[J-28-99]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	191 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Order entered on July 16,
	:	1997, in the Court of Common Pleas of
	:	Philadelphia County, Criminal Division at
v.	:	No. 1305, 1306 and 1308 June term, 1985
	:	
	:	
ARNOLD HOLLOWAY,	:	
	:	
Appellant	:	SUBMITTED: January 25, 1999

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: October 1, 1999**

I am unable to join fully the majority's treatment of three of Appellant's issues, and as to Appellant's Batson claim, I would remand for an evidentiary hearing.

First, with regard to Appellant's challenge concerning the trial court's exclusion of evidence of the acquittal of co-defendant Danny Freeman, I disagree with the majority's conclusion that the plurality decision in Commonwealth v. Meredith, 493 Pa. 1, 425 A.2d 334 (1981), establishes that there is but one narrow circumstance in which evidence of a codefendant's acquittal may be introduced into evidence. In my view, Meredith merely enunciates the sound principle that a codefendant's acquittal cannot be offered into evidence to create the impression that the defendant is equally innocent. I do not read the case as articulating a rule of preclusion foreclosing the possibility that a trial court, in the circumstances of a particular case and within the exercise of its sound discretion, might

allow the admission of evidence of an acquittal for a range of other material purposes. In the present case, however, balancing the proffered reasons for admission against the danger that the jury might draw an inappropriate inference, I do agree that the trial court acted within its discretion in excluding the evidence of Freeman's acquittal.

Second, concerning Appellant's challenge involving the prosecutor's false insinuation to the jury in his closing speech that Freeman had been convicted rather than acquitted, while I agree with the majority that Appellant has failed to establish sufficient prejudice to warrant collateral relief, I would reiterate this Court's precedent condemning the practice of making untruthful assertions to the jury, express or implied. See, e.g., Commonwealth v. Toth, 455 Pa. 154, 158-59, 314 A.2d 275, 277-78 (1974).

Third, I believe that Appellant's claim concerning the trial court's jury charge on accomplice liability deserves elaboration. Appellant asserts that the trial court's instructions improperly suggested that the specific intent to kill necessary to support a conviction of first degree murder need only be found in the actual killer when a conviction is sought on an accomplice liability theory. In this regard, Appellant notes that the challenged instruction was nearly identical to the charge at issue in Commonwealth v. Huffman, 536 Pa. 196, 638 A.2d 961 (1994), a case in which this Court reversed a murder conviction because such charge contained a "patently erroneous statement of the law."[1] The Court found the

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[1] The instruction given in Huffman proceeded as follows:

> [I]n order to find a Defendant guilty of murder in the first degree, you must find that the Defendant caused the death of another person, or that an accomplice or co-conspirator caused the death of another person. That is, you must find that the Defendant's act or the act of an accomplice or co-conspirator is the legal cause of death of [the victim], and thereafter you must determine if the killing was intentional.

Id. at 198-99, 638 A.2d at 962. The trial judge's instruction in this case was as follows:
(continued…)

instruction flawed because it "allow[s] the jury to reach a first-degree murder verdict with no finding of the requisite mental state of 'specific intent to kill' on the part of the accomplice/appellant." Huffman, 536 Pa. at 199, 638 A.2d at 963; see also Commonwealth v. Spotz, 552 Pa. 499, 518, 716 A.2d 580, 589 (1998)(stating that "[t]he charge in Huffman . . . incorrectly advised the jury that they could find the defendant guilty of first degree murder if either he or his co-conspirator possessed the necessary specific intent to kill"). Thus, Appellant's assertion that the present jury instruction was erroneous has merit.

I do agree, however, that under this Court's decision in Commonwealth v. Wayne, 553 Pa. 614, 720 A.2d 456 (1998), Appellant cannot gain relief on this claim. In Wayne, the Court concluded that the trial court had issued an instruction concerning coconspirator liability that was flawed in that it eliminated the requirement of establishing the defendant's separate, specific intent to commit first degree murder in the same manner as did the erroneous accomplice liability instruction in Huffman. Nevertheless, the Court found that the appellant had failed to demonstrate such prejudice, stating as follows:

> The conspiracy at issue was a conspiracy to kill [the victim]. A conspiracy to kill presupposes the deliberate premeditated shared specific intent to commit murder. Although each member of a conspiracy must possess the specific intent to kill

(…continued)

> in order to find the defendant guilty of murder in the first degree, you must find that the defendant caused the death of another person or that an accomplice of the defendant caused the death of another person. That is, you must find that the defendant and an accomplice's acts is [sic] the legal cause of the death of [the victim], and thereafter, you must determine if the killing was intentional.

I am unable to find any meaningful basis upon which to distinguish between these respective charges. I also note that the same judge presided over both trials, and he had not had the benefit of this Court's decision in Huffman at the time of trial in the present case.

> before a conviction of first degree murder can be sustained, that intent can be demonstrated by circumstantial evidence. Here the evidence established that appellant acted in concert with two unidentified men to kill [the victim]. Appellant and his two unknown conspirators isolated [the victim] on a street corner late at night. Appellant removed [another man] from the immediate area, leaving [the victim] at the mercy of two armed assassins. Appellant had a gun to [the other man's] head. While the two unknown men were engaged in shooting [the victim], appellant simultaneously attempted to shoot [the other man]. After the two assassins unloaded six bullets into [the victim], three of which struck a vital part of [his] body, the two men fired at [the other man] when [he] escaped from appellant's grasp. Appellant and his cohorts fled the scene together.
>
> The precise and deliberate actions of appellant and the two unidentified men establish a concerted conscious decision by all three persons to join together with the purpose of taking the life of [the victim]. The actions of each conspirator individually reflect the elements of premeditation and deliberation necessary to prove murder of the first degree.
>
> The charge as a whole defined the elements of first degree murder so that this jury was adequately apprised of the law it must consider in reaching a decision in this case. Even with an incorrect instruction on co-conspirator liability, it cannot be said that the verdict in this case would have been different. Unlike the situation in Huffman, it cannot be said that the verdict was reached through speculation as to the nature of the conspiracy and the role of the conspirators. In this case, the conspiracy was a conspiracy to kill. The conspiracy had only one object, the deliberate decision to take a life. Once this jury determined that appellant was guilty of conspiracy, the only logical conclusion to reach is that the jury also determined, beyond a reasonable doubt, that appellant possessed the specific intent to kill. Thus, appellant is entitled to no relief on this issue.

Wayne, 553 Pa. at 633-34, 720 A.2d at 465 (footnote and citations omitted).[2]

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[2] It is noteworthy that the only conspiracy charge submitted to the jury in Huffman was conspiracy to commit robbery. Thus, it would have been impossible to rely upon the conspiracy conviction to supply the requisite determination concerning the element of specific intent to commit murder.

Here, as in Wayne, Appellant was convicted of a conspiracy to murder. The circumstances underlying such conspiracy also involve the express agreement to commit a killing and actual participation in the criminal episode, which resulted in Caldwell's death by strangulation and shooting. Thus, based upon the specific analysis contained in Wayne, I conclude that, because the jury's determination regarding Appellant's specific intent may be gleaned from its disposition of the conspiracy charge, Appellant fails to demonstrate prejudice and is due no relief.

Finally, the majority dismisses Appellant's claim under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), for two reasons: first, on the basis that Appellant failed to establish a prima facie case, and second, on the basis that Appellant failed to allege prejudice for purposes of the PCRA. With regard to the majority's first point, however, I note that a plurality of the United States Supreme Court held in Hernandez v. New York, 500 U.S. 352, 358, 111 S. Ct. 1859, 1866 (1991), that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." Although this Court has not had the occasion to specifically adopt this reasoning from Hernandez, the Superior Court has done so, see, e.g., Commonwealth v. Garrett, 689 A.2d 912 (Pa. Super. 1997)("[w]e find that it is unnecessary to determine whether the prosecutor established a prima facie showing of discrimination since defense counsel offered an explanation for his peremptory challenge"), and I find its reasoning persuasive and see no reason why it should not be applied.

In this case, the district attorney would appear to have offered his reasons for various of the peremptory challenges exercised. He did this following defense counsel's attempt to make a record concerning his Batson challenges. For example, the following exchanges occurred:

[Defense counsel] Let the record show a Black juror.

[District attorney] Let the record further show that it is a Black male approximately the same age as the defendant.

* * *

[Defense counsel] Let the record indicate a Black Male.

[District attorney] May the record indicate a single, young, unemployed, on welfare Black male.

I find it particularly significant that Appellant alleged in the brief filed in support of his PCRA petition that:

> The record will support that among the white jurors assembled from the jury panel to determine defendant's innocence or guilt, there were white unemployed, single, young. At least 90% of them were approximately the same age as the defendant.

Since Petitioner was denied a post-conviction hearing, he has not had the opportunity to prove his assertion that seated jurors of the caucasian race were of the same age as Appellant, so as to lend support to his claim that the age rationale offered by the district attorney was merely pretextual. See generally Batson, 476 U.S. at 106, 106 S. Ct. at 1728 (Marshall, J., concurring)(noting that the age rationale is suspect because of its inherent susceptibility to abuse).

As to the majority's finding that Appellant's claim of ineffectiveness on the part of trial counsel for failing to preserve a Batson challenge for direct appellate review must be dismissed for failure to allege sufficient prejudice, I note that federal courts categorize Batson violations within a very limited and unique category of claims which, by the nature of their impact upon the fundamental fairness of a trial, are not subject to conventional harmless error or prejudice analysis. See, e.g., Neder v. United States, ___ U.S. ___, ___, 119 S. Ct. 1827, 1833 (1999)(stating that certain limited constitutional errors resulting in a

"'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself' . . . deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair'" (citations omitted));[3] Vasquez v. Hillery, 474 U.S. 254, 263-64, 106 S. Ct. 617, 623 (1986)(finding that racial discrimination in selection of grand jury falls within the limited class of cases involving structural error); McGurk v. Stenberg, 163 F.3d 470, 474 (8th Cir. 1998)(concluding that a structural error required reversal, although the claim proceeded through a claim of ineffective assistance of counsel and was made in the post-conviction setting); Tankleff v. Senkowski, 135 F.3d 235, 248 (2d Cir. 1998)(noting that a Batson violation is a structural defect). Here, Petitioner alleged in his amended, counseled petition that the asserted Batson violation resulted in a denial of due process of law, a jury of his peers, and equal protection of the law, and that counsel was ineffective for failing to properly preserve the issue. I believe that the form of prejudice alleged would be sufficient to warrant relief under both federal post-conviction jurisprudence and the PCRA. Cf. Commonwealth v. Lantzy, ___ Pa. ___, ___, ___ A.2d ___, ___, 1999 WL 455695 (July 7, 1999).

Although I note that Appellant bears a substantial burden in connection with proving a Batson violation, particularly in light of the United States Supreme Court's recent decision in Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769 (1995), as well as his trial and appellate counsel's ineffectiveness, in my view the allegations in the PCRA petition were sufficient

[3] It is significant that the language employed by the United States Supreme Court in Neder is substantially similar to the language employed in the PCRA in describing a petitioner's burden to establish prejudice. See 42 Pa.C.S. §9543(a)(2)(i), (ii) (providing that, in order to obtain relief, a petitioner must demonstrate that an enumerated type of error "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place").

to warrant submission of the claim to a factfinder. Thus, I would remand to the PCRA court with directions to conduct an evidentiary hearing and issue appropriate factual findings with associated legal conclusions.