IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VANDARREN MCCRAY — APPELLANT

VS. — NO. 2009-KA-0509-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On August 13-15, 2008, Vandarren McCray, "McCray" was tried before a Coahoma County Circuit Court jury for aggravated assault, the Honorable Kenneth Thomas presiding. R.1. McCray was found guilty. R. 301. He was given a fifteen year sentence with five years suspended. R. 318. McCray's motion for a new trial was denied. C.P. 11-12; 14.

McCray filed notice of appeal to the Mississippi Supreme Court. C.P. 18.

ISSUES ON APPEAL

I.
WAS HEARSAY EVIDENCE PROPERLY EXCLUDED?

II.
WAS CLOSING ARGUMENT PROPERLY CONDUCTED?

III.
WAS THE JURY PROPERLY CHOSEN WITHOUT DISCRIMINATION AGAINST FEMALES?

IV.
DID MCCRAY RECEIVE A FAIR TRIAL?

STATEMENT OF THE FACTS

On November, 2007, McCray was indicted by a Coahoma County Grand jury for aggravated assault, for shooting and causing bodily injury to Mr. Bryon Ross, on or about November 25, 2005. C.P. 2.

On August 13-15, 2008, McCray was tried before a Coahoma County Circuit Court jury for aggravated assault, the Honorable Kenneth L. Thomas presiding. R.1. McCray was represented by Ms. Cheryl Webster. R. 1.

During voir dire, there was a **Batson** challenge by the defense. R. 79. The trial court accepted the prosecution's peremptory strikes as being race neutral. R. 83. In addition, the defense also complained of strikes being used on black "female" jurors. R. 81. The record reflects that the prosecution accepted at least one black female, juror 14. R. 83. The record reflects that the prosecution provided sexual, and race neutral reasons for its strikes on black and/or female jurors. R. 79-89. One such reason was that the juror struck had family members charged or convicted of a crime. There was no rebuttal by the defense. R. 83.

The record also reflects that there was an abundance of female jurors who served on McCray's jury. The majority of the jurors would appear to be females. R. 88. The record does not contain any explicit designation of jurors by race or gender. C.P. 1-41, R. 49-88.

Ms. Maria Ross testified that she was at Mac's Lounge. This was on November 25, 2005. R. 148-162. She witnessed a fight between her brother, Derrick Ross, and Terrance Gordan. This was outside of the club in the street.

While watching the fight, Maria Ross testified a car drove up. "Shandaman," a/k/a Walter Conner and "Poncho,"McCray got out. Both Conner and McCray moved toward the fight. She heard Conner say, "Whoop that Bitch." R. 150. She believed he was encouraging Gordon in his

struggle against her brother.

Maria Ross testified to seeing McCray "with the gun in his hand." R. 152. She testified that "I saw him fire one shot." R. 152. She believed the weapon was fired in her direction. She panicked. She ran out of fear of being shot.

After being informed that her brother, Byron Ross, had been shot, she went to the hospital. Ms. Maria Ross identified McCray in the courtroom as the person she saw with the handgun. R. 153.

Mr. Derrick Ross testified that he was also at Mac's Lounge. R. 170-181. He was fighting with Terrrance Gordan. He testified to hearing Walter Conner tell Gordan "to whoop me." R. 171. While he was still struggling with Terrance, he heard a gunshot. He saw "Poncho," McCray, with a handgun. R. 171. He identified McCray as the person he saw with the hand gun. R. 172. He testified that "he saw the defendant shooting" the firearm. R. 172.

Mr. Derrick Ross testified that he believed both Conner and McCray were gangster disciples gang members. R. 173. He testified that McCray always wore "his hat to the right." This was one of the noticeable habits of that gang on the streets of Clarksdale. R. 173. Derrick testified that the gangster disciples and vice lord gangs had been in his community as long as he could remember. R. 175. He also knew that there was violence between these gangs from time to time. R. 174.

Mr. Byron Ross testified that he was at Mac's Lounge. R. 182-197. This was on November 25, 2005. Ross testified that he tried to stop a fight outside the club. His brother, Derrick, was involved in the fight. R. 184. He saw McCray with a handgun near the fight. He tried to convince McCray to put down the handgun.

Byron testified that he thought that McCray could be approached without invoking any violence. When he asked McCray to "chill out," he testified to seeing McCray fire his handgun. He testified that "he shot me on the first shot in the side." R. 186. He was taken by friends to the

emergency room for medical assistance for his bullet wound.

Deputy Sheriff Stacy Lester was at the Double Quick convenience store. This is within a few hundred yards of Mac's Lounge. R. 94-95. When he heard what he thought were two shots coming from that vicinity, he went to investigate. He determined that someone had been shot, and was at the hospital emergency room. R. 97. He went to the hospital and found that the victim was Mr. Byron Ross. R. 98.

Sergeant Robert Linley testified that he interviewed the alleged victim. He spoke to him while he was at the hospital emergency room. As a result "Poncho" McCray, the defendant, became a suspect. R. 103.

The trial court denied a motion for a directed verdict. R. 197. This was based upon the alleged failure of the state to meet its burden of proof.

McCray testified in his own behalf. R. 239-247. McCray testified that he was present at Mac's Lounge the night of the shooting. R. 241. However, he denied having a gun or having shot anyone. McCray testified that Byron Ross expressed no animosity toward him. This was allegedly when he was with him at a Mr. Chapmon's apartment. R. 242. This was two years after the alleged shooting.

Mr. Byron Ross testified in rebuttal. R. 248-250. He denied that he was ever at Chapmon's apartment. He denied that he had "been social with the defendant."R. 249.

In closing argument, McCray's counsel argued that he had been falsely accused. She argued that his identification as the shooter all came from members of the same family. They were also affiliated with the violence prone gangster disciples gang. She argued that McCray and his witnesses were allegedly not gang members, and therefore should be more credible than his accusers. R. 283.

During closing argument, the defense stated that argument dealing with street gangs "goes to character." R. 286. There was no formal objection or request for a mistrial. The prosecution argued that while gang activity and violence were not something that should be tolerated, that the issue before the jury was whether McCray was the person who shot Ross. This would be at the time and place indicated by the testimony. R.286-288.

McCray was found guilty. C.P. 26; R. 301. He was given a fifteen year sentence with five years suspended. R. 318. McCray's motion for a new trial was denied. C.P. 11-12; 14.

McCray filed notice of appeal to the Mississippi Supreme Court. C.P. 18.

SUMMARY OF THE ARGUMENT

1. This issue was waived for failure to raise the issue on the same grounds being argued on appeal. R. 206-207; 216. **Russell v. State** , 607 So. 2d 1107, 1117 (Miss. 1993). Trial counsel defended the proposed hearsay as being "an inconsistent statement." R. 207. This was allegedly by Byron Ross who had already testified. There was no defense of hearsay based upon the admissibility of third party statements to establish "identity." Nor was this issue included in McCray's motion for a new trial. C.P. 11-12.

The record reflects the proffered testimony was not about what the witness, Mr. Chapmon, saw or heard for identification purposes. Mr. Chapmon admitted he was not present at the altercation. R. 210. Rather his proposed testimony was that the victim allegedly said that he had no problem with the alleged shooter. R. 216. This was two years after the shooting.

Ross was not cross examined about any such statement made either to Chapmon or in his presence. R. 190-195.

In rebuttal the victim denied any such meeting with the alleged shooter ever took place. R. 249. This was the origin of the witnesses' alleged inconsistent statement.

Therefore, the appellee would submit that the trial court did not abuse its discretion. **Quimby v. State**, 604 So. 2d 741, 747 (Miss. 1992).

2. This issue was waived for failure to object. **Oates v. State**, 421 So. 2d 1025, 1030 (Miss. 1982). It is also lacking in merit. R. 286. The prosecution's closing argument was about facts in evidence and inferences from those facts. R. 286-288. The defense argued that Ross and his witnesses were not credible. R. 239-247. They were not credible supposedly because they were all from the same family as well as gang members. The prosecution was arguing that the issue before the jury was whether McCray shot Ross, and not who was affiliated with a street gang. R. 286-288. Guilt by

association was not the issue.

