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IN THE
COURT OF APPEALS OF INDIANA

ISSA KOUYATE,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A05-0609-CV-541
	)	
OKI SYSTEMS, INC.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cale J. Bradford, Judge
Cause No. 49D01-0209-CT-1652

October 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Issa Kouyate appeals from a negative judgment following a jury trial in his action against OKI Systems, Inc. ("OKI"). Kouyate raises the following restated issues on appeal:

I. Whether the trial court erred in rejecting Kouyate's *Batson*[1] challenge when OKI used its three peremptory challenges to strike African-American jurors.

II. Whether the trial court erred in instructing the jury regarding OSHA regulations.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 28, 2001, Kouyate was injured in the course of his employment. Kouyate was operating a forklift owned by his employer, Return, Inc. ("Return"), when it suddenly accelerated and the brakes failed. Kouyate sued OKI, the company that had repaired the forklift seven days prior to the accident.

At trial, OKI used three peremptory challenges to strike three African-American venire persons. Kouyate objected to the challenges claiming they were in violation of *Batson*. The trial court overruled Kouyate's objection.

During trial, an OKI agent testified that during repairs to the forklift he checked the brakes, and noted the right hand brake pads were wearing unevenly. The agent further testified that he "red-tagged" the forklift on that same day and notified his contact at Return. Return's contact testified and denied being notified that the forklift had been "tagged-out." Kouyate testified that he never noticed a tag or was aware he was not to use the forklift.

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Evidence was also presented that Return did not require its employees to be OSHA-certified to operate its forklifts, that Return may not have had user manuals for its forklifts, that Return would use an operable forklift even if it had a brake problem, and that the forklift had an electronic card that controls acceleration, which could go bad and cause the forklift to suddenly accelerate. OKI called a professional engineer as an expert who testified that Return's failure to properly train its employees was a contributing factor to the incident. Further, evidence was presented that the "plugging" (an alternative means of stopping a forklift in lieu of braking) was functioning normally on the forklift, and that a properly trained operator would know how to execute this maneuver.

Prior to final arguments, Kouyate objected to an OKI instruction relating to OSHA regulation 29 CFR 1910.178(1). The trial court overruled Kouyate's objection.

The jury found that OKI was not at fault and returned a verdict in its favor. Kouyate now appeals.

DISCUSSION AND DECISION

I. Batson Challenge

Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, a party cannot use a peremptory challenge to strike a prospective juror because of the juror's race. *Patterson v. State*, 729 N.E.2d 1035, 1038-39 (Ind. Ct. App. 2000) (citing *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)). A party's race is irrelevant to whether a *Batson* challenge is appropriate. *Ashabraner v. Bowers*, 753 N.E.2d 662, 666 (Ind. 2001). When a party raises a *Batson* challenge, the trial court must undertake a three-step test. *Schumm v. State*, 866 N.E.2d 781, 789 (Ind. Ct. App. 2007), *reh'g granted on other grounds* (citing

Highler v. State, 854 N.E.2d 823, 826 (Ind. 2006)). First, the trial court must determine whether the objecting party has made a prima facie showing that the challenger exercised a peremptory challenge on the basis of race. *Id.* (quoting *Highler*, 854 N.E.2d at 826-27). "Second, 'the burden shifts to the [challenger] to present a race-neutral explanation for striking the juror.'" *Id.* (quoting *Highler*, 854 N.E.2d at 827). "Third, the trial court must evaluate 'the persuasiveness of the justification' proffered by the [challenger], but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Id.* (quoting *Highler*, 854 N.E.2d at 828). "We afford great deference to a trial court's determination that a prosecutor's motivation for striking a juror was not improper, and will reverse only if we conclude the trial court's decision was clearly erroneous." *Id.*

During jury *voir dire*, OKI used its three peremptory challenges to strike African-American venire-persons. After Kouyate made a *Batson* objection to the challenges, OKI counsel provided the following reasons: the first venire-person was pregnant and was experiencing morning sickness that caused her to vomit every day after lunch; the second venire-person knew plaintiff's attorney and knew he had contributed to her husband's political campaign; and the third venire-person did not appear to be engaged in the process and only gave cursory answers to counsel's questions. The trial court found the reasons for the peremptory challenges to be race-neutral and overruled Kouyate's objection.

To the extent Kouyate established a *prima facie* showing that OKI's peremptory challenges were based on race, OKI gave its reasons for exercising its peremptory challenges, and the trial court accepted the reasons as being race-neutral. The trial court is in the best

position to weigh the reasons, and on appeal, we give great deference to its decision. Kouyate has failed to show that the trial court erred.

II. OSHA Jury Instruction

Kouyate also challenges the jury instruction on OSHA safety training requirements.[2] Specifically, he claims the instruction was irrelevant, verbose, and confused the issues before the jury. Kouyate claims the instruction's four-page length and detailed requirements were designed to confuse and mislead the jury. OKI contends that the non-mandatory instruction could not have affected the verdict, and therefore, regardless of whether or not it was proper, any error was harmless.

"An instruction is harmless when a reviewing court concludes the record establishes beyond a reasonable doubt that the error did not contribute to the verdict." *State v. Jones*, 805 N.E.2d 469, 473 (Ind. Ct. App. 2004) (citing *Yates v. Evatt*, 500 U.S. 391, 402 (1991)). Harmless error analysis requires us to review the whole record and thereafter make a judgment concerning the effect of the instruction upon reasonable jurors. *Id.*

In *Koziol v. Vojvoda*, 662 N.E.2d 985, 992 (Ind. Ct. App. 1996), we reviewed whether a jury instruction on a non-party's comparative fault was an abuse of discretion. There, a passenger in a stalled vehicle sued the driver of the stalled vehicle for injuries he sustained when the stalled vehicle was struck by another vehicle. The plaintiff appealed the trial court's giving of a comparative fault instruction and claimed that there was no issue of comparative fault because the nonparty, the driver of the other vehicle, was not before the

[2] We remind Appellant's counsel that Indiana Appellate Rule 46(A)(8)(e) requires any instruction challenged on appeal to be set out in appellant's brief verbatim.

jury. *Id.* We reasoned that the defense of comparative fault was still at issue and that because the instruction properly advised that the defendant carried the burden of proving his defenses, there was no abuse. *Id.* Further, we determined that because the jury found no negligence on the part of the defendant, even if it was an erroneous instruction, the issue was moot because, without negligence, there was no need for the jury to compare fault. *Id.*; *see also Tate v. Cambridge*, 712 N.E.2d 525, 528 (Ind. Ct. App. 1999), *trans. denied* (issue of duty and breach of that duty must be determined before jury may consider comparative fault).

Here, the OSHA instruction dealt solely with the question of fault of the nonparty employer, Return. Because the jury found that OKI was not at fault, the fault of Return, if any, is irrelevant and, as stated in *Koziol*, "moot." 662 N.E.2d at 992. Even if the instruction was erroneous, it would not change the outcome of the case – that OKI was not at fault. Therefore, any error attributed to the instruction was harmless.

Affirmed.

ROBB, J., and BARNES, J., concur.