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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000260-MR

TERRANCE DEMARCUS WINN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 11-CR-00658

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, THOMPSON AND VANMETER, JUDGES.

VANMETER, JUDGE: Terrance Demarcus Winn appeals from the January 15, 2013, final judgment of flagrant non-support and persistent felony offender, and sentence of imprisonment of the Fayette Circuit Court. We affirm.

Winn is the biological father of D.J.M., born March 16, 1996. A paternity action was filed against Winn on March 16, 1996. On January 31, 2001, Winn was ordered to pay \$161.00 per month in child support, retroactively effective April 1, 1996. After he failed to appear at a 2001 hearing regarding his failure to fulfill his support obligation, Winn was held in contempt; sentenced to 30 days incarceration; and given a purge amount of \$1,000.00, which he satisfied in order to be released from custody. The case was then referred for criminal prosecution of nonpayment. Winn was subsequently convicted of flagrant nonsupport and sentenced to one year, probated for five years. As a result of his continued failure to pay, Winn's probation was revoked and he was incarcerated for a portion of 2005. Upon his release, Winn's obligation of \$161.00 per month continued. Nonetheless, Winn continued to neglect his obligation and in 2010, a new warrant was issued. An indictment was entered on June 7, 2011, for the charges of flagrant nonsupport and first-degree persistent felony offender ("PFO"). Following a jury trial, Winn was found guilty of both charges and sentenced to five years on the flagrant nonsupport charge, enhanced to eight and a half years by the PFO charge. This appeal followed.

Winn's first argument on appeal is that the Commonwealth failed to prove every element of the offense. In particular, Winn argues that the Commonwealth failed to prove that Winn could reasonably provide the support which he failed to pay. We disagree. KRS¹ 530.050 provides, in relevant part:

¹ Kentucky Revised Statutes.

[a] person is guilty of flagrant nonsupport when he persistently fails to provide support which he can reasonably provide and which he knows he has a duty to provide by virtue of a court or administrative order to a minor.

KRS 530.050(2). “[T]he ability to provide support is an element of the offense of Flagrant Nonsupport and the Commonwealth thus bears the burden of proof as to that element.” *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003).

Winn made a motion for a directed verdict to the trial court based upon a lack of evidence as to this element.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Here, the Commonwealth provided evidence that Winn had a sporadic history of employment in the food service industry, that he did not suffer a physical impairment that would prevent him from continuous employment, and that he was able to provide child support for other children. Testimony further provided that the amount of child support ordered was calculated in consideration of a 40-hour work week at the wage of \$5.15 per hour. Given the discretion with which the jury

is permitted to determine the credibility and weight of the evidence, we find no error with the trial court's denial of Winn's motion for a directed verdict.

Winn's next argument is that the trial court erred when it allowed the Commonwealth to present evidence of Winn's prior flagrant nonsupport conviction in violation of Kentucky Rules of Evidence (KRE) 404. In general, evidence of other crime, wrongs, or acts "is not admissible to prove the character of a person in order to show action in conformity therewith." KRE 404(b). Such evidence, however, may be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

Id. Here, the Commonwealth indicated that the evidence was being used to show intent, knowledge, and identity, and also argued that it was intertwined with the evidence in the current case. Winn argues that the evidence was not necessary to prove knowledge because Winn did not argue lack of knowledge as a defense to the flagrant nonsupport charge. We disagree. Knowledge of a duty to pay is an element of flagrant nonsupport which must be proven by the Commonwealth. KRS 530.050(2). Therefore, Winn's failure to argue lack of knowledge as a defense has no bearing on the Commonwealth's burden to prove the existence of knowledge in order to prove the elements of nonsupport. Moreover, Winn was

also indicted for a PFO charge, of which one of the elements is proof of other convictions. KRS 532.080. Accordingly, we find no error with the introduction of Winn's prior nonsupport conviction.

Winn's next argument is that the trial court erred when it rejected Winn's *Batson* challenges. In particular, Winn challenged the Commonwealth's peremptory strike of two African-American jurors as being racially discriminatory. We disagree that the trial court's rejection of Winn's challenge to the strikes was error.

