

IN THE COURT OF APPEALS 01/14/97
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00576 COA

EUGENE DEDEAUX A/K/A EUGENE DEDEAUX, JR.

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ALBERT NECAISE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: FELONY-MURDER

TRIAL COURT DISPOSITION: DEDEAUX CONVICTED OF MURDER AND SENTENCED
TO LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

MANDATE ISSUED: 6/19/97

EN BANC

McMILLIN, J., FOR THE COURT:

Eugene Dedeaux was convicted by a Harrison County Circuit Court jury for the murder of his wife, Joyce Dedeaux, and sentenced to life in prison. It is from that verdict and resulting sentence that Dedeaux brings this appeal, assigning the following as error: (1) the denial of his right to equal protection because of the racially-based exclusion of black venire members from the jury through the improper use of peremptory challenges by the State, (2) the failure of the lower court to grant a directed verdict based on what Dedeaux claims to be his uncontradicted testimony establishing his innocence, (3) the trial court's failure to grant two requested accident instructions, and (4) the trial court's failure to sequester the jury when it recessed for the evening after deliberations had begun.

We find no merit to any of the issues raised by Dedeaux, and we therefore affirm.

I.

Facts

On the morning of August 23, 1993, Joyce Dedeaux was shot and killed outside her home in Biloxi. Officers responded to a 911 call from Eugene Dedeaux, the husband of the victim. Upon their arrival at the scene, they found Mrs. Dedeaux's body slumped over between the driver and passenger seat of her Volvo with a bullet wound to her head. Her arm was resting on a notepad where she had apparently been taking notes prior to her death. Also on the car seat was a copy of a complaint for divorce. The Volvo had collided with another vehicle in the driveway, and there was broken glass in the yard about ten feet behind the car. On top of the car was a tape recorder which was still playing when the officers arrived.

Dedeaux was inside the home, sitting on the couch with a gun lying near his feet. Dedeaux informed officers that his wife had awakened him that morning requesting that he sign divorce papers and asking for the tape recording of a telephone conversation between her and a man which Dedeaux had made. Dedeaux stated that he refused her requests, but did walk with his wife to her car and ultimately agreed to play the tape for her. He placed the tape recorder on top of the car and his left hand on the driver's side window, which was partially rolled up. He and Mrs. Dedeaux discussed certain terms of the divorce while she took notes on a notepad. Then, according to Dedeaux, Mrs. Dedeaux started the car and told him to move his hand. When he refused to do so, she continued rolling up the window, causing his left hand to become stuck. Dedeaux then took his gun out of his pocket with his right hand to frighten her into releasing his hand. He stated that when his wife pulled the car forward, it jerked his body and caused the gun in his right hand to discharge. Dedeaux called 911 for help, stating, "I just killed my wife . . . I (inaudible) took a gun and shot her." Dedeaux was indicted, tried, and convicted for the murder of Joyce Dedeaux. It is from this conviction and resulting judgment of sentence that Dedeaux brings this appeal.

II.

Batson Challenge

The State used peremptory challenges to remove Julia Love, Lawrence Jasper, and Bryan Hampton, three of six black individuals on the venire. Dedeaux argues that these challenges were racially motivated, thereby depriving him of the right to a fair trial. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

In a hearing in chambers, the State offered what it claimed to be non racial reasons for exercising these challenges. According to the State, Ms. Love was struck because she had previously served on a hung jury in a murder trial; Mr. Jasper was struck due to lack of available information about him because he had not fully completed his juror information card; and Mr. Hampton was struck because he lived at the same address as, and was probably related to, the indictee in a pending murder case. Counsel for the defense was permitted to make a response to these proffered reasons. The judge then made a determination that he found the reasons offered acceptable as not being discriminatory in purpose, concluding that the defense had failed to make out "a prima facie case of discrimination." He thereupon impaneled the jury without these three individuals.

The record indicates that this is another instance where all the players at the trial level appeared unaware of the procedural steps outlined by the United States Supreme Court for the resolution of a *Batson*-type challenge to the exercise of peremptory challenges. It seems to be a misconception of almost universal dimension that the mere incantation of the word "*Batson*" is sufficient to trigger the requirement that the State affirmatively defend the race-neutral character of its strikes. The *Batson* decision states, to the contrary, that, before such a requirement arises, the defense must not only suggest the existence of impropriety but must also establish a prima facie case that such discrimination is, in fact, occurring. *Batson*, 476 U.S. at 95-96. *Batson* suggests several ways that a prima facie case may be made, but then concludes:

[T]hese examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Id. at 97.

