Affirmed and Memorandum Opinion filed August 24, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01079-CR

BRODERICK D'EARL WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 1169371

MEMORANDUM OPINION

A jury convicted appellant, Broderick D'Earl Williams, of burglary of a habitation with intent to commit aggravated robbery and sentenced him to eighteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice. *See* Tex. Penal Code Ann. § 30.02(a)(1) (Vernon 2003). Appellant contends the trial court erred by: (1) denying appellant's pretrial motion to dismiss on double jeopardy grounds and (2) overruling appellant's *Batson* challenge. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 5, 2006, appellant and a friend broke into the complainant's home and robbed the family at gunpoint. Eventually, the family members were able to escape through the master bathroom window. Once the complainant was able to escape from appellant's control, he called 9-1-1. The police arrived shortly thereafter and found appellant's friend in a vehicle in the complainant's driveway. The complainant was taken to the emergency room, as appellant had hit him in the eye with a gun. Appellant's friend informed the police of appellant's name and whereabouts. Police arrested appellant later that day.

On May 23, 2008, in a proceeding separate from the instant case, appellant pleaded guilty to the offense of aggravated robbery based on the events of December 5, 2006. Appellant elected to have the jury assess punishment and he was sentenced to ten years' probation. Appellant did not appeal the conviction because he thought it was "the best thing he could get" and he did not want to prolong the start of his probation time. On June 2, 2008, appellant was indicted for burglary of a habitation with intent to commit aggravated robbery based on the events of December 5, 2006—the charge eventually giving rise to the instant appeal. Appellant filed a motion to dismiss based on double jeopardy. The trial court denied appellant's motion to dismiss and the case went to trial before a jury.

At the end of voir dire, appellant made a *Batson* challenge, alleging the State illegally struck six of eight African-American venire members. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 90 L. Ed. 2d 69 (1986). The State responded to the challenge with reasons for its strikes. The trial court denied the *Batson* challenge.

The jury convicted appellant of burglary of a habitation with intent to commit aggravated robbery and sentenced him to eighteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant timely filed this appeal.

DISCUSSION

Appellant contends the trial court erred by (1) denying his motion to dismiss based on double jeopardy grounds and (2) denying his *Batson* challenge. Specifically, appellant argues the trial court erred in denying his motion to dismiss because (1) the charge violates his double jeopardy rights and (2) the State brought the charge out of prosecutorial vindictiveness.

I. Double Jeopardy Argument

A. Applicable Law

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects an accused against a second prosecution for the same offense for which he has been previously acquitted or previously convicted. *Littrell v. State*, 271 S.W.3d 273, 275 (Tex. Crim. App. 2008) (citing *Brown v. Ohio*, 432 U.S. 161, 164–65, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)). It further protects an accused from being punished more than once for the same offense. *Id*. at 165. Appellant contends he is being prosecuted twice for an offense for which he was previously convicted and that he is being punished more than once for the same offense. In the multiple-punishment and multiple-prosecution contexts, the double jeopardy bar applies if the two offenses for which the defendant is punished or tried cannot survive the "same elements" or "*BlockburgerI"* test. *U.S. v. Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); *see Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *see Watson v. State*, 900 S.W.2d 60, 61–62 (Tex. Crim. App. 1995). The "same elements" test inquires whether each offense contains an element not contained in the other. *Watson*, 900 S.W.2d at 61. If the second offense contains an element not found in the first offense, then double jeopardy protections are not violated.

B. Analysis

Appellant urges us to apply *Littrell v. State*. *Littrell*, 271 S.W.3d at 273. In that case, the Court of Criminal Appeals held the defendant's double jeopardy rights were violated when the trial court authorized a jury to convict and punish the defendant for both felony murder and the underlying aggravated robbery offense. *Id*. at 279. The Court reasoned the first count, felony murder, required showing the defendant committed an act clearly dangerous to human life that caused death during the *commission or attempted commission* of an aggravated robbery. *Id*. at 276. While the second count only required proving the *commission* of an aggravated robbery. *Id* at 276–77. Because the first count subsumed all the elements of the second count, the Court found aggravated robbery was a lesser-included offense of count one, felony murder, for double jeopardy purposes. *Id*. at 277. Accordingly, the Court allowed only a single conviction for the criminal transaction. The dissent argued that the first offense was different for double jeopardy purposes because the second offense requires proof of *commission* and the jury could have found appellant *attempted* to commit aggravated robbery in the first offense. *Id*. at 279–80. The majority responded by noting, "as a matter of statutory law in Texas, the attempt to commit an aggravated robbery is itself a lesser-included offense of the commission of aggravated robbery." *Id*. at 277 n.18.

