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 NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001907-MR

CHERYL HOWARD

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 06-CR-00300

COMMONWEALTH OF KENTCKY

APPELLEE

OPINION
REMANDING

*** * * * *

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,¹ SENIOR JUDGE.

STUMBO, JUDGE: Cheryl Howard, hereinafter Appellant, is appealing her convictions in the Hardin Circuit Court for first-degree assault, DUI, and driving without a seatbelt. She was sentenced to twelve-years' imprisonment. Appellant claims that the trial court erred when it dismissed a *Batson v. Kentucky*, 476 U.S.

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), objection because Appellant was not of the same race or gender of the juror in question and that she was entitled to a directed verdict on the charge of first-degree assault. We find that the trial court incorrectly applied the law on the *Batson* challenge, but that it correctly denied a directed verdict on the assault charge. We therefore remand to the trial court for it to re-examine the *Batson* issue.

On March 31, 2006, Appellant was driving her car when it went off the road. Appellant overcorrected and went into the oncoming lane where it struck another vehicle being driven by Josh Miller. Josh was transported by medical helicopter to University Hospital in Louisville, Kentucky.

An x-ray revealed that Josh had a pneumothorax and rib fractures. The rib fractures had punctured one of Mr. Miller's lungs causing a pneumothorax. A pneumothorax occurs when air is trapped between the lung and chest wall. If the air pressure is allowed to build up in the chest wall, it can cause the lungs to shift to one side of the chest cavity resulting in the loss of blood flow to the heart. The doctor treating Josh, Dr. Frank Miller, inserted a tube into Josh's chest cavity allowing the trapped air to escape.

A "CAT" scan was also performed which revealed Josh's spleen had been injured and was bleeding into his abdomen. Luckily, this injury did not require surgery and healed on its own.

Appellant admitted to having been drinking and a blood-alcohol test revealed a blood-alcohol content of 0.32, four times the legal driving limit.

On May 30, 2006, Appellant was indicted by the Hardin County Grand Jury and a three-day trial began on June 25, 2007. During *voir dire*, eighteen potential jurors were struck for cause. After *voir dire*, counsel for Appellant and the Commonwealth submitted their peremptory strikes to the trial court.

Appellant's first claim of error concerns the use of one of the Commonwealth's peremptory strikes to remove Juror Ford. Juror Ford was one of two African-American potential jury panel members. Counsel for Appellant questioned why the Commonwealth wanted to remove Juror Ford and raised the *Batson* challenge. The United States Supreme Court held in *Batson* that the Equal Protection Clause forbids a prosecutor from challenging a potential juror solely on the basis of race. *Batson* at 89.

Here, Appellant's counsel questioned the Commonwealth's strike of Juror Ford. However, because Appellant was a white female, the trial judge was unsure as to how to proceed. She stated that she was unaware of case law that permitted someone who was not of the same race as the juror to raise the *Batson* issue. The Commonwealth Attorney stated that the defendant must be a member of the same race as the juror before the *Batson* issue can be raised. Appellant's counsel disputed this. Ultimately, the trial judge overruled the *Batson* objection because Appellant was not an African-American.

In *Saylor v. Commonwealth*, 144 S.W.3d 812, 816 (Ky. 2004), our Supreme Court held that a Caucasian defendant may raise the *Batson* Equal

Protection issue regarding the dismissal of an African-American potential jury member. *See also Campbell v. Louisiana*, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998); *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). In this case, the trial judge was incorrect in refusing to hear the *Batson* objection because Appellant was not of the same race as Juror Ford.

There is a three-part standard in determining whether a prosecutor violated the Equal Protection Clause with a *Batson* challenge.

First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. (Citations omitted).

Miller-El v. Cockrell, 537 U.S. 322, 328-329, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

Here, the trial judge did not apply the proper standard in denying the *Batson* challenge based on an erroneous belief that the potential juror and defendant must be of the same race in order for a *Batson* objection to be made. A retrospective hearing can be held by the trial court as set forth in *Washington v. Goodman*, 830 S.W.2d 398, 402 (Ky. App. 1992). We therefore remand this case to the trial court in order for it to hold a hearing in which it uses the three-part standard set forth above.

Appellant also argues that there was insufficient evidence to prove serious physical injury, a component of first-degree assault. This issue was preserved by Appellant moving for a directed verdict.

Kentucky Revised Statute (KRS) 508.010(1) states:

A person is guilty of assault in the first degree when:

- (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
- (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person.

Appellant was charged under KRS 508.010(1)(b). Appellant claims there was no serious physical injury to Josh Miller and that a directed verdict should have been granted in her favor.

Serious physical injury is defined in KRS 500.080(15) as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.”

On motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). 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. *Id.* The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if, under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to

a directed verdict of acquittal. *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

Williams v. Commonwealth, 178 S.W.3d 491, 493 - 494 (Ky. 2005). Here, there was testimony from Dr. Miller that Josh's injuries were "potentially life threatening." Josh suffered internal bleeding and a punctured lung. Each of these could have potentially been deadly. Appellant argues that because Josh's punctured lung was repaired before serious damage could have been done and because the spleen stopped bleeding on its own that these injuries were not serious as to create a substantial risk of death.

We disagree. The fact that Josh was fortunate in that his injuries did not progress and become more serious does not negate the fact that at the onset there was a substantial risk of death, as testified to by Dr. Miller. Either of his injuries could have been deadly. It was not clearly unreasonable for the jury to believe the internal bleeding and pneumothorax were serious physical injuries in that they could have been fatal. As such, the motion for directed verdict was correctly denied.

Based on the above, we remand this case to the trial court for a hearing on the *Batson* issue.

ALL CONCUR.

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