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NOT TO BE PUBLISHED

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

NO. 2007-CA-000941-MR

RONALD BIRDSONG

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 06-CR-00142

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MOORE AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Ronald Birdsong (Birdsong) appeals the April 17, 2007, judgment of the Fayette Circuit Court in Indictment No. 06-CR-00142, following a jury trial, which adjudged him guilty of second-degree robbery and being a first-degree persistent felon. Birdsong was sentenced to a twelve-year term of imprisonment. For the following reasons, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

On February 23, 2005, the Fayette Grand Jury handed down Indictment No. 05-CR-01079 charging Birdsong with second-degree robbery and with being a second-degree persistent felon. Subsequently, this indictment was dismissed and replaced by superseding Indictment 06-CR-00142 wherein he was charged with second-degree robbery and with being a *first-degree* persistent felon. Birdsong pled not guilty and a jury trial was held on February 14 and 15, 2007.

Several witnesses testified about a robbery at the Fifth Third Bank at Bryant Station Road in Lexington, Kentucky, on June 21, 2005. According to the video recording of the trial, their testimony recounted that a man with a bandana over his face rushed into the bank, slammed open the door into the teller area behind the counter, and screamed “Get up! Give me the money! Open the drawer! Get up!” He then took the money from two drawers, and after a teller told him that was all the money, he jumped over the counter and fled out the door. Witnesses described the scene as one with a lot of noise and pandemonium including the robber knocking over a computer monitor upon jumping over the counter. Later, during an interview with Lexington police, Birdsong confessed to being the man who had taken the money, over \$6,000, from the Fifth Third branch.

During the trial, Birdsong represented himself and the Fayette County Legal Aid acted as stand-by counsel. Birdsong claimed throughout the jury trial that he used no force to facilitate the robbery, and thus, both he and counsel moved for a Judgment Notwithstanding the Verdict, based on the fact that Birdsong’s

actions during the bank robbery did not meet the elements for robbery second-degree. Additionally, during voir dire, a potential juror informed counsel that his nephew was currently serving time in a federal penitentiary following a robbery conviction. Even though the juror contended that his relative's conviction and incarceration would not affect his ability to serve as a juror, the prosecution used a peremptory challenge to exclude him from the panel. After hearing all the evidence, the jury found Birdsong guilty of second-degree robbery and of being a first-degree persistent felon, resulting in a twelve year prison term. On April 17, 2007, the Fayette Circuit Court entered its final judgment, sentencing him in accordance with the jury verdict. Thereafter, Birdsong appealed.

## ANALYSIS

### 1. Directed Verdict

Birdsong moved for a directed verdict of acquittal on the offense of second-degree robbery, claiming that the prosecution did not provide evidence as to the use of force, and therefore, the robbery charge should have been amended to a theft offense. The judge, however, overruled the motion for directed verdict.

On a motion for directed verdict, the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth and assume that the Commonwealth's evidence is true, reserving questions of weight and credibility to the jury. *Slaughter v. Com.*, 45 S.W.3d 873, 875 (Ky. App. 2000). Furthermore, the trial court may only enter a directed verdict of acquittal

only if the prosecution produces no more than a “mere scintilla” of evidence. *Com. v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). As a reviewing Court, we will reverse only if it was “clearly unreasonable for a jury to find guilt” under the evidence as a whole. *Id.* In other words, review of a case does not allow us to substitute our view of the evidence for that of the trial court but merely consider the decision of the trial judge in light of the proof presented. After considering the evidence, we affirm as to this issue.

The elements of robbery in the second-degree are found in Kentucky Revised Statutes (KRS) 515.030(1) wherein it is stated “[a] person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with the intent to accomplish theft.” “‘Physical force’ means force used upon or directed toward the body of another person.” KRS 515.010.

Here, the Commonwealth presented far more than “mere scintilla” of evidence. As previously recounted, Birdsong rushed into the bank with a bandanna over his face and slammed open the door to enter the area behind the teller counter, thereby creating a large, crashing sound. Witnesses testified that there was a lot of noise and pandemonium as Birdsong kept yelling “Get up! Give me the money! Open the drawers! Get up!” Birdsong pulled a printer out from under the teller counter, and pieces of the monitor and the pull rope were knocked on the floor behind the teller counter. Witnesses stated that Birdsong’s tone of voice was intimidating.