Only at such time as the prima facie showing is made may the State be required to come forward with its race-neutral explanations. *Id.*

The subsequent case of *Hernandez v. New York* advances the proposition that, if the State voluntarily comes forward with its race-neutral reasons for exercising its challenges, then the requirement of a prima facie showing of discriminatory purpose becomes moot. *Hernandez v. New York*, 500 U.S. 352, 358 (1991). *Hernandez* does not answer the question of what consequences attach when the trial court improperly compels the State to give its reasons without making the requisite preliminary finding that a prima facie case of discrimination has been established. Neither has that question been answered in Mississippi by our supreme court. It has been established that, if the *defendant* is compelled by the trial court to respond to a 'reverse-*Batson*' challenge from the prosecution without the prosecution having made a prima facie showing of discrimination, such compelled response will not be treated as a waiver under *Hernandez*. *See Stewart v. State*, 662 So. 2d 552, 558-59 (Miss. 1995).

As a practical matter, the State would appear to have no real recourse from a trial court's misconception of its duties under *Batson*, since it seems doubtful that the State would have an appeal from an acquittal on a claim that it was improperly denied its peremptory challenges, and a guilty verdict renders the issue moot. Therefore, this Court will, until instructed of its error, treat both voluntary and compelled recitals of non racial reasons for exercising peremptory challenges *by the State* as rendering moot the preliminary requirement that the defense make a prima facie showing of discriminatory intent under the rationale of *Hernandez*. See *Hernandez*, 500 U.S. at 358.

Thus, the issue before us is not, as the trial court stated, whether there was a prima facie case of discrimination made, but, more properly, whether the trial court was manifestly in error in holding, in effect, that the defense had failed in its "ultimate burden of persuasion" that such discriminatory activities were underway. *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995).

We conclude that he was not. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360. The reasons given by the State in this instance are not facially based upon any consideration of race. Thus, the only basis to disallow the strikes under *Batson* would have been for the trial court to determine that the reasons offered, though facially race-neutral, were in fact merely pretextual justifications to disguise the true discriminatory purposes of the prosecution. *Id.* at 362. The trial court admitted that the reason offered to challenge Ms. Love was questionable in his mind, but, nevertheless, concluded that it was a legitimate reason. Though "implausible or fantastic justifications *may . . .* be found to be pretexts for purposeful discrimination," such a conclusion is not compelled by even "silly or superstitious" reasons. *Purkett*, 115 S. Ct. at 1771 (emphasis supplied). Such a subjective conclusion must be made, in the first instance, by the trial court, and that decision on appeal is given great deference. *Stewart v. State*, 662 So. 2d 552, 558 (Miss. 1995); see also *Davis v. State*, 551 So. 2d 165, 171 (Miss. 1989). The court made no finding of pretext in the reasons offered, and there is nothing in the record to support the proposition that the trial court was manifestly in error in failing to conclude that the State was engaged in such improper activity. As a result, we determine this issue to be without merit.

III.

Directed Verdict Under *Weathersby*

The defendant, not unexpectedly in the circumstance where a homicide has occurred and there are no witnesses other than the defendant, claims that he is entitled to a directed verdict under authority of *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933). The *Weathersby* rule, as it has come to be known, states:

[W]here the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

Weathersby, 147 So. at 482.

At the threshold, there appears to this Court a substantial question as to whether Dedeaux's version

of the homicide was so "reasonable" as to bring it within the mandatory provisions of *Weathersby*. His story that his wife rolled the car window up, thereby trapping his hand, then began to drive away, that he pulled a gun solely for the purpose of frightening her into releasing his hand, and that a sudden forward jerk in the car caused an accidental contraction of his trigger finger, if not incredible, certainly requires a rather uncritical acceptance of a somewhat bizarre sequence of events. This Court concludes that the version of the events was, on the whole, so contrary to "facts of common knowledge" as to take it out of the *Weathersby* rule.

Aside from that, there was substantial evidence that both directly and indirectly contradicted Dedeaux's version of the event. A neighbor testified to observing Dedeaux walking in a calm manner away from the shooting scene, contrary to Dedeaux's claim that he rushed into the house to summon 911 assistance. There was a tape recorder still sitting on top of the car when police arrived, suggesting that there was no sudden acceleration of the car. There was testimony of a threat made by Dedeaux approximately two weeks prior to the shooting that he was going to "blow [the victim's] . . . brains out." Finally, Dedeaux's description of the incident to the 911 operator could be reasonably construed as being inconsistent with a purely accidental shooting.

We conclude, based on all the foregoing, that the *Weathersby* rule had no application in this case, and that the case was properly submitted to the jury for determination of guilt.

IV.

Refusal to Grant Accident Instruction

Dedeaux complains of the trial court's refusal to grant a requested instruction permitting his acquittal if the jury concluded the shooting was accidental within the meaning of section 97-3-17(a) of the Mississippi Code of 1972. This passage, which establishes one circumstance in which a killing may be an excusable homicide, would cover this case only if Dedeaux had been "doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent. . . ." Miss. Code Ann. § 97-3-17(a) (1972). Dedeaux himself admitted pointing the gun at his wife in an attempt, he said, to frighten her. This act, in itself, was an unlawful act and could not possibly have been done "with usual and ordinary caution." *Id.*; *Thibodeaux v. State*, 652 So. 2d 153, 166-67 (Miss. 1995). There must be some underlying evidentiary basis to support the giving of any requested instruction. *See Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990) (citations omitted). There is no such basis in this record, and the trial court properly denied the instruction.

Dedeaux also requested an instruction based upon the language of section 97-3-17(b), which makes excusable a homicide "committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation." Miss. Code Ann. § 97-3-17(b) (1972). There was no evidence in the record to support such an instruction. The only "provocation" offered by the victim, even according to the defendant's own testimony, was an attempt to drive away in her car at a time when he was pointing a gun at her in an attempt to frighten her. The trial court did not err in denying this requested instruction.

V.

Failure to Sequester the Jury

Dedeaux claims reversible error occurred when the trial court allowed the jury to go home for the evening at 8:00 P.M. after deliberations had already begun, an alleged violation of then-existing Uniform Criminal Rule of Circuit Court Practice 5.13, which stated that "[i]f deliberations are recessed, the jurors may be sequestered if the court orders; in all capital cases the jury shall be sequestered." *See* Unif. Crim. R. Cir Ct. Prac. 5.13. Though the death penalty was not an available punishment in this case, Dedeaux nevertheless asserts that his was a "capital case" as defined by section 1-3-4 of the Mississippi Code of 1972, since life in prison was a possible sanction. *See* Miss. Code Ann. § 1-3-4 (Supp. 1996). For purposes of our consideration, we accept Dedeaux's characterization of the nature of his case.

We begin our analysis with the observation that the uniform criminal rules in effect at the time this case was tried seemed, almost by design, to lay a trap for the unwary. Rule 5.07, entitled "Sequestration of the Jury," stated quite plainly that sequestration was mandatory throughout the trial only if the State was seeking the death penalty. *See* Unif. Crim. R. Cir. Ct. Prac. 5.07. In all other cases, the question of sequestration was vested in the sound discretion of the court. *Id.* That rule made no distinction between the phase of the trial when evidence was being presented and the phase where the jury had received the case and begun its deliberations. The requirement of mandatory sequestration after the case is submitted, which must be seen as conflicting somewhat with the general pronouncement of Rule 5.07, is found in the text of another rule. To this consideration we add the proposition that, under existing Mississippi jurisprudence, even otherwise mandatory sequestration may be waived by the defendant. "We see no reason to prohibit a defendant from waiving his common law right to have a jury sequestered when the defendant may waive his constitutional right to a trial by jury in the first instance." *Barnes v. State*, 374 So. 2d 1308, 1309 (Miss. 1979).

During voir dire, the trial court made the following statement to the prospective jurors without comment or objection by defense counsel:

The second thing is, I want to make sure you understand that you will be disbursed at night and at lunchtime. You won't be kept together. You will be allowed to go home. During the lunch breaks you'll be allowed to go about or wherever it is that you want to partake of some food. In some cases the jurors are kept together, in this case it won't happen. I want to go ahead and eliminate any concern that one or more of you may have about that.

The defense raised no objection to the above preliminary pronouncement by the trial court at the time it was made. The pronouncement was not restricted in any manner, nor was there any caveat attached that the terms of the announcement might not apply if circumstances compelled a temporary cessation of deliberation after the case was submitted to the jury.

When the matter arose on the evening that the jury began deliberation, a fair reading of the record shows that the real issue being discussed was, not whether the jury would be permitted to go home or be required to spend the night together in a motel, but whether the court should compel the jury to continue deliberation into the later hours of the evening in an attempt to reach a verdict that night. Defense counsel stated on one occasion, "I think they [the jury] should be allowed to stay back there until they reach a verdict or either report to the court that they are hopelessly deadlocked." Another

time, he stated "I have discussed this with my client and he's desirous of the jury staying until they reach some type of verdict tonight."

When the trial court insisted on inquiring as to the jury's preferences on the matter, the court asked defense counsel if he had "any authority one way or the other as to the Court's power to allow them to go home and come back in the morning" Defense counsel replied, "Judge, I don't have any authority. I don't think the court has the right to disburse the jury once they start their deliberations. I realize this is a nonsequestered jury, but I think once they start deliberating that they should remain together. No, sir. I do not have any authority."

The sole authority suggesting the necessity to sequester a jury that, up to that point had not been sequestered, was the pronouncement of Uniform Criminal Rule of Circuit Court Practice 5.14. This is a procedural rule only, and there is no indication that it is in recognition of any vested constitutional right. To the extent that defense counsel's objection to the suspension of deliberations implicated this isolated portion of one procedural rule, it appears to have been nothing much more than a lucky guess. Shortly after this case was tried, the rules regarding sequestration were changed so that, even in this circumstance, sequestration would be subject to the sound discretion of the trial court at all phases of the trial except in a case where the prosecution is seeking the death penalty.

There was no allegation of any prejudice or improper juror contact or behavior during the evening recess. Even as late as appellant's new trial motion, the issue of failing to sequester the jury was not directly raised; the only issue asserted being that the trial court abused its discretion in suspending deliberations for the evening when it did, rather than requiring the jury to deliberate further into the night.

The clear thrust of the appellant's argument at trial was against suspending deliberations and was aimed at forcing the jury to continue to work. There was no meaningful consideration or discussion of the issue of where the jury would spend the night if the trial court elected to let the jury temporarily halt its work. This, coupled with defense counsel's inability to cite to the court any authority on the necessity to sequester the jury for the night, leads this Court to the conclusion that this issue was effectively waived. In the alternative, to the extent that the statement "I think once they start deliberating that they should remain together" is seen as a proper assertion of the right to require sequestration for the evening, we find that the subsequent error of allowing the jury to disburse for the night was, under the circumstances of this case, harmless.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF MURDER AND SENTENCE TO LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT, EUGENE DEDEAUX.

FRAISER, C.J., BRIDGES, P.J., DIAZ, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BARBER AND COLEMAN, JJ. THOMAS, P.J., NOT PARTICIPATING.

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KING, J., DISSENTING:

The majority holds that allowing the jury to disburse after commencing deliberations was harmless error. I respectfully dissent from that opinion.

I am of the opinion that the court committed reversible error when it failed to sequester the jury upon commencement of deliberations. A jury must be sequestered in all capital cases. Unif. Crim. R. Cir. Ct. Prac. 5.14; *see also Cox v. State*, 365 So. 2d 627, 629 (Miss. 1978); *Wilson v. State*, 248 So. 2d 802, 804 (Miss. 1971).

The determination of what is a capital case is a matter of policy. The legislature has the responsibility to declare that policy and has done so by legislative enactment. A capital case is one punishable by death or life imprisonment. Miss. Code Ann. § 1-3-4 (1972). A sentence of life imprisonment is mandatory for one convicted of murder. Miss. Code Ann. § 97-3-21 (1972). The Defendant's prosecution for murder qualifies as a capital case. Therefore, the jury should have been sequestered.

The majority seeks to rationalize the violation of the appellant's right to a sequestered jury by creating a conflict between Uniform Criminal Rules of Circuit Court 5.07 and 5.14, where no conflict exists. Rule 5.07, "Sequestration Of The Jury", provides that in death penalty cases, "the jury shall be sequestered during the entire trial"(emphasis added) while Rule 5.14, "Verdict" touches only upon

what is to occur when jury deliberation begins. In pertinent part, Rule 5.14 reads, "If the deliberations are recessed, the jurors may be sequestered if the court orders; *in all capital cases the jury shall be sequestered.*" (emphasis added). A simple reading of the relevant portions of these rules clearly shows there to be no conflict, save for that which the majority wishes to create.

The majority next undertakes an exercise to establish that the Appellant waived his right to have the jury sequestered. This is accomplished by saying Defendant should have objected during voir dire, when the trial judge said he would not keep the jury together. This argument is inconsistent with the concept of waiver.

A waiver occurs either through an affirmative act, or when a Defendant fails to object in a timely manner, so as to allow correction of the error. *See Banana v. State*, 635 So. 2d 851, 853 (Miss. 1994) (defendant waived objection to judge sitting as trial judge by voluntarily entering plea of guilty); *Shelton v. State*, 445 So. 2d 844, 846 (Miss. 1984) (Waiver occurred when defendant failed to object to remarks of trial judge). While it would have been nice if the Defendant had objected at that point, he did not nor was he obligated to do so. The only thing which had transpired at that point was not an action, but a statement of intent by the court - that intent being the jury not be sequestered during the entire trial. The Defendant did not wish to have the jury sequestered for the entire trial. He merely wished to have the jury sequestered once deliberations commenced. Such a position is not inconsistent with the stated intent of the court.

The injury to the Defendant would have occurred once jury deliberations commenced and the court prepared to disburse the jury. It was at this time, and only at this time, that the Defendant was obligated to object or consider the right waived. *Baker v. State*, 327 So. 2d 288, 292-93 (Miss. 1976) (objection should be made contemporaneously with the occurrence or matter complained of so that the court may, when possible, correct the error with proper instructions to the jury). Defendant did in fact object immediately prior to the injury so that he cannot now be alleged to have stood mute and waived this right.

The majority continues this exercise by suggesting the Defendant objected, not to the nonsequestration, but the failure to require the jury to continue to deliberate. Such a suggestion is, at best, a misstatement of the record.

The record indicates that the Defendant had a two fold objection, (1) he wanted the jury to either stay and render a verdict, or declare itself deadlocked or (2) if deliberations did not continue, he wished the jury to be sequestered. This fact is recognized in the majority opinion on page 10, where we find the following quote from the trial record:

"Judge, I don't have any authority I don't think the court has the right to disburse the jury once they start their deliberation. I realize this is a nonsequestered jury, *but I think once they start deliberating that they should remain together.* No sir. I do not have any authority"

The majority finally rationalizes by saying that a waiver occurred because Defendant failed to cite any authority in support of his objection to the nonsequestration of the jury. Because we are dealing with a court rule, I find the majority's reliance on waiver under these facts to be particularly troubling.

We may not choose to charge trial judges with knowledge of the constitution, the statutory law or common law, but surely a trial judge is chargeable with knowledge of the procedural rules, which govern the operation of his court. If a judge is chargeable with knowledge of the procedural rules governing his court, it would appear to stretch belief, that one must articulate an objection, and then cite the rule or consider the objection waived. Such a requirement is tantamount to carrying coals to New Castle!

The waiver rule was adopted to avoid holding a judge in error on matters which were not timely placed before him or on matters which were placed before him, about which he would not generally be immediately knowledgeable. *Boutwell v. State*, 165 Miss. 16, 28, 143 So. 479 (1932). The rules by which a judge is required to operate his court do not seem to fit either category.

Finally, the majority attempts to diminish the severity of the trial court's error by suggesting that the error was harmless and by stating that Rule 5.14 is a "procedural rule only, and there is no indication that it is in recognition of any vested constitutional right." A defendant's right to a sequestered jury may not have genesis in the Constitution, but it does have genesis in the common law. *See Woods v. State*, 43 Miss. 364, 369 (1871) (common law . . . forbids the separation of a jury in the trial of a capital case before they have been discharged of the prisoner). Contrary to the majority's assertion, Rule 5.14 is not just a mere rule of procedure; the rule also gives credence to a defendant's common law right to have a sequestered jury.

Moreover, a defendant has a constitutional right to a trial by a fair and impartial jury. The obligation to provide a fair and impartial trial is important for any offense, but it is of great importance when the offense charged is a capital crime. The practice of sequestering the jury upon commencement of deliberations is an acknowledgement of this fundamental right. It is an essential safeguard of the defendant's right to a verdict rendered by a jury of his peers free from taint or outside influences. In this case, to hold otherwise, tramples upon a procedural and significant right of the Defendant--that is the right to a verdict by his peers, rendered free of the possibility of outside influences.

For these reasons, I would reverse and remand for a new trial.

BARBER AND COLEMAN, JJ., JOIN THIS OPINION.