

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT



NUMBER 2010 KA 0635



STATE OF LOUISIANA

VERSUS



LEE MICHAEL BROWN

Judgment Rendered: October 29, 2010

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Trial Court Number 701,318

Honorable Ernest G. Drake, Jr., Judge

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State – Appellee

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Defendant – Appellant
Lee Michael Brown

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

The defendant, Lee Michael Brown, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty.¹ The defendant was tried by a jury and convicted as charged. The trial court sentenced the defendant to life imprisonment at hard labor without the benefit of probation, parole or suspension of sentence.

The defendant now appeals urging the following assignments of error:

1. The trial court erred in not requiring the state to give a race neutral reason for peremptorily challenging juror Sherman Jackson after the defendant made a [**Batson**] challenge.
2. The trial court erred in sustaining the state's objection to the introduction of a NCIC criminal history report of [codefendant] Ronnie Allen.

Finding no merit in the assigned errors, we affirm the defendant's conviction and sentence.

FACTS

On March 10, 2007, the Tangipahoa Parish Sheriff's Office received a call indicating that a body had been observed floating in the Manchac Canal. The body was later identified to be that of Clarence Nicholes of Ponchatoula, Louisiana. An autopsy later revealed that Nicholes died as a result of drowning associated with multiple blunt-force injuries to the head. A homicide investigation was launched.

In response to information received during the homicide investigation, the defendant and three codefendants were charged with the victim's murder. The defendant provided a taped statement wherein he admitted his involvement in the events that led to the victim's death. The defendant explained to police how he and two of the codefendants brutally beat the victim after they observed him leaving a residence that the group believed he had broken into. The defendant

¹ Codefendants George Brown, Charles Dexter Martin, and Ronnie Allen were also charged in the indictment. The defendant moved to sever his trial from the trials of the codefendants, and the trial court granted the motion.

stated that the attack began with codefendant Ronnie Allen striking the victim with a gun, causing him to lose consciousness and fall onto the ground. Allen then repeatedly struck the unconscious victim and demanded that the defendant and the others “do something.” In response, the defendant stomped the victim not “more than four (4) or five (5)” times as he lay on the ground. Codefendant Charles Martin took the gun from Allen and started hitting the victim in the head with it.

Next, Allen and Martin loaded the victim’s unconscious body into his vehicle, which was located nearby, and drove over to the Manchac Canal. When the men opened the trunk, the victim, having regained consciousness, asked the men why they were beating him. Martin started beating the victim again. Allen and Martin eventually removed the victim’s body from the trunk and Allen kicked him into the canal.

The defendant claimed his participation in the incident was motivated by his fear of Allen. He claimed he only participated because Allen was armed with a weapon and implied that he would use it if the defendant and/or the others failed to comply with his demands.

ASSIGNMENT OF ERROR NUMBER ONE BATSON CHALLENGE

In his first assignment of error, the defendant argues the trial court erred in not requiring the State to provide race-neutral reasons for its use of a peremptory challenge against prospective juror Sherman Jackson after the defense raised a **Batson** objection and the trial court concluded that a *prima facie* case of purposeful discrimination had been established.

When a defendant makes a **Batson** challenge, claiming the State has used peremptory challenges in a manner that violates the Equal Protection Clause, the defendant must first make a *prima facie* case of discrimination by showing facts and relevant circumstances that raise an inference that the prosecutor used his

peremptory challenges to exclude potential jurors on account of race. See **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); see also La. C.Cr.P. art. 795(C). If the defendant fails to make such a showing, then the **Batson** challenge fails. However, if a *prima facie* case of discrimination is successfully established, the burden of production then shifts to the State to come forward with a race neutral explanation for its peremptory challenges. This step need not demand an explanation that is persuasive, or even plausible, and unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. **Purkett v. Elem**, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam). If a race-neutral explanation is tendered, then the trial court must determine whether the defendant has established purposeful racial discrimination. **Purkett**, 514 U.S. at 767, 115 S.Ct. at 1770-71; **State v. Hobley**, 98-2460, p. 17 (La. 12/15/99), 752 So.2d 771, 782, cert. denied, 531 U.S. 839, 121 S.Ct. 102, 148 L.Ed.2d 61 (2000). The ultimate burden of persuasion remains on the defendant to prove purposeful discrimination. **Hernandez v. New York**, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991).

The voir dire in this case involved examination of three panels of prospective jurors. At the conclusion of the examination of the second panel, the State urged a peremptory challenge against prospective juror Sherman Jackson and noted, "He can't stay [a]wake."² In response, defense counsel raised the issue of a discriminatory pattern of exclusion by the State, but did not specifically urge a **Batson** objection. Thereafter, when the State attempted to use a peremptory challenge against prospective jurors Jessica Jones and Termane Ruffin (also on the second panel), the defense specifically urged a **Batson** objection alleging that the

² The voir dire transcript appears to suggest that the State may have requested to have Jackson excluded for cause during an off-the-record discussion. The court stated, "You're challenging peremptorily Sherman Jackson." In response, the prosecutor stated, "I couldn't for cause - He couldn't - I was saying you could for cause."

State was utilizing its peremptory challenges in a discriminatory manner to exclude African Americans from the jury. In ruling on the objection, the trial court reasoned:

What we have is a – to me, an inarticulate [Batson] challenge being made by defense in this particular case. Let me lay the groundwork. The very first black on either of the panels is Connie Richardson, who was accepted by both parties, including the State. The second black is Mr. Sherman Jackson, who the State used its no. 5 peremptory but first peremptory as against a black. The next black on which some pattern could – a prima facie be made is juror no. 8 on the second panel, Candace Perry-Harden, who the State accepted. So thus far, out of the first three opportunities with African-Americans, the State has accepted two and peremptorily challenged one. The next one is Ms. Jones, who is juror no. 10 on this panel, which the defense accepted and the State has peremptorily challenged. At this particular stage, four blacks have been examined, two of which have been accepted by the State and two of which is not in accordance with Article 795.

It is clear that an objection is being made at this time by the defense that the State has excluded a juror solely on the basis of race or gender. A further requirement under that article is that prima facie case supporting that objection is made by the objecting party. In other words, Mr. Dukes has to show or at least allege that two out of four peremptory challenges -- In other words, peremptory challenges to two out of four potential black jurors is prima facie case....

....

In that case, the court is not 100 percent sure that it agrees with it, but in an abundance of caution, I'm going to demand a satisfactorily race agenda neutral reason for the exercise of the challenge. He wants a race neutral.

Thereafter, the State revealed its reasons for striking prospective jurors Jones and Ruffin. The prosecutor explained that Jones's youthful age, insignificant work history, and occupation as a caregiver could possibly result in her identifying with the youthful defendant who was facing a life sentence. As to Ruffin, the prosecutor cited his youthful age, single marital status, lack of children, and short-term work history as reasons for exclusion. The prosecutor also claimed that Ruffin was inattentive during voir dire examination. The trial court accepted the State's reasons as a race-neutral justification for the exclusion of Jones upon noting

that the same reason was provided by the State for the exclusion of a white prospective juror. The court disallowed the State's peremptory challenge against prospective juror Ruffin. Counsel for the defense stated, "I'm in agreement with that, but I object to the others." The court noted the defendant's objection to the ruling and proceeded with voir dire. No further **Batson** objections were urged.

The defendant now argues that because the trial court found that a *prima facie* case of racial discrimination in jury selection was shown, the State was required to provide justification for its challenges against all of the African-American jurors excluded. He argues that it was error for the trial court not to require the State to offer justification for the exclusion of prospective juror Jackson at that time. We find no merit in the defendant's argument. As previously noted, the record reflects that at the time of its peremptory challenge against Jackson, the State specifically noted that this prospective juror was being excluded because he could not stay awake during the voir dire examination. Thus, the State had already provided its race-neutral reason for the challenge against this juror. We find no error in the trial court's failure to require the State to repeat its reason for Jackson's exclusion at the time of the **Batson** challenge. This assignment of error lacks merit.

ASSIGNMENT OF NUMBER ERROR TWO

In his second assignment of error, the defendant argues that the trial court erred in sustaining the State's objection to the introduction of a NCIC (National Crime Information Center) criminal history report for codefendant, Ronnie Allen. The defendant argues that the report, which would have served as evidence of Allen's history of violence, was relevant to his defense and was admissible as a record of regularly conducted business activity under La. C.E. art. 803(6).

During the cross-examination of Detective Roy Albritton of the Tangipahoa Parish Sheriff's Office, the defense attempted to introduce the evidence of Allen's

criminal background. The State objected to the NCIC report document as hearsay. Counsel for the defendant noted that the entire defense theory was that the defendant acted out of fear of Allen. At this point, the court agreed to allow the defense to continue its discussion regarding Allen's criminal history without specifically ruling on the admissibility of the document.

Therefore, counsel for the defendant proceeded to question Detective Albritton regarding the information contained in the document, specifically, attempting to confirm Allen's identity as the individual on the rap sheet. After the witness noted that there were four different dates of birth contained in the report, the court instructed counsel to approach the bench to discuss the issue. The court expressed concern with whether the Ronnie Allen referred to in the offenses on the criminal record was the same Ronnie Allen who was the codefendant in this case. Specifically noting that during the interrogation of the defendant and other codefendants, Detective Albritton promised to "protect [them] from Ronnie," defense counsel argued that the evidence was relevant to show Allen's violent disposition and to provide justification for the defendant's fear of him. Over the State's objection, the court agreed to allow the defense to lay a foundation for the introduction of the report. Defense counsel proceeded to question Detective Albritton about the incidents listed in the report. Counsel also asked Detective Albritton to compare the date of birth provided by Allen on a rights form executed during his custodial interrogation in connection with this case with the dates of birth listed in the NCIC report. Detective Albritton confirmed that of the four different dates of birth listed in the report, one matched the date of birth provided by Allen. At this point, the trial court ruled on the admissibility of the document. In sustaining the State's hearsay objection, the trial court stated, "I'm going to sustain that objection prior upon hearsay. I've attempted to let you lay a foundation, counselor, as to whether or not that's the same fellow. I'm not at all

confident that it is. I'm going to sustain the hearsay objection.

On appeal, the defendant argues the trial court erred in preventing him from using the NCIC report to bolster his defense, insisting that the document was admissible as a business record. Following our review of the record, we find no error in the trial court's ruling regarding the admissibility of the document.

Under La. C.E. art. 803, data compilations made and kept in the regular conduct of business activity, as shown by the testimony of a qualified witness, are admissible as an exception to the hearsay rule unless the circumstances of preparation indicate a lack of trustworthiness. La. C.E. art. 803(6) provides in pertinent part as follows:

Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, including but not limited to that which is stored by the use of an optical disk imaging system, of acts, events, conditions, opinions, or diagnoses, **made at or near the time by, or from information transmitted by, a person with knowledge**, if made and kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and to keep the memorandum, report, record, or data compilation, **all as shown** by the testimony of the custodian or other **qualified witness**, unless the source of information or the method or circumstances of preparation indicated lack of trustworthiness. This exception is inapplicable unless the recorded information was furnished to the business either by a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule. (Emphasis added.)

In order for records to be admitted under the business record exception to the hearsay rule, the person who actually prepared the documents need not have testified, so long as other circumstantial evidence and testimony suggest their trustworthiness. **National Information Services, Inc. v. Gottsegen**, 98-528, p. 7 (La. App. 5th Cir. 6/1/99) 737 So.2d 909, 914-15, writs denied, 99-1936 & 99-2366 (La. 10/8/99), 751 So.2d 226 & 751 So.2d 228.

Clearly, the language of La. C.E. art. 803(6) establishes criteria that must be met before evidence can be admitted under this exception to the hearsay rule.

Several of these criteria were not met in the attempt to introduce the NCIC report in this case. First, Detective Albritton, who testified regarding the criminal report, was not a custodian or otherwise qualified to testify regarding the document. Detective Albritton specifically testified that he did not "run" the report in question, and there was no evidence that he had personal knowledge as to who actually caused the document to be generated. Under La. C.E. art. 602, a witness may testify only to matters about which he has personal knowledge. This personal knowledge restriction would require that Detective Albritton either generated or witnessed someone generating the record. Furthermore, there was no evidence when the report was made or who the source of the information was. Finally, as the trial court apparently found, the varying dates of birth contained in the document called into question the trustworthiness of the report. Accordingly, contrary to the defendant's assertions in his brief, it is clear that the NCIC report in question did not qualify for the business records exception to the hearsay rule. The trial court did not err in finding the document to be inadmissible for use at the trial.

Moreover, there was other evidence of Allen's dangerousness presented at the trial. The defendant, Charles Martin, and George Brown all testified that Allen was an extremely dangerous man who terrorized the neighborhood. Each of the men described different instances where Allen physically assaulted various individuals.

This assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.