[Cite as *State v. Blackshear*, 2020-Ohio-3187.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108916
v.	:	
ANTOINE E. BLACKSHEAR, SR.,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 4, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-635926-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Yasmine M. Hasan, Assistant Prosecuting Attorney, *for appellee.*

Mark A. Stanton, Cuyahoga County Public Defender, and Francis Cavallo, Assistant Public Defender, *for appellant*.

RAYMOND C. HEADEN, J.:

{¶ 1} Defendant-appellant Antoine E. Blackshear, Sr. ("Blackshear") appeals his conviction. For the reasons that follow, we affirm the trial court's decision.

I. Procedural and Substantive History

{¶ 2} On December 31, 2018, Francine Meade ("Meade") and Dwayne Davis ("Davis") stopped their vehicle on West 3rd Street in Cleveland, Ohio. Meade exited the car and walked towards the Justice Center. Davis, who had been riding as a front-seat passenger, exited the car and walked to the driver's side and attempted to take control of driving the vehicle. With the driver-side door open and Davis ready to slide into the driver's seat, Davis was approached by Blackshear who, minutes before, had been released from the Justice Center.

{¶ 3} Blackshear told Davis "I'm taking this f***ing car." Blackshear grabbed at Davis's shirt and the gold chain around his neck and attempted to move Davis out of his way. Blackshear used such force with Davis that he caused Davis's vehicle to rock back and forth.

{¶ 4} As Blackshear and Davis tussled, Meade learned of their physical encounter and ran back to assist Davis. Upon Meade's return to the vehicle, Blackshear walked away from Meade and Davis, and was subsequently apprehended by the police and arrested.

{¶ 5} On January 14, 2019, Blackshear was indicted on one count of robbery and one count of resisting arrest. Blackshear pleaded not guilty to the indictment on January 29, 2019. The court referred Blackshear to the court psychiatric clinic on May 5, 2019, and the parties stipulated to the psychiatric report on June 26, 2019.

{¶ 6} A jury trial commenced on July 10, 2019. During voir dire, the potential jurors provided individual responses to the trial judge's questionnaire. Counsel then questioned the jurors individually.

{¶ 7} In questioning potential juror No. 8 ("juror No. 8"), the prosecutor addressed the juror by her last name — "Miss King" — and asked a few follow-up questions based upon the potential jurist's responses to the judge's questionnaire. Specifically, the questions focused on whether the recent homicide of juror No. 8's father and the imprisonment of her uncle in federal prison for a robbery conviction would adversely affect her ability to be a fair and impartial juror. Juror No. 8 was the only potential juror that the prosecutor referenced by name. Blackshear's counsel addressed juror No. 8 by her first name, and she was the only juror to whom he did so; this was not questioned by juror No. 8.

{¶ 8} During a break in voir dire, juror No. 8 informed the bailiff she was upset that the prosecutor called her by name during voir dire. The court held a side bar at which only juror No. 8, the defendant, and counsel were present. The trial judge explained that counsel was provided a list of potential jurors that included the jurors' first and last names. Counsel had discretion to reference the venire by their first and/or last name or juror number, and different forms of address were used in the various court rooms within the courthouse.

{¶ 9} The prosecutor then apologized to juror No. 8 and indicated that the use of her name was unintentional: "I didn't even realize that I called you by your name, so it was an unconscious decision. There was only you and I believe one other

person that I had questions regarding background information for. It was an unconscious decision, and I do apologize if I offended you in any way for it." (Tr. 128.)

{¶ 10} Juror No. 8 immediately stated that she was uncertain she could be unbiased against the state of Ohio and explained her conflicted position:

> Juror No. 8: In a — it would be a personal thing, but for me it's just like that snafu would just be in my mind. Like the presentation could be flawless or astounding, but I would still have in my mind that [the prosecutor] singled me out as the person that [she] called by their name. I'm pretty sure if you asked any juror in here, they know my name.

(Tr. 129.)

{¶ 11} Defense counsel further questioned juror No. 8 and the potential jurist indicated she could follow the court's instructions and be objective and fair in evaluating the facts of the case. (Tr. 129-130.) Juror No. 8 stated that she would objectively consider the prosecutor and the evidence presented by her even though the juror, personally, would not forget that the prosecutor singled her out by name:

> Juror No. 8: I would say specifically it's now gone — for me it would be more along the lines of I can impartially listen to their argument, but personally with her I feel like I have a bias. Just like why would you do that? But I can still be objective, but still feel like — I don't really get why you would essentially call me out in that way.
>
> * * *
>
> I do not have an issue with separating the two, because I do it every day in my job.

