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IN THE COURT OF APPEALS OF INDIANA

CHARLES DUFF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0610-CR-892
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Robinette, Master Commissioner
Cause No. 49G03-0605-FC-090234

September 6, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Charles Duff appeals his conviction for battery as a class C felony.[1] Duff raises three issues, which we restate as:

I. Whether the trial court erred by denying Duff's Batson objection to the State's peremptory challenge of a prospective juror;

II. Whether the trial court abused its discretion by denying Duff's motion for a mistrial; and

III. Whether the evidence is sufficient to sustain Duff's conviction for battery.

We affirm.

The relevant facts follow. In early May 2006, Candy Smith and her husband separated, and Duff moved in with Smith. On May 15, 2006, Smith was talking to her neighbor, Sherrie Rogers, about selling her lawn mower to Rogers and Rogers's fiancé, Kevin Lewis. Smith said that she was going to ask Duff to leave her house and asked Rogers to check on her later. At approximately 8:00 p.m., Rogers called to check on Smith, but someone answered the telephone and "slammed" the telephone back down. Transcript at 22.

Lewis and Rogers, who weighed ninety-six to ninety-eight pounds, then went to Smith's house to check on her. They took a piece of "conduit pipe" that was approximately four feet long with them. Id. at 23. When they knocked on the door, Duff opened the door and had his hand around Smith's throat. They asked Duff to leave, and he told them to mind their own business and go home. Lewis responded that they would

[1] Ind. Code § 35-42-2-1(a)(3) (Supp. 2005).

go home and call the police. Lewis and Rogers then started walking down the porch steps, and Lewis turned toward Duff again. According to Duff, Lewis said that he was going to "kick [Duff's] ass," and Lewis had the pipe in his hand. Id. at 145-146. Duff then hit Lewis on the face and knocked Lewis unconscious. Rogers bent down to help Lewis, and Duff hit her with the pipe on her left side. Rogers kept trying to get up, but Duff kept kicking Rogers on her left side. Rogers heard police sirens, and Duff got on his bicycle and left. Rogers sustained multiple rib fractures and a "hematoma laceration" to her left kidney caused by "blunt force trauma." Id. at 59. Rogers was in the hospital for six days.

The State charged Duff with battery as a class C felony as to Rogers, battery as a class C felony as to Lewis, and alleged that Duff was an habitual offender.[2] During voir dire at the jury trial, the State peremptorily challenged Carvis Herron. Herron is African American. The trial court then excused Herron and other prospective jurors. A short time later, Duff's counsel made a Batson objection to the peremptory challenge of Herron. The trial court noted that Herron had already left but allowed Duff's counsel to make a record of his objection. The State noted that they had challenged Herron because, when questioning the prospective jurors about having a witness to the incident not testify at the trial, Herron was the first prospective juror to express concern. The State also noted that they struck another prospective juror who had responded similarly to the

[2] The State also charged Duff with two counts of criminal confinement, misdemeanor battery, and misdemeanor intimidation, but dropped those charges prior to trial.

question. Additionally, the State noted that they struck the only other African American prospective juror because she had been involved with the legal system for over twenty years in her employment.

Rogers was the first witness for the State. She testified that she and Lewis took the pipe with them "[b]ecause [she] was scared because [Smith] told [her] that she didn't know how many people [Duff] had killed." Transcript at 23. Duff's counsel objected and moved for a mistrial. During a sidebar conversation, the trial court indicated that it was going to strike the comment and admonish the jury. The State volunteered to stipulate that Duff had never been charged with murder. The trial court then struck the comment from the record and instructed the jury not to consider the comment.

Duff argued that he struck Lewis and Rogers in self defense. The jury found Duff not guilty of battery against Lewis, but guilty of battery as a class C felony as to Rogers. Duff waived his right to a jury in the habitual offender phase, and the trial court found Duff to be an habitual offender. The trial court sentenced Duff to eight years in the Indiana Department of Correction on the battery conviction enhanced by four years due to his status as an habitual offender for an aggregate sentence of twelve years in the Indiana Department of Correction.

I.

The first issue is whether the trial court erred by denying Duff's Batson objection to the State's peremptory challenge of Herron. During voir dire at the jury trial, the State peremptorily challenged Herron, an African American. The trial court then excused

Herron and other prospective jurors. A short time later, Duff's counsel objected as follows:

> [Duff's Counsel]: I want to make an objection to the dismissal of Mr. Herron.
>
> [The Court]: You'd better get him then because he's gone. He has a right - - I mean, I would have been [sic] to let you do that but what I'm required to do is send out the jury and let you make a record and then rule on it. Do you see what I mean?
>
> [Duff's Counsel]: I think what - - well, I think what I need to do is object and then the prosecutor needs to make a reason why he objected to him other than his . . .
>
> [Attorney]: For the record, Mr. Herron was an African-American and . . .
>
> [The Court]: Well, I'll let you do what you want to but what I'm required to do in my opinion is if you make the objection while he's still here I ask him to stay, we have the argument because you see, he's gone.
>
> [Prosecutor]: Well (inaudible) . . .
>
> [The Court]: I'll let you make a record but I'm just telling you what I . . .
>
> [Duff's Counsel]: What's your – I mean, do you have a reason?
>
> [Prosecutor]: Yeah, he was the first one to ask - - when we said would you want to hear from the third missing witness he was the first one to speak up and say yes, absolutely.
>
> [Duff's Counsel]: Okay.
>
> [The Court]: All right.
>
> [Duff's Counsel]: I can go get him or I can always make a record.
>
> [The Court]: I'll let you make a record.
>
> [Duff's Counsel]: Okay.

[The Court]: Okay, after everything is done.

[Duff's Counsel]: That's fine.

[The Court]: Okay.

Transcript at 303-305. Later, Duff's counsel stated:

> [Duff's Counsel]: I'd like to make a Batson objection to the excusal of Mr. Herron. Mr. Herron was one of two African-American's [sic] that were on the, uh, first twenty-eight panel of prospective jurors along with Ms. Carter who, I believe, was, uh, Juror No. 8. Ms. Carter was struck by the State as a peremptory and Mr. Herron was struck as a peremptory by the State as well.
>
> [The Court]: All right, State, want to respond please?
>
> [Prosecutor]: Uh, yes, Your Honor. As far as Mr. Herron goes, when Prosecutor Blankenship asked about the possibility of there being a witness not appearing, uh, and would that concern you and would that cause you to have concern, he was the first person to outwardly answer yes, and that that [sic] would cause him some concern. He would definitely want to hear from that third person. Ms. Creech, who was sitting next to him answered similarly and the State struck both of those witnesses. As to Kathleen Carter, uh, I'll just tell the Court, we actually had a debate on whether or not to keep her. And due to her experience in the legal system, that we felt concerned about her coming off as having maybe too much authority with the other jurors because she has been involved in the legal system, I think she said, for over twenty years. And that was the basis for the State strikes.
>
> [The Court]: Okay. Yeah, you did make your record and, of course, Mr. Herron left the courtroom before this was made but you did get your record on that, sir.
>
> [Duff's Counsel]: Okay, and I believe Mr. Herron would still be available if we wanted to go get him but if the Court has made its ruling then that's fine.
>
> [The Court]: So, we'll bring them back in, swear them in, send them to lunch and take a minute to go over the Preliminary Instructions before we leave so they can reproduce them. . . .

Id. at 307-308.

The State argues, and we agree, that Duff waived his Batson objection by failing to make a timely objection. In order for error to be preserved for review, a timely and adequate objection must be raised at trial. Chambers v. State, 551 N.E.2d 1154, 1158 (Ind. Ct. App. 1990). "The purpose of the requirement for a timely objection is to alert the trial court and to permit prevention or immediate correction of an error without waste of time and effort." Godby v. State, 736 N.E.2d 252, 255 (Ind. 2000), reh'g denied. The proper time for a Batson objection was immediately after the peremptory challenges were made. Chambers, 551 N.E.2d at 1158. Here, Duff's counsel did not make an objection until Herron had already been excused and had left the courtroom. Although Duff argues on appeal that Herron had returned to the jury pool and could have been retrieved, his counsel did not attempt to locate Herron. At that point, even if the trial court had sustained Duff's objection, there is no guarantee that Herron could have been returned to the courtroom. "A timely objection would have allowed the trial court to follow Batson and make a determination regarding the intent of the challenges." Id. Duff's failure to make a timely objection results in his waiver of the Batson objection. See, e.g., id.

Waiver notwithstanding, the trial court did not abuse its discretion by denying Duff's Batson objection. Under Batson v. Kentucky, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 1723-1724 (1986), "[p]eremptory challenges based on race violate the juror's Fourteenth Amendment right to equal protection of the law and require a retrial."

Highler v. State, 854 N.E.2d 823, 826 (Ind. 2006). "A defendant's claim of racial discrimination in a peremptory strike triggers a three-step inquiry." Id.

