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IN THE
COURT OF APPEALS OF INDIANA

CARL E. BECKNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A04-0508-CR-429
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0410-FA-1017

November 29, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Carl E. Beckner (Beckner), appeals his conviction for Count I, dealing in cocaine, a Class A felony, Ind. Code §§ 35-48-4-1(A)(1); 35-48-4-1(B)(3).

We affirm.

ISSUES

Beckner raises four issues on appeal, which we restate as follows:

(1) Whether the trial court properly denied Beckner's *Batson* challenge resulting in the exclusion of the only African-American person on the venire;

(2) Whether the trial court properly denied Beckner's motion for mistrial;

(3) Whether Beckner's due process rights were violated when the State destroyed exculpatory evidence; and

(4) Whether Beckner was denied effective assistance of counsel because of government interference.

FACTS AND PROCEDURAL HISTORY

On September 2, 2004, detectives Eric Hackworth (Detective Hackworth) and Michael Kennedy (Detective Kennedy) (collectively, the Officers) of the Evansville Police Department were assigned as undercover police officers on a "buy bust" operation in the Sweetser projects in Evansville, Indiana. (Transcript p. 193). At approximately 12:30 p.m., the Officers were driving east on Sweetser in an unmarked truck when Detective Kennedy noticed an individual, later identified as Beckner, sitting on a white plastic lawn chair between two housing units. Two small children were playing nearby.

Detective Kennedy and Beckner nodded at each other. Turning the truck around, Detective Kennedy waved to Beckner. Beckner got up, walked towards the truck, and motioned the Officers to come closer. Detective Kennedy drove back to Beckner.

When meeting with Beckner, Detective Hackworth asked for a "forty piece." (Tr. p. 401). In response, Beckner ordered the Officers to pull up closer to the dumpsters, which they did. After Detective Kennedy parked the truck, Beckner, accompanied by the two children, came around the building and approached the Officers. After Beckner arrived at the truck, Detective Hackworth offered him two twenty dollar bills. In exchange, Beckner dropped two crack cocaine rocks in Detective Hackworth's hand, and left. Beckner and the two children walked around the corner and disappeared out of sight.

Detective Kennedy transmitted a description of Beckner to the cover team or jump team, additional officers who would secure the suspect. He described Beckner as an African-American male with corn row braids, about six feet tall, one hundred sixty to sixty-five pounds and wearing a white sleeveless shirt with blue Carolina pants. Additionally, he reported that Beckner had a lazy or wandering eye. However, after Beckner rounded the corner of the building and the Officers had transmitted his description to the jump team, they noticed two other males, one of whom was dressed similar to Beckner. Detective Kennedy immediately informed the jump team that these two men were approaching and instructed to let them go on by.

Nevertheless, when the jump team arrived at the scene, they apprehended the two males. However, when the jump team failed to find the buy money, they contacted the

Officers. Joining the jump team, the Officers informed them they had the wrong individuals. After a warrant check, the two men were released. Also, before the identities of the two children could be established, an unknown woman retrieved them. Despite a search of the area, Beckner could not be located.

Approximately thirteen business days later, Detective Kenney obtained a photograph of Beckner which allowed him to identify the suspect. When Detective Kennedy saw Beckner's photo there was no doubt in his mind that Beckner was the person who sold Detective Hackworth the crack cocaine during the buy bust operation. Upon obtaining a warrant for Beckner's arrest, Detective Kennedy attempted to serve the warrant at Beckner's home. After knocking on the door, Beckner answered. When Detective Kennedy identified himself, Beckner shoved him and ran back inside the residence. Detective Kennedy pursued, stopped, arrested, and handcuffed Beckner.

On October 29, 2004, the State filed an Information charging Beckner with Count I, dealing in cocaine, a Class A felony. On April 20, through April 22, 2005 a jury trial was held. At the close of the evidence, the jury found Beckner guilty as charged. Thereafter, on July 13, 2005, following a sentencing hearing, the trial court sentenced Beckner to an executed sentence of thirty years.

Beckner now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Batson Challenge*

First, Beckner contends that the trial court erred by denying his objection to the State's peremptory challenge to remove the only African American person from the

venire. Specifically, Beckner argues that the reasons advanced by the State amounted to a racially discriminatory challenge which is impermissible under the Supreme Court's decision of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct.1712, 90 L.Ed.2d 69 (1986).

The exercise of racially discriminatory peremptory challenges is constitutionally impermissible. *McCormick v. State*, 803 N.E.2d 1108, 1110 (Ind. 2004). In order to establish a prima facie case of purposeful discrimination in the selection of a jury, a defendant must show: (1) that the State has exercised peremptory challenges to remove members of a cognizable racial group from the venire; (2) that the facts and circumstances of the defendant's case raise an inference that the State used that practice to exclude venire persons from the jury due to their race. *Bradley v. State*, 649 N.E.2d 100, 105 (Ind. 1995) (citing *Batson*, 476 U.S. 79). Once a prima facie showing has been established, the burden shifts to the State to present an explanation for challenging such jurors. *Batson*, 476 U.S. at 97. The trial court then has a duty to determine whether the defendant has established purposeful discrimination. *Id*. at 98. In *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), the United States Supreme Court refined the test for determining whether a juror has been struck for a reason violative of *Batson*. In *Purkett*, the Court declared that the race-neutral explanation must be more than a mere denial of improper motive, but it need not be "persuasive, or even plausible." *Id*. at 768. "[T]he issue is the facial validity of the [State's] explanation. Unless a discriminatory intent is inherent in the [State's] explanation, the reason offered will be deemed race neutral." *Id*. (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)).

While it is true that the removal of some African American jurors by the use of peremptory challenges does not, by itself, raise an inference of racial discrimination, the removal of "the only . . . African American juror that could have served on the petit jury" does "raise an inference that the juror was excluded on the basis of race." *McCants v. State*, 686 N.E.2d 1281, 1284 (Ind. 1997); *see also Ashabraner v. Bowers*, 753 N.E.2d 662, 667 (Ind. 2001)(observing that the removal of the "only black member of the panel" standing alone "establishes a prima facie case" of discrimination).

Accordingly, here, the record is clear that the State used a peremptory challenge to remove the only African American venire person from the panel. Thus, by articulating a *Batson* objection, Beckner made at least a prima facie showing of purposeful discrimination in the jury selection process. *See id*. Therefore, we must examine the State's proffered explanation to determine whether the peremptory challenge was race-neutral.

The State offered several reasons for their strike:

> First of all on [the juror's] questionnaire his brother was the victim of a kidnapping, his father was caught dealing drugs. I believe it's been corrected by I believe he said brother, but it says father. He shows hesitation in my opinion about the use of undercover officers, he didn't like, I got that feeling, of using them to try and stop people. He . . . he did believe certain drugs should be legal to possess and other should not be. He, I believe expressed a higher burden that is required by law just like [another juror] did, that he felt he should pursue that higher burden, I believe he said a hundred percent. He agreed with [the other juror], not a smidgeon. Your honor, I . . . again I . . . he did express I think some, at least in my mind some maybe hesitation maybe on the way his brother was treated. I mean, I know it was found in the car, but I think he . . . I just think that he would be the one that might tend to view policemen in a more negative light, plus the other factors I mentioned. So I believe we do have

> a valid . . . we don't need a cause basis, but I do believe we have inherent reasons.

(Tr. pp. 98-99). Even though some of these reasons amount to the State's personalized impressions of the venire person's behavior, our review discloses that each of these proffered reasons are permissibly race-neutral explanations for the exercise of a peremptory challenge. *See J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 148, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) ("[A] trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's . . . 'bare looks and gestures.'"). Therefore, we conclude that the State provided logical non-discriminatory reasons for the strike. Thus, we find that the trial court properly denied Beckner's *Batson* challenge.

II. *Motion for Mistrial*

Next, Beckner alleges that the trial court erred in denying his motion for mistrial. In particular, Beckner's claim of error rests on a dual assertion: (1) even though the trial court granted his motion in limine excluding Beckner's "mug shots" from the jury, during trial a juror saw Beckner's shot laying on the State's table, and (2) the State introduced evidence of other wrongs or acts in violation of the trial court's grant of Beckner's motion in limine.

Whether to grant or deny a motion for mistrial is a decision left to the sound discretion of the trial court. *Alvies v. State*,. 795 N.E.2d 493, 506 (Ind. Ct. App. 2003), *trans. denied*. We will reverse the trial court's ruling only upon an abuse of that discretion. *Id*. We afford the trial court such deference on appeal because the trial court

is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. *Id*. To prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. *Id*. We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct. *Id*.

We have recognized that a mistrial is an extreme sanction warranted only when no other cure can be expected to rectify the situation. *Id*. Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement. *Id*.

In the case at bar, the record establishes that Beckner filed a motion in limine on April 20, 2005. On the same day, after a hearing, the trial court granted Beckner's request to exclude from the jury any reference to any prior bad act, including any testimony that Detective Kennedy had been involved in his arrest on a previous occasion, as well as his mug shots.

With regard to Beckner's mug shots, the record supports that counsel objected during the State's cross examination of Detective Hackworth, alleging that one of the jurors noticed Beckner's mug shot laying on the State's table. Claiming a violation of the motion in limine, counsel moved for a mistrial, which was denied by the trial court.

During its inquiry, the trial court determined that there was no conclusive evidence that the photograph was actually seen by a juror. Furthermore, even if the photograph had been divulged, the trial court concluded it did not amount to any prejudice as the jury knew a booking photograph was taken at the time of Beckner's arrest in the current case. Thus, as we review the same evidence, we conclude that the trial court did not abuse its discretion by denying Beckner's motion for mistrial. Therefore, we decline to reverse the trial court's ruling.

Turning to the evidence of prior bad acts, we reach the same conclusion. The record reflects that during the State's direct examination of Detective Kennedy, the Detective testified to the circumstances surrounding Beckner's arrest. He elaborated that at the time he served the warrant for Beckner's arrest, Beckner immediately pushed Detective Kennedy. Beckner's counsel objected when the State asked Detective Kennedy if he had prepared "any charges based on that incident." (Tr. p. 448). Maintaining that the State's question impermissibly invaded the granted motion in limine excluding prior bad acts, Beckner objected to the State's direct interrogation. After the trial court sustained the objection and instructed "the jury to disregard it," Beckner moved for a mistrial which was denied by the trial court. Because we find that the trial court timely admonished the jury, any error, if any, created by the State's question was appropriately removed. *See id.*

Nevertheless, Beckner now asserts that the cumulative effect of both perceived errors amounted to extreme prejudice. Essentially, Beckner argues "[t]he combined information of an inferred past bad act (mug shot) and the presence of another bad act at

arrest lead to reasoning that this is a bad man who commits crimes on a regular basis: the conclusion – he probably committed the charged crime here." (Appellant's Br. p. 11). In support of this assertion, Beckner compares the testimony of his alibi witnesses with the testimony of the Officers. In effect, Beckner's argument would require us to reweigh the credibility of the witnesses, which we refuse. Additionally, as we have determined above that the trial court did not abuse its discretion by denying each of Beckner's motions for mistrial, we fail to see how the cumulative effect of these two actions could result in the prejudice needed to justify the granting of such an extreme sanction as a mistrial.

III. *Exculpatory Evidence*

Continuing the previous argument, Beckner contends that the trial court improperly denied his motion to dismiss because the State had destroyed exculpatory evidence. According to Beckner, the State violated his due process rights by (1) failing to acquire the names of the two children apparently accompanying Beckner; (2) by failing to preserve the names of the two men initially detained by the jump team; and (3) by failing to preserve the batch of identification photographs used by Detective Kennedy to identify Beckner.

The United States Supreme Court has explained the scope of the State's duty to preserve exculpatory evidence as being:

> limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

California v. Trombetta, 467 U.S. 479, 488-89, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *Noojin v. State*, 730 N.E.2d 672, 675 (Ind. 2000). We have defined "exculpatory" as "[c]learing or tending to clear from alleged fault or guilt; excusing." *Samek v. State*, 688 N.E.2d 1286, 1288 (Ind. Ct. App. 1997), *reh'g denied, trans. denied*.

A. *Names of the Two Men and Identification Photographs*

Beckner now argues that the identity of the two men amounted to exculpatory evidence as they could have informed the jury that Beckner "was not the man they saw." (Appellant's Br. p. 21). Similarly, he claims that the destroyed batch of identification photographs could have been used to impeach or show other possible subjects.[1]

Evidence presented at trial established that when the Officers informed the jump team that they had apprehended the wrong persons, the jump team checked them for

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[1] In partial support of his argument, Beckner contends that Article I, § 12 of the Indiana Constitution offers more protection than its counterpart under the Federal Constitution. Referring to case law ranging from 1967 to 2005, Beckner treats us to a lengthy expose asserting that the Indiana constitution provides Indiana citizens with broader protections which include the mere negligent destruction of material evidence, as opposed to the bad faith destruction under the standard enunciated by our Supreme Court in *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281(1988).

In *Rita v. State*, 663 N.E.2d 1201, 1204 (Ind. Ct. App. 1996), *aff'd in part, vacated in part*, 674 N.E.2d 968 (Ind. 1996), this court, after concluding that "the Indiana Due Course of Law requirement is analogous to the Due Process Clause of the Fourteenth Amendment," held that *Youngblood* was applicable to evidence preservation issues under our state constitution. Nevertheless, Beckner cites to *Stoker v. State*, 692 N.E.2d 1386, 1390 n.8 (Ind. Ct. App. 1998) to suggest that a different test is used. However, in his citation, Beckner conveniently omits the final sentence of the footnote, which clarifies that the note is based upon the personal opinion of the *Stoker* court. The footnote reads in its entirety:

> Unlike the majority in *Rita*, we do not interpret *Youngblood* to hold that reversal is proper only upon demonstration of subjective "bad faith" on behalf of law enforcement officers who destroy or fail to preserve evidence. Rather in some instances the destruction or failure to preserve evidence may be so prejudicial to the defendant as to warrant reversal, even in the absence of "bad faith" by the officers. *However, the issue here involves not our personal reading of the case, but whether Indiana courts have applied the Youngblood standard to state constitutional issues*.