Littrell is distinguishable from the case at bar. The greater offense in the instant case is burglary of a habitation with intent to commit aggravated robbery; while the lesser offense (for which appellant was previously convicted) is aggravated robbery. The greater offense required showing *intent* to commit aggravated robbery, while the lesser offense required showing *commission* of the aggravated robbery. *Compare* Tex. Penal Code Ann. § 30.02(a)(1) (Vernon 2003) *with* Tex. Penal Code Ann. § 29.03(a)(2) (Vernon 2003). In *Littrell*, the greater offense required proving *commission* or *attempted commission* of the lesser offense and the lesser offense required proof of *commission*;

whereas, here, the greater offense requires proof of *intent* to commit the lesser offense and the lesser offense requires proof of *commission*.

The Court of Criminal Appeals has held that aggravated assault is not a lesser-included offense of burglary with the *intent* to commit aggravated assault. *Jacob v. State*, 892 S.W.2d 905, 909 (Tex. Crim. App. 1995). The Court stated:

> [w]hile it may be true that when the State proves an aggravated assault, the proof shows an intent to commit the assault, under Article 37.09(1) facts showing a completed assault are not "required" to prove intent to commit such assault. Intent to commit requires less proof. While it certainly *may* be used to show that intent, it is not legally *required* because intent to commit can be established by facts showing something less than commission of the offense.

Id. The *Jacob* court's reasoning is applicable here. In the current case, appellant was charged with unlawfully entering the habitation of another without consent and with intent to commit aggravated robbery. Therefore, the State was only required to prove intent to commit aggravated robbery and not the commission of an aggravated robbery—while the underlying offense required proof of commission. Thus, the "same elements" of the *Blockburger* test are not met here because each charge requires proof of an element not required under the other. Accordingly, there has been no violation of appellant's double jeopardy rights. Appellant's contentions regarding double jeopardy are overruled.

II. Prosecutorial Vindictiveness Argument

On appeal, appellant brings his prosecutorial vindictiveness claim as a sub-part of his double jeopardy claim. However, we have determined it should be addressed separately. Appellant argues the State was motivated to bring a second charge against appellant because of the State's purported disappointment in the probated sentence resulting from the first charge.

Generally, prosecutors have broad discretion to decide what charges to file against a criminal defendant. *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004). That

discretion is not without limits, however. *Ex Parte Legrand*, 291 S.W.3d 31, 41 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). For example, a prosecutor may not increase the charges against a defendant simply as a punishment for invoking a right, such as pursuing an appeal. *Id*. "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (citation omitted). One who has been convicted of an offense must be entitled to pursue his appellate rights without fear that the government will retaliate by substituting a more serious charge for the initial one. *Blackledge v. Perry*, 417 U.S. 21, 28 (1974). The United States Supreme Court has held that, under specific, limited circumstances, the presumption that a prosecution is undertaken in good faith gives way to a rebuttable presumption either of prosecutorial vindictiveness or proof of actual vindictiveness. *See Goodwin*, 457 U.S. at 373. A constitutional claim of prosecutorial vindictiveness may be established in either of two distinct ways: (1) proof of circumstances that pose a "realistic likelihood" of such misconduct sufficient to raise a "presumption of prosecutorial vindictiveness," which the State must rebut or face dismissal of the charges; or (2) proof of "actual vindictiveness"—that is, direct evidence that the prosecutor's charging decision is an unjustifiable penalty resulting solely from the defendant's exercise of a protected legal right. *Neal*, 150 S.W.3d at 173 (citing *Goodwin*, 457 U.S. at 380–81).

Under the first prong, if the State pursues increased charges or an enhanced sentence after a defendant is convicted, exercises his legal right to appeal, and obtains a new trial, the Supreme Court has found a presumption of prosecutorial vindictiveness. *Id*. In the very few situations in which this presumption does apply, it can be overcome by objective evidence in the record justifying the prosecutor's action. *Id*. at 173–74. The defendant must prove that he was convicted, he appealed and obtained a new trial, and that the State thereafter filed a greater charge or additional enhancements. *Id*. at 174. The burden then shifts to the prosecution to come forward with an explanation for the charging increase that is unrelated to the defendant's exercise of his legal right to appeal.

Id. The trial court decides the issues based upon all of the evidence, pro and con, and the credibility of the prosecutor's explanation. *Id*.

Under the second prong, when the presumption does not apply, the defendant may still obtain relief if he can show actual vindictiveness. *Id*. To establish that claim, a defendant must prove, with objective evidence, that the prosecutor's charging decision was a "direct and unjustifiable penalty" that resulted "solely from the defendant's exercise of a protected legal right." *Id*. Under this prong, the defendant shoulders the burden of both production and persuasion, unaided by any legal presumption. *Id*. Once again, the trial judge decides the ultimate factual issue based upon the evidence and credibility determinations. *Id*. at 174–75.

Both routes to proving prosecutorial vindictiveness require the defendant to exercise a protected legal right. Because appellant failed to exercise a protected legal right, his claim of prosecutorial vindictiveness fails. Appellant argues he did not appeal his probated sentence because he believed "it was the best he could get." Probation is a privilege and not a right. *Speth v. State*, 6 S.W.3d 530, 533 (Tex. Crim. App. 1999). Accordingly, appellant's contention regarding prosecutorial vindictiveness is overruled.

III. *Batson* Challenge

A. Standard of Review

When reviewing a *Batson* claim, the appellate court must determine whether the trial court's findings are clearly erroneous. *Esteves v. State*, 849 S.W.2d 822, 823 (Tex. Crim. App. 1993). This determination is made by applying a "clear error" standard of review. *Vargas v. State*, 838 S.W.2d 552, 554 (Tex. Crim. App. 1992). We apply this standard by reviewing the record, including the voir dire and the racial makeup of the venire; the prosecutor's race neutral explanation; and appellant's rebuttal and impeaching evidence. *Id*. The trial court's determination is granted great deference and will not be overturned unless it is clearly erroneous. *Chambers v. State*, 866 S.W.2d 9, 23 (Tex.

Crim. App. 1993). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Vargas*, 838 S.W.2d at 556 (quoting *Whitsey v. State*, 796 S.W.2d 707, 722 (Tex. Crim. App. 1990)).

B. Applicable Law

In a *Batson* challenge, the moving party must first make a prima facie case showing the striking party exercised its peremptory challenge on the basis of race. *Purkett v. Elem*, 514 U.S. 765, 767 (1995); *Contreras v. State*, 56 S.W.3d 274, 278 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd); *see also* Code Crim. Proc. Ann. art. 35.261 (Vernon 2009). The burden then shifts to the striking party to provide a race-neutral explanation for the strike. *Purkett*, 514 U.S. at 767, 115 S. Ct. at 1770–71. If the striking party articulates a race-neutral explanation, the moving party is given an opportunity to respond, since that party has the ultimate burden of proving purposeful discrimination. *Id*.; *Wamget v. State*, 67 S.W.3d 851, 858 (Tex. Crim. App. 2001). Finally, the trial court must determine whether the moving party met the burden of purposeful discrimination. *Purkett*, 514 U.S. at 767.

C. Analysis

The State used six peremptory strikes to remove six of the eight remaining African American venire members. Appellant brought a *Batson* challenge contending there could be no race neutral reasons for these six strikes. The trial court then asked the State whether it had a response. The State offered an explanation for each of the six strikes.

As to its first strike, the State explained that venire member 10 "got an attitude" when another panel member said he believed appellant was "a little guilty." Dislike of a venire member's attitude, albeit facially race neutral, is an intangible excuse which is

properly evaluated by the trial judge, who was present to witness the conduct of the venire member and to assess the credibility of the prosecutor and his explanation. *Ingram v. State*, 978 S.W.2d 627, 630 (Tex. App.—Amarillo 1998, no pet.). Furthermore, because attitude is not a characteristic that is peculiar to any race, it is race neutral. *Id*. (citing *Purkett v. Elem*, 514 U.S. at 768–69).

Regarding its second, fourth, fifth, and sixth strikes, the State explained it struck these venire members because they stated they were unable to consider assessing the maximum sentence. Strikes based on an inability to assess the maximum sentence have also been found to be race neutral. *See Watkins v. State*, 245 S.W.3d 444, 453 (Tex. Crim. App. 2008).

In explaining its third strike, the State explained it was concerned because the venire member was sleeping during the voir dire. Sleeping during voir dire has been held as a race neutral reason. *See Muhammad v. State*, 911 S.W.2d 823, 825 (Tex. App.—Texarkana 1995, no writ) (holding that the strike of a venire member due to sleeping during voir dire is a race neutral reason).

After the State explained the race neutral reasons for its strikes, the burden shifted back to appellant to persuade the trial judge purposeful discrimination existed beyond a preponderance of the evidence. To do so, appellant was required to show that the State's explanations were merely a pretext for discrimination. *Straughter v. State*, 801 S.W.2d 607, 613 (Tex. App.—Houston [1st Dist.] 1990, no writ). Ultimately, it was the appellant's burden to persuade the trial court that the State's explanations were incredible or disingenuous. *Watkins*, 245 S.W.3d at 457. Appellant could have rebutted these explanations or questioned the State about them. However, appellant only asked for the jury forms to be preserved in the record.

The trial court did not err in denying appellant's *Batson* challenge. *See Straughter*, 801 S.W.2d at 614 (affirming the trial court's denial of defendant's *Batson*

claims where appellant failed to cross-examine the State or otherwise seek to discredit the explanations by contradictory evidence). Accordingly, we overrule appellant's second issue.

CONCLUSION

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Frost, and Seymore.
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