IN THE COURT OF APPEALS 04/23/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00055 COA

DARON WOODS

APPELLANT

v.

CALDWELL CULVERT COMPANY AND CHARLES E. CORK

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. KENNETH COLEMAN

COURT FROM WHICH APPEALED: UNION COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

D. BRIGGS SMITH, JR.; WILLIAM O. RUTLEDGE, III

ATTORNEYS FOR APPELLEES:

CLAUDE F. CLAYTON, JR.; A. RHETT WISE

NATURE OF THE CASE: CIVIL: PERSONAL INJURY

TRIAL COURT DISPOSITION: JURY AWARD OF $30,000 FOR PLAINTIFF

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

BRIDGES, P.J., FOR THE COURT:

Daron Woods was hit in the rear of his automobile by an employee of Caldwell Culvert Company. He was awarded $30,000 by the jury. He appeals this award arguing that potential black jurors were excluded from the panel in violation of the *Batson* rule. He also argues that the lower court erred in

instructing the jury and in allowing counsel opposite to make prejudicial comments. Finding that his arguments are without merit, we affirm the jury award and the findings of the lower court.

STATEMENT OF THE FACTS

On January 26, 1989, Daron Woods (Woods) was driving his mother's car in an easterly direction on Highway 30 in Union County. At approximately 6:15 A.M., he approached an intersection of the highway where he intended to make a right turn, slowed down, and allegedly gave a right turn signal. He was then hit from the rear by Charles E. Cork (Cork), an employee of Caldwell Culvert Company, who was acting in the course and scope of his employment.

As a result of this accident, Woods claimed that he suffered permanent personal injuries, pain and suffering, past and future medical bills and past and future loss of the enjoyment of life. He demanded compensatory damages in the amount of $105,173.00. The case went to trial on November 17, 1994.

The court excused six jurors for cause at the request of the Defendants. For the empanelment process, the court started at the end of the venire list and worked backward with potential jurors being submitted to the Plaintiff for either acceptance or peremptory challenge. Woods exercised his four peremptory challenges, and the twelve jurors accepted were tendered to the Defendants. The Defendants exercised their first peremptory challenge on Betty Waldrop, a black female. In response to a request for a race-neutral reason, the Defendants stated that Waldrop was "a politically militant person who would be prone regardless of color to favor the Plaintiff in a personal injury case." It was noted by the court that Waldrop should be excused also because her employer does business with Caldwell Culvert.

George Futato, a white male, was also challenged peremptorily. No objections were made to his challenge. This challenge directly caused the inclusion of a black juror, Mary Frazier. Next, the Defendants challenged Don Cannon, a black male. In response to a request for a race-neutral reason, the Defendants noted that his employment was similar to Woods and that this may cause him to be biased toward Woods. Also noted was Cannon's short-term employment at his present job.

The Defendants' last peremptory challenge was exercised on R. C. Smith. In response to a request for a race-neutral reason, the Defendants stated that Smith was financially irresponsible having recently filed bankruptcy and was also employed as a disc jockey, a profession that made the Defendants' counsel "leery." No rebuttal argument was offered and Smith was excused.

At trial, it was shown that the Semmes-Murphey Clinic treated Woods. Woods' counsel repeatedly referred to the diagnosis of "chronic back pain syndrome" during the cross-examination of Dr. James Boyd. Wood's counsel stated that it was "a term used by Semmes-Murphey Clinic." The defense argued that these questions had the effect of implying that Woods received a diagnosis of "chronic back pain syndrome" from the clinic and wanted to "clarify to the jury that no such diagnosis had been given" by the clinic. Accordingly, the defense asked the court to require Woods to produce the medical deposition testimony supportive of such a diagnosis. Woods did not object to the request,

and could not produce any such testimony.

There was conflicting testimony by Woods and Cork during the trial. Cork claimed that no signal was given before Woods slowed down his vehicle. Woods admitted that he had not seen Cork's vehicle before the accident. As such, the court granted defense instruction D-1(a) which stated:

> The Court instructs the jury that Plaintiff, Daron Woods, had a duty to maintain a reasonable look out to the rear and to give a turn signal continuously for a reasonable distance before turning. If you find from a preponderance of the evidence in this case that Daron Woods failed as to either such duty, then Daron Woods was negligent. If you further find from a preponderance of the evidence that such negligence was a proximate contributing cause of the accident, you should reduce the amount of your verdict in proportion to the amount of negligence which is attributable to Daron Woods.

The jury returned a verdict in favor of Woods for $30,000. Aggrieved, Woods appeals to this Court arguing that the lower court erred because potential black jurors were excluded from the panel in violation of the *Batson* rule. He also argues that the lower court erred in instructing the jury and in allowing counsel opposite to make prejudicial comments.

> I. WHETHER THE LOWER COURT ERRED IN STRIKING THREE BLACK POTENTIAL JURORS IN VIOLATION OF *BATSON*.

The use of peremptory challenges to exclude blacks from a jury may be the basis for a claim of purposeful racial discrimination under the due process clause. *Batson v. Kentucky*, 476 U. S. 79, 98 (1986). Because even the peremptory challenge of one juror based on his or her race can offend the Equal Protection Clause, a court must carefully determine whether that one peremptory challenge ought to result in the reversal of the defendant's conviction. For example, in the case of *United States v. Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), the appellant, Elijah W. Ratcliff, argued that "the government impermissibly discriminated against him by utilizing a peremptory challenge to exclude a black female from the jury," pursuant to *Batson v. Kentucky*, 476 U.S. 79, (1986). In the *Ratcliff* opinion the Court observed:

> Ratcliff's claim is unavailing for two reasons. First, Ratcliff failed to timely raise this objection at trial. Second, Ratcliff does not establish a prima facie case of purposeful discrimination as required by Batson. It is insufficient that the government merely challenged a prospective juror whose race is the same as that of the defendant; the defendant must "raise an inference that the prosecutor used the practice to exclude the veniremen from the petit jury on account of their race."

Ratcliff, 806 F.2d at 1256 (citations omitted).

To raise an inference that counsel used the practice of peremptory challenges to exclude the veniremen from the jury on account of their race, the *Batson* case requires that Woods prove the existence of three factors in order to make a prima facie showing of discrimination before the Defendants will be compelled to give a racially neutral reason for the use of a peremptory challenge. Those factors are:

> 1. That [Woods] is a member of a "cognizable racial group";
>
> 2. That the [Defendants have] exercised peremptory challenges toward the elimination of veniremen of race; and
>
> 3. That facts and circumstances infer that the [Defendants] used [their] peremptory challenges for the purpose of striking minorities.

Lockett v. State, 517 So. 2d 1346, 1349 (Miss. 1987). The *Batson* rule was extended to civil cases in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 615 (1991).

The application of these three factors to the evidence in the record *sub judice* demonstrates that Woods' objection to the three jurors met the first two factors. It is with regard to the third factor that Woods' argument fails. The record simply contains no evidence that the Defendants used their peremptory challenges for the purpose of striking minorities.

In stating his reasons for striking Betty Waldrop, defense counsel stated:

> My information about her is that she would, that she is politically a militant person who is involved in issues, racial issues; and that she is, she would be prone regardless of color to favor or to favor the plaintiff in a personal injury suit.

The court found that the reason cited by the defense was sufficient and a race-neutral reason. The court then added:

> I'm going to approve the excusing of her. As I recall, she said her company did business with them; and she did business with some of the people there. She didn't know the people at the table, but I remember I put a check mark by her myself.

In stating his reasons for striking Don Cannon, defense counsel stated:

> I think he would be inclined to identify with the plaintiff. He is a lift truck operator. Additionally, the same kind of job in the factory that the plaintiff has. Additionally and independently he's only been employed on that job for six months, and in my view people of short-term employment are folks I don't want on a jury based on experience and an indication of lack of long-term employment.

The court found that the reason cited by the defense was sufficient and a race-neutral reason.

In stating his reasons for striking R. C. Smith, defense counsel stated:

> My information on this man is that he's recently filed bankruptcy; that he's financially irresponsible; and due to his personality, he would be inclined to be partial to the plaintiff. Additionally, he is a disc jockey, spins records at parties; and I don't think those kind of people--I would want to excuse him for that reason as the defendant, not the kind of juror we want.

The pivotal inquiry is whether defense counsel was able to present a race-neutral explanation for its peremptory strike. *Griffin v. State,* 607 So. 2d 1197, 1202 (Miss. 1992). In the case of *Lockett v. State*, 517 So. 2d 1346, 1352 (Miss. 1987), the Mississippi Supreme Court stated that the explanation need not rise to the level of a challenge for cause. "[T]hese findings largely turn on credibility and thus *Batson* states that 'ordinarily,' a reviewing court should give the trial court 'great deference.'" *Id.* at 1349. Further, *Lockett* held that a "trial judge's factual findings relative to [the] . . . 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." *Id.* at 1350. From the evidence presented in the record, we find that the trial judge's determination of this issue warrants our giving him "great deference" in his determination; thus, we accept his findings.

