IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

06-CR-0054-C-01

v.

LARRY HENDRIX,

Defendant.

- -

Defendant Larry Hendrix was charged with unlawful possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. § 922(g)(1), and found guilty by a jury on September 11, 2006. Taking issue with the verdict, he has filed a motion for a new trial, pursuant to Fed. R. Crim. P. 33(a). He argues that the court erred in two respects that denied him a fair trial: first, in finding that the government had made a race-neutral showing for its striking of the only two African-Americans on the jury panel and second, in denying his motion for mistrial after the government made improper references to a search warrant.

I conclude that neither of the alleged errors requires a new trial. The government's explanation of its strikes was neutral and credible and negated any implication of purposeful

discrimination. Its improper references to the search warrant were limited. If they were errors, they were harmless.

From the facts adduced at trial, I find that the following are relevant to the determination of defendant's motion for a new trial.

FACTS

A. Jury Selection

Jury selection in this case took place on September 5, 2006. After questioning of the jury panel by the court, counsel for both parties exercised their combined total of 18 peremptory challenges, including two for the alternate juror, against a qualified panel of 33. In reviewing the jury strikes, I saw that the government had struck the only two African Americans on the jury panel. Because defendant is African American, these strikes sufficed to make a prima facie showing of possible purposeful discrimination by the government. Therefore, I called counsel to sidebar to give the government a chance to explain its reasons for striking the two prospective jurors and defendant an opportunity to challenge the strikes as violative of his equal protection rights.

Assistant United States Attorney Paul Connell told the court that he had struck the two African American prospective jurors (Ernestine Hairston and Brian Woodland) and a Caucasian panel member because each of them had a family member in prison for serious

felonies. Connell said that he had decided to strike from the panel any prospective juror that had a relative in prison on the ground that the juror might be biased against the government in the person of the prosecutor. Defendant's counsel did not challenge Connell's representation that he had struck all of the panel members who had relatives in prison, but confined himself to expressing concern that the jury had no minority members.

Connell then added that prospective juror Woodland liked the television program, CSI, and that Connell worried about jurors who watched that program. Connell said that before striking Woodland, he took into account Woodland's report that he had a friend who worked for the Department of Corrections. Connell's analysis was similar with respect to Ms. Hairston, who had said that her husband owned his own business and that she had a very good friend who is a police officer.

Defense counsel raised no specific concerns and failed to identify any ground for finding Connell's representation suspect. I concluded that the reasons given were sufficient to show that Connell had legitimate reasons for striking the two African American jurors. I did not say explicitly that the showing was a race-neutral one or that I found Connell's showing credible but that was my intent in calling Connell's showing "legitimate."

For scheduling reasons, jury selection in defendant's trial took place the week before trial. On the morning of trial, before opening statements, defense counsel stated on the record that he wanted the "record to be clear the defense has made on this record a challenge

to the Government's use of its peremptory challenges under Batson." Tr. Trans., dkt. #58, at 3. Counsel did not identify any new grounds for his challenge or ask for an opportunity to make a more complete showing than he had made at the time of jury selection. I did not understand the statement to be anything more than counsel's desire to preserve his previous challenge for the record.

B. References to Search Warrant

During his opening statement, Connell told the jurors that they would hear about the events of February 9, 2006, when law enforcement officers had information leading them to believe that defendant had a firearm in his residence and obtained a search warrant from a judge for a search of defendant's apartment. After opening statements, defendant's counsel asked for a sidebar at which he moved to forbid the government from referring to the fact that the search warrant executed at defendant's apartment had been approved by a judge. The motion was granted.

Detective Bill Hendrickson testified about the execution of the search warrant at defendant's apartment, explaining how and where the officers had collected evidence, including a gun and ammunition: (1) inside the top drawer of a dresser filled with men's clothing, officers found a firearm, together with ammunition and a document from Wisconsin Auto Title Loans dated three days before the execution of the search warrant and

referring to defendant; (2) on top of the same dresser they discovered a traffic citation for defendant, along with defendant's Wisconsin identification card; and (3) inside the closet of the room in which the dresser was located, they found a loan agreement from Wisconsin Auto Title Loans showing defendant as the borrower and a social security document addressed to defendant.

In the course of Connell's examination of Hendrickson, he asked: "Prior to the execution of that warrant had the warrant been approved?" Hendrickson answered, "Yes, by a Dane County Judge, yes." Trial Tr., dkt. #58, at 25. Later, Hendrickson made a garbled reference to probable cause while he was explaining when he's "going to do a search warrant." Id. at 26. "On other occasions, investigations start more at street level and they kind of rise to what we need. Probable cause, we need to do a search warrant more quickly, they could be—the entire case could be the duration of one day and that would be it." Id.