Id. at 1391 (citations omitted) (emphasis added).

Furthermore, Beckner's references to our supreme court cases of *Madison v. State*, 534 N.E.2d 702, 707-08 (Ind. 1989), and *House v. State*, 535 N.E.2d 103, 111 (Ind. 1989), *reh'g denied*, all involve citations from the concurring opinions.

possible outstanding warrants. Having found none, the two men were allowed to leave. The record further reflects that none of the officers wrote down the individuals' names and prior to trial it was discovered that the dispatch recording had been recorded over in accordance with normal procedure. Additionally, Detective Kennedy testified that the two men arrived on the scene after the deal was concluded and Beckner had left.

Here, Beckner does not provide us with any basis to conclude that the identity and possible testimony of these two individuals possessed an "exculpatory value that was apparent before the evidence was destroyed." *Trombetta*, 467 U.S. at 488-89. At most, we believe the identity of the two men might have been potentially helpful to Beckner's case as additional evidence.

It is well established in Indiana that the failure to preserve "potentially useful evidence" – as opposed to material exculpatory evidence – violates the Fourteenth Amendment only when the defendant can show bad faith on the part of the police. *Noojin*, 730 N.E.2d at 676 (citing *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)). Potentially useful evidence is defined as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Land v. State*, 802 N.E.2d 45, 49 (Ind. Ct. App. 2004), *trans. denied* (citing *Youngblood*, 488 U.S. at 57). Bad faith is defined as being "not simply bad judgment or negligence, but rather implies the conscious doing of wrong because of dishonest purpose or moral obliquity." *Wade v. State*, 718 N.E.2d 1162, 1166 (Ind. Ct. App. 1999), *reh'g denied*, *trans. denied*. We find no evidence in the

record to support Beckner's assertion that the evidence was destroyed because of moral obliquity. *See id*.

Likewise, we conclude that the batch of identification photographs amount more to potentially useful evidence than material exculpatory evidence, as its exculpatory value and significant role in Beckner's defense, if any, was not at all apparent before its destruction. *See Trombetta*, 467 U.S. at 488-89. In support of his argument that the identification photographs were potentially useful evidence and destroyed in bad faith, Beckner alludes that "the photographs could have provided [him] with alternative suspects or at the very least provided an attack of the identification." (Appellant's Br. p. 28). We are not persuaded. It is clear that Beckner had every opportunity to question the Officers' identification of Beckner as the dealer during the Officers' testimony at trial. Additionally, this gratuitous argument fails to offer a scintilla of proof that bad faith was involved in the destruction of the photographs. Therefore, we find that Beckner's due process rights were not violated.

B. *Identity of the Children*

As a final contention, Beckner claims that the State violated his due process rights by destroying the identification of the children who could have testified that Beckner was not the man they accompanied. However, the record is undisputed that the police never established the identity of the children or the woman who picked them up at the Sweetser projects. We are at a loss to understand how the Officers could be accused of "destroying" this evidence when they never even obtained it in the first place. Thus, we

conclude that the State's duty to preserve exculpatory evidence is not applicable to this situation.

IV. *Ineffective Assistance of Counsel*

Lastly, Beckner contends that he received ineffective assistance of counsel because government interference prevented his counsel from making independent decisions. Specifically, he maintains that the State's loss of evidence of a purported exculpatory nature, *i.e.*, the identity of the two men initially apprehended and the identity of the children, effectively limited his counsel's ability to formulate a defense strategy. We have recognized that government can violate a defendant's right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. *Dew v. State*, 843 N.E.2d 556, 561 (Ind. Ct. App. 2006), *trans. denied*. In this light, we have held that a willful or deliberate violation of disclosure requirements may not only impair counsel's ability to prepare properly for trial but, may also, substantially impair his ability to counsel his client properly and thus be regarded as a violation of the defendant's right to counsel. *Thorne v. State*, 429 N.E.2d 644, 647 (Ind. 1981). Nevertheless, as we determined above that the State's failure to retain or obtain the identity of the two individuals and the children did not amount to misconduct, let alone willful misconduct, we conclude that Beckner did not receive ineffective assistance of counsel.

CONCLUSION

Based on the foregoing, we conclude that (1) the trial court properly denied Beckner's *Batson* challenge resulting in the exclusion of the only African-American

person on the venire; (2) the trial court properly denied Beckner's motion for mistrial; (3) the State did not violate Beckner's due process rights; and (4) Beckner was not denied effective assistance of counsel because of government interference.

Affirmed.

BAILEY, J., and MAY, J., concur.