

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VANDARREN MCCRAY

APPELLANT

V.

NO. 2009-KA-0509-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. Vandarren McCray, Appellant
3. Honorable Laurence Y. Mellen, District Attorney
4. Honorable Kenneth L. Thomas, Circuit Court Judge

This the 9th day of November, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


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ISSUES
STATEMENT OF THE ISSUES

ISSUE NO. 1 : WHETHER THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE AS HEARSAY THAT WAS ADMISSIBLE AS STATEMENTS OF IDENTIFICATION UNDER MISSISSIPPI RULE OF EVIDENCE 801(d)(1)(C) .

ISSUE NO. 2 : WHETHER THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE DECLARE A MISTRIAL WHERE THE PROSECUTION USED A “SEND A MESSAGE” ARGUMENT AND OTHER IMPROPER AND INFLAMMATORY REMARKS DURING IT’S CLOSING ARGUMENT.

ISSUE NO. 3 : WHETHER THE STATE ADMITTED GENDER DISCRIMINATION DURING JURY SELECTION IN AGREEING THAT THE STATE HAD USED IT’S PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN FEMALES.

ISSUE NO. 4 : WHETHER THE EFFECT OF CUMULATIVE ERROR REQUIRES THIS CAUSE TO BE REVERSED AND REMANDED.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgement of conviction for the crime of aggravated assault against Vandarren McCray, a/k/a “Poncho” following a jury trial commenced August 13, 2008, Honorable Kenneth L. Thomas, Circuit Judge, presiding. Following a jury verdict of guilty, McCray was sentenced to a term of fifteen (15)

years, with five (5) years suspended after serving ten(10), with five (5) years of supervised probation. Mr. McCray is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

Vandarren McCray, a/k/a “Poncho”, hereinafter referred to as McCray, was indicted for the crime of aggravated assault, for causing bodily injury to Byron Ross, with a deadly weapon, to wit: a pistol. A firearm enhancement was included in the indictment, but apparently not considered at the time of sentencing. (C.P. 2, R.E. 2)

Upon commencement of the trial, during selection of the jury, the State agreed that it was utilizing peremptory challenges to strike African-American women from the jury panel. While explaining it’s strikes of jurors, upon a *Batson* challenge by the defense, the State apparently argued that it should be allowed to strike females and not males to achieve a “representative [] panel.” The trial judge held that what the State was attempting to do was to “get a balance of jurors as between the sexes.” (T. 83)

Stacy Lester, at the time a policeman for the city of Clarksdale, was the first responder to the scene of a shooting at Mac’s Lounge. He was at the nearby Double-Quick when he heard shots. He called for backup. At the scene he observed approximately twenty-five people outside the lounge. He then went to the emergency room, spoke with shooting victim Byron Ross, [“Byron”], and notified investigator Robbie Linley (T. 94-97)

Robbie Linley, went to the hospital where he spoke with Byron and other witnesses, developing a suspect, “Poncho McCray.” (T. 103) Linley told the jury that McCray was then picked up on an outstanding misdemeanor warrant, which was promptly objected to, with motion for a mistrial. (T. 104) The trial judge instructed the jury to disregard the testimony and inquired of the

panel if they were not able to do so. The jury panel responded that it could lay aside the mention of a misdemeanor warrant. (T. 105-107, 126-127)

Linley was then asked about a photo lineup. An objection to the photo lineup was interposed, by the defense that the State had provided a copy of the lineup, and claimed as such, the State had committed a discovery violation and should not be permitted to use the original line-up in trial. (As testimony will later reveal, a photo-lineup of McCray was entirely superfluous, as each identifying witness personally knew McCray.) The court initially agreed that a copy did violate discovery and offered the defense time to study the original. (T. 107-113) Further objection was entered concerning the dress of the persons in the lineup. The trial judge reserved ruling, in case testimony later showed the clothing was suggestive. (T. 128-132) The photo lineup was admitted into evidence. (T. 140) Linley testified without objection concerning background information on gang activity in Clarksdale. On cross the defense then elicited testimony that the victim was affiliated with a gang, the Vice Lords (T. 143-144) and that most of the crimes he had worked involved violence of Vice Lord on Vice Lord and not Vice Lord on Gangster Disciple. (T. 147)

Maria Ross, ["Maria"], Byron's sister, was a witness, having been present at Mac's Lounge with her boyfriend and cousin. (T. 148) She observed fighting in the street outside Mac's involving Derrick Ross, also a brother, and Terrance Gordon a/k/a "Shandaman" (T. 149) A vehicle pulled up with Walter Conner and McCray. Conner jumped from the vehicle and said "Shawn, whoop that B-I-T-C-H, whoop him." McCray got out and said "hell no, this guy is my n..." (T. 150) A third individual then came up and hit Conner. The testimony, while confusing related that at some point she saw McCray with a gun. As McCray shot, she ran away. McCray was shooting toward them. (T. 151-153) She was later informed that Byron had been shot. She picked McCray from the photo line-up.

The defense pointed out a contradiction in her statement given to Linley and her testimony. That statement was that she said she saw McCray (Poncho) shot once and it hit the ground. Maria explained she heard one shot and began to run, she then heard more shots. (T. 157-158) She was examined on the photo line-up. She had some familiarity with two of the pictures used, but she also apparently knew McCray. (T. 158-160). She agreed that her brothers Derrick and Byron may be Vice Lords. She has heard them “scram” Vice Lord in the past.

McCray told Maria at some point “that he didn’t try to do it (shoot Byron).” She felt McCray was “ pretty good boy” who had been “pretty decent” towards her.

On redirect, she could not verify that Derrick and Byron were actually Vice Lord members. She was not sure of McCray’s gang affiliation, if any. When she stated she had heard McCray was a Gangster Disciple, the trial judge sustained an objection and instructed the jury to disregard. The State pursued further gang testimony and drew another objection. The defense objected and moved for a mistrial. The court declined to grant a mistrial, finding gang affiliation was first raised by the defense and relevant, but instructed the State to not pursue the gang issue further (T. 167-170)

Derrick Ross, [“Derrick”], was at Mac’s Lounge that night. He was in a fight with Terrance Gordon when Walter Conner pulled up in his car when he heard a gun shot He saw McCray fire several shots. He ran. (T. 170-172). He then caught a ride to the hospital to check on Byron. Derrick Ross knew Walter Conner to be a Gangster Disciple and believed McCray to be the same. No objection was interposed to this testimony.

He told the jury that Clarksdale is also home to Vice Lords. He denied Vice Lord affiliation. He was aware of shootings in Clarksdale between Vice Lords and Gangster Disciples. (T. 173-176)

On cross examination Derrick iterated that it was only McCray that he saw with a gun. He saw McCray point the gun at Byron. Again, he denied that he was a Vice Lord.(T. 177-181)

Byron Ross, ["Byron"], had lived in Clarksdale his entire life, and was at Mac's Lounge on November 25, 2005. He observed his brother in an altercation with Terrance Gordon. (T. 182-184) When Gordon and McCray pulled up, he saw Gordon hand a gun to McCray. McCray shot him in the side. (T. 186) Byron grabbed his side and began to run. He flagged down a ride to the hospital. (T. 187)

His injuries were described. Surgery was required to repair the damage. Physical therapy was required. Byron identified McCray as the man that shot him (T. 187)

The gang topic was then discussed. Byron said he had once been a Vice Lord, but now had a job and kids. He knew Conner to be a Gangster Disciple. While disrespect can provoke violence, most violence was Vice Lord on Vice Lord, or Gangster Disciple on Gangster Disciple. (T. 188-190)

He denied drinking that night. While both he and his brother had once been Vice Lords, their similar tatoos concerned their children and were not gang related. (T. 190-195) He saw McCray shoot him "[e]ye to eye." (T. 193)

Upon these proofs, the State rested. Defendant's motion for directed verdict was denied, the court observing that direct evidence of McCray shooting Byron was corroborated by other witnesses.

Terrance Booker testified that he was present at Mac's lounge at the time shots were fired. He stated that Vandarren McCray did not shoot a gun. (T. 200-202) He didn't tell the police of his knowledge. Kerry Burkes was also present and testified that McCray was not the shooter. (T. 221-224)

Jonathan Chapmon was formerly a Coahoama County High School teacher. He testified to a social gathering at his apartment, after the shooting, where Byron and McCray appeared to get

along. Perhaps more important was the testimony the defense wished to put on, but could not when the trial court sustained the State's objection to hearsay. The defense proffered to the court that Chapmon heard a conversation between Byron and McCray in which Byron indicated that it was not McCray who shot him. The trial court found such testimony to be hearsay. (T. 211-213, 215-216).

Andrae Whitefield was also at the gathering at Chapmon's. Both McCray and Byron were there and exhibited no animosity towards one another. (T. 218-220)

McCray was advised of his *Culverson* rights after his attorney advised the court, in the presence of the jury, that the defendant would testify on his own behalf. (T. 230) Outside the jury's presence the State objected to any testimony that Byron had told McCray that McCray was not the shooter. McCray was admonished to not testify to hearsay. (T. 234-236)

McCray testified that he was there, but not the shooter. He said there was no animosity between he and Byron. He was not allowed to repeat what Byron had told him. (T. 242)

He denied being a Gangster Disciple. Connor was also not a Gangster Disciple. (T. 245-246)

After the defense rested, the State brought back Byron in rebuttal who denied he had ever been at a social gathering at Chapmon's. (T. 248)

Closing arguments included argument by the State to the jury "And you can say I will not tolerate the violence on the streets." (T. 286) The jury was also advised that they could send a message to the the gangs that they were not going to be tolerated. "I'm not going to tolerate them [street gangs]." (T. 287) Finally the jury was reminded that they knew what happened, because they live in Clarksdale. (T. 287)

SUMMARY OF THE ARGUMENT

The case against Vandarren McCray is as simple as showing "who shot Byron Ross." Thus, the core issue is the identity of the shooter. However, when the defense attempted to put on evidence

which called into question the identity of the shooter, that evidence was excluded as hearsay. As the Mississippi Supreme Court has recently confirmed, hearsay evidence is admissible when it concerns identity.

The State, in its closing remarks utilized statements that were intended to create in the minds of the jurors an “extra-legal” burden of deciding not only the present case, but that there duty extended to stopping violence in the streets of their city. Such an argument was prejudicial and inflammatory.

The prosecution systematically exercised its peremptory challenges to jurors to exclude black females. The State admitted that its challenges were made on the basis of gender. Gender-based peremptory strikes of potential jurors violated both the defendant’s and the jurors constitutional rights.

ARGUMENT

ISSUE NO 1 : WHETHER THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE AS HEARSAY THAT WAS ADMISSIBLE AS STATEMENTS OF IDENTIFICATION UNDER MISSISSIPPI RULE OF EVIDENCE 801(d)(1)(C) .

Critical to the defendant’s case was the issue of identification. Although two other State witnesses had placed McCray at the scene with a pistol, only Byron Ross claimed to have seen McCray shoot and hit him. It was undisputed that several shots were fired, and that there were approximately twenty potential suspects present. Only Byron Ross testified that he was looking at McCray when the shot was fired that struck him. However, McCray denied he was the shooter and also put on two witnesses, who disputed that he had a gun or shot. Thus evidence showing that Byron Ross did not believe that it was in fact McCray that shot him was of paramount importance, and was clearly both direct evidence and impeachment evidence on the identification of the shooter.

The defense attempted to put on evidence that the victim had been heard making comments after the event that tended to prove that he did not know who shot him and did not believe it was McCray. However, before the jury could hear such critical evidence, the State objected to the testimony as hearsay.

BY MR. KIRKHAM : Your Honor, I'm going to object to the questions that I believe are going to lead to a hearsay answer. I believe in the supplemental discovery that has been submitted to me is that the body of this witness's testimony that he heard the alleged victim make certain statements. (T. 206)

The trial judge ruled that if the witness would be testifying to statements by the victim, the statements would be hearsay and thus not admissible. The defense offered to make a proffer of the testimony, which was done at the next occasion that the parties were in chambers. (T. 207-208) The proposed testimony would show that Byron did ever have a problem with McCray, and accordingly someone else did the shooting. (T. 211, 215)

Further attempts to elicit the crucial testimony that Byron Ross did not know that it was McCray that shot him were rebuffed, the trial court ruling that "you can't give an answer based on what someone told you." (T. 210-211)

The Mississippi Supreme Court recently addressed the very issue of the admissibility of otherwise hearsay statements, when they address the issue of identity. In the case of *Kenivel Smith v. State*, No. 2007 CT-00059-SCT, a decision entered on November 5, 2009 on writ of certiorari. In that case, a similar factual situation occurred. There the witness Andre Davis initially identified Kenivel Smith as the person who shot him. But, at trial Davis refused to identify Kenivel Smith as

the shooter. The State then sought to have Davis' statements to the police admitted as substantive evidence of Smith's guilt. The trial allowed the hearsay statements, albeit, for an improper reason. The admission of the otherwise hearsay statements were the basis for the Mississippi Court of Appeals reversing Smiths conviction. However, upon certiorari, the Mississippi Supreme Court reversed the decision of the Court of Appeals holding that pursuant to Miss. R. Evid. 801(d)(1)(C) is not hearsay if the declarant is present at the trial "and the statement is one of identification of a person made after perceiving the person." *Smith, Id.*, quoting *Livingston v. State*, 519 So. 2d 1218, 1221 (Miss. 1998)

