NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 21, 2022*
Decided December 22, 2022

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 21-1736

MICHAEL MCINTOSH, *Plaintiff-Appellant*,	Appeal from the United States District Court for the Southern District of Illinois.
v.	No. 3:16-cv-927-DWD
CHRISTOPHER LINDSEY, *Defendant-Appellee*.	David W. Dugan, *Judge*.

O R D E R

Michael McIntosh, an Illinois prisoner, appeals the jury verdict in his failure-to-protect suit against a correctional officer. We affirm.

McIntosh was attacked in 2016 at the Menard Correctional Center by a cellmate, who bit off part of his thumb in the attack. As relevant here, McIntosh sued correctional

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

officer Christopher Lindsey under the Eighth Amendment for failing to protect him. The case proceeded to trial.

During voir dire, both McIntosh (who was represented at the trial) and Lindsey questioned the venirepersons. After the questioning had ended, McIntosh objected to the composition of the venire because it was not racially diverse. The district court delayed ruling on the objection. McIntosh and Lindsey then moved to strike potential jurors for cause or through use of peremptory challenges. McIntosh did not object to any of Lindsey's peremptory challenges. Before opening statements began, the judge invited McIntosh to elaborate on his prior objection to the racial composition of the venire. McIntosh conceded, however, that he lacked evidence of systemic exclusion of racial minorities in the jury-selection process. The judge in turn denied the objection.

The next day, correctional officer Michael Adams testified as a witness for Lindsey. Adams, who was on duty the day McIntosh was attacked, responded to reports of a fight in McIntosh's cell. Adams testified that when he arrived on the scene, McIntosh had his cellmate in a chokehold. Adams then was cross-examined by McIntosh, who sought to highlight an inconsistency between Adams's testimony that he saw the chokehold and a report he wrote soon after the incident that did not mention a chokehold. Adams added on cross-examination that he did not know who had instigated the fight, or if McIntosh had acted in self-defense.

After closing arguments, both parties moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The district court denied these motions.

The jury returned a verdict in Lindsey's favor, and the district court entered judgment.

On appeal, McIntosh argues for the first time that Lindsey used peremptory challenges to remove the only two Black jurors because of their race. *See Batson v. Kentucky*, 476 U.S. 79, 86 (1986); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630 (1991) (extending *Batson* to civil suits). But because McIntosh did not object in the district court to Lindsey's peremptory challenges, he forfeited this argument. *See United States v. Heron*, 721 F.3d 896, 901–02 (7th Cir. 2013). We would review this forfeited argument for plain error and grant relief only if McIntosh can show that "(1) exceptional circumstances exist; (2) substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied." *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (en banc). On plain error review, however, we can find a *Batson* violation only if "discrimination is plain on the face of the party's justification" in the

district court, *United States v. Willis*, 523 F.3d 762, 767 (7th Cir. 2008), and McIntosh offers no evidence to show that the peremptory challenges were racially motivated.

Next, McIntosh generally challenges the jury verdict, arguing that the jury should not have credited Adams's testimony because it included details not mentioned in Adams's incident report and implicitly fingered him as the aggressor. To the extent McIntosh challenges the sufficiency of the evidence, he failed to preserve that challenge because he did not file a post-verdict motion for judgment as a matter of law. *See* FED. R. CIV. P. 50(b); *Brown v. Smith*, 827 F.3d 609, 614 (7th Cir. 2016). And even if McIntosh had preserved the issue for appeal, an inconsistency of the sort he identifies requires a credibility determination of a witness—a determination that falls within the province of the jury. *See Whitehead v. Bond*, 680 F.3d 919, 925–26 (7th Cir. 2012).

The judgment of the district court is AFFIRMED.