IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TAMEKA SMITH **APPELLANT**

V. **NO. 2015-KA-01375-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. Tameka Smith, Appellant
3. Honorable Patricia Burchell, District Attorney
4. Honorable Robert Helfrich, Circuit Court Judge

This the 8th day of November, 2017.

Respectfully Submitted,

INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER

BY: /s/Hunter N. Aikens
Hunter N. Aikens
COUNSEL FOR APPELLANT

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STATEMENT OF THE ISSUES

I. The trial court erred in overruling Smith's *Batson* objection.

II. Prosecutorial misconduct during closing arguments violated Smith's right to a fair trial.

III. Smith's Sixth Amendment right to Confrontation was violated by Detective Sims' testimony.

IV. The trial court erred in refusing Smith's requested jury instruction on the defense theory of misidentification.

V. The trial court erred in allowing CD exhibits in envelopes containing written notations commenting on the evidence and highlighting specific portions of the evidence.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Forrest County, Mississippi, and a judgment of conviction for one count of armed robbery entered against Tameka Smith following a jury trial on March 17, 2015, the Honorable Robert B. Helfrich, Circuit Judge, presiding. (C.P. 61-65; R.E. 5-9). Johnson was represented at trial by Michael R. Bonner, Esq. The trial court sentenced Smith to twenty (20) years in the custody of the Mississippi Department of Corrections with twelve (12) years to serve, eight (8) years suspended, and five (5) years of post-release supervision. (C.P. 62-65; R.E. 6-9). Smith's trial counsel filed no motion for JNOV or new trial. On September 3, 2015, Smith filed a pro se notice of appeal. (C.P. 67; R.E. 10). This Court later entered orders directing the trial court to hold a hearing under Mississippi Rule of Appellate Procedure 6(c)(1) to determine whether Smith intelligently and competently waived her right to appointed counsel on appeal. (C.P. 81-82; 95-96). On March 7, 2017, the trial court entered an order finding Smith indigent and appointing the office of the undersigned as counsel on appeal. (Tr. 99). Smith is presently incarcerated in the custody of the MDOC, and she now appeals to this Honorable Court for relief.

STATEMENT OF THE FACTS

A Forrest County grand jury returned an indictment alleging that Tameka Smith committed an armed robbery of a Dollar General store near Hattiesburg, Mississippi, on June 5, 2013. (C.P. 12). Store manager Paige Arnold and cashier Kelly James were working at the Dollar General that night. (Tr. 75, 79, 95). Through Arnold, the State introduced a copy of the store's surveillance video as an exhibit at trial. (Tr. 81; Ex. 5). Arnold testified that she was on the toothpaste aisle when a woman wearing a gray hoodie with a white towel over her head/face walked up and said she had a toothache. (Tr. 76, 85). Arnold showed the woman where the oral pain medicines were, and she (Arnold) continued straightening the aisles. (Tr. 76, 86). Arnold testified that James later "came

with the same woman and showed her the same stuff, [and] walked back up to the front." (Tr. 76).[1] About ten minutes later, a customer came to Arnold and told her that she was needed at the front of the store. (Tr. 76).

James testified that the woman came to the register with the Ora-gel; she rung it up and told her the total; and the woman then "came around the register, and she came up behind me and she said, 'I have a gun. I have my kids in the car. Just give me a little bit of the money.'" (Tr. 96, 96). James testified that the woman "put something in my back" when she said "I have a gun," and the woman "grabbed a set of scissors that was lying on the counter and put them in my back as well." (Tr. 99). James told the woman that because she had already rung up the sale, the register could not be opened without the manager using her key to void the sale. (Tr. 96, 99-100). The woman repeatedly told James to just hit the "enter" or "total" buttons to open the register; James hit the buttons–and the woman hit buttons herself–but the register would not open. (Tr. 96-97, 99-100). Meanwhile other customers had come to the register to check out, and the woman walked from behind the counter and stood nearby. (Tr. 97, 101).

Arnold arrived momentarily and voided the sale, and James began checking-out other customers. (Tr. 76, 97, 101). When the register opened, the woman walked behind the counter and started grabbing money out of the register. (Tr. 76, 97, 101). James and Arnold then grabbed the woman and tried to wrestle the money from her hands; the struggle went from the register to just outside the front door, at which point James' boyfriend emerged and assisted. (Tr. 76, 97-98, 101-02). Arnold, James, and James' boyfriend ripped-off the woman's hoodie and white towel, and the woman ran from the front of the store around the side. (Tr. 76, 108). Arnold walked back inside the

[1] Similarly, James testified that the woman came to the register and asked where the Ora-gel was, and James took the woman to the Ora-gel and returned to the register. (Tr. 96).

store, got her phone to call 911, and she went back outside and got the tag number and description of the car the woman left in. (Tr. 76, 86-87). Arnold claimed that she made eye contact the woman as she drove away. (Tr. 88). A copy of Arnold's 911 was introduced as exhibit. (Tr. 81-82; Ex. 6). Arnold told police that a woman robbed the store and left in a vehicle with a Jefferson Davis county tag with license plate number "JDM 529 or 592." (Ex. 6; Tr. 89).

James testified that the woman's face was momentarily uncovered at the end of the struggle. (Tr. 102; Ex. 5 at 6:28). Arnold testified that she got two looks at the woman, one during the struggle and another as the woman drove away. (Tr. 76, 88, 93-94). James provided police a description of the suspect on the night of the robbery, reporting that the woman was 5' 2" tall. (Tr. 104-05). James testified that she is 4' 11" tall. (Tr. 105). At trial, Smith stood so the jury could see how tall she is; James testified that Smith is "a little taller than me, but James disagreed that Smith was taller than the woman in the video. (Tr. 105-06). Arnold testified that she is 5' 9-1/2" tall and that the woman was shorter than her and was about 5' 6" tall. (Tr. 88).

