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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-001494-MR

MICHAEL HOLLOWAY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 02-CR-00247

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BAKER, BARBER, AND JOHNSON, JUDGES.

BARBER, JUDGE: Michael S. Holloway appeals from a final judgment and sentence of imprisonment following a jury verdict convicting him of third-degree assault. Holloway contends that the trial court erred by denying his motion for a mistrial after it improperly accepted the Commonwealth's peremptory strikes of two African-American jurors, and that the trial court improperly permitted into evidence testimony concerning a felony probation

warrant which was outstanding at the time of Holloway's arrest. For the reasons stated below, we affirm.

On April 19, 2002, Holloway was indicted for third-degree assault (KRS¹ 508.025). The charge resulted from the allegation that on March 8, 2002, Holloway had caused or attempted to cause physical injury to a police officer. At the time of the incident, Covington Police Officers were attempting to take Holloway into custody following a dispatch call to a Covington address and their subsequent determination that Holloway was wanted on outstanding warrants.

As the officers attempted to make the arrest, Holloway resisted, and was wrestled to the floor and maced. Holloway continued to be violent throughout the initial arrest and his transportation to jail. At some point during the altercation, one of the officers injured his left knee and left shoulder and later sought medical attention at an area hospital.

The case was tried before a jury on June 6 and June 7, 2002. On June 7, 2002, the jury returned a verdict finding Holloway guilty of third-degree assault and recommending a sentence of three years' imprisonment. The trial court subsequently imposed judgment and sentencing in accordance with the verdict and recommendation. This appeal followed.

¹ Kentucky Revised Statutes.

Holloway, who is Caucasian, contends that the Commonwealth struck the only two African-American jurors in the venire in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Though Holloway and the stricken veniremen were not of the same race, a criminal defendant may object to race-based exclusions of jurors affected through peremptory challenges whether or not the defendant and the excluded juror share the same race. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Wiley v. Commonwealth, Ky. App., 978 S.W.2d 333, 334 (1998).

At the conclusion of voir dire, the only two African-Americans in the jury pool were struck by the Commonwealth by use of peremptory strikes. The first juror, Stephan Jackson, Juror No. 56, had been previously voir dired individually. During his individual voir dire, Jackson disclosed that he had previously been involved in an incident involving one of the Commonwealth's principle witnesses, Officer Marcus Jordan. The incident involved an occasion when Jordan approached Jackson because he was smoking a cigarette in the no-smoking area of a White Castle restaurant. Jackson stated that he felt that he had not been properly treated by Officer Jordan during this incident.

Following the individual questioning of Jackson, there was a discussion regarding a report by another member of the

venire who alleged that she had detected an odor of alcohol on Jackson's person and that Jackson had been mumbling during voir dire. In the discussion, the trial court noted that he could not detect an odor of alcohol on Jackson; however he also noted that Jackson had his eyes closed for a period during voir dire questioning.

Following the individual voir dire, the Commonwealth moved to strike Jackson for cause, but the trial court denied the motion. As its reason for striking Jackson by preemptory challenge, the Commonwealth cited to its previous attempt to strike Jackson for cause and to his responses and answers during voir dire, which would presumably include the incident with Officer Jordan and his demeanor during voir dire.

The second venireman struck by the Commonwealth, Terrance Graves, Juror No. 43, was not individually voir dired. As its reason for using a peremptory strike against Graves, the Commonwealth stated (1) that Graves had been observed talking to Jackson during a break, though the Commonwealth did not purport to know what their conversation had been about; (2) that during their break-time conversation Graves and Jackson appeared to share a camaraderie; and (3) that Graves made inappropriate expressions and gestures during voir dire.

In Batson v. Kentucky, supra, the United States Supreme Court outlined a three-step process for evaluating

claims that prospective jurors were stricken on the basis of race in violation of the Equal Protection Clause.

First, the defendant must make a prima facie showing of racial bias for the peremptory challenge. Second, if the requisite showing has been made, the burden shifts to the Commonwealth to articulate "clear and reasonably specific" race-neutral reasons for its use of a peremptory challenge. While the reasons need not rise to the level justifying a challenge for cause, "self-serving explanations based on intuition or disclaimer of discriminatory motive" are insufficient. Stanford v. Commonwealth, Ky., 793 S.W.2d 112, 114 (1990) (*quoting Batson, supra*, 476 U.S. at 98, 106 S.Ct. at 1712). Finally, the trial court has the duty to evaluate the credibility of the proffered reasons and determine if the defendant has established purposeful discrimination. Washington v. Commonwealth, Ky., 34 S.W.3d 376, 379 (2000).

"A judge cannot merely accept the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact. In order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable, and second, not a pretext. These two requirements are necessary to demonstrate 'clear and reasonably specific ... legitimate reasons.' "

Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 371 (2002) (*quoting*

Wright v. State, 586 So. 2d 1024 (Fla. 1991) and State v. Slappy, 522 So. 2d 18 (Fla. 1987)).

An appellate court reviewing a trial court's findings in a Batson challenge should apply the clearly erroneous standard. McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 523 (1994) (overruled on other grounds by Elliott v. Commonwealth, Ky., 976 S.W.2d 416 (1998)); Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) "[T]he best evidence often will be the demeanor of the attorney who exercised the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176, 179 (1992).

With the above standards in mind, we first consider the peremptory strike of Jackson. With respect to the first prong of the Batson test, once the Commonwealth has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate issue of discrimination, the preliminary issue of whether the defendant has made a prima facie showing is moot. Snodgrass at 179. Thus, the first prong of Batson with respect to Jackson has been rendered moot by the circumstances herein.

The Commonwealth has clearly met the second prong of the Batson three-prong test. The Commonwealth articulated "clear and reasonably specific" race-neutral reasons for its use of the peremptory challenge in that Jackson and one of the Commonwealth's primary witnesses had previously been involved in an incident in which Jackson felt he had not been treated properly by the witness. Further, there was evidence that Jackson had been inattentive and was mumbling during voir dire.

In the third prong of the Batson test, the trial judge is charged with weighing the evidence before him and deciding whether the Commonwealth has exercised purposeful discrimination in its use of its peremptory challenges. The trial court is afforded great discretion in making its determination under Batson. "The trial court may accept at face value the explanation given by the prosecutor depending upon the demeanor and credibility of the prosecutor." Snodgrass at 179.

In view of Jackson's admitted prior experience with a principle Commonwealth witness and his questionable demeanor during voir dire, the trial court's determination that the Commonwealth did not purposefully discriminate against Jackson because of his race when it used a peremptory strike against him was not clearly erroneous.

With regard to Graves, as with Jackson, since the Commonwealth offered a race-neutral explanation for the

peremptory challenge and the trial court ruled on the ultimate issue of discrimination, the preliminary issue of whether the defendant has made a prima facie showing of purposeful discrimination is moot. Snodgrass, supra.

The second prong of Batson required the Commonwealth to articulate "clear and reasonably specific" race-neutral reasons for its use of the peremptory challenge against Graves. These reasons were his jury-break conversation with Jackson; his apparent camaraderie with Jackson; and his facial expressions and gestures during voir dire. Though problematic, the reasons given were clear and specific race neutral reasons for striking Graves, and the second step of Batson does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Purkett v. Elm, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834, 839 (*quoting Hernandez*, 500 U.S. at 360, 111 S.Ct. at 1866, 114 L.Ed.2d at 406). Thus, if Holloway's claim of racial bias in the peremptory challenge of Graves is to prevail, it must be at the third step.

