

RENDERED: DECEMBER 31, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001126-MR

KENDALL EUGENE COLLINS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MITCHELL PERRY, JUDGE  
ACTION NO. 06-CR-000876

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT, STUMBO, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Kendall Eugene Collins appeals from a judgment of conviction from the Jefferson Circuit Court. For the reasons set forth herein, we affirm.

On January 29, 2006, Collins pointed a handgun at Renaldo Childress, seized Childress' vehicle, and then drove away, eventually abandoning the vehicle

in an alley. Childress went to the Louisville Metro Police Department where he reported the incident to Officer Kalisa McWhorter. The following day, Detective James Scott telephoned Childress who then relayed the same version of the facts to Scott as he had to McWhorter.

During Collins' jury trial, Childress testified that he did not remember the events of January 29, 2006. Further, he testified that he did not remember telling the two law enforcement officers that he was robbed by Collins. The Commonwealth then called the two officers to the stand, and they both testified that Childress had informed them that Collins had robbed him at gunpoint. Audio recordings of conversations between Collins and some of his family members were then played for the jury. The audio recordings depicted several family members that were intent on getting Childress to discontinue his cooperation with police.

At the conclusion of the trial, the jury was instructed on first-degree robbery and theft by unlawful taking of property valued over \$300. Collins' request to instruct the jury on the unauthorized use of an automobile and theft by unlawful taking of property valued under \$300 was denied. Subsequently, the jury found Collins guilty of first-degree robbery, and he was sentenced to ten-years' imprisonment in accordance with the jury's recommendation. This appeal followed.

Collins contends that he was denied a fair trial because two police officers were improperly permitted to give hearsay testimony. Specifically, because the prosecutor did not question Childress regarding the circumstances of

the crime, Collins contends that a proper foundation was not laid and the officers' subsequent testimony, regarding Childress' prior inconsistent statements, was improper. We disagree.

Kentucky Rules of Evidence (KRE) 613(a) permits the introduction of a witness' prior out-of-court statement, for the purpose of impeachment, when the witness' in-court testimony is inconsistent with his prior out of court statement. Before out-of-court statements can be introduced, the witness must be questioned regarding the prior statement in a manner sufficient to permit the witness to recollect the prior statement, including the circumstances of time, place, and persons present at the time the prior statement was made. *Id.* Compliance with this rule provides a proper foundation because it provides a witness with a "proper and timely opportunity" to explain his prior statement. *Jett v. Commonwealth*, 436 S.W.2d 788, 792 (Ky. 1969).

Although Collins contends that the prosecution failed to ask Childress to recite what happened at the time of the crime and, thus, failed to lay a proper foundation to permit his impeachment, KRE 613(a) relates back to a witness' prior inconsistent statement rather than to the events that gave rise to the substance of the prior statement. *Porter v. Commonwealth*, 892 S.W.2d 594, 596-97 (Ky. 1995). More specifically, a witness need only be asked about the circumstances surrounding his prior statement, not the circumstances surrounding the subject matter of his statement. *Id.*

During the trial, Childress and the two officers, who received the prior inconsistent statements, testified and were subject to cross-examination. The foundation for the admission of Childress' inconsistent prior statement was laid when he was asked about the statements that he made to the two officers. Once Childress indicated that he did not remember making these prior statements, the officers' testimony could be properly admitted to impeach Childress and as substantive evidence of the robbery. *Wise v. Commonwealth*, 600 S.W.2d 470, 472 (Ky.App. 1978). Thus, the admission of the officers' testimony was proper.

Collins next contends that the prosecution deprived him of his right to a fair trial when it notified the trial court that it was seeking the indictment of Calvin Collins, Collins' father. Citing *Hillard v. Commonwealth*, 158 S.W.3d 758, 765 (Ky. 2005), Collins contends that the prosecutor's indictment revelation constituted impermissible intimidation because it caused his father to decline to testify on his behalf. We disagree.

During the defense's case in chief, shortly after Calvin took the stand and identified himself, the prosecutor approached the bench and informed the trial court that Calvin was going to be charged with felony handgun possession and, possibly, witness tampering. The trial court discussed the matter with Calvin, advised him of his right not to testify, and appointed him counsel to consult with during the overnight recess. The following day, Calvin's counsel informed the trial court of his advice to Calvin to invoke his Fifth Amendment rights and that the defense no longer sought him as a witness.

Throughout this process, the jury was not informed of the circumstances of Calvin's decision. The trial court only told them that Calvin was no longer a witness in the case and that they should not consider why he was no longer a defense witness. Based on these facts, despite Collins' contention, the prosecution did not improperly conduct itself but conducted itself in conformity to proper procedure. The prosecution properly notified the trial court, and then the trial court informed Calvin of his constitutional rights. Therefore, unlike the situation mentioned in *Hillard*, Collins' constitutional right to a fair trial was not violated. *Id.* at 766.

Collins next contends that the prosecutor's reference to his incarceration prejudiced his case by permitting the jury to form a negative opinion of him. Specifically, during his closing argument, when referencing the recorded telephone conversations between Collins and his family members, the prosecutor stated that these conversations were jail calls. However, the trial court had issued a pre-trial order that these telephone calls were not to be related to Collins' incarceration. Based on the prosecutor's characterization of these calls, Collins contends that the trial court should have granted his motion for a mistrial. We disagree.