Officer Eric Prouix testified that he received the dispatch reporting the robbery, and the dispatcher provided a description of the vehicle as "a white Pontiac, and they gave a tag number as well." (Tr. 115-16). Prouix arrived at the Dollar General and preserved the area(s) on the counter that he suspect had touched, for potential fingerprints. (Tr. 116). Prouix testified that he was not aware that any fingerprints were ever recovered. (Tr. 118). Officer Tammy Hoadley testified that dispatch "put out the suspect was leaving in a white Bonnevile and provided us with two separate tag numbers consistent with the first three, but they weren't sure about the last three numbers." (Tr. 120-21). Officer Hoadley secured the area and spoke with Arnold and James when she arrived. (Tr. 121). She testified that police recovered and photographed a gray jacket, a white rag, and some

personal hygiene items. (Tr. 121). Hoadley testified that she did not collect any fingerprints and she did not transport anything to the crime lab for DNA analysis. (Tr. 122).

Detective Sims testified that police recovered no fingerprints from the Dollar General, and no DNA was recovered the gray jacket. (Tr. 145-46). According to Sims, the jacket was stored in a plastic bag which destroyed any possible DNA evidence. (Tr. 146). Sims testified that he ran the tag number(s) that were reported, and he determined that the vehicle belonged to "this little grandma who lived out of town. . . . Bobbie Fairly was her name." Through the following exchange, Sims was also allowed to testify that:

> A. [I] made contact with Bobbie. Asked her to come to Hattiesburg, actually under a pretense. Once she arrived in Hattiesburg in her vehicle that was used in the robbery, we were able to seize the vehicle and process it as a crime scene. During my investigation I was able to determine the people at Bobbie's house the evening of the robbery. It included our suspect, Tameka Smith, and I then presented both the cashier and the manager of the Dollar General the photo lineup, and they identified Tameka as the suspect in the case
>
> Q. Now, let's back up a little bit. Is it true that you ran the tag number and that the tag number - -
>
> A. Exactly. That's what I did. I ran the tag and it came back to Ms. - - I keep forgettingher name - - Fairley, and through my investigation, I was able to determine - - basically what happened, Tameka is rather promiscuous. Ms. Fairley's grandson was one of her boyfriends. She went over to see Ms. Fairley's grandson. He borrowed Tameka's car, which left Tameka at the grandma's house with no vehicle. After the grandma went to sleep - -
>
> Mr. Bonner: Objection, Your Honor. I don't think that there's been a proper foundation laid. It's not exactly hearsay, but he hasn't established how he knows what he's saying at this point.
>
> Mr. Denton: Let me ask the question and see if I can't keep this on track.
>
> The Court: Okay.

Q. Once you were able to trace the vehicle to a Bobbie Fairley, were you able to ascertain who was living with Bobbie Fairley?

A. I was. It was her grandson, which we brought in for questioning, as well as Tameka, who was there present that night. Through that questioning in my investigation, I was able to determine that the grandson had taken Tameka's vehicle, leaving Tameka there with - - I believe she had two children with her, without a vehicle. Tameka then shows up in Hattiesburg. I do have some theories of how and why this happened, but Tameka did not - -

Q. Detective, before we get into any theories, let me ask you - - once you were able to ascertain that Tameka Smith was living with Bobbie Fairley, who was the owner of the vehicle used for the armed robbery, at that time did you bring Tameka Smith in for questioning?

A. We did.

(Tr. 128-30).

About three days after the robbery, Detective Sims presented photo lineups to James and Arnold. (Tr. 83-84, 98, 130). Sims testified that Arnold "[c]ircled two separate people - - said they both looked like it." (Tr. 154). Arnold testified that "I told Detective Sims, my gut instinct is 80 percent sure it was the defendant; 20 percent sure it was the other person." (Tr. 90). Sims testified that Arnold did not give a percentage. (Tr. 162). According to Arnold, "I did an 80 percent i.d. The reason why being one of the women in the lineup, along with the defendant, was a regular customer, and it kind of threw me." (Tr. 83). James selected Smith as the robber in the lineup. (Tr. 98). Both Arnold and James identified Smith in court as the robber. (Tr. 84, 98).

Sims testified that he arrested Smith for armed robbery and that Smith's booking information reflects that she is 5' 7" tall and weighed 235 pounds. (Tr. 132). Sims acknowledged that James had reported that the suspect was 5' 2" tall, but he opined that he did not believe that James' description was accurate based on the surveillance video. (Tr. 155). Sims also requested Smith's cell phone records from Cspire, and the records were admitted as an exhibit at trial. (Tr. 133-36; Ex. 7). The

records reflected that Smith made a call from Prentiss at 7:00 p.m. which lasted 582 seconds. (Tr. 135; Ex. 7). The records also reflected that Smith made a call from Prentiss at 8:43 p.m., which lasted 252 seconds. (Tr. 136; Ex. 7). Sims testified that the call reporting the robbery came out "around 2000 hours, which is 8 p.m. (Tr. 157).[2]

Steve Pazos, an investigator with the District Attorney's office, testified that he conducted a follow-up investigation into the case. (Tr. 165). Specifically, Pazos testified that he investigated Smith's alibi witness, Jennifer Smith ("Jennifer"), who had "advised that she was on the phone with her daughter during the time that the robbery took place." (Tr. 166-67). On May 9, 2013, Pazos called Smith and recorded their conversation, and the State introduced a recording of the call as an exhibit at trial. (Tr. 166-67; Ex. 9). In the recorded call, Jennifer told Pazos that she talked to Smith on the phone from 7:00 p.m. to 7:09 p.m. on the night of the robbery. (Tr. 167, 169; Ex. 9). Jennifer said that she talked to Smith about school project in which Smith was tasked with researching examples of business plans, and she (Jennifer) emailed Tameka some helpful materials the next morning. (Tr. 169; Ex. 9). Pazos testified that his phone conversation with Jennifer discredited Smith's alibi: "[S]he advised me that she was on the phone with her daughter between 7 p.m. and 7:09 p.m., and the actual call for service came in through the police department's line at 7:54 p.m. So, therefore, it would discredit that as being on the phone with her during the time that the robbery took place." (Tr. 167-68).

The prosecutor also asked Pazos, "During your investigation into the defendant's alleged alibi, during that phone conversation or at any other time were you provided with a credible alibi []

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[2] The time stamp on the store's surveillance video indicates that the robbery occurred at about 7:00 p.m., or 19:00 hours. (Ex. 5). Arnold testified that the time on the surveillance video was an hour behind because the district manager was the only one who could adjust the system, and the district manager on sick leave when time changed and sprung forward. (Tr. 80).

by any of the witnesses?", to which Pazos testified "No, sir." (Tr. 168). The prosecutor also asked Pazos if, at any time, his investigation uncovered an alibi for Smith, and Pazos testified that it did not. (Tr. 168).

Smith's mother, Jennifer, testified for the defense. Jennifer testified that she had watched the surveillance video many times, and that the person in the video was not her daughter. (Tr. 177, 186). Specifically, Jennifer testified that Smith was pigeon-toed and her feet pointed inward; whereas, the person on the video had feet that pointed outward. (Tr. 177-79). Jennifer also testified that her daughter and the person in the video had different builds, in that, the person in the video was much wider and thicker than Smith through the back waist and thigh. (Tr. 178, 180-81). She also testified that Smith and the person in the video stood differently, in that, Smith's legs were straight, but the person in the video had legs that "bowed back." (Tr. 178-80). Jennifer also testified that the person in the video had darker skin than Smith. (Tr. 179-80). Jennifer testified that she could not tell whether the person in the video was a man or a woman, and she could not make out the person's face on video. (Tr. 183). Jennifer acknowledged that Smith had lost some weight since the night in question, but she maintained that "even with her gaining and losing weight, that still is not her body build or body structure [on the video]." (Tr. 183-84).

Jennifer testified that she was at her home in Pattison, Mississippi, on the night of the robbery, and she talked to Smith on the phone about a business-plan homework assignment from about 7:00 p.m. to 7:10 p.m. (Tr. 181-82). And she emailed Smith some examples of business plans the next morning. (Tr. 181-82). On cross-examination, Jennifer acknowledged that Smith was staying at Bobbie Fairley's house in June 2013. (Tr. 186).

Smith testified in her own defense at trial. Smith testified that she was not the person in the video and that she never went to the Dollar General on the night in question. (Tr. 187-88). Smith

testified that she and her kids went to Prentiss at about 4:00 p.m., and she worked on her homework for a summer school class that she was attending online at Alcorn. (Tr. 188). Smith testified that she went a corner store right down the street just outside of Prentiss sometime between 7:30 p.m. and 8:30 p.m. (Tr. 188). She testified that she was gone for only about five minutes, and she then resumed working on her homework. (Tr. 188). Smith testified that she left the house a second time with her boyfriend at about 10: p.m., and they went to the Junior Food Mart in Prentiss. (Tr. 189). Smith denied ever going to Forrest County on the night in question. (Tr. 189).

Smith testified that she is about 5' 7" tall. (Tr. 189). At trial, Smith stood up and walked around the courtroom to show the jury that she was pigeon-toed and how she stood and walked. (Tr. 189-90). Smith testified that she had gained and lost some weight over the last two years. (Tr. 190). Smith testified that she was taller than the person on the surveillance video. (Tr. 194-95). She denied that she was guilty of the robbery. (Tr. 190).

On cross-examination, Smith testified that she weighed 205 pounds at trial, which was about 30 pounds less than she weighed in June 2013. (Tr. 191). In response to questions by the prosecutor, Smith denied that she lived with her boyfriend's grandmother (Bobbie Fairly) in 2013, but she acknowledged that she visited for a couple of days and was staying the night on June 5, 2013. (Tr. 191-92). Smith acknowledged that Ms. Fairley lived in Jefferson Davis County, and that Ms. Fairley's car was the car police tracked down using the tag number at issue. (Tr. 192). Smith testified that Ms. Fairley laid down in bed about 7:00 p.m. or 7:30 p.m. on the night in question, but she testified that Ms. Fairley's car was not accessible to her because Ms. Fairley kept her keys in her purse in the bedroom. (Tr. 192-93). Smith acknowledged that Arnold reported the vehicle being driven by a person matching her general description, but she maintained that she never drove the vehicle that night or left Prentiss to go to Hattiesburg. (Tr. 193-94).

The jury was instructed on armed robbery, the lesser-included offense of simple robbery, and the defense of alibi. (C.P. 48-52, 54). The trial court denied Smith's requested instruction on misidentification. (C.P. 59; R.E. 11). After retiring for deliberations, the jury returned a verdict finding Smith guilty of armed robbery. (C.P. 61; R.E. 5).

SUMMARY OF THE ARGUMENT

The trial court erred in overruling Smith's *Batson* objection. The trial court's inquiry concluded with finding that the State proffered race-neutral reasons for striking three black female prospective jurors. The trial court failed to conduct *Batson*'s third step, which requires the consider and make on-the-record findings as to whether the State's facially valid reasons were merely a pretext for purposeful discrimination. Smith requests this Court to reverse and remand this case for a new trial.

The prosecutor violated Smith's right to a fair trial during closing arguments by commenting on Smith's failure to call a witness in her defense and by making remarks that improperly shifted the burden of proof to Smith. Thus, this Court should reverse and remand this case for a new trial.

The State violated Smith's Sixth Amendment right to confrontation by eliciting testimonial hearsay evidence through Detective Sims' testimony. Sims' testified that Bobbie Fairley and her grandson placed Smith at Fairley's house with Fairley's car on the night of the robbery. Smith's trial was prejudiced, and she requests this Court to reverse and remand this case for a new trial.

The trial court erred refusing to instruct the jury on Smith's defense theory of misidentification. While James selected Smith in a photo lineup, Arnold was uncertain and selected two people when police presented her with a photo lineup. There was effectively only one eyewitness identification prior to trial. The refusal of the instruction unfairly limited Smith's right to present a full defense, and this Court should reverse and remand this case for a new trial.

The trial court erred in allowing three of the State's CD/DVD exhibits to go the jury in envelopes containing argumentative comments and directions that highlighted specific portions of the evidence. Argument is not evidence, and the jurors could have believed that the markings were made by the trial court. This error is inconsistent with generally understood notions of justice and fair play, and this Court should reverse and remand this case for a new trial.

ARGUMENT

I. The trial court erred in overruling Smith's *Batson* objection.

The trial court failed to conduct a proper and complete *Batson*[3] analysis. The trial court's ruling ended with its determination that the State proffered race-neutral reasons for challenging three black female jurors. The trial court failed to conduct *Batson*'s third step, which requires the trial court to consider and make on-the-record findings as to whether the State's facially-valid race-neutral reasons were merely a pretext for purposeful discrimination.

During jury selection, the State used three of its first five peremptory challenges on black females, and trial counsel raised a *Batson* objection. (Tr. 52-53). The trial court stated that it would allow the State to give race-neutral reasons for the challenges, and the State provided the following reasons for excluding the prospective jurors:

Juror Number 9:	"[W]e observed that she seemed to be disinterested, was not making eye contact."
Juror Number 10:	"[I]t was our observation that she frowned a lot during our voir dire and gave us the impression that she just didn't want to be here."
Juror Number 13:	"[S]he also seemed to be disinterested and not really engaged in the voir dire process."

[3] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

(Tr. 54). Trial counsel argued in rebuttal that, "[t]he only thing that the State has proffered as a race-neutral reason is that they didn't want to be here. Nobody wants to be here, Your Honor. That's not a valid excuse or a reason to excuse somebody, and he said noting else." (Tr. 54). The trial court then denied Smith's *Batson* challenge, concluding that the State had race-neutral reasons for striking the jurors:

> I think he said more than simply they don't want to be here. And, quite frankly, I disagree with you that nobody wants to be here. These are my people. They like to come to court.
>
> But in any event, I don't think you've met your burden to go forward with a *Batson* Challenge. And in the event you have, I do not think that these jurors were -- well, I do think they were struck for race-neutral reasons.

(Tr. 54-55).

"The trial court in the case sub judice did not go far enough in its findings. While stating that each reason given for the peremptory strikes was racially neutral, the court did not make an on-the-record finding that the State's reasons were not pretextual." *Jones v. State*, 801 So. 2d 751, 760 (Miss. Ct. App. 2001) (citing *Johnson v. State*, 754 So. 2d 1178 (Miss. 2000); *Hatten v. State*, 628 So. 2d 294, 298 (Miss. 1993)).

> *Batson* claims are analyzed under a three-part test:
>
> *First*, the party objecting to the peremptory strike of a potential juror must make a prima facie showing that race was the criterion for the strike. *Second*, upon such a showing, the burden shifts to the State to articulate a race-neutral reason for excluding that particular juror. ***Finally***, after a race-neutral explanation has been offered by the prosecution, the trial court must determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory strike, i.e., that the reason given was a pretext for discrimination.

Pitchford v. State, 45 So. 3d 216, 224 (Miss. 2010) (citing *Flowers v. State*, 947 So. 2d 910, 917 (Miss. 2007)) (emphasis added).

On appeal, this Court will sustain a trial court's "'*Batson* ruling unless the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence.'" *Flowers*, 947 So. 2d at917 (quoting *Thorson v. State*, 721 So. 2d 590, 593 (Miss. 1998)). "The trial court has a pivotal role in evaluating *Batson* claims [because s]tep three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility . . . ." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208 (2008) (citing *Batson*, 476 U.S., at 98, n. 21, 106 S.Ct. 1712). "The *Batson* analysis has three steps, and it is imperative that a trial judge follow those steps accordingly." *Hardison v. State*, 94 So. 3d 1092, 1099 (Miss. 2012).

Whether Smith established a *prima facie* case of discrimination in this case is moot, as the State proffered its supposed race-neutral reasons for the strikes. *Manning v. State*, 735 So. 2d 323, 339 (Miss. 1999) ("When the prosecution gives race-neutral reasons for its peremptory strikes, the sufficiency of the defendant's prima facie case becomes moot.") (citing *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859 (1991)). Under *Batson*'s second prong, the State's proffered reasons "'need not be persuasive, or even plausible; so long as the reasons are not inherently discriminatory, they will be deemed race-neutral.'" *Chamberlin v. State*, 989 So. 2d 320, 337 (Miss. 2008)). And Smith acknowledges that demeanor/inattentiveness and lack of eye contact have been deemed race-neutral reasons. *See Lockett v. State*, 517 So. 2d 1346, 1353 (Miss. 1987). However, "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much. . . ." *Miller-El v. Dretke*, 545 U.S. 231, 239-40, 125 S.Ct. 2317 (2005). This is why *Batson*'s third step–i.e., considering whether the facially-valid race-neutral reasons are merely a pretext for discrimination–is most critical.

"Once the prosecutor proffers his explanation, and the Court determines that it is race-neutral and satisfies the prosecution's step-two burden of articulating a nondiscriminatory reason for the

strike, the inquiry should proceed to step three, where the trial court determines whether the prosecutor was motivated by discriminatory intent." *Chamberlin*, 989 So. 2d at 337 (citing *Purkett v. Elem*, 514 U.S. 765, 769, 115 S. Ct. 1769 (1995)); *see also*, *Robinson v. State*, 773 So. 2d 943, 947 (Miss. Ct. App. 2000) ("[T]he trial court must further consider whether the facially-acceptable reasons are, in fact, merely pretexts offered by the prosecution to camouflage its purpose of systematic exclusion of prospective jurors based on race.") (citing *Batson*, at 97-8, 106 S.Ct. 1712). "It is not until the third step that the persuasiveness of the justification becomes relevant-the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett*, 514 U.S. at 768, 115 S. Ct. 1769 (citing *Batson*, at 98, 106 S.Ct., at 1723; *Hernandez*, 500 U.S. at 359, 111 S.Ct. 1859). "At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 515 U.S. at 768, 115 S. Ct. 1769.

Pretext can be shown "where there exists: (1) disparate treatment, that is, 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 record support for the stated reason; and (5) group-based traits." *Estate of Jones v. Phillips ex rel. Phillips*, 992 So. 2d 1131 (Miss. 2008). Appearing disinterested, frowning and failing to make eye contact are simply not related to the facts of a case. *Batson* requires that the prosecutor "articulate a neutral explanation *related to the particular case to be tried*." *Batson*, 476 U.S. at 98, 106 S.Ct. 1712 (citations omitted) (emphasis added). A race-neutral reason unrelated to the facts indicates pretext and purposeful discrimination. *See e.g.*, *Flowers*, 947 So. 2d at 917; *Manning*, 765 So. 2d at 519 (¶9). And it is not sensible to assume that unchallenged jurors of the opposite race did not also "appear disinterested." The State's failed to

voir dire on the jurors' disinterest or body language further suggests that these reasons were offered merely as a pretext. *Id.*; *see also*, *Dretke*, 545 U.S. at 246, 125 S.Ct. 2328 ("the State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.") (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)).

Additionally, aside from the prosecutor's assertion, the record lacks support that the jurors exhibited the alleged demeanor(s); and the trial court made no independent finding concerning the jurors' demeanor. "Lack of support in the record for the reason stated has been held by this court to be an indicator of pretext." *Flowers*, 947 So. 2d at 928 (citing *Manning*, 765 So. 2d at 519). "Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility [.]" *Snyder*, 552 U.S. at 477, 128 S. Ct. 1203 (citing *Batson*, 476 U.S., at 98, n. 21, 106 S.Ct. 1712). In *Snyder*, a case involving a juror's alleged non-verbal conduct of looking "very nervous," the United States Supreme Court explained the necessity of the trial court's findings as follows:

> [R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate ***not only*** whether the prosecutor's demeanor belies a discriminatory intent, ***but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor***.

Snyder, 552 U.S. at 477, 128 S. Ct. 1203 (emphasis added). In refusing to "presume that the trial judge credited the prosecutor's assertion that [a juror] was nervous[,]" the *Snyder* Court held that "deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. *Here, however, the record does not show that the trial judge actually made a determination concerning [the juror's] demeanor*." *Id.*, at 479, 128 S. Ct.

1203) (emphasis added). As in *Snyder*, the trial court in this case made no finding of whether the jurors could credibly be said to have exhibited the demeanor(s) alleged by the prosecutor.

Mississippi law "[r]equires the trial court to make on-the-record factual findings that each race neutral reason offered by the State for striking a juror is non-pretextual." *Johnson v. State*, 875 So. 2d 208, 209 (Miss. 2004) (citing *Johnson*, 754 So. 2d at 1180; *Hatten*, 628 So. 2d at 298). In this case, "[h]aving determined the reasons offered were facially race-neutral, the trial court failed to move further to consider whether, based upon all the relevant considerations, it appeared likely that the State was voicing reasons that appeared race neutral on their face but which were intended [as a pretext for purposeful discrimination]." *Robinson*, 773 So. 2d at 949.

Smith submits that remand for a new trial is appropriate because the prosecutor's proffered reasons are "so contrived, so strained, and so improbable" that they "fall within the range of those 'implausible or fantastic justifications' [] that ought to 'be found to be pretexts for purposeful discrimination.'" *Id.*, at 949–50 (quoting *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769). Alternatively, Smith requests this Court to remand for a complete and proper *Batson* hearing. *Id.*, at 949 (citing *Williams v. State*, 507 So. 2d 50, 52-53 (Miss. 1987)).

II. Prosecutorial misconduct during closing arguments violated Smith's right to a fair trial.

The prosecutor committed prosecutorial misconduct during closing argument by improperly commenting on Smith's failure to call a witness and by making remarks that impermissibly shifted the burden of proof to Smith.

"Attorneys are allowed a wide latitude in arguing their cases to the jury. However, prosecutors are not permitted to use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury." *Sheppard v. State*, 777 So. 2d 659, 661 (Miss. 2000) (citing

Hiter v. State, 660 So. 2d 961, 966 (Miss. 1995)). On appeal, this Court review instances of misconduct during closing arguments to determine "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 so created." *Id.*, (citing *Ormond v. State*, 599 So. 2d 951, 961 (Miss. 1992)).

