RENDERED: NOVEMBER 1, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky
# Court of Appeals

NO. 2012-CA-001088-MR

DEMONTRAY ASHFORD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 10-CR-003279

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MAZE, JUDGES.

CAPERTON, JUDGE: Demontray Ashford appeals the jury verdict convicting him of one count of complicity to commit first-degree robbery and one count of possession of a handgun by a convicted felon for which Ashford was sentenced to fifteen years imprisonment. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm.

The facts of this matter were testified to at a jury trial. Forty-eight year old Ronald Burns spent September 4, 2010, at a party at a friend's house watching football in Louisville, Kentucky. In the span of three to five hours, Burns consumed twelve to thirteen beers. Between 2 and 2:30 a.m. Burns left the party on foot to go to another friend's house. While walking down Hale Street near 34th, not far from his house on South 34th Street, Burns was approached on his left by an individual wearing a red hooded sweatshirt (a "hoodie") who asked if he wanted to buy some "weed". When Burns declined the offer to purchase marijuana, another individual approached on his right questioning his response. As Burns turned to his right to see this individual, the click of a weapon engaging a round drew his attention back to the individual on the left. As he turned to his left, Burns was immediately hit on the right and told to "give it up". Responding that he didn't have anything, the assailants told him "yes, you do" and repeatedly hit him, in addition to holding a gun to his left temple. Burns slightly saw the face of the individual with the gun, but not well enough to identify him. He could nevertheless describe their clothing despite his prior libations because the assault had a sobering effect. Before running to a white Cadillac parked five to six cars away from the scene, the assailants removed Burn's pants.

At 3:16 a.m., Burns called 911 from the front porch of his house. He reported that six black males wearing red and black hoodies had just jumped him at 34th and Hale; four beat him up, the fifth held a gun to him, and the sixth remained in a white Cadillac Coupe de Ville. He reported to 911 that the car went toward

Broadway on 34th. Burns did not request any medical treatment despite his swollen face and eye.

Responding to the 911 call, Louisville Metro Police Department ("LMPD") Officer Williams found a white Cadillac with an Indiana license plate[1] parked in the 600 block of Lindell Avenue, less than a mile from the incident and within fifteen minutes of the 911 call. Ducked down in the back seat were Ashford and Jerry Stokes (co-defendant). Officer Williams removed Ashford and Stokes from the car and handcuffed them. Afterward, Officer Williams found a 9 mm Luger handgun under and behind the right rear tire next to the curb. According to Officer Williams, neither Ashford nor Stokes had actual possession of the handgun.

Forty-five minutes after the incident, Officer Williams directed LMPD Officers Schuhmann and Perez to drive Mr. Burns, seated in the back of a police car, to where Officer Williams had Ashford and Stokes handcuffed behind the Cadillac for a show-up identification. According to Burns, the officers told him that they were taking him to identify the individuals they had caught. Burns testified that he first saw the individuals seated on the curb and without prompting he identified the car and the individuals by their clothes. Once they were brought in front of the police car's spotlight, Burns again identified the individuals by their

[1] Burns testified that the Cadillac did not have a license plate and that he did not mention a license plate to 911 dispatch.

clothes[2]. Both Stokes[3] and Ashford were placed under arrest for first-degree robbery.

That same night, the police determined the owner of the white Cadillac via the license plate to be Robert Evans, who had loaned the car to his daughter (Ms. Evans), who had then loaned the car to Michael Broughton. Ms. Evans gave the police information[4] as to where Broughton could be located and on September 30, picked him out from a photo-pack. Burns could not pick Broughton out from the same photo-pack.

Six weeks later, on November 18, Stokes and his attorney met with Detective Scanlan. In a recorded conversation, Stokes placed Broughton at the scene and as the driver of the white Cadillac by picking him out of the same photo-pack shown to Ms. Evans and Burns. Stokes admitted to being friends with Ashford but did not know Broughton. Stokes told the detective that only he, Ashford, and Broughton were in the car. Stokes told the police that Burns was punched but that he did not remember seeing a gun. Stokes admitted that all three fought the victim but claimed that someone else removed his pants. Stokes

[2] In contrast to the 911 call where he identified the assailants as wearing "red and black hoodies" and in the suppression hearing where he identified one assailant as wearing red, at trial Burns testified that he first described one assailant as wearing a black hoodie and the assailant with the handgun as wearing a red hoodie and brown color pants. The red sweatshirt that Ashford wore that evening was introduced into evidence and the $5.00 in cash that he had in his possession. Stokes had $336 in cash in his possession and no clothing of his was introduced.

[3] Stokes was a juvenile at the time of the robbery.

[4] Broughton later threatened Ms. Evans for talking to the police.

claimed that after the incident, he ran almost a mile to where the Cadillac was found and denied getting into the car and being driven away from the scene.[5]

On May 8, 2011, Stokes had a second conversation with Detective Scanlan and the Commonwealth, although this conversation was not recorded. Stokes stated that it was Broughton's idea to get Burns. He stated that while he did not see Ashford with a gun during the robbery, he did see him hide the gun behind the tire of the car. Stokes explained that he omitted any information about the gun because he was afraid of Broughton-who in a separate incident had shot a woman in the neck.[6]

One month after this conversation, the Commonwealth recommended amending Stokes's first degree robbery charge to facilitation to robbery and a recommendation of diversion, in exchange for Stokes's pleading guilty and agreeing to testify against Ashford.

The jury found Ashford guilty of complicity to first-degree robbery but announced they were hung three to nine for not guilty on the charge of carrying a concealed deadly weapon. Stipulating to his status as a convicted felon, Ashford was then found guilty of possession of a handgun by a convicted felon. During the penalty phase, evidence was introduced that Ashford had three separate convictions for first-degree robbery from when he was seventeen. The ten year concurrent sentences had been probated for five years. The jury then

[5] After this conversation with LMPD, Stokes was released on home incarceration.

[6] At some point, Stokes received a letter from Ashford asking him to "take the heat" for the charge because Stokes was a juvenile and would get probated.

recommended ten years on the current first-degree robbery and five years on possession of a handgun by a convicted felon, to run consecutively. The court so sentenced Ashford[7]. It is from this conviction and sentence that he now appeals.

On appeal, Ashford presents two arguments, namely, (1) the trial court's findings of fact were clearly erroneous as to the Commonwealth's reasons for striking three African-American jurors, violating Ashford's Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution; and (2) the court abused its discretion in failing to suppress the witness's out of court show-up identification of Ashford and subsequent in court identification. In response, the Commonwealth argues, (1) the circuit court's determinations on the alleged Batson violations are not clearly erroneous; and (2) the circuit court did not abuse its discretion in not suppressing the show up identification of Ashford within minutes of the robbery. With this in mind we turn to the first issue on appeal, the *Batson* challenge.

Ashford first argues that the trial court's findings of fact were clearly erroneous as to the Commonwealth's reasons for striking three African-American jurors after his *Batson* challenge. The court first found that Ashford had made a *prima facie* case of racial discrimination because the Commonwealth striking the three remaining African-American jurors on the venire panel with peremptory strikes. The Commonwealth objected to the trial court's finding as to the *prima facie* case of discrimination and informed the court that Seat #25 was struck

[7] At this sentencing, the court also revoked Ashford's probation and sentenced him to an additional consecutive ten years.

because she had sat on a jury panel the previous week that had failed to reach a verdict.[8] The Commonwealth argued that Seats #5 and #14 had been peremptorily struck for two reasons, one of which was that each responded during voir dire that they would require more than circumstantial evidence to convict. Additionally, Seat #14 had a previous indictment, although was not a convicted felon, and had failed to inform the court on his juror information sheet that he had previously been a defendant; and the Commonwealth explained that it had also struck Seat #5 because she lived close to the scene of the robbery. The court concluded that the Commonwealth's rationale was "thin" on all three jurors but found that the responses were race-neutral and let the Commonwealth's peremptory strikes stand, resulting in Ashford, an African-American, being tried by a jury composed of non-African-Americans.

It is well-established that "[t]he government cannot use its peremptory challenges in a criminal case to exclude members of the venire from the jury solely on the basis of their race." *United States v. Hill*, 146 F.3d 337, 340 (6th Cir.1998). Under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and its progeny, claims of a race-based peremptory challenge by the prosecution are examined by use of a three-step test. First, the defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. *Batson*, 476 U.S. at 96–97, 106 S.Ct. at 1722–23; *see also Hernandez v. New York,* 500 U.S. 352, 358, 111 S.Ct. 1859, 1865–66, 114 L.Ed.2d 395 (1991) (plurality

[8] The Commonwealth also struck two non-African American jurors for the same reason.

opinion); *Thomas v. Commonwealth*, 153 S.W.3d 772, 777 (Ky. 2004). "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723; *see also Thomas*, 153 S.W.3d at 777. After such an explanation is offered, "The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724; *see also Thomas*, 153 S.W.3d at 777.

The question then becomes whether the Commonwealth stated an adequate race-neutral basis for the strike. "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror." *Hernandez*, 500 U.S. at 360, 111 S.Ct. at 1866. Thus, "The issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id*. The burden of meeting this standard is slight since, "The prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723; *see also Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992). Indeed, it does not even "demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995). As long as the reason given does not deny equal protection, it is enough to satisfy the Commonwealth's burden. *See id*., 514 U.S. at 769, 115 S.Ct. at 1771.

The third step of the *Batson* analysis requires the trial court to determine whether the Commonwealth's race-neutral reason was actually a pretext for racial discrimination. "Because the trial court's decision on this point requires it to assess the credibility and demeanor of the attorneys before it, the trial court's ultimate decision on a *Batson* challenge is like a finding of fact that must be given great deference by an appellate court." *Commonwealth v. Coker*, 241 S.W.3d 305, 308 (Ky. 2007); *see also Gray v. Commonwealth*, 203 S.W.3d 679, 691 (Ky. 2006); and *Batson*, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21. Accordingly, "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 1207, 170 L.Ed.2d 175 (2008); *see also Wells v. Commonwealth*, 892 S.W.2d 299, 303 (Ky. 1995).

Our case law holds that, "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Snodgrass*, 831 S.W.2d at 180, quoting *Anderson v. Bessemer City,* 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

Thus, in the matter *sub judice*, we must determine if the trial court erred in applying *Batson* which we review under the clearly erroneous standard. *Gray v. Commonwealth*, 203 S.W.3d 679, 691(Ky. 2006) ("The trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference, and must be accepted unless they are clearly erroneous.") (Internal citations omitted).

We agree with the trial court that Ashford made a *prima facie* case of discrimination satisfying the first step of a *Batson* challenge. As noted, the Commonwealth struck the three remaining African-American jurors from the venire panel, using three out of the nine peremptory strikes. The Commonwealth when questioned by the court explained each of the nine peremptory challenges. The issue of concern is the *Batson* challenge to Seats # 5, 14, and 25.

The Commonwealth stated that Seat #24 was struck due to the bored attitude and inappropriate laughter the juror exhibited throughout the proceeding. Then the Commonwealth explained that Seats # 1, 5, 6, 14, and 19 were struck due to their response that they would need more than circumstantial evidence to convict. The Commonwealth stated that Seat #6 was additionally struck due to a conflict on Friday. Seat #14 was additionally struck due to his failure to inform the court of his prior status as a defendant and reiterated that they believed he should have been struck for cause. Ashford objected that Seat #5 had not responded that she would need more than circumstantial evidence. The Commonwealth stated that their notes reflected that Seat #5 had responded in such a way. Then the Commonwealth explained that it had also struck Seat #5 as she lived close to the scene of the robbery. Ashford then questioned whether others who lived close to the scene had also been struck. The court remembered one other juror stating that they lived close to the scene but that juror had already been excused.

The remaining three strikes were used by the Commonwealth to remove jurors, including Seat #25, who had sat on a jury panel the previous week

that had failed to reach a verdict. As previously noted, Seats #5, 14, and 25 were African-American.

Having reviewed the transcript of the proceedings and the video record, we believe that the Commonwealth's explanations for Seats #14 and 25 were patently race neutral. *See Hernandez*, 500 U.S. at 360, 111 S.Ct. at 1866 ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.").

More troubling is the Commonwealth's explanation for Seat #5 as it is unclear whether she responded affirmatively to needing more than circumstantial evidence in order to convict[9]. However, the Commonwealth readily gave their answers for the strike and seemed to truly believe that the juror had responded affirmatively. While their secondary explanation appears to be an after-thought, we are unprepared to say that such a reason was inherently discriminatory in its intent. Thus, we turn to the third step of *Batson,* whether the race-neutral explanation is a pretext for discrimination.

The trial court was presented conflicting accounts of *voir dire* by the attorneys before it. However, we reiterate that the trial court's ability to assess the credibility and demeanor of the attorneys before it requires this Court to give the trial court's ultimate decision on a *Batson* challenge great deference. *See Coker* at

[9] Our review of the record does not indicate that Seat #5 stated her badge number on the record when answering affirmatively; however, the camera was not positioned on the juror, so we are unclear what her facial expressions were. We note that the Commonwealth had relied on body language and facial expressions in striking non African-Americans so we are unclear whether such was the case here.

308. The trial court concluded that the Commonwealth's explanations for their peremptory strikes were ultimately race neutral and non-discriminatory. After our review of the evidence, we must conclude that the trial court's finding is not clearly erroneous. Thus, we decline to reverse on this ground.

We now turn to the second issue presented, whether the court abused its discretion in failing to suppress the witness's out of court show-up identification of Ashford and subsequent in-court identification. Ashford argues that the show-up identification of him in a red sweatshirt handcuffed next to a white Cadillac was unduly suggestive and, thus, created a substantial likelihood of misidentification given the totality of the circumstances.

The trial court held a hearing on this matter and overruled Ashford's motion to suppress the show-up identification. In so doing, the court concluded that the identification procedure was highly suggestive, as the attention was on a single individual, Ashford; however, Burns's identification of Ashford was not the result of procedures that created a substantial likelihood of irreparable misidentification. The court was impressed with Burns's recollection of the incident and the identification of Ashford later; and that he freely admitted any limitations on his recollection of events. While Burns's could not identify Ashford's face, the court was convinced that Burns's description of the incident, including, his assailants' clothing[10], and the identification of Ashford based on

[10] Ashford questions the reliability of Burns's description of assailants in "red and black" hoodies, in Louisville, on the day of the UK-U of L football game. We note that these concerns did not persuade the court below given the testimony of Burns. We decline to reverse, as "[a]t a suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable

clothing without hesitation or prompting from the officers within a short period of time after the incident was sufficient to convince the court that the identification of Ashford was not the result of the show-up procedure. Thus, the court overruled the motion to suppress the show-up identification.

We will not disturb the circuit court's findings of fact subsequent to a hearing on a motion to suppress if they are supported by substantial evidence. *Drake v. Commonwealth*, 222 S.W.3d 254, 256 (Ky. App. 2007). However, the circuit court's legal conclusions are reviewed *de novo*. *Id.*

*Sub judice,* the court below concluded that the show-up identification procedure was suggestive, to which we agree. Thus, the central question is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188,199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). When looking to the totality of the circumstances,

> the relevant factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

*Id.* at 199–200.

---

inferences from the testimony is vested in the discretion of the trial court." *Sowell v. Commonwealth*, 168 S.W.3d 429, 431 (Ky. App. 2005) citing *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky.2002).

We agree with the trial court that in considering the totality of the circumstances, Ashford's identification was reliable given the short period of time that had elapsed from the incident to the identification, the accuracy of Burns's description of the assailants' clothing, his degree of attention, and the level of certainty Burns possessed when he identified Ashford. Accordingly, we decline to reverse on this ground.

In light of the aforementioned, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Cicely J. Lambert
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky