IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 10, 2002

STATE OF TENNESSEE v. MARK LEE DALE

Direct Appeal from the Circuit Court for Lincoln County
No. S0000039 Charles Lee, Judge

No. M2001-01205-CCA-R3-CD - Filed June 5, 2002

The defendant was convicted by a Lincoln County Circuit Court Jury of robbery, a Class C felony, and was sentenced by the trial court as a Range II, multiple offender to nine years, three months in the Department of Correction. The sole issue he raises on appeal is whether the trial court erred in finding that the State's peremptory challenge of the only African-American member of the venire was exercised on race-neutral grounds. Based on our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JOE G. RILEY and NORMA MCGEE OGLE, JJ., joined.

John H. Richardson, Jr. (on appeal) and Raymond W. Fraley, Jr. (at trial), Fayetteville, Tennessee, for the appellant, Mark Lee Dale.

Paul G. Summers, Attorney General and Reporter; Braden H. Boucek, Assistant Attorney General; William Michael McCown, District Attorney General; and Ann L. Filer, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On August 22, 2000, the defendant, Mark Lee Dale, who is Caucasian, was indicted by the Lincoln County Grand Jury on one count of aggravated robbery, a Class B felony, for the armed robbery of the owner of Scrub City Uniform Shop, a business that was located on the Huntsville Highway outside of Fayetteville. He was subsequently convicted by a jury of the lesser offense of robbery, a Class C felony, and was sentenced by the trial court to nine years, three months in the Tennessee Department of Correction.

During the jury selection phase of the defendant's January 4, 2001, trial, the State exercised a peremptory challenge to strike Mrs. Farley Wayne Edmiston, the only African-American member of the venire. Upon objection by defense counsel, the prosecutor asserted that her decision to remove Mrs. Edmiston had "absolutely nothing to do with her color or her race," but was instead based on Mrs. Edmiston's "general body language" during voir dire, which had consisted of her "[s]miling hugely" and "[n]odding enthusiastically" in agreement with everything defense counsel said. The trial court found no indication that "there would be any motive on behalf of the State to challenge on behalf of color," noting that the case involved a Caucasian defendant and a Caucasian victim, and that all the witnesses were Caucasian. Consequently, it accepted the race-neutral explanation proffered by the State, and excused Mrs. Edmiston from the panel. At the hearing on the defendant's motion for a new trial, the trial court reiterated that it had "no reason to believe that the State's exercise of their challenge was racially motivated" and denied the motion for a new trial. Thereafter, the defendant filed a timely appeal to this court.

ANALYSIS

State's Exercise of Peremptory Challenge

The defendant contends that the trial court erred in ruling that the State struck Mrs. Edmiston on legitimate grounds. He argues that her general body language, which was observed only by the State, was not a satisfactory race-neutral explanation for the State's exercise of its peremptory challenge, and suggests that the trial court erroneously relied on the fact that both he and the victim are Caucasian in concluding that the State exercised the challenge on race-neutral grounds. The State contends that the trial court followed the proper procedure, set forth in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), for evaluating a claim of racial discrimination in the jury selection process, and that its determination that the State exercised the challenge on race-neutral grounds is not clearly erroneous. We agree with the State.

Batson and its progeny established the procedure by which a trial court is to evaluate claims of racial discrimination in the jury selection process. In Batson, where an African-American criminal defendant had challenged the State's exclusion of African-Americans from his jury, the United States Supreme Court held that the State's use of peremptory challenges to exclude jurors of the defendant's race violated the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. Id., 476 U.S. at 89, 106 S. Ct. at 1719. Subsequently, in Powers v. Ohio, 499 U.S. 400, 415, 111 S. Ct. 1364, 1373, 113 L. Ed. 2d 411 (1991), the Court held that a Caucasian criminal defendant had third party standing to raise the equal protection rights of African-American venire members who were excluded by the prosecutor's peremptory challenges. Thus, a defendant need not be of the same race as the excluded venire member to raise a Batson challenge to the prosecution's use of peremptory challenges.[1]

[1] In Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 2539, 120 L. Ed. 2d 33 (1992), the Court held that the Constitution similarly prohibits a defendant from purposefully discriminating on the grounds of race in the (continued...)

To raise a Batson claim, the defendant must first make a prima facie showing of purposeful discrimination against a venire member. Batson, 476 U.S. at 93-94, 106 S. Ct. at 1721. This may be done by showing that the totality of relevant facts, considered together, raises an inference of purposeful discrimination. Id.; see Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 903 (Tenn. 1996). Once the defendant has established a prima facie case of discrimination, the burden of production then shifts to the State to offer a race-neutral explanation for the exercise of its peremptory challenge. Batson, 476 U.S. at 97, 106 S. Ct. at 1723; Purkett v. Elem, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770, 131 L. Ed. 2d 834 (1995). This explanation "must be based on something more than stereotypical assumptions, but it need not rise to the level required to justify the exercise of a challenge for cause." State v. Ellison, 841 S.W.2d 824, 826 (Tenn. 1992) (citing Batson, 476 U.S. at 97, 106 S. Ct. at 1723). The race-neutral explanation need not "be persuasive, or even plausible." Purkett, 514 U.S. at 767, 115 S. Ct. at 1771. If there is no discriminatory intent inherent in the explanation, it will be deemed to be race-neutral. Id. (citations omitted). Finally, the trial court must consider the totality of the circumstances to determine if the race-neutral explanation offered by the State is actually a pretext for purposeful discrimination. Batson, 476 U.S. at 97-98, 106 S. Ct. at 1723-24. "Because the core issue is the prosecutor's discriminatory intent, or lack thereof, the trial court's finding 'largely will turn on evaluation of credibility.'" Ellison, 841 S.W.2d at 827 (quoting Batson, 476 U.S. at 98 n.21, 106 S. Ct. at 1724 n.21). The best evidence of discriminatory intent "'often will be the demeanor of the attorney who exercises the challenge.'" Id. (quoting Hernandez v. New York, 500 U.S. 352, 365, 111 S. Ct. 1859, 1869, 114 L. Ed. 2d 395 (1991)). "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768, 115 S. Ct. at 1771.

In its determination of whether a peremptory challenge has been exercised on discriminatory grounds, the trial court "must carefully articulate specific reasons for each finding on the record[.]" Woodson, 916 S.W.2d at 906. "The trial court's findings are imperative for rarely will a trial record alone provide a legitimate basis from which to substitute an appellate court's opinion for that of the trial court." State v. Carroll, 34 S.W.3d 317, 319 (Tenn. Crim. App.), perm. to appeal denied (Tenn. 2000). The trial court's findings are, therefore, entitled to great weight, and will not be set aside on appeal unless found to be clearly erroneous. Woodson, 916 S.W.2d at 906; Carroll, 34 S.W.3d at 319.

In the case at bar, the trial court did not specifically state on the record that the defendant had satisfied his burden of making out a prima facie case of discrimination in the jury selection process. However, such a finding was implicit in the trial court's request that the prosecutor state her race-neutral basis for the challenge. See Carroll, 34 S.W.3d at 320 (concluding that trial court's implicit finding that prima facie prong of Batson test had been met was sufficient for appellate review); see also Ellison, 841 S.W.2d at 827 ("Finding that the exclusion of one minority venireperson can constitute a prima facie case is consistent with the principle set out in Batson.").

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[1](...continued)
exercise of peremptory challenges.

When asked to provide the race-neutral basis for her challenge, the prosecutor explained: "Judge, her responses to [defense counsel] she was nodding, even when he wasn't specifically speaking to her. Nodding enthusiastically in everything he said. Smiling hugely. It is based on just general body language." In determining the issue, the trial court observed that there is inherent difficulty in evaluating an explanation, such as that offered by the State, which is based on an attorney's subjective assessment of a juror's behavior or demeanor:

> It places the court in a somewhat of a dilemma because I am not saying for a moment that I suspect the State challenged this juror because of race. By the same token those reasons could be given on any juror for any challenge. . . . Subjective decision made by the attorney.
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> . . . .
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> How can the court make a decision based upon the feeling of the attorney regarding non verbal reactions?

Ultimately, however, the trial court accepted the State's explanation, "taking the [prosecutor's] word" that Mrs. Edmiston's body language was the basis for the challenge, and that race had played no part in the decision to strike her from the jury. In reaching this conclusion, the trial court noted: "In this case to buttress the State's position is that this case couldn't even be construed to have anything to do with race. What I am saying is if the State did not have that in this case I might rule differently."

We find no error in the trial court's ruling on this issue. Nonverbal reactions on the part of a prospective juror may serve as legitimate, nondiscriminatory bases for the exercise of a peremptory challenge. In a recent case with similar facts, this court concluded that a venire member's body language during voir dire constituted a legitimate nondiscriminatory basis for the exercise of the State's peremptory challenge. See Carroll, 34 S.W.3d at 319. The defendant in Carroll, who was Caucasian, raised a Batson objection to the State's peremptory challenge of an African-American venire member. When asked to provide its race-neutral basis for the challenge, the State asserted that it was based on the venire member's failure to make eye contact with the prosecutor during voir dire. Recognizing that "'many of the judgments made by counsel in picking a jury are purely intuitive and based upon inarticulable factors,'" and that "'ultimate Batson findings will largely turn on evaluation of credibility of counsel's explanations,'" we concluded that the explanation offered by the State was sufficiently race-neutral to withstand the defendant's Batson challenge. Id. at 320 (quoting United States v. Bentley-Smith, 2 F.3d 1368, 1374 (5th Cir. 1993)). Although apparently neither the trial court nor defense counsel in the case at bar observed the body language cited by the State, whereas in Carroll defense counsel agreed that the venire member failed to make eye contact, see id., we cannot conclude that the trial court erred in its decision to accredit the prosecutor's assertion that the challenge was exercised on race-neutral grounds.

The defendant suggests that the trial court erred by considering his race in reaching its conclusion that the State was not motivated by racial bias in striking Mrs. Edmiston from his jury, arguing in his brief "that the manner in which the trial court reached its decision as to whether the State was racially profiling was clearly not proper." We respectfully disagree. The race of the defendant and the venire member may be among the relevant factors for a trial court to consider in making its determination of whether the State engaged in purposeful discrimination in any given case. See Powers, 499 U.S. at 416, 111 S. Ct. at 1373-74 (noting that the race of the defendant may, in some cases, "be relevant to discerning bias"). The defendant also cites Peters v. Kiff, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972), for the proposition that he was entitled to a jury comprised of members of the African-American community that Mrs. Edmiston represented. Peters, however, merely prohibits the arbitrary exclusion of members of any race from jury service, regardless of the race of the defendant; it does not guarantee that a defendant will be tried by a jury composed of members of any particular race. See id., 407 U.S. at 504-05, 92 S. Ct. at 2169; see also State v. Bell, 759 S.W.2d 651, 654 (Tenn. 1988) ("A defendant is no more entitled to a jury containing members of his race than is the State to engage in purposeful or deliberate racial exclusion by the use of peremptory challenges."). The trial court found the prosecutor in this case to be credible, and that the circumstances did not suggest that the race-neutral explanation offered by the State was a pretext for purposeful discrimination. We will not disturb those findings on appeal.

CONCLUSION

Based on our review, we conclude that the trial court applied the appropriate test for evaluating the defendant's claim of racial discrimination in the jury selection process. We further conclude that the court did not err in accepting the State's race-neutral explanation for the challenge. Accordingly, we affirm the judgment of the trial court.

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ALAN E. GLENN, JUDGE