Burden-shifting arguments

During closing argument, the State told the jury that "it's undisputed" that "the person who robbed the Dollar General used a pair of scissors and said they had a gun. . . [and] that $70 was taken from Paige Arnold and Kelly James against their will by the exhibition of a deadly weapon[.]" (Tr. 211-12). The prosecutor then argued that, "These are undisputed facts. *The Defense hasn't put on one shred of evidence contradicting the elements of this crime*, the", at which point trial counsel interjected, "Your Honor." (Tr. 212) (emphasis added).[4]

Later, the prosecutor argued that Smith's testimony and theory of defense was "no proof at all", "argument", and "speculation." (Tr. 231). And the prosecutor continued that:

> That's all they've given you. *Not a shred of evidence to support their defense*. As jurors, you have to take the evidence, apply that evidence to the law. Remember we talked about letting sympathies slip into your process? Okay. Other types of factors. Things outside of looking at the evidence and applying it to the law. *I submit to you that if you do your duty as a juror*, if you focus not on all this nonsense but on the evidence, and you apply the evidence to the law, *you have to find her guilty 'cause there's nothing else to consider. Nothing has been provided to you by the Defense that would –*

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[4] Trial counsel then said "I withdrew." (Tr. 212). To the extent that this may be considered a withdrawal of the objection, Smith would note that "'in cases of prosecutorial misconduct, [] this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made.'" *Randall v. State*, 806 So. 2d 185, 210 (Miss. 2001) (quoting *Mickell v. State*, 735 So. 2d 1031, 1035 (Miss. 1999)).

MR. BONNER: Your Honor, I would object to this line. What he's saying is that the Defense has a duty to do anything to present evidence. That is not the law, Your Honor.

THE COURT: All right. Let's stay away from that area. Let's move along.

(Tr. 231) (emphasis added).

It is well-established that "'[t]he burden of proof in a criminal case never shifts from the State to the defendant.'" *Randall v. State*, 806 So. 2d 185, 211 (Miss. 2001) (quoting *Smith v. State*, 754 So. 2d 1159, 1164 (Miss. 2000)). In *Randall*, the Court held that it was error for the prosecutor to argue: "Where is the evidence? What evidence do you have of that? You can't guess or speculate. Something has to be given to you." . . . "[t]here is no evidence or exhibit that some other person did this." *Randall*, at 211 (emphasis omitted).

Smith submits that the prosecutor's comments in this case are materially indistinguishable from the prosecutor's erroneous comments in *Randall*. The natural and probable effect of the prosecutor's comments were to prejudice Smith's defense by "creat[ing] an inference that [Smith] possessed the burden of producing evidence to prove or establish h[er] innocence or the burden to refute the State's case." *Randall*, at 212. "[T]he defense of an abili [is] like any other defense. . . ." *Dawson v. State*, 62 Miss. 241, 244 (1884) (citing *Simmons v. State*, 61 Miss. 243, 259 (1883). "The defendant is not required, in any phase, of any criminal case, to prove his defense [alibi] to the satisfaction of the jury, but it is sufficiently established if, upon consideration of the whole evidence, there is a reasonable doubt of his guilt." *Dawson*, 62 Miss. at 244. "To suggest that [Smith] had the burden of proving or establishing anything was error." *Randall*, at 212. Accordingly, Smith requests this Court to reverse and remand this case for a new trial.

Failure to call a witness

The State also impermissibly commented on Smith's failure to call Bobbie Fairley to support her defense:

> Now, Tameka -- she'd have you believe that she didn't do this because she was in Prentiss, Mississippi. She was in Prentiss, Mississippi, the entire night. She never left. That whoever committed this crime must have just looked like her. But the Defense has another problem. There's no evidence that she was in Prentiss, Mississippi, at 8 p.m. on June 5, 2013. *There's no witness that puts her in Prentiss, Mississippi, at the time this crime was committed*. And that's because all of the evidence shows that Tameka was in Hattiesburg at 8 p .m. robbing the Dollar General. *She doesn't have any evidence of alibi because she doesn't have an alibi. Ms. Bobbie Fairley -- you know, she was staying at Ms. Bobbie Fairley's house, and she wasn't here to testify*.
>
> MR. BONNER: Objection, Your Honor.
>
> THE COURT: What's the basis of your objection?
>
> MR. BONNER: A witness not called, Your Honor. He had the opportunity to put her here. If he wanted to ask her that question, he could have done so.
>
> THE COURT: Stick to the evidence that's been presented.

(Tr. 213-14) (emphasis added).

"[T]he failure of either party to examine a witness equally accessible to both parties is not a proper subject for comment before a jury." *Holmes v. State*, 537 So. 2d 882, 884 (Miss. 1988) (citing *Brown v. State*, 200 Miss. 881, 27 So. 2d 838 (1946)). "'Because of the high potential for prejudice to the accused, this rule has been strictly enforced in criminal cases. Additionally, this Court has not been hesitant to reverse when such comments are joined by other unrelated sources of prejudice to the defendant.'" *Randall*, 806 So. 2d at 210 (Miss. 2001) (quoting *Griffin v. State*, 533 So. 2d 444, 449 (Miss. 1988)).

There is no indication in this case that Ms. Fairley was any more accessible to Smith than to the State. In fact, the State presented a witness (Detective Sims) who testified that he had previously contacted Ms. Fairley and had her come to the police department. The natural and probable effect

of the prosecutor's statement in this case was to "etch[] into the minds of the jurors the impression that [Bobbie Fairley] would not, in fact, corroborate the defendant's [testimony]." *Holmes*, 537 So. 2d at 884. Smith submits that this error warrants reversal and remand for a new trial.

III. Smith's Sixth Amendment right to Confrontation was violated by Detective Sims' testimony.

During the State's case-in-chief, Detective Sims provided testimonial hearsay about what Bobbie Fairley and her grandson allegedly told him during questioning at the police department. Specifically, Detective Sims testified that he got Ms. Fairley "to come to Hattiesburg, actually under a pretense" and police "brought [her grandson] in for questioning." (Tr. 128, 130). Sims testified that through Fairley and her grandson, he was informed that Smith was at Fairley's house on the nigh of the robbery, and the grandson took Smith's car leaving her at Fairley's house with no vehicle except Fairley's car, which was used in the robbery. (Tr. 129-30).

Trial counsel objected on the basis that an insufficient foundation was laid. (Tr. 129). The proper objection should have been that Sims' testimony was hearsay and, specifically, testimonial hearsay in violation of the Confrontation Clause. In any event, this issue is subject to plain error review because "[a] violation of the Confrontation Clause is a violation of a 'fundamental, substantive right' which seriously affects the 'fairness, integrity or public reputation of judicial proceedings.'" *Corbin v. State*, 74 So. 3d 333, 337 (Miss. 2011) (quoting *Smith v. State*, 986 So. 2d 290, 294 (Miss. 2008); *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508, 518 (1993)).

"Both the Sixth Amendment to the Constitution of the United States and Article 3, Section 26, of the Constitution of the State of Mississippi provide a criminal defendant the right 'to be confronted by the witnesses against him.'" *Johnson v. State*, 155 So. 3d 733, 739 (Miss. 2014)

(quoting U.S. Const. amend. VI; Miss. Const. art. 3, § 26). "In *Crawford v. Washington*, the United States Supreme Court held that testimonial statements of witnesses absent from trial can be admitted, in accordance with common law, *only* where the declarant is unavailable *and* the defendant had a prior opportunity to cross-examine." *Smith v. State*, 986 So. 2d 290, 296 (Miss. 2008) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1364, 158 L.Ed.2d 177 (2004)).

For Sixth Amendment purposes,[5] out-of-court statements are testimonial "[w]hen the circumstances objectively indicate that there is no [] ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273–74 (2006). In this case, Fairley's and her grandson's statements to Detective Sims were clearly testimonial. Neither Fairley nor her grandson testified at trial, and the record does not establish that Smith had a prior opportunity to cross-examine them concerning their statements to Detective Sims. Thus, Detective Sims' testimony violated Smith's Sixth Amendment right to Confront the witnesses against her.

And the error prejudiced Smith's defense. During opening statements, the defense stated only that Smith was in Prentiss at the time of the burglary; the defense did not state that it intended to prove that Smith was at Fairley's house during the robbery. Smith's defense was based on her phone records, which indicated that her calls were made from the Prentiss area, generally. That defense did not rest on her presence at Fairley's house, specifically, nor should it have; placing Smith

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[5] *Crawford* drew distinctions between out-of-court statements that are testimonial and non-testimonial. The Court noted that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless . . . ." *Crawford*, 541 U.S. at 51, 124 S. Ct. 1354. The Court found that nontestimonial statements remain subject to a State's rules of evidence; "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford, 541 U.S. at 68, 124 S. Ct. 1354.

at Fairley's house with the car used in the robbery would have been detrimental to the defense. The first mention that Smith was at Fairley's house on the night on question came during Detective Sims' testimony. Smith later testified that she was at Fairley's house; however, the State had already impermissibly elicited evidence that she was there. Without evidence that Smith was at Fairley's house, Smith could have presented her defense by relying on the phone records, which showed only that she was in/near Prentiss generally around the time of the robbery. Without evidence that she was at Fairley's house, Smith may even have chosen not to testify.

If the State wished to introduce evidence that Smith was at Fairley's house with the car used in the robbery, it should have called Bobbie Fairley and her grandson to testify against Smith at trial. The introduction of this evidence through Detective Sims violated Smith's fundamental rights to confrontation and to a fair trial. And Smith requests this Honorable Court to reverse and remand this case for a new trial.

IV. The trial court erred in refusing Smith's requested jury instruction on the defense theory of misidentification.

"'On appellate review of the trial court's grant or denial of a proposed jury instruction, our primary concern is that 'the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it.'" *Banyard v. State*, 47 So. 3d 676, 681 (¶11) (Miss. 2010) (quoting *Young v. Guild*, 7 So. 3d 251, 259 (Miss. 2009)). "'A defendant is entitled to have instructions on his theory of the case presented, even though the evidence that supports it is weak, inconsistent, or of doubtful credibility.'" *Banyard*, at 681 (¶12) (quoting *Ellis v. State*, 778 So. 2d 114, 118 (Miss. 2000)). "'[I]t is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court. This Court will never permit an

accused to be denied this fundamental right."' *Chinn v. State*, 958 So. 2d 1223, 1225 (¶13) (Miss. 2007) (quoting *O'Bryant v. State*, 530 So. 2d 129, 133 (Miss. 1988)).

In this case, one of Smith's defenses was misidentification. In furtherance of her defense of misidentification, Smith requested instruction D-9. (Tr. 202-03; C.P. 59; R.E. 11). The State, citing *Victory v. State*, 83 So. 3d 370 (Miss. 2012), argued that Smith was not entitled to the instruction because more than one eyewitness–i.e., both Arnold and James–identified Smith. (Tr. 202-03). Trial counsel argued that there was truly only one eyewitness identification because Arnold was unable to positively identify Smith in the photo lineup and selected two people. (Tr. 203-04). The trial court refused instruction D-9 because "both of the store victims made positive in-court identification[s] of the defendant[.]" (Tr. 209).

