or the norm, I would object to that as a non-race-neutral reason for

striking a juror. I don't think that . . . should have any bearing on his decision to be able to judge a case or be able to determine whether someone is innocent or guilty.

COURT: Okay. Okay. I'm going to accept that as a race-neutral reason. That's fine. . . .

(Tr. 34-35)

The Prosecutor's explanation for striking Mr. Spates from the juror was not race-neutral and amounted to a pretext for racial discrimination. When considering whether a strike is pretextual, the court should consider whether the following indicia of pretext are present: (1) disparate treatment - 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 support for the stated reason; and (5) group based traits. *Mack v. State,* 650 So. 2d 1289, 1298 (Miss. 1994).

The State's justification for striking Spates amounted to a characteristic unrelated to the facts of the case and a group based trait. The State reasoned that Spates was a non-conformist but failed to articulate how that would make Spates a bias juror. Furthermore, the State failed to show the correlation between its assumption that Spates was a nonconformist and the facts of the case. Even if the State were to successfully argue that Spates hairstyle fell outside the norms of society, this characteristic is totally unrelated to the facts of the case that dealt with the sale of cocaine.

"In selecting a jury, each juror must be evaluated on his/her own merits, not based on supposed group-based traits or thinking." *Flowers,* 947 So. 2d at 914. The facts and law in this case compel a reversal. The State's justification for denying Spates as a juror was pretextual and violated the Equal Protection Clause of the US Constitution.

II. THE TRIAL COURT ERRED IN FAILING TO OBJECT, SUA SPONTE, TO THE STATE'S INFLAMMATORY "SEND A MESSAGE" REMARKS MADE DURING CLOSING ARGUMENTS.

i. Standard of Review -

The standard of review applied to an attorney's misconduct during closing arguments is "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice created." *Davis v. State,* 992 So. 2d 1190, 1192 (¶5) (Miss. Ct. App. 2008) (citing *Sheppard v. State,* 777 So. 2d 661 (¶7) (Miss. 2002)).

ii. The State's closing arguments were inflammatory are created undue and irreversible prejudice

During closing arguments, the State made several "send a message" statements to the jury. On three separate occasions, the State made the following statements:

PROSECUTOR: Ladies and gentlemen of the jury, at the beginning of the trial this morning we told you that we would prove to you that defendant, Jeffrey Shelley, did, in fact, sell cocaine and that he sold to an undercover agent. . . . And we believe today we did just that. . . We did our part as the State.. . and now it is time for you to do your part. It's time for you to help us get drugs off our street, to help us get these drugs off the street by getting the criminals that sell the drugs off the streets. We must all do our part.

(Tr. 144)

PROSECUTOR: So as I told you before, it's time to do your part, and this may be the only opportunity that you have to play a part, to play a definite part in cleaning the drugs off of our streets, and not only cleaning the drugs off of our streets, but the defendants who sell drugs. Ladies and gentlemen, do your part this afternoon, and find the defendant, Jeffrey Shelley, guilty of sale of cocaine.

(Tr. 147)

PROSECUTOR: ... And he's not such a great guy that he deserves a third chance. Okay. He takes you for fools. He's been getting away with it since he can remember.

> I'm upholding mine. I'm not letting drug dealers get away with it. What are you going to do?

(Tr. 159)

The Mississippi Supreme Court has repeatedly condemned the use of "send a message" comments made by prosecutors. *Spicer v. State,* 921 So. 2d 292, 317-18 (¶53) (Miss. 2006). In determining if reversible error exists, the Court must determine (1) whether the remarks were improper, and (2) if so, whether the remarks prejudicially affected the accused's rights. *Id.* at (¶55).

Even in cases where the defense failed to object to the prosecutor's comments, the Court will consider the issue if the comments were so inflammatory that the trial court should have objected to the comments, *sua sponte*. *Gray v. State,* 487 So. 2d 1304, 1312 (Miss. 1986). For the prosecutor's comments to be considered harmless error, the Court must find that, absent the inappropriate comments, the jury would have still found the defendant guilty. *Brown v. State,* 986 So. 2d 270, 276 (¶¶16-17) (Miss. 2008).

Prosecutors have been instructed that the closing arguments need to focus of the facts in evidence and not the broader issues of crime in society. *Spicer,* 921 So. 2d at 318. In *McCoy v. State*, 954 So. 2d 479, 489 (¶29) (Miss. Ct. App. 2007), the Court state that "the suggestion to the jury that its job was to 'protect those of use who live in this community from people who sell drugs,' is clearly improper."

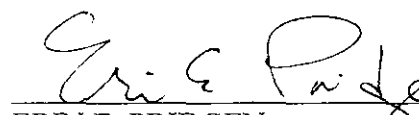
In this case, the prosecutor's closing statements were highly inflammatory. The prosecutor did not attempt to send a message just one time, but there were three staggering times throughout the closing arguments where the prosecutor repeatedly encouraged the jury to "send a message." Just as in *Spicer*, the prosecutor's statements in this case "were an attempt to use emotion to overcome possible reluctance in the jury, making a baseless appeal to the jurors that they needed to

vote as representatives of the community and not based on the evidence that was before them." *Spicer*, 921 So. 2d at 318 (¶56).

CONCLUSION

Based on the reversible errors at trial, Shelley requests that this Honorable Court reverse and render the trial court's decision in this case. In the alternative, Shelley requests that this Court reverse the trial court's decision and remand this case to the lower court for a new trial.

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

ERIN E. PRIDGEN
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

I, Erin E. Pridgen, Counsel for Jeffrey Shelley, 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:

Honorable Frank G. Vollor
Circuit Court Judge
1121 Farmer Street
Vicksburg, MS 39181

Honorable Richard Smith
District Attorney, District 9
Post Office Box 648
Vicksburg, MS 39181

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 4th day of May, 2009.

ERIN E. PRIDGEN
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200