Kentucky courts have recognized that “intent may be inferred from the actions of a defendant or from the circumstances surrounding those actions.” *Marshall v. Com.*, 60 S.W.3d 513, 518 (Ky. 2001). Clearly, in the case at hand, more than a “scintilla of evidence” existed for a reasonable jury to determine that Birdsong’s behavior constituted the force necessary for robbery in the second-degree. While victims’ testimony of fear of assault is relevant, the law requires a showing that the defendant threatened immediate use of physical force. The jury, in the case at hand, found that Birdsong’s actions including the bandana over his face and his loud, vocal demands for money constituted a threat of immediate use of physical force upon the clerk. The jury is the finder of fact. *Robinson v. Com.*, 572 S.W.2d 606, 609 (Ky. App. 1978) (overruled on other grounds.) Thus, the circuit court did not err when it declined to direct a verdict of acquittal on the second-degree robbery charge.

## 2. *Batson* challenge

Birdsong also claims that the Commonwealth purposefully excluded an African-American juror from the panel of potential jurors on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69, 54 USLW 4425, (1986). In *Batson*, the United States Supreme Court held that peremptory challenges could not be used to purposefully exclude a potential juror on the basis of race. Upon raising an objection that a juror has been unlawfully

excluded, a defendant must make a prima facie showing of purposeful discrimination by showing facts and other circumstances that raise an inference that the prosecution unlawfully struck the potential juror because of that person's race. *Id.* at 96, 106 S.Ct. 1712. Once the defendant successfully makes the prima facie showing, the burden is then on the prosecution to demonstrate a race-neutral reason for exercising its peremptory challenge. *Id.* at 97, 106 S.Ct. 1712. When reviewing a ruling on a *Batson* challenge, the appellate Court will not disturb the trial court's decision unless it is found to be clearly erroneous. *Washington v. Com.*, 34 S.W.3d 376 (Ky. 2000). After reviewing all of the circumstances surrounding Birdsong's challenge of the Commonwealth's peremptory strike of the juror in question, the trial court found that no *Batson* violation occurred. We agree.

At the trial, immediately before the judge announced the numbers of the thirteen jurors for the case, the prosecution asked to approach. A bench conference ensued between the judge, the two prosecutors, and the two defense attorneys. The prosecution explained that it was using a peremptory challenge to strike Juror No. 94. The prosecution's rationale for striking the juror was because his nephew was serving time in the federal penitentiary following a conviction for strong-arm robbery, and therefore, the prosecution believed the juror might have an affinity for the defendant. Despite the juror's statement during voir dire that he could be unbiased, the prosecution believed the familial relationship was problematic and could create bias. Significantly, the prosecution chose to use a

peremptory strike rather than one for cause. Thereafter, the defense observed that they could raise a *Batson* challenge to the prosecution's use of the peremptory strike. But the trial court ascertained that no *Batson* violation occurred and the reason given for striking the juror was race-neutral.

It is undisputed that a peremptory challenge cannot be used merely to exclude member of the venire from the jury based solely on race. *Washington*, 34 S.W.3d 376. Here, however, before the defense objected to the challenge, the prosecutor had offered his explanation for the peremptory challenge. The prosecution explained its peremptory challenge was based on the fact that the juror might be influenced by his nephew's incarceration. At this point, the trial court must conduct an inquiry into the ultimate question of whether the party making the *Batson* challenge has met his burden of proving "purposeful discrimination." *Chatman v. Com.*, 241 S.W.3d 799, 804 (Ky. 2007). And after the trial court inquired about discriminatory intent on the part of the prosecution, it decided none existed. As far as Birdsong's contention that the trial judge did not make a "meaningful inquiry," the judge fully considered and rejected Birdsong's contention that the prosecution peremptorily struck this juror for racial reasons.

In his *Batson* challenge, Birdsong also suggests that, because the trial court denied the defense's request to strike Juror No. 207 for cause because he had been robbed by a black man thirty years ago and did not reject the prosecution's peremptory challenge of Juror No. 94, a racial pretext existed in the peremptory challenge. But, we fail to see how juxtaposition of the acceptance of the

*peremptory* strike of Juror No. 94 and the denial of the challenge for *cause* of Juror No. 207 supports this proposition. First, the two challenges are substantively different as one was for cause and one was peremptory. Second, and most noteworthy, the defense provided nothing to show racial bias on the prosecution's part when they peremptorily struck Juror 94. As a matter of fact, both jurors were ultimately discharged peremptorily – one by the defense and one by the prosecution. Given these circumstances, we find nothing to support Birdsong's allegation that the trial court's actions were clearly erroneous.

### CONCLUSION

In sum, we find no error in the trial court's decision to denying Birdsong's motion for directed verdict of acquittal on the offense of second-degree robbery, as well as overruling Birdsong's objection to the prosecution's use of a peremptory challenge to strike an African-American juror. Therefore, finding that Birdsong's conviction for second-degree robbery and first-degree persistent felony offender was sufficiently supported by the evidence adduced at trial, we affirm the April 17, 2007, judgment of the Fayette Circuit Court.

ALL CONCUR.



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