> II. WHETHER THE LOWER COURT ERRED IN GRANTING DEFENSE INSTRUCTION D-1(a).

In Mississippi, all questions of negligence and contributory negligence are determined by the jury. Miss. Code Ann. § 11-7-17 (1972). In personal injury actions arising from motor vehicle accidents, the Mississippi Supreme Court has repeatedly held that factual conflicts as to a driver's look out and whether or not such look out caused or contributed to the collision are matters to be considered and determined by the jury. *Jones v. Hatchett,* 504 So. 2d 198, 204 (Miss. 1987); *Howard v. Young*, 450 So. 2d 90, 91 (Miss. 1984).

Based on the fact that Woods admitted that he never saw Cork's approaching vehicle from the rear before the accident, we cannot find the lower court in error for granting instruction D-1(a). When a party complains that an instruction submitted by the trial judge was not supported by the evidence or was contrary to the overwhelming weight of the evidence, we must look to whether a reasonable jury could find the facts in accordance with the theory of the requested instruction. *Hill v. Dunaway*, 487 So. 2d 807, 809 (Miss. 1986).

Further, when read together, if jury instructions adequately inform a jury of the law, then there can be no error. *Hornburger v. State,* 650 So. 2d 510, 515 (Miss. 1995); *Gray v. State,* 487 So. 2d 1304, 1308 (Miss. 1986); *Roberts v. State,* 458 So. 2d 719, 721 (Miss. 1984). Jury instructions are to be received as a whole, not individually, and are to be read together as a whole with no one instruction taken out of context. *Wilson v. State,* 592 So. 2d 993, 997 (Miss. 1991); *Heidel v. State*, 587 So. 2d

835, 842 (Miss. 1991). Instruction D-1(a) adequately informed the jury of the law. As such, we find that this argument has no merit.

III. WHETHER STATEMENTS MADE BY DEFENSE COUNSEL WERE PREJUDICIAL.

Following the accident, Woods was treated by several doctors and chiropractors for pain in his neck, shoulders, and back. One of his treating physicians was Dr. Robert Deshazo, a neurologist in the Semmes-Murphey Clinic in Memphis, Tennessee. Dr. Deshazo did not diagnose Woods with "chronic back pain syndrome." Neither did Dr. Deshazo diagnose Woods with any significant neurological problems. Despite the absence of such a diagnosis, Woods questioned Dr. James Boyd if he was familiar with the term "chronic back pain syndrome." Dr. Boyd replied that he was. He was then asked if the term was used by the clinic. Again, Dr. Boyd replied that it was. Woods then questioned Dr. Boyd if chronic back pain syndrome would be an acceptable diagnosis. Dr. Boyd replied that it would.

Later in the cross-examination, defense counsel requested the court to find testimony concerning chronic back pain syndrome in a deposition and "show it to the jury." Woods now argues that this request prejudiced the jury. However, Woods never objected at trial and raises this issue for the first time on appeal. As such, this issue is procedurally barred from our review. *See Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108, 1114 (Miss. 1992); *West Cash & Carry Bldg. Materials, Inc. v. Palumbo*, 371 So. 2d 873, 876 (Miss. 1979). Additionally, Woods cites no authority for his position. "Where assignments of error are unsupported by argument and authority, the court does not, as a general rule, consider them." *Ramseur v. State*, 368 So.2d 842, 844 (Miss. 1979). Accordingly, we affirm the judgment of the lower court and the jury award of $30,000 to Woods.

THE JUDGMENT OF THE UNION COUNTY CIRCUIT COURT AND JURY AWARD OF $30,000 TO WOODS IS AFFIRMED. WOODS IS TAXED WITH ALL COSTS OF THIS APPEAL.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY DIAZ AND SOUTHWICK, JJ. MCMILLIN, J., NOT PARTICIPATING.

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KING, J., CONCURRING:

I concur with the result reached in the majority opinion. However, I write to express my concern about *Batson* and the lack of guidance provided to the trial courts.

It remains unclear whether the trial judges should be guardians of the constitutional rights of prospective jurors or mere umpires.

Because no guidance has been given on this issue, the trial courts have been left to their own devices. The inevitable result of this is inconsistent results in virtually identical circumstances.

The reason given for striking Betty Waldrop was on it face racially neutral. However, it contains code phrases which could indicate an attempt to select, "the right type of Black."

Had the trial judge performed the role of guardian of the constitutional rights of prospective jurors, then further inquires, *sua sponte* should have been conducted.

DIAZ AND SOUTHWICK, JJ., JOIN THIS OPINION.