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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000705-MR

DEANTON GREENWADE — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NOS. 14-CR-00432 AND 14-CR-00578

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND J. LAMBERT, JUDGES.

KRAMER, JUDGE: Deanton Greenwade appeals the Christian Circuit Court's judgment convicting him of second-degree burglary and of being a first-degree persistent felony offender (PFO-1st). After a careful review of the record, we vacate Greenwade's conviction and remand the case for a new trial because a violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69

(1986) occurred. We address Greenwade's other issues in the event that they may arise again in the circuit court upon remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Greenwade was charged with second-degree burglary and PFO-1st. Following a jury trial, he was convicted on both counts and sentenced to five years of imprisonment for the burglary conviction, which was enhanced to twelve and a half years due to the PFO-1st conviction.

He now appeals, contending that: (a) the circuit court erred in denying his request for a jury instruction on the lesser-included offense of criminal trespass; (b) he was unduly prejudiced by the Commonwealth's consistent preemptive bolstering of the truthfulness of its lay witnesses; (c) the circuit court erred in denying his motion brought pursuant to *Batson*, 476 U.S. 79, 106 S.Ct. 1712; (d) he was unduly prejudiced by the Commonwealth's repeated use of photographs that showed him handcuffed; and (e) the circuit court violated his right to due process by denying his motion to exclude the unduly suggestive photograph pack line-up.

II. ANALYSIS

A. LESSER-INCLUDED OFFENSE JURY INSTRUCTION

Greenwade first alleges that the circuit court erred in denying his request for a jury instruction on the lesser-included offense of criminal trespass. We review a "trial court's decision not to give a jury instruction . . . for [an] abuse of discretion." *Hunt v. Commonwealth*, 304 S.W.3d 15, 31 (Ky. 2010) (citation

omitted). "In a criminal case it is the duty of the court to prepare and give instructions on the whole law and this rule requires instructions applicable to every state of case deducible or supported to any extent by the testimony." *Kelly v. Commonwealth*, 267 S.W.2d 536, 539 (Ky. 1954) (citations omitted).

> However, the trial court has no duty to instruct on theories of the case that are not supported by the evidence. An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense and, yet, believe beyond a reasonable doubt that he is guilty of the lesser offense.

Hunt, 304 S.W.3d at 30 (citations omitted).

Greenwade was convicted of second-degree burglary. Pursuant to KRS[1] 511.030(1), "[a] person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling."

However, Greenwade claims that he was entitled to a lesser-included offense jury instruction on the offense of criminal trespass, which is defined at KRS 511.060(1): "A person is guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a dwelling." "First-degree criminal trespass, KRS 511.060, differs from second-degree burglary, KRS 511.030, only to the extent that the burglary statute requires 'with intent to commit a crime.' This phrase is not included in the criminal trespass statute." *Commonwealth v. Sanders*, 685 S.W.2d 557, 558 (Ky. 1985).

[1] Kentucky Revised Statute.

In the present case, evidence was presented by Greenwade's co-defendant, Kareem Gonzalez, that Greenwade came over to Gonzalez's house and said he wanted to make some money so that he could buy his girlfriend a gift for her birthday. Greenwade asked if Gonzalez would drive him, and he did. Gonzalez testified that he knew what Greenwade was planning to do, although Greenwade never specifically told him that he was going to commit a crime. Greenwade knocked on a trailer door, but when he heard a dog bark, he went to another trailer. Gonzalez attested that Greenwade told him that at the second trailer, he knocked on the door and nobody answered, so he kicked the door down. When Greenwade heard somebody say "hey," he ran away and hopped back into Gonzalez's car. Gonzalez saw two Caucasian women walking a dog in the neighborhood, and they turned around and looked at his car when Greenwade hopped back into it.