When reviewing allegations of error in a closing argument, an appellate court must examine the overall fairness of the trial and not the culpability of the prosecutor. *Berry v. Commonwealth*, 84 S.W.3d 82, 90 (Ky.App. 2001). Reversing a conviction for prosecutorial misconduct is reserved for circumstances

so egregious as to render the trial fundamentally unfair. *Id.* Additionally, an admonition to the jury to disregard improper statements cures an error unless the statement was so prejudicial that an admonition could not cure it. *Price v. Commonwealth*, 59 S.W.3d 878, 881 (Ky. 2001).

The prosecutor's statements regarding the jail phone calls were inappropriate but did not rise to a level sufficient to deprive Collins of his constitutional right to a fundamentally fair trial. First, the statements were isolated and did not appear to have been calculated to inflame the jury. Second, and perhaps more importantly, the trial court admonished the jury that it was to disregard the prosecutor's reference to the jail phone calls. Further, the trial court asked the jury if they could follow his admonition, and they all answered in the affirmative. Under the circumstances of this case, the prosecutor's statements were not so egregious that Collins' trial was rendered fundamentally unfair.

Collins next contends the prosecution used one of its peremptory strikes in violation of his equal protection rights under the Fourteenth Amendment. Specifically, Collins contends the prosecution struck Juror No. 143530, the lone African-American juror in the *venire* panel, based on his race. The prosecutor explained that the juror stated that he had problems with sentencing someone to ten-years' imprisonment for a robbery and that he had bad experiences with police.

Collins' defense counsel argued that another venireman stated that he would have a problem imposing a ten-year sentence for the crime and other veniremen indicated that they had experienced problems with police in the past.

Thus, he argued that race must have been the prosecutor's motivation to strike Juror No. 143530, because the prosecutor did not strike the other similarly situated white veniremen. Following these arguments, the trial court ruled that the prosecution had offered a race-neutral reason for striking the juror and overruled Collins' *Batson* challenge. We agree with the trial court.

The United States Supreme Court, in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), established a three-step process to determine if a prosecutor's use of peremptory challenges violated a defendant's constitutional rights. In *Chestnut v. Commonwealth*, 250 S.W.3d 288, 300-01 (Ky. 2008), in restating the *Batson* requirements, our Supreme Court wrote the following:

A defendant first has the burden of making a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if this showing is made, then the burden shifts to the prosecutor to articulate a race-neutral reason for striking the juror in question; and third, the trial court must then determine whether the burden of proving purposeful discrimination has been met.

In reviewing the trial court's ruling, an appellate court must provide great deference to the trial court's decision. *Chatman v. Commonwealth*, 241 S.W.3d 799, 804 (Ky. 2007).

After reviewing the record, we conclude that the trial court properly ruled that the prosecution offered a sufficient race-neutral justification for striking the African-American venireman. Although he echoed sentiments regarding punishment and police relations that were similar to other veniremen, Juror No.

143530 was unique in that he was the only prospective juror who shared both sentiments. This uniqueness was sufficient to provide a race-neutral justification for the peremptory strike.

Collins next contends that the trial court erred when it failed to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle. Specifically, Collins contends that the evidence permitted a reasonable jury to find him not guilty of robbery and of theft by unlawful taking of property over \$300 but guilty of the unauthorized use of Childress' motor vehicle. Consequently, he contends that his conviction must be reversed because he was denied the right to receive a lighter sentence based on a conviction for a lesser-included offense. We disagree.

At the conclusion of a criminal trial, the trial court is required to give every instruction supported to any extent by the testimony, including giving instructions for lesser-included offenses. *Taylor v. Commonwealth*, 995 S.W.2d 355, 360-62 (Ky. 1999). However, a defendant is only entitled to an instruction on a lesser-included offense if “a reasonable juror could entertain a reasonable doubt as to the defendant's guilt of the greater offense, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense.” *Id.* at 362.

KRS 514.100 provides that “[a] person is guilty of the unauthorized use of an automobile or other propelled vehicle when he knowingly operates, exercises control over, or otherwise uses such vehicle without consent of the owner or person having legal possession thereof.” On the other hand, KRS 514.030(1)(a)



provides that “a person is guilty of theft by unlawful taking or disposition when he unlawfully [t]akes or exercises control over movable property of another with intent to deprive him thereof.”

Providing additional explanation of the statute, in *Lawson v. Commonwealth*, 85 S.W.3d 571 (Ky. 2002), our Supreme Court wrote that “[t]he Penal Code Commentary to KRS 514.100 explains that the offense of Unauthorized Use of an Automobile provides criminal sanctions for conduct that does not rise to the level of the Kentucky Penal Code theft offenses: This section is directed primarily against ‘joy riding’ generally committed by youngsters.” *Id.* at 577. Further, “[i]t is necessary because it covers conduct not amounting to theft under other sections of this chapter. There is no intention to deprive the owner of his property or to appropriate property.” *Id.* Thus, a defendant can only be convicted of the unauthorized use of an automobile when he takes the vehicle and intends to return the vehicle to its rightful owner. *Id.* at 578.

In the instant case, there was no evidence that Collins intended to return the vehicle to Childress. After taking Childress’ vehicle, he drove it to a different location and abandoned it. While he may contend that his father’s jail call offer to give Childress sufficient funds to obtain the car’s release from an impound lot, the jail call conversations in this case were heavily centered around convincing Childress to discontinue cooperating with police. Based on the facts of this case, there was no evidence sufficient to permit a jury to find upon a

reasonable basis that Collins intended to return the vehicle to Childress, its proper owner. Thus, no lesser-included instruction was warranted.

For the foregoing reasons, the Jefferson Circuit Court's judgment of conviction is affirmed.

ALL CONCUR.

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