IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1996 SESSION

STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	No. 03-C-01-9509-CR-00284
	)	
	)	Hamilton County
v.	)	
	)	Stephen M. Bevil, Judge
	)	
	)	(Theft Under $500)
PAMELA F. BOSTON, Alias,	)	
PAMELA CROWDER, Alias,	)	
VALERIE KITCHENS,	)	
	)	
APPELLANT.	)	

FOR THE APPELLANT:

J. Estes Cocke
Attorney at Law
4159 Ringgold Road, Suite 106
East Ridge, TN 37412

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
500 Charlotte Avenue
Nashville, TN 37243-0497

Elizabeth T. Ryan
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Gary D. Gerbitz
District Attorney General
600 Market Street, Suite 310
Chattanooga, TN 37402

Bates W. Bryan, Jr.
Assistant District Attorney General
600 Market Street, Suite 310
Chattanooga, TN 37402

OPINION FILED:_____

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Pamela F. Boston, alias, Pamela Crowder, alias Valerie Kitchens,[1] was convicted of theft under $500, a Class A misdemeanor, by a jury of her peers. The trial court sentenced the appellant to pay a fine of $500 and serve eleven months and twenty-nine days in the Hamilton County Workhouse. In this Court, the appellant contends the evidence is insufficient to support her conviction, and the trial court committed error of prejudicial dimensions by permitting the State of Tennessee to peremptorily challenge the only African American female on the jury panel. After a thorough review of the record, the briefs submitted by the parties, and the law governing the issues presented for review, it is the opinion of this Court that the judgment of the trial court should be affirmed.

On the 18th day of January, 1994, the appellant and Angela Jordan visited the J. C. Penney store in the Northgate Mall. The store is located in Chattanooga. The appellant and Jordan went to the bath and bedding department. The appellant purchased two pillows while Jordan removed two quilts and a package of drapes to a remote area of the department. The appellant joined Jordan after paying for the pillows. Jordan removed a sack from her jacket, opened it, and placed the drapes and quilts in the bag. A security officer, who witnessed the entire transaction, testified that the appellant "handled the merchandise" before it was placed in the sack. The appellant did not place any of the items in the sack.

When Jordan and the appellant left the department, the security officer followed them. The women discovered they were being followed, and they entered another department rather than exit the store. The security officer approached the women. He took the women to the office and called the police. The security officer subsequently executed the documents necessary for issuance of a warrant for the appellant's arrest.

I.

[1]The parties have captioned this case "State of Tennessee v. Pamela F. Boston." This Court uses the name of the accused as it appears in the indictment in the caption of the case notwithstanding the accused's actual name. The only exception is where the trial court has permitted an amendment to the indictment or has granted a motion to strike the alias from the indictment.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt."[2] This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence.[3]

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence.[4] Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence.[5] To the contrary, this Court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence.[6]

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court.[7] In State v. Grace,[8] our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of

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[2]Tenn. R. App. P. 13(e).

[3]State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

[4]State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

[5]Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956).

[6]State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

[7]Cabbage, 571 S.W.2d at 835.

[8]493 S.W.2d 474, 476 (Tenn. 1973).

fact.[9] This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt.[10]

The evidence adduced at the trial was sufficient to support a finding by a rational trier of fact that the appellant committed the offense of theft under $500, beyond a reasonable doubt.[11] The evidence establishes the appellant aided and abetted Jordan in the theft of the two quilts and drapes.[12] A reasonable trier of fact could conclude the appellant questioned the clerk and purchased the pillows to distract the clerk while Jordan obtained the quilts and drapes and removed the merchandise to a remote area of the department. Once the appellant purchased the pillows, she went directly to Jordan, watched Jordan place the quilts and drapes in the sack, and left with Jordan. During this period, the appellant had one or more of these items in her possession before Jordan placed them in the sack.

This issue is without merit.

II.

Numerous prospective jurors were peremptorily challenged by the parties. There were no objections registered when these jurors were challenged and excused by the trial court. The challenged prospective jurors were excused for the day.

There were three African Americans on the jury panel, two males and one female. The State of Tennessee challenged the female African American peremptorily. The two male African Americans served on the jury that convicted the appellant.

The assistant district attorney general read the indictment and the appellant entered a plea of not guilty. The jury was sworn. Thereafter, the parties made opening statements. The trial court called counsel to the bench. The purpose of the sidebar conference was

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[9]State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

[10]Tuggle, 639 S.W.2d at 914.

[11]Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[12]Tenn. Code Ann. § 39-11-402(2).

to determine if the assistant district attorney general was prepared to present the state's evidence or needed a short recess. The assistant district attorney advised the court he did not need a recess and was prepared to proceed. During the sidebar conference, defense counsel stated he wanted to know why the assistant district attorney general peremptorily challenged the only female African American woman on the panel. The assistant district attorney general, noting that he excused two Caucasian prospective jurors and the female African American, gave a race-neutral reason for the challenge. However, he advised the trial court that it was too late for defense counsel to raise the Batson issue. The trial court denied the challenge.

The appellant, relying on Batson v. Kentucky,[13] contends the reasons given by the State of Tennessee for striking "the only black female juror" on the panel were insufficient. She does not state what relief she seeks for the violation. In the conclusion portion of the brief, the appellant states she wants "her convictions . . . set aside, and the charges dismissed; or in the alternative, that the case be remanded for a New Trial free of . . . prejudicial error." The State of Tennessee contends the appellant waived this issue when she failed to interpose the objection when the juror was excused or before the jury was sworn. In the alternative, the state argues the reason given by the assistant district attorney general was race-neutral and complied with Batson.

When the accused desires to challenge the State of Tennessee's use of a peremptory challenge to exclude a juror based on race or gender, the accused must bring the objection prior to overtly or tacitly accepting the jury, and prior to the administration of the jury's oath.[14] If the accused, as in this case, waits until the jury has been sworn before raising a Batson objection, the accused is deemed to have waived the issue.[15] As this

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[13]476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[14]State v. Peck, 719 S.W.2d 553, 555 (Tenn. Crim. App.), per. app. denied (Tenn. 1986).

[15]Peck, 719 S.W.2d at 555. See State v. Robert Williams, Hamilton County No. 03-C-01-9302-CR-00050 (Tenn. Crim. App., Knoxville, April 2, 1996)(Batson issue raised for the first time in the motion for a new trial deemed waived); State v. James Taylor, Williamson County No. 89-93-III (Tenn. Crim. App., Nashville, April 25, 1990), per. app. denied (Tenn. October 8, 1990)(failure to comply with Peck resulted in waiver of issue); State v. Cole, Davidson County No. 88-311-III (Tenn. Crim. App., Nashville, November 7, 1989), per. app. denied (Tenn. March 5, 1990)(Batson issue raised prematurely, but not renewed at appropriate time deemed waived); State v. Paulette Irby and Pete Irby, Cocke
(continued...)

Court said in State v. James Taylor:[16] "[T]he proponent of a Batson claim must present this Court with a properly presented, legally cognizable claim . . . . The defendant has not cited us to, nor can we find in the record, any contemporaneous objection to the makeup of the jury at the time of jury selection. Hence, the defendant's claim . . . comes too late."[17]

In Batson v. Kentucky, the United States Supreme Court declined to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenge."[18] Later, the United States Supreme Court stated that "a state court may adopt a general rule that a Batson claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected."[19] In Ford v. Georgia,[20] the Court said a state rule which requires a Batson claim to be "raised not only before trial, but in the period between the selection of the jurors and the administration of their oath, is a sensible rule."[21]

This jurisdiction's rule requiring a Batson claim to be raised before the jury is accepted and sworn was formulated in 1986, the same year the United States Supreme Court decided Batson. This case was tried on July 6, 1995, approximately nine years after the formulation of the waiver rule. Thus, the appellant knew, or should have known, that

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(...continued)
County No. 130 (Tenn. Crim. App., Knoxville, June 14, 1988), per. app. denied (Tenn. September 6, 1988)(Batson issue raised for the first time in the motion for a new trial deemed waived); State v. Pamela Maxine Bogle, Davidson County No. 86-258-III (Tenn. Crim. App., Nashville, August 7, 1987), per. app. denied (Tenn. November 9, 1987)(Batson issue raised for the first time after verdict was returned by the jury deemed waived); State v. Johnny W. Philpot, Hamilton County No. 998 (Tenn. Crim. App., Knoxville, June 12, 1987), per. app. denied (Tenn. September 8, 1987)(Batson issue raised for the first time in the motion for a new trial deemed waived); State v. Frank Peters, Hamblen County No. 230 (Tenn. Crim. App., Knoxville, February 24, 1987)(Batson issue raised for the first time after verdict was returned by the jury deemed waived). Rule 36(a), Tenn. R. App. P., provides that an accused who has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error" is not entitled to relief in an appellate court.

[16]Williamson County No. 89-93-III (Tenn. Crim. App., Nashville, April 25, 1990), per. app. denied (Tenn. October 8, 1990).

[17]Taylor, Williamson County No. 89-93-III, slip op. at 2.

[18]476 U.S. at 99, 106 S.Ct. at 1724-25, 90 L.Ed.2d at 89-90.

[19]Ford v. Georgia, 498 U.S. 411, 423, 111 S.Ct. 850, 857, 112 L.Ed.2d 935, 948-49 (1991).

[20]498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991).

[21]498 U.S. at 422, 111 S.Ct. at 857, 112 L.Ed.2d at 948.

either overtly or tacitly accepting the jury and permitting the trial court to swear the jurors before raising the Batson claim would result in the waiver of the issue.

This Court adheres to the rule created in Peck, namely, a Batson issue must be raised prior to the jury being sworn. Since the appellant did not raise her Batson claim until after the jury was sworn and the trial had commenced, the appellant has waived this issue.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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WILLIAM M. DENDER, SPECIAL JUDGE