The fact that Ross and his brother admitted knowledge about and/or association with gangs was no basis for destroying their credibility. Their credibility was based upon what they saw and heard when the victim was shot. It was incidental that he was shot while trying to prevent an escalation of violence on the streets. **Booker v. State**, 511 So. 2d 1329, 1332 (Miss. 1987).

3. The record reflects the trial court accepted the prosecutions' reasons as being race and gender neutral. R. 83. **Lockett v. State**, 517 So. 2d 1346, 1350 (Miss. 1987). There was also no rebuttal by the defense. R. 83. **Davis v. State**, 551 So. 2d. 165, 172 (Miss. 1989).

Among the reasons provided for strikes were that jurors had family members charged with crimes. The record reflects that **Batson** objection was based upon "race." R. 79-80. While the record reflects that the prosecution used strikes on blacks and females, it also accepted or "tendered" some females to the defense. R. 83-86. The record also reflects that there was apparently an abundance of females who served on the jury. R. 88.

This would be based upon the female first names contained in the record. R. 88. To the best of the appellee's knowledge there is no explicit racial or gender designation of the jury venire or the petit jury contained in the record. R. 49-88; C.P. 1-41. **Jackson v. State**, 672 So. 2d 468, 479 (Miss. 1996).

4. The record reflects that McCray was given a fair trial by a jury of his peers. As shown under previous propositions, there were no trial errors that denied McCray a fair trial. The record reflect the proposed hearsay testimony was not impeachment testimony at all. It was not inconsistent with what the victim testified he saw and heard when McCray shot him. The proffered testimony was from a person who admitted that he was not present at the shooting. R. 210. It was testimony about

an impression the witness formed two years later.

The trial court accepted the prosecution's reasons as "race neutral." There was no rebuttal. R. 83. The record reflects that there was apparently an abundance of females who served on McCray's jury. R. 88. The incomplete record does not support a finding of reversible error because of alleged gender discrimination. **Coleman v. State**, 697 So. 2d 777, 787 (Miss. 1997).

In addition, Ross testified that in rebuttal that he was never present with Chapmon and McCray much less amicably talking with them. R. 249. The comments during closing argument were in response to innuendo by defense counsel. The record reflects the argument was about facts in evidence and inferences from those facts. R. 286-288.

ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED. AND TRIAL COURT DID NOT ERR. THE RECORD INDICATES MR. CHAPMON WAS NOT A WITNESS TO THE SHOOTING. NOR DID THE PROFFER INDICATE THAT ROSS EVER SAID THAT MCCRAY DID NOT SHOT HIM.

McCray argues that the trial court erred in not admitting testimony from Mr. Jonathon Chapmon. His counsel argues that this was important testimony for his defense. McCray believed that Chapmon's testimony would have gone to discrediting the previous identification testimony of the victim, Mr. Bryon Ross.

He argues that it was reversible error to reject it based upon the fact that hearsay evidence needed to establish identity is admissible in evidence. He relied upon the Supreme Court's case of **Kenivel Smith v. State**, 2007-CT-00059. Appellant's brief page 7-10.

To the contrary, the record indicates that this issue was waived. It was waived for failure to raise it on the grounds being argued on appeal. The record reflects that the defense response to a hearsay objection was that Chapmon's proposed testimony was to show "an inconsistent statement" by Byron Ross. R. 207. The record reflects that the victim, Mr. Byron Ross, had already testified. R. 182-196. On cross examination, he was never questioned about any inconsistent statement. Nor was he ever questioned about any relationship he might have had with Mr. Chapmon. R. 182-196. Rather he was questioned about whether he and his brother were members of "the vice lords gang." R. 194.

This issue was also not raised in McCray's motion for a new trial. C.P. 11-12.

In **Russell v. State** , 607 So. 2d 1107, 1117 (Miss. 1993), the Court stated that issues raised on appeal on different grounds from those raised at trial were waived.

> This is the first time the question of voluntariness of the July 27, 1989, statement has been raised in connection with its impeachment use; at trial, Russell challenged impeachment use of his prior statement only on the grounds of authenticity. "It is elementary that different grounds than the objections presented to the trial court cannot be presented for the first time on appeal." **Thornhill v. State** , 561 So. 2d 1025, 1029 (Miss. 1989.).

In addition, the record reflects that the witness, Chapmon, admitted that he was not present at the shooting. R. 210. The proffer indicated that the testimony by this third party, Mr. Chapmon, was not about rebuttal of what the victim said about his identification of the person who shot him. Rather it was testimony about how there was allegedly no animosity between the victim and McCray at a much later date. This was allegedly some two years after the shooting. R. 213.

> Q. And so in 2007, at your apartment, and Byron Ross and Vandarren McCray partied together?
>
> A. Yes, ma'am.
>
> Q. In a friendly atmosphere.
>
> A. Yes, ma'am. R. 213.

This proposed testimony was when they were allegedly together at Chapmon's apartment. In rebuttal, Byron Ross, the victim, denied ever having been in Chapmon's apartment much less having engaged in any amicable conversation with McCray. R. 249.

In short, the appellee would submit that the record indicates that this proffered testimony was not impeachment or rebuttal evidence related to Ross's identification.

The record reflects that Byron Ross identified McCray as the person who shot him in the side. R. 186; 188. This was on November 25, 2005 outside of Mac's Lounge on Desoto Avenue in Clarksdale. R. 183. His identification was clear, and unequivocal. He was cross examined about what he saw and heard when shot. R. 249-250. For example:

> Ross: Okay. Well, can I tell what I seen then?

Q. Yes.

A. **I seen Walter give Vandarren a gun... and I asked him to chill because, you know, we was all right with each other so I asked him to chill out. So instead of him chilling out, he pulled out the gun and cocked it. He paused for a minute and he looked at me and shot me on the first shot in my side.** R. 186

...

Q. (By Mr. Kirkham) The person that shot you, do you see him in the courtroom today?.

A. Yes, sir.

Q. **Can you point him out, please?**

A. **Right there.**

Kirkham: **Your Honor, I'd ask that the record reflect that the witness has identified the defendant.**

Court: **That is ordered.** R. 187-188. (Emphasis by appellee).

In rebuttal of Mr. McCray, the record reflects that Ross was questioned about whether he had any subsequent contacts with McCray. R. 249. Ross denied any visit to Chapmon's apartment, or any social interaction with McCray. As stated in the record:

Q. **Okay. Since November 25th, 2005, have you hung out with or been social with the defendant?**

A. **No, sir.** R. 249. (Emphasis by appellee).

On cross examination Ross was not contradicted or shown to have made any inconsistent statements about the circumstances under which he was unexpectedly shot. Nor was there any inconsistencies in his identification of McCray as the person who shot him in the side. He unequivocally testified "I saw him shoot me." R. 193-195.

Mr. Ross also was questioned, as were all the prosecution witnesses, about his alleged gang affiliation. Ross explained that gang activity had nothing to do with his being shot. He was shot

affiliation. Ross explained that gang activity had nothing to do with his being shot. He was shot trying to prevent harm to his brother by a man holding a gun on him in the street.

> Q. **But you don't know that Mr. McCray shot you. You only know he had a gun, right?**
>
> A. **Ma'am, I know he shot me. Eye to eye contact. I saw him shoot me. It ain't no, what I know. It's something I know. It ain't about what I think. It's what I know.**
>
> Q. **And you were a member of vice lords and your brother was a member of vice lords?**
>
> A. Ma'am, actually ma'am, that don't really have nothing to do with it, because that didn't have nothing, a vice lords and gangsters, they weren't the reason for what went on that night. It wasn't about no gang activity. R. 193-194.
>
> Q. **Didn't you see?**
>
> A. **I seen him shoot me.** R. 195. (Emphasis by appellee).
>
> Chapmon's proffered testimony in the trial court's chambers was as follows:
>
> Chapmon: I mean, I couldn't quite explain, but I just really want my answer, I mean, it was like, just like, it never seemed like Byron was the one with the problem. It wasn't Byron. It was all of his brothers. Byron told me himself that he didn't have no problem with him. It, he said it was his brother.
>
> Webster: And that's what we were trying to get in. Byron told him he had never had a problem with Vandarren. Derrick has the problem with him. And we think that should be put before the jury.
>
> Court: All right. But it is hearsay. Do you have any questions in cross examination, not argument but cross examination.
>
> Kirkham: No, your honor. R. 216.

On appeal, McCray relied upon **Kenivel Smith v. State**, 2007-CT-00059-SCT decided on November 5, 2009. McCray believes that "hearsay" statements should be admissible since they were crucial for identification under disputed facts. The appellee would submit that the facts involved in the **Smith** decision are clearly distinguishable from the instant cause. In **Smith**, the crucial issue was

hearsay admissions about identification where the out of court statements of identification were allegedly not subjected to cross examination.

In the instant cause, Mr. Byron Ross was cross examined about his identification of McCray as the shooter. R. 190-195. Ross testified that he was never present at Chapmon's apartment. He testified that he did not have an amicable conversations with McCray. R. 246. The other state witnesses were also cross examined. R. 157-162; 177-181.

In fact, the proffered testimony merely corroborated Mr. Byron Ross's previously testimony. R. 185-186. Ross testified that "we was all right with each other"or so he thought when he was shot.

In **Quimby v. State**, 604 So. 2d 741, 747 (Miss 1992), the Court found that the trial court had discretion to determine if hearsay should be admitted under any of the exceptions to hearsay as contained in M. R. E. 803, Hearsay Exceptions. This court also stated that unless there was evidence of an abuse of discretion, it would not reverse the trial court.

> A trial court is entitled to a considerable measure of judicial discretion in deciding whether or not to admit hearsay evidence under either 803(24) or 804(b)(5), and a determination of admissibility will not be overturned on appeal absent an abuse of discretion. These observations, however, presuppose the presence of findings made on the record.

The appellee would submit that based upon the record cited, the issue was waived for failure to raise it on the same grounds being argued on appeal. In addition, the record cited above indicates that the trial court did not abuse its discretion. The proposed hearsay testimony was not found by the trial court to have been impeachment as to identification testimony. The appellee believes we have cited record evidence in support of that ruling. This issue is lacking in merit.

PROPOSITION II

THIS ISSUE WAS WAIVED. THERE WAS NO OBJECTION ON THE GROUNDS BEING RAISED ON APPEAL. THE PROSECUTION'S ARGUMENT WAS IN RESPONSE TO INNUENDO IN CLOSING BY THE DEFENSE.

McCray's counsel argues that the trial court should have "sua sponte" granted a mistrial during closing argument. He should have done so because the prosecution was allegedly using inflammatory comments. These remarks focused the jury's attention not on facts to be decided but rather on the need to act to eliminate gang activity from the Clarksdale community. He argues this was the equivalent of the "send them a message" type rhetoric condemned by our courts repeatedly in the past. Appellant's brief page 10-12.

The appellee would submit that the record indicates that there was no objection on the "send them a message" grounds being raised on appeal. The defense did not object. It merely stated that "the argument of the street gangs goes to character." R. 286. Therefore, this issue was waived.

In **Thornhill v. State** , 561 So. 2d 1025, 1029 (Miss. 1989.), the Supreme Court stated that an appellant waived issues raised on different grounds from those raised at trial.

In addition, the record indicates that when the prosecution's comments are viewed in context, they can be understood as responses to the defense's closing. R. 283-289. The defense attacked the credibility of the prosecution witnesses, including the victim. The defense argued that the state witnesses were not credible because they were all members of the same family. And more importantly, for the defense's rhetorical purposes, state witnesses admitted to being either members of the gangster disciples gang or friends of members of the gangster disciples in Clarksdale. Whereas, McCray and Walter Conner, defense witnesses, never admitted that they were gang members. Therefore, they were supposedly credible witnesses. R. 275-283.

The record reflects that McCray's counsel, in fact, used cross examination to question all of the state witnesses about their alleged gang affiliations. R. 163-164; 180; 194. This is in keeping with the closing argument which attacked the state's case based upon innuendo. How could Ms. Maria, Mr. Derrick and Mr. Byron Ross be telling the truth if they were alleged violence prone street gang members?

The record also reflects that both the prosecution and the defense questioned the jury panel about whether they were aware that there were gangs in Clarksdale. They were questioned to determine whether this knowledge might interfere with their ability to deliberate fairly and impartially in the instant cause. R. 22; 40.

In short, in closing the defense argued that McCray was innocent, in keeping with his testimony. R. 239-247. She argued there had been a misidentification. It was a "misidentification" based upon the testimony of Byron Ross and his siblings, Derrick and Maria Ross . R. 283. She also pointed out that they allegedly admitted to being gang members or affiliated with gang members. R. 283.

However, McCray and his witnesses never admitted to being gang members. She also argued that testimony from former teacher, Mr. Chapmon, about how there was no allegedly animosity expressed between McCray and Ross allegedly in his presence cast doubt on the victim's credibility.

As argued by defense counsel in closing:

> So I'm telling you that Jon Chapmon came here, gave testimony under oath and said Byron Ross was at his apartment participating and there was no animosity between them. They thought they were friends...R. 279.
>
> I submit to you Vandaren McCray is innocent of this charge. There's been a misidentification. He did not do it. If he had done it, they would have had witnesses here and they don't. And he's not a gang member. None of the young men we put on

were gang members. Not even a breath, not even mention of it. And the others are knee deep in violence with the vice lords. I submit to you he is an innocent man and there's reasonable doubt. R. 283.

The prosecution's rebuttal closing argument was a response to this argument. It was a response about alleged misidentification by biased family members associated with violence prone gang members.

In **Hoops v. State**, 681 So. 2d 521, 531 (Miss. 1996), the Supreme Court found the trial court did not err in admitting testimony about gangs where relevant for showing a motive for a street shooting.

The prosecution argued that since alleged gang affiliation was being used to attack the credibility of the victim that this issue should be addressed. The prosecutor argued that the jury should not focus upon group identity. This was "a red herring." They should focus on determining who did the shooting in this case based upon the evidence. The appellee would submit that this was clearly argument about facts and inferences from those facts before them in the testimony and exhibits.

As stated by the prosecution in its closing:

The Rosses tell a coherent story. Three different points of view on the same event. The defense witnesses are basically arguing with each other. You're the judge. You're the judge of their credibility. R. 285.

There's a back drop to that story that got drug in. Ladies and gentlemen, that backdrop is painted black and blue, the g.d. colors and white and red, the vice lord colors...So what I'm telling you when I tell you that is that Byron Ross is the alleged victim here. But that doesn't mean that you can't look over here and say, I don't like what you were doing that night. I don't like that vice lord stuff. I don't like what they do. R. 285-286.

The evidence is before you, ladies and gentlemen, I'm going to leave it in your hands. But I will argue to you, ladies and gentlemen, that you know what happened out there. You know what the evidence shows. And that you know that the defendant is guilty of the charge in this indictment, aggravated assault upon Byron Ross. R. 288.

In **Alexander v. State**, 602 So. 2d 1180, 1182 (Miss. 1992), the Court stated the trial court was in the best position to determine if a mistrial should be granted. As stated:

> Case law unequivocally holds that the trial judge "is in the best position for determining the prejudicial effect" of an objectionable comment. See, e.g. **Alexander v. State**, 520 So. 2d 127, 131 (Miss. 1988). Thus, the judge is vested with discretion to determine whether the comment is so prejudicial that a mistrial should be declared. **Edmond v. State**, 312 So. 2d 702, 708 (Miss. 1975). Where "serious and irreparable damage" has not resulted, the judge should "cure" or remedy the situation by "admonish[ing] the jury then and there to disregard the improp[riety,]." **Johnson v. State** , 477 So. 2d 196, 210 (Miss. 1985). See also **Gray v. State**, 549 So. 2d 1316, 1320 (Miss. 1989);...