"First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race." Id. at 826-827. "To make a prima facie case of purposeful discrimination, the defendant must show that the excused juror was a member of a cognizable racial group and present an inference that the juror was excluded because of his or her race." Id. at 827. "The removal of some African American jurors by the use of peremptory challenges does not, by itself, raise an inference of racial discrimination." Id. "However, the removal of 'the only . . . African American juror that could have served on the petit jury' does 'raise an inference that the juror was excluded on the basis of race.'" Id. (quoting McCormick v. State, 803 N.E.2d 1108, 1111 (Ind. 2004)). Here, the State does not dispute that it removed the only two African American prospective jurors and, thus, Duff presented a prima facie case of racial discrimination.

"Once the defendant presents a prima facie case of racial discrimination in the use of a peremptory challenge, the burden shifts to the State to present a race-neutral explanation for striking the juror." Id. "A race-neutral explanation means 'an explanation based on something other than the race of the juror.'" Id. (quoting Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866 (1991) (plurality)). "Although the prosecutor must present a comprehensible reason and offer more than a mere denial of improper motive, 'the second step of this process does not demand an

explanation that is persuasive, or even plausible.'" Id. (quoting Purkett v. Elem, 514 U.S. 765, 767-768, 115 S.Ct. 1769, 1771 (1995) (per curiam)). If the reason is not inherently discriminatory, it passes the second step. Id. "[T]he issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason will be deemed race neutral." Id. "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons" proffered. Id. (quoting Miller-El v. Dretke, 545 U.S. 231, 252, 125 S.Ct. 2317, 2332 (2005)).

The State argues that its reasons for striking Herron were race-neutral. The State noted that they had challenged Herron because, when questioning the prospective jurors about having a witness to the incident not testify at the trial, Herron was the first prospective juror to express concern. We conclude that the State presented a race-neutral reason for striking Herron and proceed to the third step to determine whether the defendant had established purposeful discrimination. See, e.g., id. at 827-828 (holding that the State's reasons for striking a prospective juror were on their face race-neutral where the State struck the prospective juror because: (1) he was a pastor, and thus, more apt to be forgiving and (2) statements in his questionnaire and during voir dire raised questions about his ability "to be fair and impartial to the State").

"This third step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" Id. at 828

(quoting Purkett, 514 U.S. at 768, 115 S.Ct. at 1171). A trial court's conclusion that the "prosecutor's reasons were not pretextual is essentially a finding of fact that turns substantially on credibility. It is therefore accorded great deference." Id. (citing Batson, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724).

Duff argues that the trial court did not reach the third step in the Batson analysis. Although the trial court did not specifically mention this third step and did not specifically overrule Duff's Batson objection, it is clear from the record that the trial court did just that. Consequently, we will address the third step.

In Highler, the court noted that "[w]here the same opinion is expressed by others, but only a minority juror is struck, pretext may be inferred." Id. Here, the State struck Herron because he expressed significant concern about a witness to the event (Smith) not being available to testify despite other witnesses to the event testifying. Another non-minority juror also expressed the same concern, and the State struck her as well. All things considered, we cannot say that Duff met his burden of demonstrating that the State's reasons for striking Herron were pretextual. See, e.g., id. (holding that the trial court's conclusion was not clearly erroneous where the trial court concluded that the prosecutor's reasons for striking a prospective juror were not pretexual).

II.

The next issue is whether the trial court abused its discretion by denying Duff's motion for a mistrial. To succeed on appeal from the denial of a mistrial, a defendant must demonstrate that the conduct complained of was both error and had a probable

persuasive effect on the jury's decision. Booher v. State, 773 N.E.2d 814, 820 (Ind. 2002). The decision to grant or deny a motion for a mistrial lies within the discretion of the trial court. Id. A mistrial is an extreme remedy granted only when no other method can rectify the situation. Id. Because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury, the trial court's determination of whether to grant a mistrial is afforded great deference on appeal. Id.

Rogers testified that she and Lewis took the pipe with them "[b]ecause [she] was scared because [Smith] told [her] that she didn't know how many people [Duff] had killed." Transcript at 23. Duff's counsel objected and moved for a mistrial. During a sidebar conversation, the trial court indicated that it was going to strike the comment and admonish the jury. The State volunteered to stipulate that Duff had never been charged with murder. The trial court then struck the comment from the record and instructed the jury not to consider the comment.

On appeal, Duff argues that the trial court abused its discretion by denying his motion for a mistrial. According to Duff, the only issue at trial was whether he acted in self defense, and Rogers's testimony that she did not know how many people he had killed would have prejudiced the jury against him.

