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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000720-MR

DOMONICK YOUNG — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 11-CR-00372

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFRIMING

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON JUDGES.

MOORE, JUDGE: The appellant, Domonick Young, appeals a final judgment of the Christian Circuit court finding him guilty of second degree burglary in violation of Kentucky Revised Statute (KRS) 511.030(1). Young contends that the circuit court erred by denying his motion made pursuant to *Batson v. Kentucky*. 476 U.S. 79, 106 S.Ct. 1712 (1986). He also alleges that the circuit court erred

when it denied his motion for a directed verdict. We disagree with Young's contentions and affirm his conviction.

In August of 2011, Young was incited on one count of second degree burglary. He and his codefendant, Ryan Oatts, proceeded to trial. After vior dire, the attorneys for both defendants and the prosecutor returned to chambers. The court asked if there were any objections to each other's preemptory strikes. Oatt's counsel stated that he would like to know the race-neutral reason for the prosecutor's removal of a potential African American juror. The prosecutor indicated that he removed the juror because she was unresponsive to questions posed by any of the counsels. The court determined that the race-neutral reason was sufficient, and the case proceeded to trial.

The Commonwealth presented four witnesses, two Christian County Sherriff's deputies, the property owner, Dr. Frederick Robbe, and the neighbor who alerted the police, Walter Logan. According to his testimony, on June 25, 2011, Walter Logan observed a white four-door sedan pull into the parking lot of an adjacent property owned by Dr. Robbe. Logan's view was unobstructed and he observed, through binoculars, one white male and one African American male exit the vehicle. Logan was not immediately suspicious, as the property is commonly used for youth group meetings. However, when the men proceeded down the hill and to the rear of the cabin, his interest peaked. Logan became worried when they walked from the rear of the cabin to the car multiple times. Logan then called his other neighbor, Steve Dunning, and arranged for Dunning to accompany him to Dr.

Robbe's property. When Logan and Dunning arrived at Dr. Robbe's, the two men fled to the vehicle. However, Logan blocked the vehicle's exit routes. Logan then claimed to be carrying a gun and asked the men to step out of the car and await the police. During this time, Logan observed a television in the gravel driveway that was not there prior to the men's arrival.

Deputies from the Christian County Sheriff's Office arrived soon thereafter. Both deputies testified that the men told conflicting and inconsistent stories about whether or not they had permission to take the television and whether or not they had gone inside the home to retrieve it. Deputy Hawkins indicated that Young admitted they entered the home to retrieve a television they had been paid to steal. Dr. Robbe testified that neither man had permission to be on the property or to remove the television.

At the close of the Commonwealth's case, Young's attorney entered a motion for a directed verdict and contended that the Commonwealth failed to prove intent. She further contended that this would be proven by her client's testimony.

The inconsistencies between Young and Oatts's stories continued when they testified. Young testified that Oatts came to his house and told him his uncle said they could take the television. Young claimed he never told Deputy Hawkins they would receive money for moving the television. Oatts, on the other hand, claimed Young said they should take a ride and knew where they could make

$150.00. At the close of the trial, Young's counsel renewed the motion for directed verdict, but presented no additional arguments.

Both Oatts and Young were convicted of second degree robbery and received sentences of five years' imprisonment. On appeal, Young contends that the court erred when it denied his *Batson* challenge and his motions for a directed verdict. As a result, Young asserts he is entitled to a new trial. We will address the arguments in turn.

"A trial court's ruling on a *Batson* challenge will not be disturbed unless clearly erroneous." *Washington v. Commonwealth*, 34 S.W.3d 376, 380 (Ky. 2000). However, before considering the court's ruling, we must address an issue of preservation. The *Batson* challenge was not posed by Young's counsel. Instead, Oatt's counsel inquired as to the race-neutral reason for the strike. Young's counsel remained silent. The Commonwealth responded and explained the juror was unresponsive to the questions posed by all three counsels. The court determined that the reason was race-neutral and noted that no pattern had been established. Young's attorney remained silent, and neither codefendant's counsel's challenged the racial neutrality of the explanation. On appeal, Young contends the motion was made on behalf of both parties. However, "where two or more defendants are being tried together, it is incumbent upon each party to timely make the court aware of his objection to any of the proceedings. This may be done on behalf of one of the parties or jointly on behalf of others, but the court must be informed of the position taken by a party or he cannot later complain." *Price v.*

Commonwealth, 474 S.W.2d 348, 350 (Ky. App. 1971). Young's attorney's silence did not make the court aware of his position, and the issue is therefore unpreserved. However, even if we assume that the issue was preserved; Young is not entitled to a new trial.

There is a three step process for evaluating a *Batson* challenge. *Washington*, 34 S.W.3d at 379.

> First, the defendant must make a prima facie showing of racial bias for the preemptory challenge. Second, if the requisite showing has been made, the burden shifts to the Commonwealth to articulate "clear and reasonably specific" race-neutral reasons for its use of a preemptory challenge… Finally, the trial court has the duty to evaluate the credibility of the proffered reasons and determine if the defendant has established purposeful discrimination.

Id. When Oatts's attorney questioned the race-neutral reason for the preemptory strike, he did not make a single assertion as to racial bias. Instead he merely said, "your honor, we would like to know the racially neutral reason[.]" Likewise, he did not challenge the Commonwealth's response. Absent any challenge by either defense counsel, the court evaluated the explanation that the juror was unresponsive and determined it was sufficient. This decision was not clearly erroneous.

Next we turn to the court's denial of Young's motion for a directed verdict. Once again, the Commonwealth contends that the issue is unpreserved. Our review of the record reveals that Young's attorney entered a motion for directed verdict at the close of the Commonwealth's case and asserted that the

Commonwealth failed to establish intent. Young's counsel further averred that this point would be established via the defense's witnesses. At the close of the defense's case, Young's counsel renewed the motion; but, presented no supporting arguments.

As the Commonwealth points out, Kentucky Rules of Criminal Procedure 50.01 requires a motion for directed verdict be supported by specific grounds and "Kentucky appellate courts have steadfastly held that failure to do so will foreclose appellate review of the trial court's denial of the directed verdict motion." *Pate v. Commonwealth*, 134 S.W.3d 593, 597-98 (Ky. 2004). However, Young's counsel did indicate her reasoning for the first directed verdict motion. We will assume, for the sake of argument, that the second motion was also properly supported.

When reviewing the denial of a motion for directed verdict, we must determine if "under the evidence as a whole, it would be clearly unreasonable for the jury to find guilt... ." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). "[I]ntent may be inferred from the act itself or from the circumstances surrounding it." *Talbott v. Commonwealth*, 986 S.W.2d 76, 86 (Ky. 1998). Given the circumstances of this case, including the conflicting stories presented by Young and Oatts, the eyewitness testimony by Logan, and the fact that Logan and Oatts were caught on property they did not have permission to be on, with a television they did not have permission to remove, it was not clearly unreasonable for the jury to find guilt.

For the foregoing reasons, Young's conviction is affirmed.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: I agree that the evidence was more than sufficient to affirm Domonick Young's conviction, but I disagree with the majority's conclusion that a prosecutor's explanation for removing a juror because she was unresponsive to questions posed by counsel was a sufficient race-neutral reason.

The same general explanation, that a juror was unresponsive to questions, could justify removing many potential jurors, however, only this African American juror was singled out. I do not believe such an explanation is sufficient under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), to the extent that other potential jurors were equally unresponsive yet not struck from the juror pool. Under these circumstances, I believe the prosecutor was required to articulate a more specific reason that applied only to this juror or show that this reason also applied to other jurors being removed before the African American juror could properly be excluded on this basis. *Compare France v. Commonwealth*, 320 S.W.3d 60, 67-68 (Ky. 2010) (in response to challenges for striking African American jurors, prosecutor gave sound race-neutral reasons for striking jurors and in response to follow up questions explained that the same reasons were also used

to strike white venire members). However, a reversal is not warranted because of the overwhelming evidence of guilt.

Accordingly, I concur that Young's conviction should be affirmed.

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