In **Booker v. State**, 511 So 2d 1329, 1332 (Miss. 1987), the Court found that the prosecutor's comments when viewed in context were a rational response to the defense statements before the jury.

> In reviewing the statements in the context in which they were made, we conclude that the prosecutor's were 'invited,' and did no more than 'right the scale' tipped by defense counsel's remarks. **Young, supra**. Additionally, a rational link can be made between the arguments of defense counsel and the response in kind of the prosecution.

The appellee would submit that based upon the record cited, the trial court did not abuse its discretion during closing argument. The record cited does not support a basis for a mistrial. This issue is lacking in merit.

PROPOSITION III

THERE IS A LACK OF EVIDENCE OF GENDER DISCRIMINATION IN THE RECORD.

Mr. McCray's counsel argues that the prosecution allegedly admitted gender discrimination during voir dire. Consequently, he thinks this case must be reversed. He interprets the record to indicate that at least one juror was stricken peremptorily solely because she was a female. This was in his opinion a flagrant violation of the **Batson** line of cases which was extended to include prohibitions against discrimination against female jurors under **J. E. B. v. Alabama**, 511 U.S. 127, 114 S. Ct. 1419 (1994). Appellant's brief page 12-14.

To the contrary, the appellee would submit that the record does not reflect a violation of the **Batson** guidelines based either on race or gender. The record reflects that the original **Batson** challenge was based upon "race," rather than gender. R. 79-80. The defense did not explicitly mention a **Batson** challenge based on gender or **J. E. B. v Alabama** at any time. As stated by defense counsel:

Webster: Your Honor, I would move the state that there's been a **Batson** challenge. R. 79.

The record reflects that while the prosecution used five strikes on black females, it also tendered at least one black female. R. 83. The record also reflects that the prosecution accepted other jurors who were not designated by race or gender. R. 83-84.

The record reflects that after the **Batson** challenge, the prosecution struck at least one male. The reason for the strike was that he had a cousin charged with a crime. R. 84. Other strikes were based upon a juror claiming to have been falsely accused, and a juror indicating by body language , shaking her head, that she might show sympathy in her deliberations. R. 81. The record reflects the trial court accepted the prosecution's reasons as being "race neutral" and by implication gender

neutral. R. 83.

In addition, the record reflects that the strike on juror 20, as an alternate juror, was based upon the fact that he or she had a family member or friend charged with a crime. R. 43; 85. The defense did not challenge the racially neutral reasons provided by the prosecution.

> Court: Ms. Webster, what the prosecutor is endeavoring to do is to try to get a balance of jurors as between the sexes. **He has expressed that anyway as being his race neutral reason. Do you quibble with that?**
>
> Webster: I do. He has, he has made five challenges, all to black females. And I think by his striking all the black females, we have the making, I think that's I think that is squarely a **Batson** challenge. I think the makeup of he jury is such, I differ with him on that.
>
> Court: **All right. Well, the court accepts the given reasons as being race neutral.** R. 83.
>
> Webster: **All right, your honor.**
>
> Court: All right.
>
> Kirkham: **The state tenders juror number 14, a black female.**
>
> Court: **That is correct. We are to juror no. 11.**
>
> Kirkham: **The state finally tenders juror no. 15.** R. 83. (Juror 15 not designated by race or gender to the best of appellee's knowledge) (Emphasis by appellee).

In **Davis v. State** 551 So.2d 165, 172 (Miss. 1989), the Supreme Court stated that it would not reverse a trial court where there was no challenge on the record of the reasons provided for peremptory strikes.

> It is clear from the record that counsel for Davis was given his opportunity to "make his record". He could have made an offer of proof after the neutral reasons were supplied by the State, but instead only alleged in general terms that the strikes exercised by the State amounted to a **Batson** violation.
>
> The record also reflects that there were an abundance of females who served on the jury.

This would be based upon the apparent female first names contained in the record. R. 88. For instance, Gloria Buckley, Pauline Myles, Debra Brown, Betty Fowler, Leeann Flowers, Tawanda Anderson, Erica Thomas, Shelia Fuqua, Rachel McBride, Tammie Hooper, and Patricia Cummings. R. 88.

To the best of the appellee's knowledge there is no explicit racial or gender designation of the jury venire or the petit jury contained in the record. R. 49-88; C.P. 1-41.

In **Lockett v. State**, 517 So. 2d 1346, 1350 (Miss. 1987), this Court stated that "great deference" is due a trial court's findings on peremptory challenges of minority jurors. The court also pointed out that having a family member charged or convicted of a crime was an acceptable race neutral reason for a peremptory strike. As stated:

> We today follow the lead of other courts who have considered this issue and hold that 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. This perspective is wholly consistent with our unflagging support of the trial court as the proper forum for resolution of factual controversies.

In **Jackson v. State**, 672 So.2d 468, 479 (Miss. 1996), the Supreme Court found that a failure to make a record was fatal to his argument about racial discrimination in jury selection.

> The record, however, does not reflect the racial composition of the jury as seated. The race of prospective jurors is not indicated on questionnaires, which were designed by the defense and completed prior to trial, and is noted only where specifically requested by the defendant in several instances during the jury selection process, when those individuals were struck from the venire by either party. In **Hansen v. State**, 592 So.2d 114 (Miss.1991), where the record likewise did not indicate the race of the jurors, this Court rejected the appellant's **Batson** challenges, noting that it " 'must decide each case by the facts shown in the record, not assertions in the brief ...' " **Hansen**, 592 So.2d at 127, citing **Burney v. State**, 515 So.2d 1154, 1160 (Miss.1987), and further that, the burden is on the appellant to make sure that the record contains " 'sufficient evidence to support his assignments of error on appeal.' " Id.

The appellee would submit that failure to make an adequate record in support of racial and alleged gender discrimination claims should be fatal to an appeal on that basis. In addition, the reasons provided were found by the trial court to be race neutral. There was no challenge by the defense to the reasons provided by the prosecution. R. 83.

The appellee would submit that this issue is lacking in merit.

PROPOSITION IV

MCCRAY WAS GIVEN A FAIR TRIAL BY A JURY OF HIS PEERS.

McCray's counsel argues that the errors alleged in previous propositions when taken together were sufficient for denying McCray a fair trial. He argues that the alleged gender discrimination, the exclusion of alleged relevant identification evidence and the improper "send them a message" rhetoric in closing when taken together in combination denied him a fair trial. Appellant's brief page 12-15.

To the contrary, as shown under previous propositions, there was a lack of record evidence indicating gender discrimination, the alleged impeachment evidence was not about what the victim said when he was shot, or said about who shot him then or at a later date. R. 83-86; R. 216; 286. It was also waived for failure to ground an appeal argument on issues raised during the trial. **Russell v. State** , 607 So. 2d 1107, 1117 (Miss. 1993).

The alleged "send them a message argument" was not objected to on the grounds raised during closing argument. R. 286. And when the argument is viewed in context, the prosecution's closing was a response to the defense gang affiliation taint argument. That was an argument which discredited prosecution witnesses as being gang members or friends of gang members and obviously violent people as a consequence. R. 279, 282-283.

In **Coleman v. State**, 697 So. 2d 777, 787 (Miss. 1997), the Court stated that where there were no reversible errors in any part, there were no reversible errors in the whole.

> This court may reverse a conviction and sentence based upon the cumulative effect of errors that independently would not require reversal...However, where there was no reversible error in any part, so there is no reversible error to the whole, quoting **McFee**, 511 So. 2d 130, 136 (Miss 1987).

The appellee would submit that this issue is lacking in merit.

CONCLUSION

McCray's conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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