The fulcrum of the State's case is the identification of McCray as the person that shot Byron Ross. Witnesses for both sides testified, the State's witnesses supporting the State's theory that McCray shot Byron, and diametrically opposed, the defense witnesses denied that McCray shot a gun at all. Hence, the jury was required to determine facts while lacking critical and admissible evidence. As such, the evidence disputing the in court identification was of paramount importance and it's exclusion was highly prejudicial to McCray's case.

Whether admitted as substantive evidence, or to impeach Byron Ross, the evidence concerning Byron Ross' identification on McCray should have been presented to the jury, and the failure to allow such evidence was an abuse of discretion requiring reversal. "Admission of evidence is within the discretion of the trial judge. That discretion must be exercised within the scope of the Mississippi Rules of Evidence, and reversal will only be had when an abuse of discretion results in prejudice to the accused." *Austin v. State*, 784 So.2d 186, 193 -194 (Miss. 2001) The Mississippi Rules of Evidence clearly allow hearsay evidence if it concerns identification, and identification is the critical disputed fact in this trial. Accordingly, this case should be reversed and remanded for a new trial.

ISSUE NO. 2 : WHETHER THE TRIAL COURT ERRED IN FAILING TO SUA SPONTE DECLARE A MISTRIAL WHERE THE PROSECUTION USED A “SEND A MESSAGE” ARGUMENT AND OTHER IMPROPER AND INFLAMMATORY REMARKS DURING ITS CLOSING ARGUMENT.

Closing argument of the State, while afforded significant latitude, must none-the-less not be “calculated to unduly prejudice the jury.” *Sheppard v. State*, 777 So. 2d 659, 661 (Miss. 2001)

Argument which places an undue burden on the jury, a burden to go beyond the facts of the case and to request the to act as the “conscience of the community” is well established as impermissible and reversible conduct. “For two decades, this Court has warned prosecutors not to encourage juries to use their verdict to ‘send-a-message’ to the public or to other potential criminals.” *Brown v. State*, 986 So.2d 270, 275 (Miss. 2008) Yet, in this case the State charged the jury with personal responsibility for stopping the violence in the streets of Clarksdale The State first told the jury:

MR KIRKHAM : And you can say, I will not tolerate **the violence on the streets**. I will not tolerate **the shooting** because you don’t have to, ladies and gentlemen. I asked during voir dire, who’s aware of the criminal street gangs that are out there and are part of the community.
(T. 286)

This argument unarguably charges the jury not with simply deciding the facts of this case, but of making the streets of Clarksdale safe and with solving the problem of “criminal street gangs.” It is critical to note that the defense did object to the inflammatory rhetoric employed by the State’s attorney. But the use of a “send a message argument” can be so egregious that even where the defense has failed to object, the procedural bar is not controlling. *Payton v. State*, 785 So. 2d 267, 270 (Miss. 1999) That is because the argument can be so prejudicial.

Certainly with continued send a message arguments, the sum of the total, outweighs the sum of the parts. In other words, one isolated incident may be forgivable, but repeated abuses require reversal. And herein, the State was not finished arguing this jury had a duty to solve the gang problem in Clarksdale.

MR. KIRKHAM : ...I was shocked so few people didn't want to talk about street gangs in Clarksdale or were afraid to think about street gangs in Clarksdale. If that's the case... that means you can't stand up and say, I'm not going to tolerate them. (T. 287)

Again, the argument transcends the facts, that gang affiliation may have been the motive of this shooting, and instead charges the jury with a wider responsibility, to send the message that gang activity will not be tolerated in Clarksdale.

Although it is urged the prejudice to the defendant is already irreparable, the State had not finished with this line of duty to the community argument, it then asked the jury to consider it's collective experience with street gangs, clearly not the evidence in this case, to help them decide the facts these facts:

You know what happened out there. **You live in Clarksdale.** You know what happened out there. (T. 287)

and further:

You're the residents of Clarksdale. You make the decision. (T. 288)

The State had in fact premised it's entire closing argument on the concept that this case and jury's verdict was a statement to the community against gangs, that "I don't like that gangster disciple stuff." And "I don't like that vice lord stuff." (T. 286)

As made clear in *Brown, Id.*, repeated violations of the Supreme Court's twenty year directive that prosecutors not use the "send a message" argument require reversal, lest a rule be not enforced so as to become no rule at all.

The test for whether the violations require reversal was stated in *Spicer v. State*, 921 So. 2d 292 (Miss. 2006). The threshold is objection by the defense, and in this case we have objection to this line of argument. Next, were the comments invited. Although gang affiliation was mentioned as motive, nothing in the defense's closing can be said to invite any "send a message" argument. Then comes a two part test: (1) were the comments improper and (2) whether they were prejudicial. As a "send a message" argument is per se improper, the first prong is readily passed. Did it prejudice McCray? Certainly it did. The jury had a he said versus he said kind of case. Both side produced corroborating witnesses. But the injection of a "send a message" argument elevated the jury's decision to one of protecting Clarksdale as a whole from street gangs and violence.

Accordingly, it is urged that this cause be reversed and a too oft repeated message be sent to prosecutors, that "send a message" arguments are improper and shall not be tolerated.

ISSUE NO. 3 : WHETHER THE STATE ADMITTED GENDER DISCRIMINATION DURING JURY SELECTION IN AGREEING THAT THE STATE HAD USED IT'S PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN FEMALES.

Purposeful gender discrimination in the State's exercise of its peremptory strikes of jurors violates *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) and its derivative *J.E.B.v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419 (1994) Where the state admits that it has utilized gender as the basis for its strikes, *Batson, Id.* is satisfied, the discriminatory intent being confessed. *McGee v. State*, 953 So. 2d 211 (Miss. 2007) Thus, in the case at bar, where the State has utilized all five strikes for black females, and acknowledges gender was the sole reason for one juror and a consideration in the other four strikes, the judgement of the lower court need necessarily be reversed.

Although, the State's explanation of its strikes is not entirely coherent, the trial court's understanding of the State's explanation makes it clear, that the State sought to strike females.

BY MR. KIRKHAM : A black female is not representative on this panel, I don't believe by racial breakdown. I believe their required to do so, to show a pattern of racial discrimination. I think that would be borne out by striking males.

BY MRS. WEBSTER : Your Honor, he only struck black females.

BY MR. KIRKHAM : It turned out they're not representative on this panel. I kept black males (inaudible) recognize the (inaudible) We can break down the panel.

BY THE COURT : Ms. Webster, what the prosecutor is endeavoring to do is to try to get a balance of jurors between the sexes. He has expressed that anyway as being his race neutral reason. Do you quibble with that?

BY MS WEBSTER : I do. He has, he 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 that the makeup of the jury is such, I differ with him on that.

BY MR. KIRKHAM : Your Honor, I have also struck one, two three, four, five black females. Yes. (T. 82-83)

As set out in *McGee, Id.*, discrimination based on gender is impermissible. It violates the constitutional guarantee of equal protection for not only McCray, but also the females who were

struck on the basis of their gender. “[I]ntentional discrimination on the basis of gender violates the Equal Protection Clause...” *McGee. Id., quoting J.E.B., Id.* In this matter, much like in *McGee*, when *Batson* was raised the State admitted the strike(s) were exercised because the potential jurors were female.

Accordingly, this cause must be reversed and remanded

ISSUE NO. 4 : WHETHER THE EFFECT OF CUMULATIVE ERROR REQUIRES THIS CAUSE TO BE REVERSED AND REMANDED.

If the errors committed above are each, standing alone, deemed to be harmless, the cumulative effect of the totality of error demands reversal. *Russell v. State*, 185 Miss. 464, 469, 189 So. 90, 91 (1939) McCray was first prevented from presenting critical evidence on his theory of the case, that the victim’s identification of him as the shooter was false and contradicted by his own statements. This was compounded by the inflammatory “send a message” argument employed by the State. And this was done before a jury that has been selected in a discriminatory manner. Appellant strongly urges that each issue constitutes reversible error standing alone, but when combined the unfairness to Appellant is trenchant. Reversal is a necessity.

CONCLUSION

It is respectfully submitted that for the foregoing arguments this cause should be reversed and remanded.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 
W. DANIEL HINCHCLIFF
MISSISSIPPI BAR NO. 

CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Vandarren McCray, 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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This the 9th day of November, 2009.



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