After Hendrickson finished testifying, defendant moved for a mistrial, arguing that despite the court's ruling that the government was not to mention the fact that the search warrant was for a firearm, Hendrickson had stated that he had a search warrant for a firearm and that a judge had approved it. I agreed with defendant's counsel that the government was not supposed to have elicited testimony about a judge's approval of the warrant, but disagreed with counsel that the government was prohibited from any mention of the subject of the search. I did not rule explicitly on the motion for mistrial.

Later in the trial, Detective Steve Wagner testified that the basis for the search warrant was "follow-up investigation from information we received about firearms at the residence." Trial Tr., dkt. #58, at 54-55. Sergeant Ann Lehner of the Madison Police Department testified that she had recovered a firearm at defendant's apartment and notified Detective Wagner, because "part of the information we had received was specifically that we would find a gun in the apartment." Trial Tr., dkt. #60, at 1-P-5. At the conclusion of Lehner's testimony, defendant moved to strike the testimony. Id. at 1-P-7. The motion was denied. Id.

Police Officer Lester Moore testified that when he took defendant in for booking, defendant asked what he was going to be charged with and that when Moore told him that "items found at his residence would lead to charges" against him, he said that "all they were going to find would be a pistol." Trial Tr., dkt. #58, at 91. Moore testified that he told defendant that what had been found was bigger than a pistol and defendant responded that he "calls everything a pistol" and that he had only gotten the weapon because his apartment had been broken into. Id. at 91-92. The firearm seized at defendant's apartment was a sawed-off shotgun, a short barrel type of shotgun with a pistol grip.

During his rebuttal closing argument, Connell argued to the jury that law enforcement had information that a firearm would be found at defendant's apartment before law enforcement agents conducted the search of the apartment. In addition, he argued to the

jury that it had

> all the evidence [it needed] to find the defendant guilty beyond a reasonable doubt: Information leading to a search warrant, a search, contraband, firearm, ammunition, other documents indicating that it is the defendant's, along with the defendant's statements.

Trial Tr., dkt.#66, at CA-18. Again, defendant moved for a mistrial, this time on the ground that the government was getting the benefit of a confidential informant's testimony without having to call him, in violation of its assurance at the final conference that it would not be introducing any evidence relating to the informant. Trial Tr., dkt. #60, at 1-P-16-17. The motion was denied.

Defendant did not ask for any limiting instruction, either at the time that allegedly improper statements were made or at the final instruction conference.

OPINION

A. Defendant's *Batson* Challenge

Batson v. Kentucky, 476 U.S. 79 (1986), prescribes the procedure for evaluating the exercise of peremptory challenges by the state when there is an allegation that one or more prospective jurors was stricken because of his or race. Instead of having to show systematic exclusion in a number of cases, as was required by many courts before Batson was decided, a defendant can make a prima facie showing simply by demonstrating that he is a member

of a cognizable racial group, that the prosecutor has exercised one or more peremptory challenges to remove other members of that group from the jury panel and that these facts and any other relevant circumstances imply that the government has used its peremptory challenges to exclude prospective jurors on the basis of their race. Id. at 96. Once the defendant makes that showing, the burden shifts to the government to proffer a neutral explanation for challenging black jurors. Id. at 97. This explanation "need not rise to the level justifying exercise of a challenge for cause," but it may not be that the government thinks jurors of the same race are apt to be sympathetic to the defendant. Id. at 97-98. Once the prosecutor has made his explanation, the trial court has the task of determining whether the defendant has established purposeful discrimination on the part of the prosecutor. Id. at 98.

Citing United States v. Chandler, 12 F.3d 1427 (7th Cir. 1996), and McCrory v. Henderson, 82 F.3d 1243 (2d Cir. 1996), the government asserts that the court need not even consider defendant's Batson claim because his counsel did not make the objections necessary to preserve defendant's rights. In Chandler, the defense attorney asked the prosecutor to explain why she had struck an African American from the jury panel, the prosecutor offered an explanation and the district court excused the prospective juror. Defense counsel did not argue that any of the proffered reasons were pretextual or based on race. The Court of Appeals for the Seventh Circuit held that the defendant had failed to

preserve any claim under Batson because he had not objected specifically to the prosecutor's challenge. In McCrory, the Court of Appeals for the Second Circuit emphasized the importance of timely objections to the exercise of peremptory challenges. "Given the often subtle reasons for the exercise of peremptory challenges, a court's determination of whether a prosecutor has sued them in a discriminatory fashion will often turn on the judge's observations of prospective jurors and the attorneys during voir dire and assessment of their credibility . . . It is nearly impossible for the judge to rule on such objections intelligently unless the challenged juror either is still before the court or was very recently observed." McCrory, 82 F.3d at 1248.

