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RENDERED: FEBRUARY 20, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000645-MR

EUGENE EMMANUEL BATES — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 11-CR-01115

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Eugene Emmanuel Bates, appeals as a matter of right from a judgment of the Fayette Circuit Court convicting him of second-degree burglary, resisting arrest, of being a first-degree persistent felony offender (PFO), and sentencing him to a total of twenty years' imprisonment.

On appeal, Appellant raises two arguments: (1) that the trial court erred in refusing to give the jury an instruction on the lesser included offense of criminal trespass; and (2) that the Commonwealth committed a *Batson* violation in exercising a peremptory challenge on Juror 4460. For the reasons set forth below, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

According to evidence presented at trial, Appellant entered the apartment of Donald Lutz and Chase Bablitz while they were not at home. While inside, Appellant collected a number of personal items belonging to either Lutz or

Bablitz, including two laptop computers, a gun, and a hat filled with coins. As he exited the apartment, Appellant was seen by Lutz and Bablitz, who gave chase. During the chase, Appellant threw the computers and coins at his pursuers. Lutz and Bablitz captured Appellant, Bablitz wrestled a gun from him, and Appellant was restrained until the police arrived to arrest him. Appellant resisted police efforts to put his hands behind his back, and he eventually had to be subdued by an electroshock taser weapon.

In an interview with police following his arrest, Appellant said that he was acquainted with Lutz and Bablitz because he had previously purchased drugs from them. Appellant told the police that when he entered the apartment his only intention was to speak to Lutz and Bablitz about his dissatisfaction with a prior marijuana purchase. He told the police that because he believed they were "playing games" with him, he decided to steal items from the apartment. He also said that when Lutz and Bablitz returned while he was still in the apartment, he leaped from a window to escape detection.

Consequently, Appellant was indicted for first-degree burglary, possession of a handgun by a convicted felon, four counts of first-degree wanton endangerment, resisting arrest, possession of burglary tools, and for the status offense of first-degree persistent felony offender.

At trial, Lutz and Bablitz denied that they had ever met Appellant before seeing him escaping their apartment. They also denied ever selling drugs to him. The jury found Appellant guilty of second-degree burglary and resisting

arrest.[1] In the penalty phase the jury determined that Appellant was a first-degree PFO and recommended a total sentence of twenty years' imprisonment. The trial court entered judgment consistent with the jury's verdict and sentencing recommendation. This appeal followed.

II. APPELLANT WAS NOT ENTITLED TO A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS

Appellant argues the trial court erred in denying his request for an instruction on the lesser included offense of first-degree criminal trespass because the jury could have reasonably concluded from the evidence that he did not enter the apartment with the contemporaneous intent to commit a crime, therefore making him guilty of first-degree criminal trespass rather than second-degree burglary. As relevant here, first-degree criminal trespass differs from second-degree burglary only to the extent that burglary requires that the defendant have "the intent to commit a crime" whereas the trespass statute does not.

Second-degree burglary is defined in KRS 511.020(1) as follows:

> (1) A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling.

First-degree criminal trespass is defined in KRS 511.060(1) as follows:

> (1) A person is guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a dwelling.

[1] The jury acquitted Appellant on all four counts of wanton endangerment and possession of burglary tools. The trial court subsequently dismissed the charge of possession of a firearm by a convicted felon.

In determining whether to give a jury instruction on a lesser included offense "[a] trial court is required to instruct the jury on every theory of the case reasonably deducible from the evidence." *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007) (citing *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000)); see also CR 9.54(1). Instructing the jury on a lesser included offense is required where "considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." *Swan v. Commonwealth*, 384 S.W.3d 77, 99 (Ky. 2012) (quoting *Caudill v. Commonwealth*, 120 S.W.3d 635, 668 (Ky. 2003)); see also *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998) (holding a lesser included offense instruction is not required where no evidence supports the instruction).

As applied in the circumstances presented in this case, Appellant was entitled to an instruction on the lesser included offense of first-degree criminal trespass if, and only if, the jury could have reasonably believed from the evidence that Appellant had no intent to commit a crime when he entered the dwelling or while he remained therein. See *Martin v. Commonwealth*, 571 S.W.2d 613, 615 (Ky. 1978) (holding that in a situation where the evidence plausibly demonstrated that the defendants unlawfully entered a home to investigate a burglary, rather than to commit a crime, a jury instruction on the lesser included offense of criminal trespass was required).

The evidence at trial proved without doubt that Appellant was in the apartment without permission and that at some time before leaving there he formed the intent to commit theft of property situated within the dwelling. He was caught leaving the scene with several stolen items. There is overwhelming circumstantial evidence that, even if Appellant did not enter the dwelling with a present intention to commit theft, then he formed that intention while in the dwelling and then remained on the premises long enough to collect several items before departing with them in hand.

Thus, while Appellant's admission may have raised a factual issue about whether he *entered* the premises with the intent to commit a crime, his version of events fails to refute in any way the overwhelming evidence that he formed the requisite intent while he *remained* on the premises. See *McCarthy v. Commonwealth*, 867 S.W.2d 469 (Ky. 1993)[2] (defendant may be convicted of burglary even if he did not have requisite intent to commit a crime as he entered the dwelling, but the intent was subsequently formed). In *McClellan v. Commonwealth*, 715 S.W.2d 464 (Ky. 1986), the prosecution's only theory of culpability was that the defendant entered the victims' residence with the intent to commit the crimes of murder and kidnapping. Thus, the defendant's denial that he entered with that intent presented a question of fact which, if resolved in the his favor, would have justified a conviction on the lesser charge of criminal trespass. Unlike the circumstances in *McClellan*, Appellant's denial

[2] Overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

that he entered the residence with an intent to commit a crime does not dispel the compelling proof that he formed the intent to commit a theft while he remained on the premises.

Based upon this standard and the evidence presented at trial, there is no reasonable possibility that the jury could have believed that Appellant committed trespass by entering or remaining in the dwelling, but did not intend, either upon entering or while remaining therein, to commit a theft. We are persuaded that the trial court did not err in denying Appellant's request for an instruction on first-degree criminal trespass.

III. NO *BATSON* VIOLATION OCCURRED

Bates also argues the trial court erred in denying his objection to the Commonwealth's peremptory strike of Juror 4460, an African-American female, pursuant to *Batson v. Kentucky*.[3] The trial court found the Commonwealth's reason for the strike was race neutral and was not indicative of purposeful discrimination. For the reasons discussed below, we conclude that this finding is not clearly erroneous.

In *Batson*, the United States Supreme Court made clear a state may not use peremptory challenges in violation of the Equal Protection Clause of the Constitution. *Batson*, 476 U.S. at 91. *Batson* created a three-part test for showing discrimination:

> Initially, discrimination may be inferred from the totality of the relevant facts associated with a prosecutor's conduct during a defendant's trial. The second prong requires a prosecutor to offer a

[3] 476 U.S. 79 (1986).

> neutral explanation for challenging those jurors in the protected class. Finally the trial court must assess the plausibility of the prosecutor's explanations in light of all relevant evidence and determine whether the proffered reasons are legitimate or simply pretextual for discrimination against the targeted class.

France v. Commonwealth, 320 S.W.3d 60, 67 (Ky. 2010) (quoting *McPherson v. Commonwealth*, 171 S.W.3d 1, 3 (Ky. 2005)). See also *Batson*, 476 U.S. at 96-97; and *Miller-El v. Cockrell*, 537 U.S. 322, 328 (2003).

The trial court's decision on a *Batson*-issue is deemed to be similar to a finding of fact. *Chatman v. Commonwealth*, 241 S.W.3d 799, 804 (Ky. 2007). Therefore, upon appellate review, the trial court's decision is afforded considerable deference and will not be reversed unless it is clearly erroneous.[4] See *Hernandez v. New York*, 500 U.S. 352, 359 (1991); *Washington v. Commonwealth*, 34 S.W.3d 376, 380 (Ky. 2000). Where evidence reasonably supports either of two possible findings, the fact-finder's choice is not clearly erroneous. *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179-80 (Ky. 1992).

The prosecutor at Appellant's trial gave two reasons for striking Juror 4460. First, during the course of the day she was twice tardy in returning from breaks. Second, on her juror questionnaire she indicated she had a prior misdemeanor and that an eviction proceeding was currently pending against her. The prosecutor also indicated that Juror 4635, who was not African-American, was struck because of a prior criminal conviction, and that Juror

[4] A judgment "supported by substantial evidence" is not "clearly erroneous." *Owens–Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is defined as "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

4433, who was not an African American, was struck because of a traffic conviction.

After hearing arguments on the issue, the trial court found that no *Batson* violation had occurred because the prosecutor had used the same reasoning in striking non-African-American jurors as he had in striking Juror 4460.

In *France*, we held that the removal by peremptory challenge of an African-American venire member for a prior misdemeanor conviction was justifiable and not pretextual. Based upon the same reasoning, we are persuaded that the trial court was not clearly erroneous in finding that the peremptory challenge of Juror 4460 was not a *Batson* violation.

Appellant also asserts the trial court's acceptance of the prosecutor's reason for striking Juror 4460 was flawed because the prosecutor should have further questioned Juror 4460 on the nature of her misdemeanor. However, we have previously held that the failure of the prosecutor to directly question a juror in detail regarding his specific concerns with the juror's desirability as a juror does not, standing alone, negate an otherwise race-neutral reason for a peremptory strike. *Chatman*, 241 S.W.3d at 804; see also *France*, 320 S.W.3d at 68.

Therefore, we are persuaded that the trial court properly upheld the Commonwealth's peremptory strike of Juror 4460, and that no *Batson* violation occurred.

IV. CONCLUSION

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

All sitting. All concur.

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