In *Victory*, the Court held that the defendant was not entitled to an identification instruction because "multiple witnesses identified [the defendant] as the shooter." *Victory v. State*, 83 So. 3d 370, 375 (Miss. 2012). In *Victory*, two witnesses "identified the shooter as Victory" at the police station. *Id*., at 371 (¶5). In the instant case, only James was able to positively identify Smith to police prior to trial. Arnold was uncertain and selected two persons in the photo lineup; this is even more reason to have a jury instructed on the relevant factors to consider in accessing the defense of misidentification. In-court identifications are extraordinarily suggestive, and should not be credited in accessing whether to give an identification instruction. Smith maintains that there was effectively only one pre-trial eyewitness identification in this case, and she was entitled to instruction D-9.

The *Victory* Court relied on *Warren v. State*, 709 So. 2d 415 (Miss.1998). *Id*., at 375 ("Under *Warre*n, the identification jury instruction is necessary only when the identification of the suspect hinges on one witness."). In *Warren*, the Court revered the case for the trial court's failure to give an identification instruction, and, in so doing, stated: "This failure to instruct the jury on the law of

identification was error as this case turned on the identification of Warren by a single person." *Warren v. State*, 709 So. 2d 415, 421 (Miss. 1998). Smith submits that *Warren*'s statement referring to identification by a single person was made in the way of communicating that the error was not harmless, not to establish a hard-and-fast standard for when the instruction must be given. Indeed, the Court had previously noted that "James' testimony regarding her identification of Warren based upon the February 11 voyeurism offense was anything but conclusive." *Warren*, at 419.

Smith submits that the right to have the jury fully instructed on the defense of misidentification should not limited to instances where there is only one eyewitness. Where there is one or more than one eyewitness, the defense of misidentification encompasses an incorrect identification, whether by one person or more than one person. It cannot be sensibly presumed (surely not beyond a reasonable doubt) that two people under similar circumstances cannot both be wrong about an identification. And if one eyewitness identification is correct, and the other wrong, there is no reason to excuse any reasonable doubt created by the incorrect identification. The incorrect identification is not bolstered any more than the correct identification is brought into question.

Smith's defense in this case was that she was incorrectly identified as the person who robbed the Dollar General with a towel over her head. Smith maintains that her jury was not fully and fairly instructed on the issue of identification, and she requests this Court to reverse and remand this cae for a new trial.

V. The trial court erred in allowing CD exhibits in envelopes containing written notations commenting on the evidence and highlighting specific portions of the evidence.

The State introduced three CD/DVD exhibits in this case; one was a copy of the store's surveillance video, one was a recording of the 911 call(s), and one was a recording of Pazos' phone

conversations with Jennifer. (Ex. 5, Ex. 6, Ex. 9). Each CD/DVD was in an envelope that contained notations, directions, and comments regarding specific portions of the exhibit. (Ex. 5, Ex. 6, Ex. 9; C.P. 12-17). The envelope for the surveillance DVD contained the following comments: (1) "6:28 Δ's face is exposed", (2) "It appears that Δ had a pair of scissors in her pocket", and (3) "Δ went for cash drawer." (Ex. 5; R.E. 12-13). The envelope for the 911 CD contained the following: (1) 06-05-13 19:56:05 911 call from manager gave dispatch Δs lisence plate #", and (2) "you can hear the panic in her voice."[6] (Ex. 6; R.E. 14-15). And the envelope for the phone conversation between Pazos and Jennifer commented that "7:00-7:09 on phone (AR occurred at 8:00)." (Ex. 9; R.E. 16-17).

In *Jones v. State*, 342 So. 2d 735 (Miss. 1977), the Court held that the trial court erred in allowing a map with red and black arrows drawn on it to indicate the State's supposed path that the defendant took to flee the scene. *Jones v. State*, 342 So. 2d 735, 736 (Miss. 1977). Also, it is generally understood that "[t]The judge in any criminal cause, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence[.]" Miss. Code. Ann. § 99-17-35. While Section 99-17-35 is aimed at jury instructions, it has been applied where the trial court makes comments incident to the admission of evidence. *See, e.g., Wilson v. State*, 451 So. 2d 724, 726 (Miss. 1984); *Stallworth v. State*, 310 So. 2d 900, 902 (Miss. 1975). "This Court has acknowledged that judges unconsciously exert tremendous influence in the trial of a case, and they should be astutely careful so that unintentionally the jurors are not improperly influenced by their words and actions." *Wilson*, 451 So. 2d at 726.

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[6] It should be noted that the manager had just finished a physical struggle with the robber and that the exasperation was just as likely her being winded/out of breath.

Although the comments on the envelopes in this case were almost certainly made by investigators or a member of prosecution team, one or more jurors could have believed that the comments were the trial court's. And while the comments on the envelopes may have been proper for the prosecutor to point out during closing argument, the fact remains that "argument is not evidence." *Birkley v. State*, 203 So. 3d 689, 696 (Miss. Ct. App. 2016) (citing *Henton v. State*, 752 So. 2d 406, 409 (Miss. 1999)). Notions of justice and fair play are inconsistent with allowing the State to introduce exhibits with argumentative comments and directions highlighting specific portions of the evidence. Smith maintains that the admission of these envelopes in this case violated her right to a fair trial and that this Court should revere and remand this case for a new trial.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Smith respectfully requests this Honorable Court to reverse her conviction and sentence and remand this case for a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Hunter N. Aikens, Counsel for Tameka Smith, do hereby certify that on this day I electronically filed the forgoing **BRIEF OF THE APPELLANT** with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable Jason L. Davis
Attorney General Office
Post Office Box 220
Jackson, MS 39205-0220

Further, I have this day caused to be mailed electronically or via United States Postal Service, First Class postage prepaid, a true and correct copy of the above to the following non- MEC participants:

Honorable Robert Helfrich
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This the 8th day of November, 2017.

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