I agree with defendant that it was necessary for him to raise the Batson challenge after I raised it. I considered the matter fully at the time and did not view defendant as having waived his opportunity to be heard on the matter. If, however, counsel wished to prevail on the issue, he had an obligation to point out at that time any reasons for doubting the prosecutor's explanation, while the matter was still fresh in everyone's mind and time remained for correcting any problem. He cannot come forward after the trial has been concluded and proffer new reasons for finding that the government's showing is not credible. Therefore, I have not considered any argument relating to the Batson challenge that defendant raised in briefing his motion for a new trial (or any argument made by the government in response to such an argument).

In defendant's case, the prima facie showing required by Batson was obvious: he is African-American, the prosecutor exercised peremptory challenges against the only two African-Americans on the panel and his doing so implied that he was using his challenges to exclude those prospective jurors because of their race. When the burden shifted to the prosecutor to explain his reasons, he gave an explanation for his decision. It did "not rise to the level justifying exercise of a challenge for cause," id. at 97, but as the Court made clear in Batson, it need not. In my view, Connell's explanation sufficed to show that the prosecutor was not challenging the African American jurors because of their race, but rather because he thought they might be biased against the government because of their experiences with family members convicted of serious crimes. I found the explanation adequate to demonstrate a lack of purposeful discrimination.

Although defendant argues that the prosecutor's explanation was suspect, he raised no objections to it at trial. He says now that Connell did not strike all of the prospective jurors with relatives in prison. If this is true, counsel did not bring it to my attention at the sidebar conference, when Connell could have responded and when any problem could have been cured. At the time I ruled, I relied on Connell's assertion that he had applied a neutral factor (a close relative in prison on a felony charge) in challenging the two African Americans and the one Caucasian. I agree with defendant that watching CSI is not a valid reason by itself for striking prospective juror Woodland when many other panelists had reported

watching the same show. However, it gave Connell's decision a modest amount of added heft in combination with the fact that Woodland has a relative in prison, particularly when the case was one in which there was no scientific evidence to prove defendant's possession of the firearm. (It is possible that because shows such as CSI rely heavily on scientific evidence in solving crimes, jurors that watch these shows expect the government to produce similar evidence in any criminal case. Tom R. Tyler, Viewing CSI and the Threshhold of Guilt, 115 Yale L.J. 1050 (2006).)

When defendant's counsel brought up the matter again just before opening statements, he did not state any specific objection but merely indicated that he wished to be sure that his initial objection was noted on the record. I did not understand him to be asking for reconsideration or even an opportunity to enlarge upon what he had said during jury selection.

I conclude that defendant failed to show during jury selection that the government's exercise of its peremptory challenges violated his right to equal protection. He has waived any right to make an additional showing now.

B. References to Search Warrant

The full extent of defendant's challenge to the government's references to the search warrant is not entirely clear. I understand that defendant objects to the government's

question to Detective Hendrickson about whether the search warrant for defendant's residence had been approved and to Hendrickson's answer that it had been approved by a judge. Defendant compares the government's references to judicial approval of the search warrant in this case as the equal of the long litany of approvals given the wiretap application in United States v. Cunningham, 462 F.3d 708 (7th Cir. 2006), but the two cases are not even close. In Cunningham, the government had its witnesses explain the entire process for obtaining a Title III wiretap up to the final approval of the United States Department of Justice and the supervision of the wiretap by the district court. In this case, there was only a brief reference by Detective Hendrickson to the fact that a judge had approved the warrant. The government should not have asked the question after I had ruled that it would be improper to do so, but the error was harmless. The testimony was not elaborated on and, given the strong evidence against defendant, it would not have had any effect on the outcome of the trial.

Defendant has a second argument: that it was improper for the government to make any reference to information obtained by the police before they sought a warrant after the government had represented to the court that it would not be putting in any evidence obtained from the confidential informant. Apparently, defendant believes that a reference to "information" necessarily refers to the source of the information. If so, he is wrong. The government did not breach its representation; it confined itself to saying simply that it had

information. It did not go into any detail about that information or about how it had been received. This was an appropriate way to handle the matter.

It is more problematic whether the government acted properly when it argued in rebuttal that the jury could consider the information that led to the search warrant in determining defendant's guilt. Not only did the jury not know what that information was, it had no basis on which to evaluate its credibility. Nevertheless, the government's error did not require a mistrial. A curative instruction would have sufficed, had defendant asked for one. He made no such request.

As for defendant's assertion that he should have had access to the confidential informer, that issue was dealt with before trial. Defendant had the opportunity to argue the possibility that anyone with access to defendant's apartment could have planted the gun. It did not need the confidential informant at trial to make the argument. I am not persuaded that it was prejudiced by not being able to call the informant.

ORDER

IT IS ORDERED that defendant Larry Hendrix's motion for a new trial is DENIED.

Entered this 30th day of November, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge