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RENDERED: August 21, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000479-MR

KENOBI WILLS — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
NO. 2013-CR-00069 and 2013-CR-00213

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Christian Circuit Court jury convicted Kenobi Wills (Wills) of complicity to first-degree robbery and of being a first-degree persistent felony offender (PFO-I). He was sentenced to twenty (20) years' imprisonment. Wills appeals his sentence as a matter of right under Ky. Const. § 110(2)(b). Before this Court, Wills raises a single issue: in rejecting defense counsel's claim that the Commonwealth's peremptory challenges were racially motivated, the trial court failed to complete the three-step analysis required by *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Thomas v. Commonwealth*, 153 S.W.3d 772 (Ky. 2004), thus denying him of due process and equal protection. Having reviewed the record and the parties' arguments, we affirm.

I. FACTS.

On December 12, 2012, Wills, an African-American male, drove Daniel Gibson (Gibson), a white male, to the Copper Still liquor store (Copper Still) in

Hopkinsville, Kentucky, which Gibson robbed. A grand jury later indicted Gibson and Wills for first-degree robbery of the Copper Still. Gibson pled guilty to the lesser offense of second-degree robbery and testified that Wills planned the robbery, drove the car, and shared in the proceeds. Wills, on the other hand, testified that he drove Gibson to a service station near the Copper Still, but denied that he knew Gibson was robbing the Copper Still, stating that he was unaware a robbery had taken place until the police arrested him later that evening. The jury ultimately convicted Wills of complicity to first degree robbery and of being a PFO-I.

After the parties completed *voir dire* and made their peremptory strikes, the following conversation took place among defense counsel, the Commonwealth, and the trial judge:

> *Defense Counsel:* We'll have some *Batson* issues.
>
> *Judge:* Go ahead, let's deal with the *Batson* first. Who was it?
>
> *Defense Counsel:* I think he struck [T.B.], [L.C.], and [K.J.][1].
>
> *Judge:* Alright, let's take them one at a time. Go ahead, the first one . . .
>
> *Commonwealth:* [T.B.]
>
> *Judge:* [T.B.]. Okay.
>
> *Commonwealth:* Of course, the court knows my position. There has to be a pattern shown preliminarily before we're required to answer. But, given that, I know the court ultimately would like us to provide a reason. I think both [T.B.] and [K.J.], apparently

[1] All three of whom were African-American.

Detective Beemer's[2] newest evidence technician, I forget her name, but she's been in the gallery and she said that both of them expressed some disgust when they were called to the box. So I think that's significant. I think that would affect their ability to be a juror; they just simply don't want to be here.

[T.B.], especially when I was asking questions about the burden of proof— "Do you promise only to hold me to that?"—she gave me a pretty hostile look, kind of stone-faced stare. I thought that was significant that she kind of gave me a hostile stare when I was asking questions about the burden of proof. So I think [T.B.] in terms of the comments she made when she got up and then the stare. That was the reason I struck her.

In terms of [K.J.], the same reason, the comment she made when she got up. That's the primary reason I struck her.

Judge: Alright, let me first of all say that I find those to be race-neutral reasons for striking them so I am going to allow them. The *Batson* challenge is preserved for the record.

Commonwealth: Okay, now with regard to [L.C.], he's a convicted felon so I don't think he's eligible to proceed.

Judge: Are you sure about that?

Commonwealth: I may have left it over . . .

Judge: That's alright. Did you find some kind of criminal history?

Commonwealth: He had a criminal history. It's at the table, but he's a convicted felon.

Judge: Okay, the court finds that to be a race-neutral reason

Commonwealth: And [K.J.], the same lines along with [T.B.]. She gave me a really hostile stare when I was asking about the burden of proof and things like that and her body language otherwise just seemed very hostile towards the Commonwealth. Specifically, when I was asking questions about "do you only, do you promise to hold us to this burden and nothing higher?" I noticed it and

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[2] Detective Kenneth C. Beemer had been employed with the Hopkinsville Police Department (HPD) for seventeen (17) years at the time of trial. He testified during Wills's trial to his role as custodian of the evidence gathered after the robbery.

Detective Finley[3] observed it also, in that she did not answer the question. She did not shake her head yes or no; she just gave me a hostile stare. So for that reason, that's the reason we struck her.

Judge: Alright, I'm going to find that to be a race-neutral reason also. Those objections are preserved for the record.

II. STANDARD OF REVIEW.

Wills now argues the trial court denied him due process and equal protection by permitting the Commonwealth to strike those three African-American jurors. In *Batson*, the Supreme Court of the United States held that because the trial judge's findings largely turn on evaluations of credibility, a reviewing court ordinarily should give those findings great deference. *Batson*, 476 U.S. at 98. Therefore, we accept the trial court's findings of fact unless they are clearly erroneous. *Mash v. Commonwealth*, 376 S.W.3d 548, 555 (Ky. 2012).

III. ANALYSIS.

Batson established a three-step process to determine if the Commonwealth's peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment. *Batson*, 476 U.S. at 79; and *Thomas*, 153 S.W.3d at 777. "First, the defendant must show a *prima facie* case of racial discrimination." *Thomas*, 153 S.W.3d at 777. Second, if the trial court is satisfied with the defendant's showing that a peremptory challenge was exercised on the basis of race, the burden then shifts to the Commonwealth to

[3] Detective Corporal Albert Finely Jr. had been employed by the HPD for nine (9) years at the time of Wills's trial. Detective Finely testified at trial to his investigation of the robbery as a part of the Holiday Robbery Prevention Unit.

proffer race-neutral reasons for the peremptory strikes. *Id.* Third, if the Commonwealth shows sufficiently race-neutral reasons, the burden then shifts back to the defense to show purposeful discrimination. *Id.*

As to the first step, Wills informed the trial court of the "*Batson* issues," but did not make a *prima facie* case for racial discrimination. However, because the Commonwealth voluntarily offered explanations for his peremptory challenges, Wills did not need to make a *prima facie* case for racial discrimination. *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992) quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991)(holding "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot).

In the second step, the burden shifts to the Commonwealth to proffer race-neutral reasons for the peremptory strikes. *Thomas*, 153 S.W.3d at 777. The reason for the strike cannot be in violation of equal protection, but that does not mean it needs to be highly logical. *See Stanford v. Commonwealth*, 793 S.W.2d 112, 113 (Ky. 1990) (a juror's flashy manner of dressing and perceived slowness were race-neutral reasons). The Commonwealth offered its reasons for striking the three prospective jurors, a felony conviction, hostile stares, disdain for serving on a jury, and perceived disagreement on the proper standard of proof necessary to obtain a conviction. The tr ial court accepted these reasons as race-neutral, thus satisfying the second step requirement.

As to the third step, if the Commonwealth shows a sufficiently race-neutral reason, the burden then shifts back to the defense to show purposeful discrimination. *Thomas*, 153 S.W.3d at 777. Although a prosecutor could, in theory, fabricate issues regarding a juror's demeanor as a pretext to conceal racially motivated peremptory strikes, the third step of *Batson* protects against that by permitting the court to determine whether it believes the prosecutor's reason to strike. *Id.* It is incumbent upon the trial court to determine if the proffered reasons are merely pretext for purposeful racial discrimination. *Id.* It is not necessary until the third step of this analysis to examine the persuasiveness of the race-neutral reasons offered by the Commonwealth. *Id.*

Wills argues the judge made eight errors in applying the third step of *Batson,* thus depriving him of his constitutionally protected rights to due process and equal protection. We view these alleged errors as, in fact, only six. According to Wills, the trial judge: (1) should have required the Commonwealth to call the unidentified evidence technician to testify about what she observed; (2) should have required the Commonwealth to provide more explanation regarding its "hostile stare" rationale for striking T.B. and K.J.; (3) should have required the Commonwealth to set forth its observations of what others jurors did when asked about the burden of proof; (4) should have provided defense counsel an opportunity to provide proof, or at least explain why, the Commonwealth's reasons for striking the jurors were not race-neutral or pre-textual; (5) should have required the Commonwealth to provide documentation

that L.C. was a convicted felon; and (6) should have put on the record what he observed when T.B. and K.J. were called and questioned.

As correctly noted by the Commonwealth, the judge is under no obligation to act for the defense. *Chatman v. Commonwealth,* 241 S.W.3d 799, 804 (Ky. 2007). However, that is exactly what Wills is arguing - that the judge should have practiced his case for him. As previously noted, after saying that he had "*Batson* issues," counsel for Wills said nothing. Wills cannot now fault the trial judge for "fail[ing] to exercise [his] own initiative to plumb the depths of the Commonwealth's proffered reasons in order to divine whether the reasons were a mere pretext for racial discrimination . . . ." *Id.* Furthermore, because Wills did nothing "there was nothing on the record from which the trial court could have found that the Commonwealth's proffered reasons were a mere pretext for racial discrimination" *Id.*, and nothing on the record for us to review. As we held in *Chatman,* a defendant's silence once the Commonwealth articulates facially race-neutral reasons for exercising a peremptory challenge is fatal to any *Batson* claim. *Id.* Therefore, Wills cannot now complain of his own inaction to the trial court.

Also, we note that Wills implies that the trial judge in some way prevented him from attacking the Commonwealth's proffered reasons. Having reviewed the record, we see no evidence that Wills attempted to respond to the Commonwealth's proffered reasons or that the judge prevented him from doing so. Thus, for the same reasons mentioned above, this argument fails.

Furthermore, neither Wills nor the Commonwealth's brief mentions the eventual racial make-up of the jury; nor can that be gleaned from our review of the record.

III. CONCLUSION.

The trial court successfully completed the three-step analysis required by *Batson* and *Thomas*, notwithstanding its rejection of defense counsel's claim that the Commonwealth's peremptory challenges were racially motivated; therefore, the trial court did not deny Wills due process or equal protection under the law. In affording the trial court great deference, we hold the trial court's findings were not clearly erroneous. Therefore, we affirm Wills's conviction.

All sitting. All concur.

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