Generally, an admonishment is sufficient to cure an error. See, e.g., Kent v. State, 675 N.E.2d 332, 336 (Ind. 1996) (holding that "the trial court's admonishment, along with a final instruction which told the jury to consider only the evidence admitted at trial, was sufficient to cure any error"). In support of his argument that the admonishment here

was insufficient to cure the error, Duff relies upon Baker v. State, 506 N.E.2d 817 (Ind. 1987). There, the defendant was charged with child molesting, and the conviction rested solely upon the uncorroborated testimony of the victim. 506 N.E.2d at 818. During the trial, a police officer testified that he had offered a polygraph examination to the defendant. Id. Although the defendant sought a mistrial, the trial court denied the motion but admonished the jury to disregard the officer's testimony. Id. On appeal, the Indiana Supreme Court reversed because the admonishment was insufficient to cure the harm. Id. The court emphasized that the statement was made by a trained police officer and not "a lay witness who accidentally blurted out a comment concerning a polygraph test." Id. at 819. The court held "we cannot presume, under the circumstances, that the officer's testimony was inadvertent or that the error was harmless in view of the fact that there was no corroborating evidence to support the testimony of the victim."[3] Id. at 818.

Here, the improper statement was made by a lay witness, not a police officer. Moreover, Duff's conviction was not based upon the uncorroborated testimony of one witness. Duff himself admitted to pushing and kicking Rogers. As for his allegation of self defense, both Rogers and another neighbor who witnessed the incident testified that Rogers was not physically aggressive toward Duff. We also note that it is unlikely that

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[3] Duff also relies upon Mack v. State, 736 N.E.2d 801 (Ind. Ct. App. 2000), trans. denied. There, as in Baker, a police officer testified that the defendant was a known drug dealer, and the trial court denied the defendant's request for a mistrial. 736 N.E.2d at 803. We concluded that the trial court erred by denying the request for a mistrial. Id. at 804. We emphasized that the conviction rested solely upon the officer's identification of the defendant. Id. at 803-804. "Because there was no independent evidence of Mack's guilt, there was a substantial likelihood that the evidence in question played a part in Mack's conviction." Id. at 804. This case is distinguishable because the improper statement was not made by a police officer and Duff's conviction did not rest solely upon the uncorroborated testimony of one witness.

Rogers's comment had a probable persuasive effect on the jury's decision given the jury's acquittal of Duff for the battery of Lewis. We conclude that the trial court did not abuse its discretion by denying Duff's request for a mistrial because Duff has failed to demonstrate that Rogers's comment had a probable persuasive effect on the jury's decision. See, e.g., Booher, 773 N.E.2d at 820-821 (holding that, while the reference that the defendant had spent time in prison was prejudicial, the probable persuasive effect on the jury was minimal given the defendant's admission of other criminal conduct).

III.

The final issue is whether the evidence is sufficient to sustain Duff's conviction for battery. Duff argues that the evidence is insufficient to sustain his conviction because he acted in self-defense. Self defense is governed by Ind. Code § 35-41-3-2. A valid claim of self-defense is legal justification for an otherwise criminal act. Wallace v. State, 725 N.E.2d 837, 840 (Ind. 2000). In order to prevail on such a claim, the defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. Wilson v. State, 770 N.E.2d 799, 800 (Ind. 2002). When a claim of self-defense is raised and finds support in the evidence, the State has the burden of negating at least one of the necessary elements. Id. If a defendant is convicted despite his claim of self-defense, we will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt. Id. at 800-801. The standard of review

for a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim. Wallace, 725 N.E.2d at 840. We neither reweigh the evidence nor judge the credibility of witnesses. Id. If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed. Id.

"The amount of force used to protect oneself must be proportionate to the urgency of the situation." Hollowell v. State, 707 N.E.2d 1014, 1021 (Ind. Ct. App. 1999). "Where a person has used more force than necessary to repel an attack the right to self-defense is extinguished, and the ultimate result is that the victim then becomes the perpetrator." Id. Duff argues that, when Lewis fell, Rogers bent down where Lewis was and was next to the pipe. Duff testified at trial that Rogers said, "you really in for it now." Transcript at 149. Duff admits that he then pushed Rogers, kicked her, and "may also have hit her with the [pipe]." Appellant's Brief at 19. However, both Rogers and another neighbor who witnessed the incident testified that Rogers was not physically aggressive toward Duff. Even if Rogers, a ninety-six to ninety-eight pound woman, said, "you really in for it now" and was next to the pipe, Duff's reaction was far from proportionate to the urgency of the situation. Because there existed sufficient evidence from which the jury could find that Duff did not validly act in self-defense and that he was guilty as charged, we will not disturb the jury's decision. See, e.g., Birdsong v. State, 685 N.E.2d 42, 46 (Ind. 1997) (affirming the defendant's convictions "[b]ecause

there existed sufficient evidence from which the court could find that defendant did not validly act in self-defense and that he was guilty as charged").

For the foregoing reasons, we affirm Duff's conviction for battery as a class C felony.

Affirmed.

MAY, J. and BAILEY, J. concur