Two male children who lived in the trailer that Greenwade broke into also testified.[2] The fourteen-year-old (Child 1) attested that someone knocked on their door in the middle of the day. He looked at the person through the peephole, but he was only able to see that the person knocking was a shirtless black man, as the person was standing too close to the door. Child 1 testified that the man knocked about six times. Child 1 went to tell his mom about the man knocking, and Child 1 was standing in the kitchen when he saw the man kick in the door. Child 1 attested that the man actually entered the trailer because after he kicked in

[2] The two children were identified only by their initials during trial. However, they have the same initials, so we will refer to the older child as "Child 1" and the younger as "Child 2."

the door, the man fell, and then the man ran out because he saw Child 1. Child 1 testified that he made eye contact with the man before the man ran and that the man was in their home for approximately ten seconds. Child 1 stated that he noticed the man was not wearing a shirt and that he had three stars tattooed on his chest. He also noticed that the man had dreadlocks. The following day, Child 1 was shown a black-and-white, six-photograph lineup, and he identified one of the men in the lineup as being the perpetrator. The man in the photograph was Greenwade.

The younger male child (Child 2) also testified that when the man was knocking on their door, he looked out the peephole and saw a man with dreadlocks and a tattoo on his chest. When he and his brother were going to the other room to tell their mom, the man banged on the door very hard and busted the door open. Child 2 attested that the man stepped into the trailer. When the man heard the boys' mom yell and heard the boys scream, the man ran out of the home. Child 2 was also shown the black-and-white, six-photograph lineup, and he identified Greenwade as the perpetrator.

Rachel Percy testified that she and her sister were walking her dog in the neighborhood where the incident occurred when they noticed a White Mustang vehicle because it looked as though it had driven out of a nearby field. As they continued walking, a man ran from the direction of the victims' trailer and hopped into the Mustang. He was about five to ten feet away from Percy when he ran past her. Percy described the man as: "he had a thicker build, a black gentleman,

shoulder to just past shoulder length dreads, blonde tips, he had tattoos on his chest and stomach, and I thought it slightly odd because he looked like he had a unibrow, for lack of a better term." It was still daylight outside when she saw the man. Perry did not know what the tattoo on the man's chest depicted--only that it consisted of three blobs. Percy said the man was wearing "dark blue/black colored shorts, they were sagging so you could see the top of his underwear, [and] no shirt." When Percy returned home after her walk, her neighbor "came out screaming that her door had been kicked in" and the neighbor asked Percy if she had seen a black man running. Percy responded in the affirmative. She stayed there until the police arrived and told them what she had seen. The police asked Percy to participate in a "drive-by" identification, which she agreed to do. She rode in a police cruiser to the location where the suspects had been found. Percy identified one of the suspects as the person she had seen running. While testifying during trial, she was shown color photographs of Greenwade that were taken after he was arrested. She stated that she remembered having been shown the photographs before trial. Percy attested that the man in the photographs was the man that she had seen running on the day in question, and she identified him in the courtroom, as well.

Thus, based on the weight of the evidence from Gonzalez that Greenwade was looking to "make money" to buy a gift for his girlfriend's birthday; the testimony from Child 1 and Child 2 that Greenwade busted in their door and came into their trailer; and the testimony of Percy that she saw

Greenwade running from the direction of the victims' trailer, then hop into a car, which drove away, there was sufficient evidence that Greenwade committed second-degree burglary by knowingly entering the dwelling of Child 1 and Child 2 with the intent to commit a crime. Moreover, absolutely no testimony was introduced to show that Greenwade accidentally busted down the victims' door or to support an instruction that he was merely guilty of criminal trespass. Consequently, this claim lacks merit.

B. BOLSTERING OF WITNESSES

Greenwade also asserts that he was unduly prejudiced by the Commonwealth's consistent preemptive bolstering of the truthfulness of its lay witnesses. Greenwade acknowledges that this claim is not preserved for appellate review, so he asks us to review it for palpable error pursuant to RCr[3] 10.26, which provides: "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

> [T]he requirement of "manifest injustice" as used in RCr 10.26 . . . mean[s] that the error must have prejudiced the substantial rights of the defendant, . . . *i.e.*, a substantial possibility exists that the result of the trial would have been different. . . .
>
> [The Kentucky Supreme Court has] stated that upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

[3] Kentucky Rule of Criminal Procedure.