Case law well establishes that the Commonwealth cannot use its peremptory juror challenges as a means to exclude potential jurors solely on the basis of their race. Under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), claims of a race-based peremptory challenge by the prosecution must be 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; *Thomas v. Commonwealth*, 153 S.W.3d 772, 777 (Ky. 2004). Next, the burden shifts to the Commonwealth to produce a racially neutral explanation for its challenge. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723; *see also Thomas*, 153 S.W.3d at 777. A reason is race-neutral when “it could apply with equal force to a juror of any race.” *Mash v. Commonwealth*, 376 S.W.3d 548, 555 (Ky. 2012). Lastly, the trial court must determine if the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724; *Thomas*, 153 S.W.3d at 777. We review a trial

court's denial of a *Batson* challenge for clear error. *Washington v. Commonwealth*, 34 S.W.3d 376, 380 (Ky. 2000).

In the case at hand, Winn argues that the trial court's denial of his *Batson* challenge is clear error because the court did not engage in the final step of the three-part analysis. We disagree. The final step of the *Batson* process requires the trial court "to determine whether the prosecutor's race-neutral reason was actually a pretext for racial discrimination." *Mash*, 376 S.W.3d at 556. In short, the trial court must determine whether it believes the prosecutor's proffered reason.

Id.

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. In the absence of exceptional circumstances, appellate courts should defer to the trial court at this step of the *Batson* analysis.

Mash, 376 S.W.3d at 556 (citations omitted). Here, the Commonwealth stated that they had struck the first juror at issue because he was the only juror who was unemployed and that employability was an important factor in their case against Winn. The Commonwealth then indicated that the second juror at issue was struck in part for not disclosing several speeding tickets and dismissed charges, but primarily because his demeanor towards the court appeared frustrated and irritated. Thereafter, the trial court clearly indicated that it found the reasons to be race-neutral, and thus fulfilled the final step of *Batson* analysis. Contrary to Winn's suggestion, the trial court is not also required to observe the offensive conduct

described by the Commonwealth. “It is not implausible that the prosecutor noticed a reaction that the judge and defense counsel did not or could not see.” *Mash*, 376 S.W.3d at 556. Although a prosecutor could, in theory, lie about a juror’s conduct, the third step of *Batson* grants the trial court the discretion to determine the prosecutor’s credibility. *Id.* The trial court here chose, appropriately within its discretion, to believe the prosecutor. Winn’s argument is therefore without merit.

Winn’s final argument is that the Commonwealth violated KRS 532.055 when it exceeded the scope of permissible evidence during the penalty phase of Winn’s trial. In particular, Winn challenges the admission of positive drug screens acquired during his prior probation and argues that the admission of this information resulted in a harsher sentence. He seeks review of the issue under the palpable error standard of Rules of Criminal Procedure (RCr) 10.26.

“A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, and the error must have resulted in ‘manifest injustice.’” *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005) (citations omitted). Therefore, a reversal under palpable error analysis is appropriate only when “the reviewing court believes there is a ‘substantial possibility’ that the result in the case would have been different without the error.” *McDaniel v. Commonwealth*, 415 S.W.3d 643, 649 (Ky. 2013) (citation omitted). Without embarking upon a detailed account of the evidence which Winn challenges, the sentence itself is sufficient to defeat his claim of harshness. The crime of flagrant nonsupport is a class D felony which carries a sentence of (1) to (5) years. KRS

530.050(6); KRS 532.060(2)(d). In addition, a first-degree PFO charge on a class D felony should carry a sentence of (10) to (20) years. KRS 532.080(b). For whatever reason, Winn received a sentence of only eight and a half years, a sentence which directly contradicts an argument of harshness. Moreover, it has been held that recommended sentences which conform to the legal limits fail to prove prejudice sufficient to show the existence of palpable error. *Mayo v. Commonwealth*, 322 S.W.3d 41, 58 (Ky. 2010). Accordingly, Winn's argument is without merit.

For the foregoing reasons, the January 15, 2013, judgment and sentence the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Molly Mattingly
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky