IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2841
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES WATSON
and
LARRY JAMES BROWN,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 92 20 1)

October 1, 1993

Before SMITH, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

James Watson appeals his conviction of conspiracy to possess with intent to distribute in excess of five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846 and of aiding and abetting the use and carrying of a firearm during the

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

commission of a drug trafficking offense, in violation of 18 U.S.C. §§ 2 and 924(c). Larry Brown appeals his conviction on a similar conspiracy-to-possess count. Finding no error, we affirm.

I.

On or about December 24, 1991, Drug Enforcement Administration ("DEA") agents learned from a confidential informant that Limus Brown was advertising by word-of-mouth for a cocaine supplier. DEA Special agent Deborah Sibila, acting under cover, met with Limus Brown at a restaurant near the Houston Intercontinental Airport on December 26, 1991, and Brown told Sibila that his brother worked for a car dealership on West Gulf Bank Road and that the car dealer had lost his regular source for cocaine. Brown stated that his brother Larry was handling the cocaine transaction for the car dealer and that they wanted to buy twenty kilograms of cocaine with $170,000 cash, a 1991 Cadillac Coupe DeVille, a 1989 BMW 735i, and one hundred pounds of marihuana.

Brown told Sibila that Larry would have to inspect the cocaine before they would make the exchange and that his girlfriend knew a lot of people with money and had twenty years of experience in laundering money. Brown also mentioned that a person called "Tin Hat" had been in their office that day on the way to Louisiana to deliver seven kilograms of cocaine. Brown encouraged Sibila to call Brown that night, but Sibila declined.

Between December 26 and 28, the DEA determined that the automobile dealership referred to by Brown was Julius Auto Sales,

which was owned by Watson.[1] On December 28, Sibila contacted Larry Brown at Julius Auto Sales and expressed interest in selling the cocaine; Sibila and Brown later made an appointment to meet.

On December 30, DEA Special Agent Norman and Sibila met with Brown in his private office at Julius Auto Sales to discuss the amount and price of the cocaine. Brown mentioned that he was not a "rookie" in the drug trade and that he had been involved in drug transactions before. The DEA agents offered twenty kilograms of cocaine at $14,000 per kilogram, but Brown requested a price of $16,000 per kilogram so that he could "shave" $40,000 of profit for himself. Brown then handed Sibila the keys to the Cadillac and allowed him to take a test drive. The DEA agents believed that Watson was to show up at the meeting, but Brown told them that he would meet them later that evening at a restaurant to discuss details of the transaction.

The DEA agents met with Brown and Watson at the restaurant near the airport; Norman and Watson drove to another location so that Watson could examine a cocaine sample. Watson sampled the cocaine and approved of its quality. Watson later told Norman that he was "primarily in the weed business" and had moved multiple hundred-pound quantities of marihuana; he also stated that his usual connection had been "taken down."

Sibila remained with Brown in the parking lot of the restaurant. At that time, Brown told Sibila that something had happened

[1] Watson is referred to as "Julius" and "James" at different times during the trial. Watson's presentence report indicates that his full name is Julius James Watson.

to Watson's "regular" source of cocaine. Sibila, Brown, and accompanying confidential informants went into the restaurant, where Brown explained methods of laundering money through concert promotions and real estate transactions. Norman and Watson returned to the restaurant, and Norman asked about the BMW that had been promised as part of the deal. Watson then delivered the keys to the BMW to Sibila.

The following day, a meeting was arranged for the exchange of twenty kilograms of cocaine at the same restaurant. Brown arrived at the restaurant in the Cadillac and tendered the titles to the Cadillac and a third vehicle, a 1988 BMW 735i, to the agents. Brown also explained that Watson was on the way to the meeting with cash and one hundred pounds of marihuana.

Watson did not arrive at the restaurant but called later to change the meeting place to another restaurant. Watson arrived at the second restaurant in a pickup truck with another individual in the passenger seat. Brown explained that the passenger worked for Watson handling marihuana. The passenger was later identified as a Mr. Judge Hill. Watson had brought only $40,000 cash; Watson told Norman that the marihuana was in a vehicle parked across the street at another restaurant.

Sibila delivered the bust signal, Watson was arrested at the pickup truck, and Brown was arrested after attempting to flee through the restaurant. Watson was carrying a 38-caliber handgun and $1,400 in cash. Hill was carrying approximately $940, and a 9-millimeter, semi-automatic handgun was found on the passenger side

of the truck where Hill had been sitting.

II.

Watson argues that the prosecutor's explanations for his peremptory challenges were a pretense to exclude veniremen on the basis of their race in violation of Batson v. Kentucky, 476 U.S. 79 (1986). The Equal Protection Clause prohibits a prosecutor from challenging potential jurors solely on the basis of their race or on the premise that black jurors would be incapable of being impartial to black defendants. United States v. Moreno, 878 F.2d 817, 820 (5th Cir.) (quoting Batson, 476 U.S. at 89), cert. denied, 493 U.S. 979 (1989).

The district court's decision that a prosecutor had a race-neutral reason for striking a member of the venire is a credibility determination viewed with deference. United States v. De La Rosa, 911 F.2d 985, 991 (5th Cir. 1990), cert. denied, 111 S. Ct. 2275 (1991). It is reviewed for clear error. United States v. Clemons, 941 F.2d 321, 325 (5th Cir. 1991).

There is a three-step process for evaluating a Batson objection. The defendant must make a prima facie showing that the prosecutor struck a potential juror on the basis of race; the burden then shifts to the prosecutor to demonstrate a race-neutral reason for the challenge; and finally, the district court must decide whether the defendant carried his burden of proving purposeful discrimination. Clemons, 941 F.2d at 324. Nevertheless, step one in the analysis may be omitted if the district court

required explanation for the peremptory strikes. See United States v. Broussard, 987 F.2d 215, 220 n.4 (5th Cir. 1993).

The district court required the prosecutor to explain the reasons for the use of peremptory strikes against three black veniremen. The prosecutor stated the following reasons for the strikes:

> With respect to juror number two, that juror did not appear to be interested. Among other things, according to my cocounsel, he was playing some type of electronic game during the seating of the panel while nobody was here. He did not appear to be interested in what was going on.
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> I saw him constantly fumbling with his shirt. He was fidgeting. He didn't appear to be attentive as to what was going on.
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> * * * *
>
> Juror number seventeen, your honor, during the voir dire appeared to be sleeping. He also did not appear to be attentive . . . . It is the opinion of the counsel for the government, according to his jury sheet, that he had been unemployed for some time. This gave me some concern about whether or not he could be fair and impartial to the government.
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> * * * *
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> With respect to . . . juror twenty-two . . . . We looked at him, we could not make any determination)) it didn't appear that he was attentive, that he was listening to what was going on. We looked at him. He gave us a rather blank stare.

The prosecutor added:

> I might also state for the record, your honor, that the prosecutor is black in this particular case[,] and there is no issue of race that's involved, if that's the question that's being asked of me. The peremptory strikes were made for sound reasons for my picking a jury, and it had nothing at all to do with anybody's race.

The district court then overruled the defendants' motion to quash

the panel.

This court has refused to set out a specific procedure to be followed in evaluating Batson objections. Clemons, 941 F.2d at 323. A race-neutral reason is determined by the "facial validity" of the attorney's explanation of how the challenge was based upon factors other than race.

Employment status and attentiveness are valid, race-neutral grounds for peremptory strikes. See United States v. Pofahl, 990 F.2d 1456, 1465-66 (5th Cir. 1993) (jurors struck because of lack of attentiveness and prosecutor's preference for a jury comprised of middle-class jurors who work eight hours a day or are salaried), petition for cert. filed (U.S. Aug. 4, 1993) (No. 93-5526). Factors arising from "intuitive assumptions," eye contact, or demeanor are valid bases for a peremptory challenge. Moreno, 878 F.2d at 821 (quoting United States v. Terrazas-Carrasco, 861 F.2d 93, 95 (5th Cir. 1988)). The juror's physical appearance is also a legitimate basis for a peremptory strike. Clemons, 941 F.2d at 324-25.

A trial court's findings are clearly erroneous when evidence exists to support them, but the appellate court, after reviewing the entire record, is left with "`the definite and firm conviction that a mistake has been committed.'" Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985) (citation omitted). This court may not reverse even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently.

The district court was in the best position to judge the

demeanor of the prosecutor as he made this argument and to observe the prospective jurors during the voir dire. See United States v. Valley, 928 F.2d 130, 136 (5th Cir. 1991). Demeanor evidence is particularly within the province of the district court when sitting as trier of fact, and the defendant has not shown that the district court's decision was clearly erroneous.

III.

Brown argues that the district court abused its discretion by dismissing juror four, Michael Wayne Koons, and replacing him with the first alternate juror prior to the commencement of deliberations. The district court's decision to discharge a juror is reviewed for abuse of discretion and will result in reversal only if the defendant has demonstrated that he was prejudiced by the dismissal of the juror. United States v. Ramirez, 963 F.2d 693, 703 (5th Cir.), cert. denied, 113 S. Ct. 388 (1992).

The district court became aware of the possibility of Koons's ineligibility after Koons's parole officer contacted the court. The district court later found that Koons was under a pending felony information and that Koons had not disclosed that information in the jury questionnaire. Alternatively, the court found that Koons's failure to explain his status and the existence of the charges against him was material and that the government had relied upon false information to its detriment. Koons later admitted that he had been charged with the burglary of a building in state court. Under 28 U.S.C. § 1865(b)(5) (West Supp. 1993), Koons was ineligi-

ble to serve as a juror, so the district court did not abuse its discretion by replacing him.

IV.

Watson argues that the district court abused its discretion by refusing a jury instruction regarding entrapment. Watson did not take the stand in his defense. An entrapment defense requires that the criminal design originate with officials or agents of the government and that they implant in the mind of an innocent person the disposition to commit the defense. United States v. Menesses, 962 F.2d 420, 429 (5th Cir. 1992). "[T]he mere assertion of entrapment does not require the trial judge to automatically instruct the jury on it." Id. "If the defendant fails to demonstrate the existence of even a scintilla of evidence that government agents entrapped him into committing a crime that he was not otherwise predisposed to commit, then he has failed to make the required prima facie showing and is therefore not entitled to such a jury instruction." Id.

Watson argues that he was entrapped because he did not take part in any of the initial discussions regarding the cocaine deal and because the government "surprise flashed" twenty kilograms of cocaine. His argument is unavailing.

Norman testified that Watson claimed to have moved multiple hundred-pound quantities of marihuana and stated that his usual cocaine connection had been "taken down." The evidence suggests not that Watson was an unwary innocent but instead that he was an

unwary criminal who was successfully trapped. See Menesses, id. at 420 (citing Sherman v. United States, 356 U.S. 369 (1958)).

V.

Watson argues that the district court improperly commented on the weight of the evidence and invaded the province of the jury by stating that the government agents used tactics that were legal and proper. The relevant statement by the district court is as follows:

> [T]here were some arguments during the summations that were critical of the methods used by law the law enforcement officers here in the scenario which formed the basis of this case.
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> Now, there's absolutely nothing illegal or improper in government agents, drug enforcement agents, providing an opportunity for those who would do so to violate the law . . . [O]ur Congress allocates substantial amounts of money for the purpose of agents going out and purchasing drugs in sham transactions, because this is one of the means that is used to catch people that are involved in the narcotics traffic. There's nothing wrong with government's use of cocaine previously seized as a means of inducing those who would to [sic] buy the cocaine or attempt to buy the cocaine for the purpose of taking these monies and these assets out of circulation.
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> So when this happens, not only is a criminal violator captured, but the resources that would have been utilized to buy cocaine are seized by the government. And so there's absolutely nothing wrong with the government agents engaging in this type of activity in order to apprehend those who are or who would violate the law. And they don't have to play by the Marquis of Queensberry rules in this endeavor. They can take roles that are phony and fake and pretend to be that which they're not in order to catch the culprits that they are looking for.

Watson argues that the above statements improperly removed the issue of the conduct of the government from the consideration of the jury. After objection by defense counsel, the district court

explained his comments:

> [T]he reason I did make the observations about the use of roles in these cases is that there was argument by counsel that these defendants should be fairly acquitted because the government used the tactics that it used here. And it doesn't make a hill of beans what tactics the government used here so long as they did not commit entrapment in the case. And I felt, as a matter of law, they did not. So I was trying to cure that argument because certainly you don't acquit a person that's guilty of committing a crime because you get mad at the police-man.

In his summation, Watson's counsel stated that the case was "created somewhere in, I guess, Washington, D.C., or . . . in the drug enforcement office, perhaps here in Houston." He also suggested that the government targeted the defendants:

> Who do you want to pick? You want to pick some black people, you want to pick some Mexican people, you want to pick some kids, who do you want to pick? We'll pick anybody you want to. But he'll tell you that there are three people 2,000 miles away who decide whether this is a good person to pick or not. I don't care if they got Dan Quail [sic: Quayle] picking who we use. I don't care who decides who we pick. That's a terribly danger-ous tool [seized cocaine] that your government is using on this war on drugs, and it offends me. It offends me because it's open to terrible abuses. They pick the rules, they set the rules.

Because there was insufficient evidence to support an instruction on entrapment, the district court properly instructed the jury that entrapment was not in issue.

AFFIRMED.