Two of the three reasons articulated for striking Graves involved concerns the Commonwealth had about Jackson, and

the concerns were ascribed to Graves merely because there was a perceived "camaraderie" between Jackson and Graves during their break-time conversation. In addition, the third-factor, which involved facial expressions and gestures in voir dire, borders on the vague. However, it is the function of the trial court, not this Court, to evaluate the demeanor and credibility of the prosecutor with regard to his stated reasons for the peremptory strike and we may not overturn the trial court's decision unless it was clearly erroneous. Graves' facial expressions during voir dire - which presumably reflected a nonreceptivness to the Commonwealth's voir dire questioning - is a valid race neutral reason for exercising a peremptory strike. Further, we note that Graves is not of the same race as Holloway, which tends to suggest that the peremptory strike was not based upon Graves' race. We cannot say that the trial court's finding of fact that the Commonwealth's peremptory strike of Graves was not based upon purposeful discrimination was clearly erroneous.

Next, Holloway contends that the trial court erred when it denied his motion for a mistrial after it permitted the Commonwealth to introduce testimony concerning Holloway's character in violation of KRE 404(b).

At the time of his arrest, Holloway was wanted on an outstanding felony probation warrant. The trial court granted

Holloway's pretrial motion in limine to exclude any mention of the warrant.

The Commonwealth called Officer Jordan as its first witness. On direct examination, Officer Jordan testified regarding the events which lead to the charge of third-degree assault. During cross-examination, the following exchange occurred between Officer Jordan and defense counsel:

Defense counsel: You didn't have a gun call, did you sir?

Officer Jordan: No, sir.

Defense Counsel: And so, uh, you and Officer Bacon surmised there may be a weapon?

Officer Jordan: Yes, Sir.

Defense Counsel: Because of his furtive activities. That being, he was hiding in the closet?

Officer Jordan: There is more to it than that.

Defense Counsel: I was talking about based upon the call, sir.

Officer Jordan: No, sir. Based upon the call, we were there to execute a felony warrant for probation violation. Based upon the call, we had information that the suspect was violent and had injured police officers in the beginning.

Holloway alleges that Officer Jordan's response was in violation of the trial court's in limine order not to mention the prior felony warrant, and a violation of KRE 404(b) in that

the reference to the warrant necessarily alluded to prior bad acts.

Under KRE 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible in order to prove the character of a person or in order to show action in conformity therewith."

Pendleton v. Commonwealth, Ky., 83 S.W.3d 522, 528 (2002).

While such evidence may be presented for other purposes, consistent with this rule, the trial court's in limine order excluded any mention of Holloway's outstanding felony warrant.

However, when the mention of the warrant was made, trial counsel was aggressively cross-examining Officer Jordan in furtherance of Holloway's defense that the police had used excessive force in the course of the arrest. To this end defense counsel's cross-examination challenged the police suspicions that Holloway may be armed; suggested that police could not rationally have suspected that Holloway was armed because he was hiding in a closet; and suggested that the information they had from the dispatch call alone could not have lead to suspicions regarding Holloway.

We are persuaded that defense counsel opened the door to Officer Jordan's reference to the outstanding warrant by his questions concerning police suspicions of the dangers presented by Holloway and the contents of the dispatch call. "[O]ne who opens the book on a subject is not in a position to complain

when his adversary seeks to read other verses from the same chapter and page.” Smith v. Commonwealth, Ky., 904 S.W.2d 220, 222 (1995).

A mistrial is an extraordinary remedy. Lynch v. Commonwealth, Ky., 74 S.W.3d 711, 714 (2002). The record must reveal a manifest necessity for a mistrial before such an extraordinary remedy will be granted. Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 863 (2002). For a mistrial to be proper, the harmful event must be of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. The standard for reviewing the denial of a mistrial is abuse of discretion. Bray v. Commonwealth, Ky., 68 S.W.3d 375, 383 (2002).

As we previously noted, defense counsel opened the door to the reference to the warrant, and the reference amounted to a direct response to trial counsel’s question. Under these circumstances there was not a manifest necessity of granting a mistrial, and the trial court did not abuse its discretion in refusing to grant Holloway’s motion for a mistrial.

For the foregoing reasons the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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