RENDERED: AUGUST 4, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002014-MR

DEMARCUS LAMAR FUQUA — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
INDICTMENT NO. 00-CR-00044

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON,[1] SENIOR JUDGE.

HUDDLESTON, SENIOR JUDGE: On April 11, 2000, in Princeton, Kentucky, two masked individuals armed with pistols entered one of the First Bank and Trust Company's branches and robbed it of $3,096.00. DeMarcus Lamar Fuqua, who was seventeen years old at the time, was arrested and charged with robbery in the first degree, a Class B felony. Since Fuqua was a juvenile, Caldwell District Court held a hearing to determine if Fuqua should be

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

transferred to Caldwell Circuit Court to be tried as an adult. After Fuqua was transferred to circuit court, he was indicted and tried for first-degree robbery.

On January 29, 2001, fifty-nine prospective jurors appeared for Fuqua's trial. Four of the fifty-nine jurors were, like Fuqua, African-American. During the jury selection process, the following exchange took place:

> TRIAL COURT: Do any of you know the Defendant, DeMarcus Lamar Fuqua? Any of you know Mr. Fuqua? We've got one hand. Yes, ma'am. You are?
>
> VENIRE PERSON: Tashia Grooms.
>
> TRIAL COURT: Ms. Grooms. And how well do you know Mr. Fuqua, Ms. Grooms?
>
> MS. GROOMS: I've always known him.
>
> TRIAL COURT: Okay, and you've known him all your life?
>
> MS. GROOMS: Yeah.
>
> TRIAL COURT: All his life. Do you live close to him, to his family?
>
> MS. GROOMS: Um-hum.
>
> TRIAL COURT: Do you believe that your relationship with him, based upon what I've told you, and I've told you very little about this case so far, but based on what I've told you, do you believe that your relationship with him would keep you from being able to be a fair and impartial juror in this case?
>
> MS. GROOMS: Yeah; I would rather just get out of it.

TRIAL COURT: Pardon?

MS. GROOMS: I rather just get out of it.

TRIAL COURT: Okay. Well, everyone in the courtroom would prefer to get out of it. So, you're going to have to do a little bit better. Do you believe that because of your relationship with him that, or any reason because of that relationship you would be unable to sit on this case and be a fair and impartial juror?

MS. GROOMS: Yeah.

TRIAL COURT: Only you can answer that question, Ms. Grooms. And are you telling the Court that because of your relationship and knowledge of Mr. Fuqua and his family, that you feel like that you would be unable to sit here and listen to the evidence, and render a fair and impartial verdict?

MS. GROOMS: I can listen.

TRIAL COURT: Okay, but can you base your decision in this case, solely upon the evidence, and not be influenced by your prior relationship with him or your prior knowledge of him?

MS. GROOMS: Yeah.

TRIAL COURT: You're not such a good friend of the family's or of his that if you were called upon to serve on this jury, that you would be influenced by that? You would be influenced only by the evidence presented here? You believe you could be a fair and impartial juror in this case?

Ms. GROOMS: Um-hum.

The Commonwealth used one of its peremptory challenges to strike Ms. Grooms, who was an African-American. When

thirteen jurors had been selected, Fuqua's attorney approached the bench and pointed out that there were no African-Americans on the jury. Although Fuqua's attorney did not make a *prima facie* showing that the Commonwealth had violated the mandate of *Batson v. Kentucky*,[2] the Commonwealth, on its own initiative, provided a race-neutral reason for peremptorily striking Ms. Grooms. However, Fuqua's attorney complained that neither the jury pool nor the jury represented the community. The trial court asked Fuqua's attorney if he wished to have Ms. Grooms sit on the jury. Fuqua's attorney said he did, and the trial court reinstated Ms. Grooms as the fourteenth juror.

The next day, the jury, with Ms. Grooms sitting as one of the twelve, convicted Fuqua of robbery in the first degree. On March 7, 2001, Fuqua was sentenced to twenty years' imprisonment.

Fuqua appealed to the Kentucky Supreme Court where he argued that (1) the trial court erred when it refused to allow him to participate in his own defense by cross-examining two witnesses; (2) the court erred in admitting into evidence a letter that he had written but that the Commonwealth had failed to properly authenticate; and (3) the court erred in allowing the Commonwealth to introduce, during the sentencing phase of the trial, his juvenile felony record. Finding that Fuqua's

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

assignments of error lacked merit, the Supreme Court affirmed his conviction.

On August 9, 2005, Fuqua filed a *pro se* motion to vacate his judgment of conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 in which he made numerous allegations that his trial attorney had rendered ineffective assistance. Without appointing counsel or holding an evidentiary hearing, Caldwell Circuit Court denied Fuqua's motion on September 14, 2005.

On appeal, Fuqua avers that he and the juror, Ms. Grooms, had known one another for many years and that Ms. Grooms did not like him. Because Ms. Grooms was biased against him, Fuqua argues, his trial attorney rendered ineffective assistance by not objecting when the trial court reinstated her as a juror. According to Fuqua, Ms. Grooms' presence on the jury was a structural error that rendered his entire trial prejudicial.

When a convicted criminal defendant makes a claim of ineffective assistance of counsel, he must show that his attorney's performance was both deficient and prejudicial.[3] In other words, the defendant must show, with reasonable

[3] *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

probability, that the outcome of his trial could have been different but for his attorney's deficient performance.[4]

Fuqua never alleged in his RCr 11.42 motion that he informed his attorney that he and the juror, Ms. Grooms, knew one another or that Ms. Grooms did not like him. Nor does he now claim before us that he told his attorney that Ms. Grooms harbored ill will towards him. And the record does not support Fuqua's allegation. While the record reflects that Ms. Grooms knew Fuqua and that she preferred not to participate as juror, it does not show that she was biased against Fuqua.

Furthermore, Fuqua's attorney acted appropriately when he informed the trial court that there were no African-Americans on the jury panel, thereby alerting the trial court to a possible *Batson* violation. While Fuqua's attorney did not make a *prima facie* showing of purposeful discrimination by the Commonwealth, the court treated the situation as such and acted to insure that the jury selection process comported with the equal protection provisions of the Fourteenth Amendment to the United States Constitution.[5] Fuqua has failed to show that his counsel's actions as they relate to Ms. Grooms were deficient, and has failed to show prejudice.

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[4] *Id.,* 466 U.S. at 694.

[5] *See Batson v. Kentucky, supra,* note 3.

Fuqua also insists that, in 2000, approximately 20 percent of Caldwell County's population was African-American while but four of the fifty-nine jurors, approximately 6.8 percent, were African-American. Fuqua argues that his attorney rendered ineffective assistance since he neither investigated the method Caldwell Circuit Court used to select jurors when it was apparent that the jury pool did not accurately reflect a fair cross-section of the community and did not object to the method used to select the jury pool.

We take judicial notice[6] of the results of the 2000 census conducted by the United States Census Bureau. According to the Census Bureau's records, the total population of Caldwell County, Kentucky was 13,060 of which 628, approximately 4.8 percent, were African-American. Fuqua's allegation that the jury pool did not reflect a fair cross-section of the community is simply without merit since only 4.8 percent of Caldwell County's population was African-Americans while 6.8 percent of the prospective jurors at Fuqua's trial were. The jury pool, therefore, represented a fair cross-section of the community, and the method for selecting the jury comported with equal protection.[7]

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[6] *See* Kentucky Rules of Evidence (KRE) 201.

[7] *See* Administrative Procedures of the Court of Justice, Part II, Jury Selection and Management, particularly AP II, Sec. 2.

In his brief, Fuqua insists that the robbery received significant news coverage, so much in fact, that the whole populace of Caldwell County and surrounding counties were aware of his alleged involvement in the offense. According to Fuqua, he could not receive a fair trial in Caldwell County or in any surrounding county. However, despite this pervasive publicity, Fuqua's attorney did not move for a change of venue, thus, rendering ineffective assistance.

The record reflects that several prospective jurors were aware that the robbery had occurred. However, none of the prospective jurors indicated that they had formed an opinion regarding Fuqua's guilt or innocence based upon the publicity surrounding the robbery. The record demonstrates that there was no need for a change of venue; therefore, Fuqua's attorney did not act ineffectively when he failed to move for change of venue.

During the Commonwealth's case-in-chief, Peggy Hollowell, an eyewitness, identified Fuqua as one of the individuals who had robbed the bank. On cross-examination, Fuqua's attorney solicited testimony from Hollowell that she knew Fuqua because Fuqua was a friend of her son, Scotty, and that Fuqua and Scotty had gotten into legal trouble when both were juveniles. During the sentencing phase, the Commonwealth called the Caldwell District Court Clerk who testified about

Fuqua's juvenile felony record. According to Fuqua, his attorney rendered ineffective assistance by introducing his juvenile record.

In his brief, Fuqua accurately reproduces the exchange between his attorney and Hollowell as well as the testimony of the Caldwell District Court Clerk. As the record shows, Fuqua's attorney did not introduce his juvenile record, the Commonwealth did during the sentencing phase of the trial. We assume that Fuqua is actually arguing that his attorney rendered ineffective assistance by soliciting testimony from Hollowell that revealed bad acts that he committed while a juvenile and that somehow this testimony opened the door for the Commonwealth to introduce his juvenile felony record. Perhaps he is arguing that his attorney should have objected to the introduction of his juvenile record during the sentencing phase. Either way, the Commonwealth had the statutory right to introduce, during the sentencing phase, Fuqua's juvenile felony record.[8] Therefore, Fuqua's attorney did not render ineffective assistance by failing to object to the testimony of the district court clerk.

Inasmuch as the record refutes all of Fuqua's claims of ineffective assistance of counsel, the circuit court properly denied his RCr 11.42 motion, and its order doing so is affirmed.

[8] Ky. Rev. Stat. (KRS) 532.055(2)(a)(6). *See also Manns v. Commonwealth,* 80 S.W.3d 439 (Ky. 2002).

ALL CONCUR.

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