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks omitted).

Greenwade argues that "the Commonwealth did not wait to hear cross-examination before impermissibly bolstering the testimony of its witnesses by asking them if they had told the truth." Greenwade states that the Commonwealth did this with Child 1, Child 2, Percy, Percy's sister, Gonzalez's girlfriend, and the mother of Child 1 and Child 2, all during direct examination. He quoted the testimony from the various parts of the trial where this bolstering occurred. The Commonwealth states in its appellate brief that it "does not dispute [Greenwade's] factual description of the colloquies between the prosecutor and various witnesses but notes that each witness was sworn to tell the truth before testifying."

A witness is not permitted "to bolster his or her own testimony unless and until it has been attacked in some way." *Brown v. Commonwealth*, 313 S.W.3d 577, 628 (Ky. 2010) (citations omitted). In *Brown*, the defendant's cross-examination of a witness for the Commonwealth questioned whether the witness was lying in order to benefit himself. On redirect, the trial court permitted the Commonwealth to ask the witness whether he was telling the truth. The Kentucky Supreme Court agreed with the holding in a case from Illinois

> that where the impeachment has attacked not the witness's perception or memory but has focused intently on the witness's veracity, it is within the trial court's discretion to permit the witness on redirect to deny the

> imputation of dishonesty. It may be that such testimony adds little to the witness's oath, but for that very reason it poses little risk of short-circuiting the jury's credibility determination, the risk that is posed when one witness vouches for another.

Brown, 313 S.W.3d at 628 (citation omitted).

Although the Commonwealth argues that each witness was sworn to tell the truth before testifying and, therefore, that the witnesses' bolstering by testifying that they were telling the truth adds little, considering the witnesses had already taken an oath to tell the truth, a witness is not permitted to bolster his or her own testimony unless it has been attacked first. The Commonwealth does not contend that, at the time any witness bolstered his or her testimony, that witness's testimony had been attacked. Therefore, the bolstering was improper.

Nevertheless, we must review this error to determine if it is palpable. We conclude that, based upon the strength of the testimony provided by the witnesses before they each bolstered their testimony, a substantial possibility does *not* exist that the result of the trial would have been different if the bolstering had not occurred. Consequently, we find that the bolstering did not amount to palpable error in this case.

C. *BATSON* CHALLENGE

Greenwade next contends that the circuit court erred in denying his motion brought pursuant to *Batson*, 476 U.S. at 79, 106 S.Ct. at 1712. He alleges

the Commonwealth was racially discriminatory during jury selection in regard to two jurors.

> Under *Batson*, claims of racial discrimination in the use of peremptory strikes are analyzed under a three-step test. First, the defendant must show a *prima facie* case of racial discrimination. If the trial court is satisfied with the defendant's showing, the burden shifts to the prosecutor to state race-neutral reasons for the peremptory strikes. The trial court must then determine whether the defendant has sufficiently proven purposeful discrimination. A trial court's denial of a *Batson* challenge is reviewed for clear error.
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> * * *
>
> The second *Batson* step [is] whether the prosecutor stated a race-neutral basis for the strike. . . . This step sets a fairly low bar for the Commonwealth to meet. [T]he 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. . . .
>
> At the third step of *Batson*, the burden shifts back to the defendant to show purposeful discrimination. At this step, the trial court [is] required to determine whether the prosecutor's race-neutral reason [is] actually a pretext for racial discrimination. Because the trial court's decision on this point requires it to assess the credibility and demeanor of the attorneys before it, the trial court's ultimate decision on a *Batson* challenge is like a finding of fact that must be given great deference by an appellate court. In the absence of exceptional circumstances, appellate courts should defer to the trial court at this step of the *Batson* analysis.
>
> The third step of the *Batson* test is where the persuasiveness of the justification becomes relevant. Although a prosecutor theoretically could fabricate a demeanor-based pretext for a racially-motivated peremptory strike, the third step in *Batson* alleviates this

> concern by permitting the court to determine whether it believes the prosecutor's reasons.
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> * * *
>
> [E]valuation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.

Mash v. Commonwealth, 376 S.W.3d 548, 555-56 (Ky. 2012) (internal quotation marks and citations omitted).

In the present case, the parties do not dispute that Greenwade made a *prima facie* showing of racial discrimination regarding the two jurors. Thus, the first *Batson* step was met.

Regarding the second step of *Batson*, the prosecutor stated, in regard to Juror A,[4] that she was young and she "did not look happy," and that her "behavior in sitting down, her body language was such that it kind of made me think she was slightly immature." The prosecutor stated that to him, it appeared Juror A "did not want to be [t]here." The prosecutor also stated that he had noted on his juror form that Juror A had "smirked, [and had] bad body language." Neither the court nor the defense observed this behavior.

> To satisfy step two of *Batson*, the prosecutor's neutral explanation must be clear and reasonable. This is so because a clear, reasonably specific and legitimate *reason* is necessary for the trial court to fulfill its duty to assess the plausibility of the proffered reason for striking the potential juror in light of all the evidence; therefore, it is essential that the proponent of the peremptory strike fully articulate the reason so that a proper assessment can be made.

[4] We have elected not to use the Juror's name.

Johnson v. Commonwealth, 450 S.W.3d 696, 703-04 (Ky. 2014), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015), *as modified* (Ky. 2016) (internal citations omitted). Additionally, if the proffered reasons for the strike are vague, "their very vagueness alone could fairly point toward a conclusion that they are merely pretextual." *Johnson*, 450 S.W.3d at 704 (citation omitted).

We find the prosecutor's proffered reasons for the strike of Juror A to be too vague. Indeed, his claims that she "did not look happy" and it appeared that she "did not want to be [t]here" could describe a large percentage of potential jurors, such that if those were appropriate reasons for striking jurors, the right to trial by a jury of one's peers might never be placated. Additionally, the prosecutor's references to Juror A's "body language" and "behavior in sitting down" are so vague that they could be interpreted any number of ways. The only somewhat specific reason the prosecutor gave was that Juror A had "smirked," but no further information was provided regarding what she smirked in response to, such as a specific question. Therefore, this also was too vague a reason.

As for the second juror, Juror S,[5] the prosecutor stated that she had rolled her eyes at him when he sat down. The prosecutor argued that by doing so, Juror S made him think she would be hostile. We find this to be more specific than the behavior upon which the prosecutor based his strike against Juror A. It is more

[5] Like Juror A, we have elected not to use this Juror's name.

akin to the level of specificity that the prosecutor in the *Mash* case described. In *Mash*, the prosecutor stated that he had stricken a juror due to the juror's actions of "sitting up, crossing her arms, and looking angry." *Mash*, 376 S.W.3d at 556. The juror, who was the only African American juror on the panel, reacted this way after defense counsel asked if any of the jurors had a "problem with a black [defendant] and a white victim." *Id*. at 554. The Kentucky Supreme Court noted that

> The trial court determined that the prosecutor's explanation for the strike was credible and not a pretext, and there are a number of factors that support the trial court's determination. For example, the prosecutor brought up the *Batson* issue of his own accord. The prosecutor also provided a detailed explanation for his reasons for striking [the juror], and he showed the court his strike sheet to demonstrate that he had not intended to strike her until he saw her reaction to defense counsel's questions near the very end of *voir dire*. Finally, the prosecutor had appeared frequently in front of the trial judge, and the judge believed that he and no history or pattern of excluding African Americans from juries. For all of these reasons, the trial court's determination of the prosecutor's credibility was not clearly erroneous, and this Court will not disturb it.

