

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01120 COA

THEODORE MICHAEL LYONS

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. JAMES E. THOMAS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MACK A. BETHEA

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: PAT FLYNN

DISTRICT ATTORNEY: STEPHEN B. SIMPSON

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: DEF. GUILTY OF COUNT 1 ATTEMPTED RAPE AND
COUNT 2 BURGLARY SENTENCED 10 YRS FOR EACH COUNT IN MDOC TO RUN
CONSECUTIVELY

EN BANC.

McMILLIN, P.J., FOR THE COURT:

A jury in the Circuit Court of Harrison County convicted Theodore Michael Lyons of attempted rape and burglary of a dwelling. Lyons appeals his conviction and raises six assignments of error. Finding these issues to be without merit, we affirm the conviction of attempted rape. However, noting plain error in the indictment for burglary, we reverse and remand the burglary conviction.

I.

Facts

B.D., a sixty-nine-year-old woman and the victim of this crime, was approached by the defendant, Theodore Michael Lyons, while she was walking home from a visit with a relative. Lyons asked if he could escort her home. He began to walk with her, exhibiting some unusual behavior. Somewhat alarmed, the victim stopped at a cousin's home in order to prevent Lyons from finding out where she lived. She did not proceed on to her own home until she thought Lyons had left.

Despite her precautions, later that afternoon she was on her front porch when Lyons approached her, again acting in an unusual, if not bizarre, manner. Lyons appeared to be in the process of entering the victim's home through the front door when she attempted to physically intervene. At that point, Lyons physically forced her into the house, threw her down on the couch and ripped a portion of her clothing off. He also began to unzip his trousers. The victim was able to struggle free, grab a cordless telephone and lock herself in the bathroom. From there she called a neighbor, asking the neighbor to call the police. After briefly trying to gain entry to the bathroom, Lyons fled.

The victim was able to identify Lyons as her assailant the next day at a photographic lineup conducted by the police.

Lyons was indicted for burglary and attempted rape and was convicted on both counts. This appeal ensued.

II.

Burglary Charge

This Court, in the course of our review of the record, has noted a matter of sufficient concern regarding the indictment for burglary that we consider it under the plain error doctrine. *See* M.R.A.P. 28(a)(3).

The state's burglary statute requires that the accused have the "intent to commit a crime" at the time of breaking and entering. *See* Miss. Code Ann. § 97-17-19 (1972). Mississippi has long held that it is insufficient in a burglary indictment to simply charge the intent to commit some unspecified crime. Rather, the indictment must charge the specific crime which the State alleges the defendant intended to commit.

In *State v. Buchanan*, the supreme court dealt with an indictment that charged the defendant with breaking and entering a dwelling "with the willful, felonious, and burglarious intent, then and there, to commit some crime to the jurors aforesaid unknown." *State v. Buchanan*, 75 Miss. 349, 22 So. 875, 875 (1898). The supreme court condemned the indictment for failing to apprise the defendant of the charge to which he was held to answer, saying that "[u]nder this very indefinite charge, the prosecution may compel the prisoner to run the gauntlet of all the felonies of the criminal calendar, and rain upon his defenseless head blows from every quarter." *Id.* at 349. Likewise, the supreme court recognized this requirement as recently as *Lambert v. State*, stating: "Because the offense of burglary itself requires an underlying crime, an indictment for burglary that does not specify what crime the accused intended to commit is fatally defective." *Lambert v. State*, 462 So. 2d 308, 311 (Miss. 1984).

In the instant case, the indictment charged Lyons with breaking and entering the victim's house with the intent to "commit a crime therein." It appears certain that the defect is not capable of being waived. This fatal error was carried forward into the jury instruction, which simply instructed the jury that it must find the defendant entered the dwelling house of the victim with the "intent of committing a crime therein." The evident problem with such an instruction is that a jury cannot be held to know of every common law and statutory crime in existence. Some jurors may believe that certain acts are criminal when, in fact, no such crime exists under the law. We conclude that to sustain the burglary conviction on this record would be a manifest injustice; therefore, we reverse and remand the conviction on this count.

Because we are reversing the burglary conviction only, the Court must now turn to the issues raised by Lyons to determine their affect on his conviction for attempted rape.

III.

Psychiatric Evaluation

Lyons raises as his first assignment of error the court's failure to grant a continuance. A week prior to trial, defense counsel asked the court to grant a continuance in order to obtain a psychiatric evaluation of the defendant. The attorney felt the evaluation was necessary because Lyons had been found not guilty by reason of insanity in two prior unrelated cases. Lyons had previously been committed to Whitfield and was under the impression that he had been "framed up" in the case at bar. The attorney stated that he had grave doubts about Lyons's ability to assist in conducting the defense of the case.

The supreme court has held that the decision to grant a continuance is in the sound discretion of the trial court. *Jackson v. State*, 684 So. 2d 1213, 1220 (Miss. 1996) (failure to grant continuance to allow defendant to obtain independent psychiatric evaluation not reversible error). This court will only reverse the court's failure to grant a continuance where a manifest injustice has resulted from the decision to deny the continuance. *Id.*

The record shows that the judge gave the defense a fair hearing on its motion. At the hearing, Lyons told the judge that he was mentally fit, that he did not want to be examined by a psychiatrist, and that he was ready to go to trial. Lyons explained that his commitment to Whitfield was drug related, and that he had been released in 1984, some nine years prior to the alleged offense. The judge denied the

continuance motion, noting the defendant's resistance to the idea of a delay and the remoteness of his previous mental problems. The judge also stated that he found the defendant to be articulate and able to communicate with others.

After reviewing the findings made by the trial court, we cannot conclude that the failure to grant a continuance has resulted in a manifest injustice. Therefore, we find this issue to be without merit.

IV.

Double Jeopardy

Lyons's issue on appeal concerning double jeopardy based on the proposition that the attempted rape was an element of the burglary charge has been rendered moot by our decision to reverse the burglary charge.

V.

Batson Challenge

Lyons claims that the trial court committed reversible error when it permitted the State to peremptorily strike Spellman Varnado, a black male, from the jury despite Lyons's *Batson* challenge that the strike was racially motivated. *See Batson v. Kentucky*, 476 U.S. 79 (1986). The *Batson* decision requires the opponent of the strike to make a prima facie showing of discriminatory intent before the party exercising the strike can be compelled to articulate a race-neutral reason for the strike. *Batson*, 476 U.S. at 79-80. However, in a subsequent opinion, the Supreme Court held that when the State voluntarily announces its reasons, the previously-existing issue of determining if a prima facie showing has been made is rendered moot and the court should proceed directly to consider the merits of the offered explanation. *Hernandez v. New York*, 500 U.S. 352, 359 (1991). That is what occurred in this case, and we will, therefore, consider the merits of the State's explanation for striking Varnado.

The State claimed that it struck Varnado because he was forty-nine-years old, unmarried, and childless. The first step in a *Batson* analysis is to determine if the tendered explanation is, on its face, race neutral. At that stage of the inquiry, the tendered reason does not have to be "persuasive, or even plausible" so long as "a discriminatory intent is [not] inherent in the prosecutor's explanation . . ." *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995). The explanation offered by the State cannot be said to be inherently race based. If the State honestly concluded that jurors having a background similar to Varnado would not be good jurors, we may not disturb the results flowing from that decision because we feel that this "is not a reason that makes sense." *Id.*

Nevertheless, that brings the Court to the next level of inquiry, which is whether the tendered reason, race-neutral on its face, is but a pretext to cover a hidden racial animus on the part of the prosecution. *Id.* Decisions of this nature are highly subjective, relying as they must, upon the fact-finder's assessment of the credibility of the prosecuting attorney. As a result, the trial court's findings, when reviewed on appeal, are entitled to great deference. *Hatten v. State*, 628 So. 2d 294, 298 (Miss. 1993). In this case, the trial court found as a matter of fact that the State had accepted other black jury members without protest. Neither, apparently, was there any showing by the

defendant that non-minority venire members similarly situated to Varnado were accepted without challenge by the State. Given the necessarily broad discretion granted to the trial court, we cannot discover an abuse of discretion in the exclusion of Varnado as a juror that would require this Court to set aside the conviction for attempted rape.

VI.

Improper Comment During Closing Argument

During the victim's testimony, she testified that the relative at whose home she stopped while Lyons was following her had an encounter with Lyons the same day. In closing argument, defense counsel was attacking the State's case as being based solely on the identification made by the victim. In the course of that argument, defense counsel derided the State for its failure to call this relative to corroborate the victim's identification. In its final summation, the State responded that the relative was equally available to the defense as to the State, suggesting the duty of the defense to call witnesses that might provide exculpatory evidence. Defense counsel objected to this argument, but the trial court overruled the objection. Lyons now claims this improper argument requires reversal of his conviction.

We agree as to the impropriety of this argument but disagree that reversal is necessary. The law is quite clear that it is improper for counsel, in closing argument, to suggest that the other side's failure to call a particular witness equally available to both sides permits an inference that the witness's testimony would be unfavorable. *Burke v. State*, 576 So. 2d 1239, 1241 (Miss. 1991). The utility of such a rule is self-evident. The jury's decision is supposed to be based upon the evidence presented, not upon speculation of what evidence might have been available and was not presented. The failure to call a particular witness may be based upon any number of considerations, none of which are related to the damage that witness might do to the case.

We find it more than passingly interesting that defense counsel was quite prepared to use this improper summation tactic to bolster his client's case, but claims reversible error when the State, in response, turned the tables on him. However, we resist the impulse to condone the State's improper argument by holding that the defense "opened the door" with its earlier comments on this "missing" witness. The proper response by the State would have been to interpose a timely objection to defense counsel's argument, articulating the particular legal basis for the objection. This would have permitted the trial court to rule on the objection, and to admonish the jury to disregard the improper argument. In this instance, the State's only objection came after defense counsel's argument had begun to address the Biblical requirement of the book of Deuteronomy that a criminal conviction must be based on the testimony of two or more witnesses. The State's objection was that defense counsel "needs to stay within the evidence." We do not find that this broad objection properly raised the issue of the impropriety of speculating a missing witness's testimony. Had the trial court improperly overruled an objection that pinpointed the issue, then the question of whether the defense "opened the door" might merit consideration, but not until then. If one side in a criminal trial may counter improper tactics by the other side with its own answering improprieties, any semblance of rationality in the trial process would soon disappear.

Nevertheless, we conclude that these improper speculations by both sides as to why this witness was not called, or what this witness might have said had she been called, were nothing more than a mildly

distracting sideshow. The arguments by both sides did nothing to aid the jury in its deliberations, but neither, in our opinion, did the State's participation in the events so unduly prejudice the defendant that he was denied a fair trial.

VII.

Lesser-Included Offenses

As his final assignment of error, Lyons argues that the trial court erred when it refused to grant jury instructions on simple assault and trespass.

A lesser-included offense instruction may be denied only where the evidence would justify a conviction of the principal charge only. *Mease v. State*, 539 So. 2d 1324, 1330 (Miss. 1989). The testimony in this case revealed that Lyons threw the victim on the couch, got on top of her, stripped her from the waist down, and began unzipping his pants. Lyons's sole defense was that this was a case of mistaken identification and that, whatever occurred that day, he was not the perpetrator. In order to return a guilty verdict for simple assault the jury would have to reject, for the most arbitrary reasons, portions of the victim's testimony while accepting the remainder. Based on the nature of the defendant's theory of his defense, *i.e.*, that he was not present when the crime was committed, we do not think that it was reversible error to require the jury to either convict of the crime charged or acquit the defendant altogether. A lesser-included offense instruction on these facts would have only given rise to the possibility of a compromise verdict.

As a result, we conclude that the court did not err when it refused to grant an instruction on simple assault. Because we are reversing Lyons's conviction for burglary, it is not necessary for this court to address the judge's failure to grant a trespass instruction.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF ATTEMPTED RAPE AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY OF A DWELLING AND SENTENCE OF TEN YEARS IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE ASSESSED TO HARRISON COUNTY.

BRIDGES, C.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.