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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000793-MR

WILLIAM E. HILLOCK — APPELLANT

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 09-CR-00007-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: William E. Hillock appeals from the final judgment of the Adair Circuit Court sentencing him to five years' imprisonment for criminal abuse in the second degree, following a jury trial. For the following reasons, we vacate the judgment and remand for a new trial.

Hillock was indicted by the Adair County Grand Jury on two counts of criminal abuse in the first degree, based on allegations that he abused his daughter,

who at the time of the indictment was less than a year old. Count one of the indictment charged Hillock with committing the offense of criminal abuse in the first degree on or about October 15-29, 2008. Count two charged him with committing the same offense on or about December 15, 2008.

Before the trial commenced, the Commonwealth moved to amend count two of the indictment to include a period of time from November 28, 2008 to December 17, 2008 during which the alleged abuse occurred. Hillock objected on the basis that these dates did not conform to the proof and that the grand jury had not indicted him for actions occurring during this period of time. Hillock noted that three separate incidents were alleged and the grand jury chose to indict on only two of them. Hillock argued that amending the indictment to include actions between November and December 2008 would include the third alleged incident, which the grand jury had already chosen not to indict him on. The trial court allowed the Commonwealth to amend the indictment.

Following voir dire and the exercise of peremptory challenges by both parties, the trial court *sua sponte* asked counsel for Hillock why she peremptorily struck the sole African-American venire member. Counsel explained that she had reason to believe the member was a former police officer and that Hillock did not want a police officer serving as a juror. The Commonwealth objected, emphasizing that no inquiry was made during voir dire about anyone being a police officer. The trial court refused to strike the member, and the member ultimately sat on the jury that convicted Hillock.

The trial court then asked counsel for Hillock to explain exercising eight of nine peremptory strikes against females, excepting the three females also struck by the Commonwealth. The court accepted counsel's explanations except for the one female venire member at issue, who counsel stated she struck because the member was sitting next to and talking with another female venire member who had a hostile demeanor when counsel questioned the venire members about child abuse. Counsel stated that she had reason to believe these two venire members were related. The female member with the hostile demeanor was struck from the panel, but the trial court refused to strike the female member in question and she ultimately sat on the jury that convicted Hillock.

At the close of the Commonwealth's case-in-chief, Hillock moved for a directed verdict and the trial court dismissed count two. At the close of all the evidence, the jury was instructed on one count of criminal abuse in the first degree, as well as second and third-degree lesser offenses, covering the period of time on or about October, November, or December 2008. The jury returned a guilty verdict on criminal abuse in the second degree and recommended a sentence of five years' imprisonment. The trial court sentenced Hillock in accordance with the jury's recommendations. This appeal followed.

On appeal, Hillock claims the trial court erred by: (1) denying him the right to exercise all of his peremptory challenges when it refused to strike the African-American venire member and the female venire member, (2) allowing the Commonwealth to amend count two of the indictment to cover a period of time

between November and December 2008, and (3) not allowing Hillock's expert, Dr. George Nichols, to testify about the results of an MRI which were interpreted by a radiologist who was not present at trial. Hillock also contends the evidence was insufficient to permit the jury to find him guilty beyond a reasonable doubt. Since we agree that the trial court erred by setting aside Hillock's peremptory strikes, we vacate the judgment and remand for a new trial. Nonetheless, we will address all of Hillock's claims of error since their resolution may affect the second trial.

First, Hillock maintains the trial court erred by not allowing him to peremptorily strike the venire members at issue, constituting a violation of his substantial rights. We agree.

Under Kentucky law, the exercise of peremptory strikes is viewed as a "substantial right," the denial or misallocation of which is per se reversible error. *Shane v. Commonwealth*, 243 S.W.3d 336, 341 (Ky. 2007). The Equal Protection Clause prohibits one from discriminating against potential jurors on the basis of race or gender in the exercise of peremptory challenges. *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky.App. 1998). The United States Supreme Court has articulated a three-step process to be used in evaluating claims that a peremptory challenge was exercised in a manner inconsistent with the Equal Protection Clause. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).[1]

[1] While the *Batson* test has often been applied in situations in which the prosecution's peremptory strike is challenged, "a criminal defendant is characterized as a state actor and is thereby precluded from the exercise of peremptory challenges based on race or gender." *Wiley*, 978 S.W.2d at 335.

The first step requires the prosecution to make a *prima facie* showing of purposeful discrimination. *Id.* at 96-97, 106 S.Ct. at 1722-23. If a race or gender-neutral explanation is provided and the trial court rules on the issue, the determination as to whether a *prima facie* showing was made is, as here, mooted. *Harris v. Commonwealth*, 134 S.W.3d 603, 611 (Ky. 2004) (citations omitted).

The second step requires the defendant to articulate a race or gender-neutral explanation for the strike. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. This explanation "need not be persuasive, or even plausible, nor does it need to rise to the level of a challenge for cause. It must simply be facially valid." *Harris*, 134 S.W.3d at 611. Further, "'[u]nless a discriminatory intent is inherent in the [defendant's] explanation, the reason offered will be deemed race [or gender] neutral.'" *Id.* (citations omitted).

Here, counsel for Hillock explained that she had reason to believe the African-American venire member was a former police officer and that Hillock did not want a police officer to serve as a juror. *See Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992) (a neutral explanation for peremptorily striking a potential juror may be based upon information received from a source other than information derived from voir dire). In addition, counsel explained that she peremptorily struck the female venire member because she was seated next to, and conversing regularly with, another female venire member who counsel believed to be her relative and whose demeanor was hostile when counsel questioned the jurors about child abuse. Counsel reasoned that if one relative had an adverse

reaction, then the other might likely have similar feelings but may not be so noticeable in her disgust. *See Thomas v. Commonwealth*, 153 S.W.3d 772, 778 (Ky. 2004) (assumptions drawn from demeanor, inattentiveness, posture, and manner of dress have been recognized as neutral explanations). These facially valid explanations offered by counsel for Hillock satisfy the second step of the *Batson* test.

The third step "requires the trial judge to determine whether the [prosecution] has met the burden of showing intentional discrimination." *Harris*, 134 S.W.3d at 611 (citing *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724). In making this determination, the trial court "must evaluate the reasons offered by the [defendant] to determine if they are valid and neutral and not simply a pretext for discrimination." *Harris*, 134 S.W.3d at 612 (citing *Gamble v. Commonwealth*, 68 S.W.3d 367, 371 (Ky. 2002)). We afford great deference to the trial court's determinations since the trial judge is in the best position to evaluate the credibility and demeanor of counsel. *Harris*, 134 S.W.3d at 612. The trial court's decisions will not be overturned unless clearly erroneous. *Id.* (citing *Stanford v. Commonwealth*, 793 S.W.2d 112, 114 (Ky. 1990)).

In this case, though the trial court made no specific findings in this regard, it did state on the record that it did not believe counsel for Hillock would intentionally discriminate. Thus, since Hillock offered both race and gender-neutral explanations for striking the venire members at issue, and the record reveals no finding that the explanations were a pretext for discrimination, we

believe the trial court erred by setting aside Hillock's peremptory strikes of these venire members. As a result of this error, Hillock was only permitted to exercise seven peremptory strikes, while the Commonwealth exercised nine. Thus, reversal is warranted.

Next, Hillock claims the trial court erred by allowing the Commonwealth to amend count two of the indictment to cover a period of time between November and December 2008 because it included a separate incident for which Hillock was not indicted. We disagree.

RCr[2] 6.16 provides that the court may permit an indictment or information to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. *See McPherson v. Commonwealth*, 171 S.W.3d 1 (Ky. 2005) (amending the dates on which the crime occurred is permissible so long as amended date precedes return of indictment); *Berry v. Commonwealth*, 84 S.W.3d 82 (Ky.App. 2001) (failure to amend indictment to include dates shown by the proof and used in the instructions did not affect defendant's substantial rights).

In this case, before the trial commenced, the trial court allowed the Commonwealth to amend count two of the indictment to include a range of dates from November 28, 2008 to December 17, 2008; the date on the original indictment for count two was on or about December 15, 2008. Based on our review of the record, we do not believe the amendment to count two charged an additional or different offense. Furthermore, if any error occurred by amending the

[2] Kentucky Rules of Criminal Procedure.

indictment, such error was harmless since the trial court dismissed count two at the close of the Commonwealth's case-in-chief. *See* RCr 9.24 ("[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties."). In addition, no argument is now made that the court's instructions to the jury on count one, which included the months of October, November, and December 2008, did not conform to the proof. Thus, the trial court's decision to allow the Commonwealth to amend the indictment to include a range of dates which preceded the return of the indictment is not cause for reversal in this instance.

Next, Hillock contends the trial court erred by not allowing his expert, Dr. Nichols, to testify about the results of an MRI which were interpreted by a radiologist who was not present at trial. We disagree.

KRE[3] 703(a) addresses opinion testimony by experts and provides, in part:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The record shows that Dr. Nichols, a pathologist, reviewed an MRI performed on the victim and requested a radiologist to interpret the MRI and provide a report. Dr. Nichols then relied upon the radiologist's report to form some of his opinions concerning what the MRI revealed. Following the

[3] Kentucky Rules of Evidence.

Commonwealth's objection to Dr. Nichols testifying as to the radiologist's report, the trial court held an in-camera hearing on the matter.

During the hearing, the trial court confirmed that Dr. Nichols was available to testify regarding the cause of the incident alleged in count one. The court further confirmed, and Hillock conceded, that Dr. Nichols' opinion was entirely his own, exclusive of any information provided by the radiologist. As a result, we fail to appreciate Hillock's argument that Dr. Nichols should have been permitted to testify as to the radiologist's report since Dr. Nichols testified to the incident alleged in count one. Thus, the trial court did not err by excluding reference to the radiologist's report in Dr. Nichols' testimony.

Finally, Hillock asserts that insufficient evidence was presented at trial to permit the jury to find him guilty beyond a reasonable doubt. We disagree.

Hillock moved for a directed verdict at the close of the Commonwealth's case-in-chief on the basis that the evidence presented was insufficient to permit the jury to find him guilty beyond a reasonable doubt. Upon consideration of a motion for a directed verdict,

> the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citation omitted); *accord Banks v. Commonwealth*, 313 S.W.3d 567, 570 (Ky. 2010).

In this case, an expert for the Commonwealth, Dr. Melissa Currie, a child abuse pediatrician, testified that the records of the victim were diagnostic of an inflicted injury, rather than an accidental fall. Dr. Currie explained to the jury that reviewing bruising patterns on children to distinguish accidental bruising from abuse is part of her daily practice. Dr. Currie opined, based on her training and experience, that the cause of the victim's bruises was inflicted by blunt force trauma, with a pattern most consistent of multiple strikes with the hand. Taking the evidence in a light most favorable to the Commonwealth, we believe the evidence presented was sufficient to survive a motion for directed verdict.

Based on the errors committed during voir dire, we vacate the final judgment of the Adair Circuit Court and remand for a new trial.

ALL CONCUR.

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