Id. at 556-57 (internal citations omitted).

In the present case, we do not know how frequently the prosecutor appeared before the trial judge. But, the prosecutor's explanation for his reasons for striking Juror S were sufficiently detailed, in that he explained what the juror did and provided the context for it, *i.e.*, she rolled her eyes at him when he did nothing more than sit down, and he argued that this action by the juror made him

believe that she would be hostile towards him. Thus, this was a sufficient race-neutral reason for striking Juror S.

As for the third *Batson* step and its applicability to the striking of Juror S, the prosecutor's reasons for striking this juror were based upon her demeanor. The only evidence regarding her demeanor is what the prosecutor said. Therefore, the analysis of this step depends upon the prosecutor's credibility, which is in the trial court's province. The circuit court in this case clearly found the prosecutor's reasons for striking Juror S to be credible and not a pretext, and we do not disagree.

Consequently, Greenwade's *Batson* challenge concerning Juror S lacks merit. However, regarding Juror A, the Commonwealth failed to show that its reasons for striking her were race-neutral; accordingly, it failed to satisfy the second step of the *Batson* test. Thus, the circuit court abused its discretion in accepting the Commonwealth's explanations for striking Juror A. Further, because "a *Batson* violation is structural error not subject to harmless error review," we are required to vacate Greenwade's conviction and sentence, and we remand the case to the circuit court for a retrial. *Johnson*, 450 S.W.3d at 706, *abrogated on other grounds by Roe*, 493 S.W.3d 814, *as modified* (Ky. 2016).

D. PHOTOGRAPHS SHOWING GREENWADE IN HANDCUFFS

Next, Greenwade alleges that he was unduly prejudiced by the Commonwealth's repeated use of photographs that showed him handcuffed. He

acknowledges that this issue is unpreserved for appellate review, but he nevertheless asks us to review it for palpable error.

However, as the Commonwealth notes in its brief, the defense was asked if it had any objection to the introduction of the photographs at issue. The defense replied that it did not object. Consequently, because the defense expressly stated that it had no objection to the photographs being admitted into evidence, Greenwade cannot now claim that the admission of this evidence amounted to palpable error. *See Tackett v. Commonwealth*, 445 S.W.3d 20, 28-29 (Ky. 2014). Therefore, this claim is not subject to review.[6]

E. SUGGESTIVE PHOTOGRAPH PACK LINE-UP

Finally, Greenwade contends that the circuit court violated his right to due process by denying his motion to exclude the unduly suggestive photograph pack line-up. However, the defense again expressly stated that it had no objection to the admission of the photograph pack line-up when it was introduced during Child 1's testimony and again when it was introduced during Child 2's testimony. The defense subsequently moved to exclude the photographic line-up evidence after the close of the Commonwealth's case, but the circuit court denied the motion.

Because the defense twice expressly waived any objection to the admission of the photograph pack line-ups, it cannot now claim that the admission

[6] Nonetheless, we note that because this case is being remanded for a new trial, an admonishment by the trial court that the handcuffs have no significance would be the better course of action.

of such evidence amounted to palpable error. *See Tackett*, 445 S.W.3d at 28-29. Consequently, this claim is not subject to review.

Accordingly, we find that Greenwade was not entitled to a lesser-included offense instruction on criminal trespass; the bolstering of the witnesses did not amount to palpable error; there was no *Batson* violation concerning Juror S; and Greenwade's claims regarding the admission of various photographic evidence are not subject to review because he expressly waived any objection to the admission of the photographs in the circuit court. However, due to the *Batson* violation regarding Juror A, we vacate the Christian Circuit Court's judgment and remand the case for a new trial.

D. LAMBERT, JUDGE, CONCURS.

J. LAMBERT, JUDGE, DISSENTS AND DOES NOT FILE SEPARATE OPINION.

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