

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30298
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

OSCAR HUGHES,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 93 346 I)

(March 9, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Oscar Hughes appeals his conviction of distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1). Finding no error, we affirm.

* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

The government used all of its peremptory challenges to strike six black jurors and one black alternate juror: Lorrie Jones, Alton Woods, Gilda Augustus, Linda Smith, Edith Lester, Albert Cammon, and Augusta Anderson. Hughes objected, and the district court required the government to articulate its reasons for striking the black jurors.

The government explained that Jones was struck because she was a student in substance abuse. The government believed that Jones would have her own opinions about drugs and would have difficulty following the law. In addition, Jones was inattentive when the district court gave its initial instructions to the venire panel.

Woods was struck because he is single and a student. According to the government, students have less life experience than other people and have something in common with the defendant: They are trained to challenge established principles and would have a difficult time following the court's instructions. Woods was also inattentive.

Augustus was struck because she and her husband, as employees of South Central Bell and the Sewerage and Water Board, respectively, are "city utility type workers." According to the government, "It's been our experience that local government employees . . . always have a grievance against the government and are less favorable to the government's position." Smith, also an employee of the Sewerage and Water Board, was struck for the same reason.

Lester was struck because she had been on a criminal jury that returned a not guilty verdict. The government was also concerned Hughes would be encouraged to interject religion into the trial, because Lester's husband owns a Christian bookstore.

Cammon was struck because he had been asleep through most of the proceedings. Anderson was struck because he was single; the government preferred another juror who was married.

B.

Hughes claims that the state used its peremptory challenges to exclude blacks from the jury in violation of the rule in Batson v. Kentucky, 476 U.S. 79 (1986). The Equal Protection Clause prohibits the prosecution 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. Batson, 476 U.S. at 89; see United States v. Moreno, 878 F.2d 817, 820 (5th Cir.), cert. denied, 493 U.S. 979 (1989). There is a three-step process for making a Batson objection:

(1) a defendant must make a prima facie showing that the prosecutor has exercised his peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

United States v. Clemons, 941 F.2d 321, 324 (5th Cir. 1991) (citing Hernandez v. New York, 500 U.S. 352 (1991) (plurality opinion)).

"Where 'the prosecution's explanation is of record,' [this court does] not examine whether the defendants established a prima

facie case; instead, [the court] 'review[s] only the district court's finding of discrimination vel non.'" United States v. Collins, 972 F.2d 1385, 1402 (5th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993) (quoting United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987)). We review the district court's findings on discrimination for clear error. United States v. Terrazas-Carrasco, 861 F.2d 93, 94 (5th Cir. 1988).

Although the district court did not expressly find that the government's explanations for striking the seven black jurors were race-neutral and did not explicitly consider whether Hughes had demonstrated purposeful discrimination, Hughes concedes that the findings are implicit in the court's statements during voir dire and in the fact that the proceedings were permitted to continue. Hughes argues that "the manner in which the court handled the issue indicates that the court simply glossed over the defendant's claim, satisfied that an explanation, any explanation, was in the record." Hughes contends that the government's explanations were pretextual.

The government's explanations are weakest with regard to the "city utility type workers," Augustus and Smith. Hughes notes that neither prospective juror indicated that he or she personally held a grievance and that one selected white juror and two selected white jurors' spouses were government employees. Cf. Collins, 972 F.2d at 1402 n.32 (finding reasonable government's explanation that it struck black teacher but not white teacher because black teacher, who instructed disabled children, would be more sympathetic to defendant than white teacher, who taught at technical

school); Terrazas, 861 F.2d at 95 (although government used six of seven peremptory challenges to strike black jurors, district court did not commit clear error in overruling Batson objection))"Had the prosecutor used all of his challenges to exclude members of defendant's race, his argument might be stronger."). The government points out, however, that of the three seated white jurors with government employment connections, one was a fireman (a quasi-law enforcement job, favorable to the government), and two had spouses who, although government employees, were not city employees.

Prosecutors may rely upon intuition in striking jurors. United States v. Bentley-Smith, 2 F.3d 1368, 1375 (5th Cir. 1993) (per curiam). The ultimate question for the district court to determine is whether counsel is telling the truth in asserting that the strike was not race-based. Id.

We review the district court's decision for clear error. Id. at 1372. The district court is in the best position to make credibility choices, and we perceive no clear error here.

II.

Hughes argues that the district court should have propounded a special interrogatory to the jury asking whether the distributed substance was crack cocaine or cocaine powder. Both, however, are controlled substances, and their distribution violates the statute. The distinction matters only at sentencing, so the district court, not the jury, makes the decision. This issue is without merit.

AFFIRMED.