(Tr. 132.)

{¶ 12} Upon the state's motion to excuse juror No. 8 for cause, the trial court asked a series of questions regarding the potential juror's impartiality. (Tr. 131-134.) The trial court denied the motion for cause but noted, in anticipation of a *Batson* challenge, the following: "I think it is very hard to say that at this point this was racially motivated by the State of Ohio." (Tr. 139.)

{¶ 13} The state subsequently exercised a peremptory challenge to excuse juror No. 8 — the sole African-American on the venire. Blackshear, who is also African-American, raised a *Batson* challenge to juror No. 8's removal, but the trial court denied that challenge.

{¶ 14} A jury was impaneled and following trial, the jury returned a guilty verdict on Count 1, robbery, a second-degree felony in violation of R.C. 2911.02(A)(2), and a not guilty verdict on Count 2, resisting arrest, a second-degree misdemeanor in violation of R.C. 2921.33.

{¶ 15} The court sentenced Blackshear to three years at the Lorain Correctional Institution, and Blackshear filed a timely appeal on August 19, 2019, raising the following assignments of error, verbatim, for our review:

> Assignment of Error I: The trial court erred in overruling appellant's objection to allowing the prosecution to exercise one of its peremptory challenges in violation of *Batson v. Kentucky*.
>
> Assignment of Error II: There was insufficient evidence produced at trial to support a finding of guilt.
>
> Assignment of Error III: The verdict of the jury was against the manifest weight of the evidence.

II. Law and Analysis

A. *Batson* Challenge

{¶ 16} In his first assignment of error, Blackshear argues that his constitutional rights were violated when the trial court allowed the state to peremptorily excuse the only African-American juror from the venire.

{¶ 17} In *Batson*, the United States Supreme Court found that the Equal Protection Clause of the United States Constitution applies to a state's use of peremptory challenges during jury selection. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *Batson* prohibits the state from utilizing a peremptory challenge solely on the basis of the potential juror's race or "on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson* at 89.

{¶ 18} *Batson* set forth a three-step test when evaluating claims that a peremptory strike violated equal protection. *State v. Moseley*, 8th Dist. Cuyahoga No. 92110, 2010-Ohio-3498, ¶ 32. Initially, the opponent of the peremptory strike must demonstrate a prima facie case of racial discrimination. *Id.*

{¶ 19} If the defendant presents a prima facie case, the burden then shifts to the state to provide a race-neutral basis for the peremptory challenge. *State v. May*, 2015-Ohio-4275, 49 N.E.3d 736, ¶ 44 (8th Dist.). "This step of the process 'does not demand an explanation that is persuasive, or even plausible.'" *State v. Richardson*, 1st Dist. Hamilton No. C-030453, 2005-Ohio-530, ¶ 74, quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), citing *Hernandez v. New*

York, 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). The explanation need not rise to the same level substantiating a challenge for cause. *Moseley* at ¶ 33, citing *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 106. "But the prosecutor must give a clear and reasonably specific explanation 'based on something other than the race of the juror.'" *Richardson* at ¶ 74, quoting *Hernandez, supra*. Absent an inherent discriminatory interest, the trial court deems the state's proffered reasoning race-neutral. *May* at ¶ 44.

{¶ 20} The third step of the inquiry requires the trial court to determine, based upon all the circumstances, whether the opponent of the peremptory strike proved purposeful racial discrimination. *Moseley* at ¶ 34, citing *State v. Herring*, 94 Ohio St.3d 246, 256, 2002-Ohio-796, 762 N.E.2d 940. The trial court must examine the peremptory challenge in context to ensure the offered race-neutral reasoning is not simply pretextual. *May* at ¶ 45. The trial court considers the persuasiveness of the state's reasoning, but the opponent bears the burden of persuasion regarding racial motivation. *Moseley* at ¶ 34.

{¶ 21} "A trial court's finding of no discriminatory intent will not be reversed on appeal unless it was clearly erroneous." *State v. Webster*, 8th Dist. Cuyahoga No. 102833, 2016-Ohio-2624, ¶ 59, citing *State v. Hernandez*, 63 Ohio St.3d 577, 583, 589 N.E.2d 1310 (1992), following *Hernandez, supra*. "This deferential standard arises from the fact that step three of the *Batson* inquiry turns largely on the evaluation of credibility by the trial court." *Moseley*, 8th Dist. Cuyahoga No. 92110, 2010-Ohio-3498, at ¶ 35.

{¶ 22} The prosecutor sought to remove juror No. 8 through a peremptory challenge. (Tr. 152.) Defense counsel raised a *Batson* challenge and argued juror No. 8, who was the only African-American juror in the venire of 22 jurors, was removed due to her race. (Tr. 153.)

{¶ 23} Initially, the state argues Blackshear failed to establish the first step of the *Batson* analysis — a prima facie case of discrimination. However, this issue is moot because the state presented a race-neutral explanation that was accepted by the trial court:

> "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."

Hernandez at 583, quoting *Hernandez*, 500 U.S. 352, at 359, 111 S.Ct. 1859, 114 L.Ed.2d 395.

{¶ 24} The prosecutor offered the following race-neutral justification for removing juror No. 8 in satisfaction of *Batson's* second prong:

> Prosecutor: Thank you, Your Honor. I don't have it in front of me, but the case law I cited previously when we were on the record outside of the presence of the jury. The reason for Prospective Juror 8, * * * King's removal, was for a race-neutral reason, that being she was offended when she was addressed by her name, Miss King, during the voir dire process and during her questioning.
>
> When asked if she could be fair and impartial to the State of Ohio and the State of Ohio's presentation, her specific answer initially was that even if she, meaning myself, were to present a flawless case, she was not sure if she could, because it would always be in the back of her mind.

> The State understands that upon further questioning by the defense attorney in this matter, she stated that she could follow the law. However, the State would, again, point out her initial knee-jerk reaction, which in most instances ends up being a person's true feelings, that she would hold it against the State and then proceeded to eventually say that she would hold it against me personally, just not professionally.
>
> That raises cause for concern, especially when the State got up to then voir dire the additional two witnesses and Prospective Juror 8 kept rolling her eyes every time I spoke.
>
> So the State believes that she would not be a fair and impartial juror in this matter. The State would have no previous reason to strike her until that comment was made and one of the reasons Miss King was initially addressed was because she was one of the few people in the box that had stood out with her father being the victim of a homicide and her uncle being in federal court for robbery.

(Tr. 154-155.)

{¶ 25} The court noted the defendant's *Batson* objection and rejected it. Juror No. 8's removal stemmed from the juror's own misgivings that were voiced to the bailiff during voir dire, and that were addressed at the court's side bar.[1] While the prosecutor apologized to juror No. 8, the juror questioned, on the record, her ability to act impartially and disassociate her personal feelings about the prosecutor's use of the juror's last name from the prosecutor's presentation throughout trial. Although juror No. 8 subsequently retracted those statements, her potential inability to act fairly and impartially had been voiced. Concern that a juror cannot act fairly and impartially is an appropriate race-neutral reason to seek

[1] Blackshear's argument that the prosecutor purposefully targeted juror No. 8 — by calling the potential juror by her last name — with the intent to provoke a negative reaction is unsupported by the record.

removal of a juror. *Webster*, 8th Dist. Cuyahoga No. 102833, 2016-Ohio-2624, at ¶ 72. The court observed the juror and counsel throughout the voir dire process, found no racial motivation for the peremptory challenge, and thereby, rejected the *Batson* challenge. (Tr. 155-156.)

{¶ 26} After reviewing the record, we find the record supports the trial court's finding that the state provided a legitimate, race-neutral explanation to peremptorily excuse juror No. 8, and we cannot find the trial court's denial of Blackshear's *Batson* challenge was clearly erroneous. Blackshear's first assignment of error is overruled.

B. Sufficiency of the Evidence

{¶ 27} In his second assignment of error, Blackshear argues that the evidence did not support a conviction of robbery and the state failed to prove his intent to commit robbery. Specifically, Blackshear argues that a physical altercation between Blackshear and Davis coupled with Blackshear's statement — "I'm taking this f***ing car" — do not demonstrate Blackshear's intent to steal Davis's car. Blackshear argues that absent the use of a weapon, threats, or an alleged attempt to gain access to the vehicle, "the elements of a legitimate attempt to steal [the] vehicle, let alone a specific intention to commit grand theft, have not been established." Appellant's brief at 13. Blackshear also denies Davis suffered any harm or injury.

{¶ 28} Where a party challenges the sufficiency of the evidence supporting a conviction, a determination of whether the state has met its burden of production at trial is conducted. *State v. Hunter*, 8th Dist. Cuyahoga No. 86048, 2006-Ohio-20,

¶ 41, citing *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). An appellate court reviewing sufficiency of the evidence must determine "'whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. With a sufficiency inquiry, an appellate court does not review whether the state's evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction. *State v. Starks*, 8th Dist. Cuyahoga No. 91682, 2009-Ohio-3375, ¶ 25, citing *Thompkins* at 387. A sufficiency of the evidence argument is not a factual determination, but a question of law. *Id.* at 386, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955).

{¶ 29} Here, the jury found Blackshear guilty of robbery under R.C. 2911.02(A)(2) that provides, in pertinent part:

> (A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> * * *
>
> (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another[.] * * *

The statute requires the state to prove that Blackshear inflicted, attempted to inflict, or threatened to inflict physical harm in conjunction with attempting or committing a theft offense.

{¶ 30} "The intent required to commit a theft offense cannot be proven by direct testimony of a third person, but 'may be inferred from the circumstances surrounding the crime.'" *State v. Catney*, 8th Dist. Cuyahoga No. 104141, 2017-Ohio-90, ¶ 29, quoting *State v. Fasino*, 8th Dist. Cuyahoga No. 101788, 2015-Ohio-2265, ¶ 15, quoting *Herring*, 94 Ohio St.3d 246, at 266, 2002-Ohio-796, 762 N.E.2d 940. The required physical harm is defined by R.C. 2901.01(A)(3) as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." Actual physical harm is not required; an attempt to cause physical harm is sufficient to establish the physical harm requirement. *State v. McLean*, 8th Dist. Cuyahoga No. 106293, 2018-Ohio-2232, ¶ 22.

{¶ 31} The evidence presented, if believed, satisfied the elements of robbery. Blackshear attempted to steal Davis's vehicle. Blackshear approached Davis and stated, "I'm taking this f***ing car." (Tr. 200.) Blackshear grabbed and pulled at Davis's shirt and necklace, as Blackshear attempted to gain access to the vehicle. (Tr. 205-206; 210.) Blackshear used such force that the vehicle rocked back and forth. (Tr. 219.) The state introduced this evidence to demonstrate Blackshear's intent to steal the vehicle and his attempt to cause physical harm to Davis. Video-camera footage obtained from the Justice Center's cameras supports Davis's version of the incident.

{¶ 32} The evidence was sufficient to allow the jury to infer that (1) Blackshear attempted to steal Davis's vehicle, and (2) Blackshear attempted to inflict

physical harm on Davis. Therefore, Blackshear's second assignment of error is overruled.

C. Manifest Weight of the Evidence

{¶ 33} In his third assignment of error, Blackshear contends the verdict was against the manifest weight of the evidence. A manifest-weight challenge tests whether the prosecution has met its burden of persuasion. *Thompkins*, 78 Ohio St.3d at 390, 678 N.E.2d 541. A reviewing court "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 34} Blackshear argues Davis lacked credibility because he provided inconsistent trial testimony that did not demonstrate he sustained any harm during the alleged robbery and no written statement had been procured by the police.

{¶ 35} Assuming Davis made contradictory statements regarding his injuries, that issue alone does not support reversal of the jury's verdict. This court has previously found reversal on manifest weight grounds is not supported simply because inconsistent evidence was introduced at trial. *Moseley*, 8th Dist. Cuyahoga No. 92110, 2010-Ohio-3498, at ¶ 27. Further, "[w]hen examining witness credibility, 'the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own

judgment for that of the finder of fact.'" *State v. Peterson*, 8th Dist. Cuyahoga Nos. 100897 and 100899, 2015-Ohio-1013, ¶ 74, quoting *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). "A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it." *Peterson* at ¶ 74, citing *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

{¶ 36} The court chose to believe Davis's version of the events that Blackshear attempted to harm Davis during the attempted robbery. A showing of actual harm was not necessary. *McLean*, 8th Dist. Cuyahoga No. 106293, 2018-Ohio-2232, at ¶ 22. The testimony of Meade and the Justice Center video-camera footage corroborated Davis's testimony that Blackshear attempted to harm Davis and steal his vehicle.

{¶ 37} Upon our review of the record, we cannot conclude that the jury clearly lost its way and created a manifest miscarriage of justice when it choose to believe Davis and Meade and found Blackshear guilty of robbery under R.C. 2911.01(A)(2). Blackshear's third assignment of error is overruled.

{¶ 38} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

RAYMOND C. HEADEN, JUDGE

EILEEN T. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR