IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5432
Summary Calendar

ARTHUR W. CARSON,

Plaintiff-Appellant,

VERSUS

JAVIER AGUILERA, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:90-CV-527)

(September 13, 1994)

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

PER CURIAM:[*]

Arthur Carson appeals an adverse judgment in his prisoner's civil rights action brought pursuant to 42 U.S.C. § 1983. Finding no error, we affirm.

I.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Carson, a prisoner in the Texas Department of Criminal Justice, Institutional Division ("TDCJ"), testified that Lieutenant L.D. Sheppard and Corrections Officer (CO) David Sias had harassed him and retaliated against him for use of Texas's prisoner grievance system. Specifically, Carson averred that Sheppard had ordered his cell searched after he complained about a lost identification card; had ordered him stood against a fence; had ordered him placed in solitary confinement; and implicitly had threatened to strike him in the head. Carson testified that Sias had written a bogus disciplinary report against him and had ordered him stood against a fence. Carson also testified that Sheppard and Sias were part of a small clique within TDCJ's Michael Unit, that they brutalized inmates, and that they became angry when prisoners filed grievances against them.

Victor Canty, also a Texas prisoner, testified that he had seen Sias order another CO to stand Carson against a fence and search him. Canty also testified that he was familiar with Sheppard's and Sias's reputations. According to Canty, prison employees frequently retaliate against prisoners who file grievances.

Major Craig Raines testified about the identification-card policy at the Michael Unit and searches of inmates' cells for identification cards. He explained the importance of identification cards in a maximum-security institution. He described the hall-pass system used at the Michael Unit and testified that prisoners are subject to searches at any time. He described close

custody prisoners as those with tendencies to aggression, possession of weapons, and serious discipline problems. He described administrative-segregation prisoners as the worse inmates in the system and testified about TDCJ's grievance process. On cross-examination, Raines stated that he had never served as a grievance officer and that he had not seen Carson's grievances.

Sias testified that he did not recall having written a disciplinary case against Carson and that he had ordered another CO to pat Carson down once when the CO's were patting down other prisoners selected randomly. According to Sias, he had encountered no difficulties with Carson.

Sheppard testified that prisoners frequently file grievances against good prison employees. According to Sheppard, prisoners had filed several hundred grievances against him. He had never been disciplined based upon any grievances filed by Carson. Sheppard averred that he knew which prisoners frequented the law library but that he treated "writ-writers" no differently from other prisoners and that he treated Carson no differently from any other prisoner. Regarding Carson's allegation that Sheppard had made him stand against a fence and had placed him in segregation, Sheppard testified that Carson's conduct had made discipline appropriate. Sheppard also testified that prison officers occasionally make prisoners stand against a fence while officers clear hallways of other inmates.

Sheppard denied that he had ordered a search of Carson's cell. Another prison employee had ordered a search when Carson claimed

that he had lost his identification card. Sheppard averred that he never had spoken with Sias about retaliating against Carson.

The jury found that Sias and Sheppard had not retaliated against Carson. The magistrate judge entered judgment for the defendants and dismissed Carson's complaint with prejudice.

II.

A.

Carson contends that the magistrate judge erred by not issuing a curative instruction after defense counsel asked a question based upon the premise that a perjury conviction would have no effect on Canty's term of imprisonment. Carson also contends that the magistrate judge should have given a curative instruction after defense counsel asked Canty whether he had perjured himself in an earlier proceeding. Carson further contends that defense counsel wrongly elicited Canty's testimony that he was serving a ninety-nine-year prison term.

> Even if [counsel's] remarks are deemed improper and a trial judge's response is deemed inadequate, a new trial will not be granted unless, after considering counsel's trial tactics as a whole, the evidence presented, and the ultimate verdict, the court concludes that "manifest injustice" would result by allowing the verdict to stand.

Johnson v. Ford Motor Co., 988 F.2d 573, 582 (5th Cir. 1993). Under the Johnson standard, Carson's contentions fail.

On direct examination, Carson asked Canty whether he was familiar with perjury laws. Canty answered that he was. Canty then testified that if he had seen that anything in an earlier affidavit was erroneous, he would have changed it. Defense counsel

elicited Canty's agreement that he was familiar with perjury laws and that Canty was serving a ninety-nine-year sentence. He then asked whether a perjury conviction would have much meaning to Canty. Carson objected on the basis that Texas law allows stacking of sentences. The magistrate judge overruled Carson's objection. Canty averred that a perjury conviction would not much affect his prison term.

Defense counsel then elicited that Canty had testified to a different version of facts at an earlier hearing. Defense counsel asked, "So basically you committed perjury at that time, didn't you?" Canty answered, "No." The magistrate judge objected to defense counsel's question, and counsel withdrew it.

Carson opened the door to defense counsel's questions about the effect of a potential perjury conviction on Canty's prison term when he asked whether Canty was familiar with perjury laws. Counsel's questions about the length of Canty's prison term and the effect of a perjury conviction were within the scope of cross-examination and constituted legitimate impeachment. See Polythane Systems, Inc. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201, 1210 (5th Cir. 1993), cert. denied, 114 S. Ct. 1064 (1994). Moreover, contrary to Carson's assertion, counsel's questions do not appear implicitly to mislead the jury regarding Texas's sentence-stacking provisions. Rather, those questions appear based upon the premise that any additional sentence for perjury would not make a great deal of difference to a prisoner serving such a lengthy sentence.

The magistrate judge objected to counsel's question whether

Canty had committed perjury at the earlier proceeding. The jury therefore was informed that the magistrate judge found the question objectionable. Additionally, Carson elicited Canty's testimony on redirect that the only difference in his testimony at the earlier proceeding and at trial was the names of the individuals involved in a particular incident.

The magistrate judge's objection and Carson's follow-up questions obviated the need for a curative instruction. Moreover, Carson did not request a curative instruction following defense counsel's objectionable question. Under the circumstances, the magistrate judge need not have given such an instruction.

B.

Carson next contends that Sias and Sheppard improperly exercised one of their peremptory strikes to dismiss juror Mary Williams, who is black, from the jury venire panel.[1] He also contends that the magistrate judge improperly delayed a hearing on his peremptory-strike contention and forced him to state his contention in front of the jury. Carson's assertions are unconvincing.

To prevail on a claim under Batson v. Kentucky, 476 U.S. 79 (1986), of discriminatory use of peremptory strikes, a party must show that the other party used his strikes to eliminate black

[1] Carson mentions the exclusion of black venireperson Sundra Timberlake but does not argue that defense counsel erred by striking her. Carson therefore has waived any such contention on appeal. See In re Municipal Bond Reporting Antitrust Litig., 672 F.2d 436, 439 n.6 (5th Cir. 1982).

venirepersons from the jury. "Once a [party] establishes a prima facie Batson case, the burden shifts to the [opposing party] to offer a race neutral explanation for striking the black veniremembers." United States v. Roberts, 913 F.2d 211, 214 (5th Cir. 1990), cert. denied, 500 U.S. 955(1991). "Finally, the trial court must determine whether the [objecting party] has carried his burden of proving purposeful discrimination." Hernandez v. New York, 500 U.S. 352, 359 (1991). Batson applies to civil trials. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991). This court reviews a district court's determination regarding an alleged Batson violation under the "clearly erroneous" standard of review. Roberts, 913 F.2d at 214.

Carson did not object when the jury was selected, sworn, and seated. After the magistrate judge gave preliminary instructions to the jury, Carson stated, "I have a matter that I need to take up with the Court outside the presence of the jury." The magistrate judge told Carson that she would take up the matter at the next break in the trial. Carson assented. After opening statements, the magistrate judge directed Carson to call his first witness. Carson instead lodged an objection to the voir dire and told the magistrate judge that he had attempted to raise the objection earlier. Carson added, "I think it should go on the record before we go any further." The magistrate judge asked Carson, "What is your objection?" The following exchange occurred:

> MR. CARSON: Well, it was basically in the selection process. The one I asked to have done outside the presence of the jury. Based on certain jurors that were struck off the record that I would request that the

> State's attorney be required to articulate a race neutral reason for striking two of the jurors off the jury as required by Edmonson vs. Leesville, and because some --
>
> THE COURT: Okay. I am going to take this up outside the presence of the jury, but I will take it up later. And if you are correct, then we will declare a mistrial.

The magistrate judge heard Carson's Batson contention over the lunch break. Defense counsel enunciated his reasons for striking juror Williams as follows:

> [O]ne of the first reasons I struck her is because she works for Vaughn Package. She is basically a blue collar. And it was my feeling that on this kind of case with retaliation issues is a little more advanced. And I think the rest of our jurors pretty much -- several of them have college degrees. And that was my first basis, basically, her education. I didn't feel in terms of the way she spoke, her responses, and the way she articulated it was going to be very high in order to handle the issues that we have here.
>
> Second, I felt her body language and the way she was looking at our defendants, I didn't feel comfortable with that. She didn't seem to pay attention to Mr. Coates or even to Mr. Carson for that matter. I felt she would be basically a disinterested juror. And I felt for those reasons I owe it to my defendants to have somebody that is going to pay attention and listen to these issues presented today.

The magistrate judge overruled Carson's Batson objection.

Carson's contention that the magistrate judge erred by forcing him to voice his objection to the jury-selection process in the presence of the jury is unavailing. Carson "could have requested a bench conference or a brief recess," United States v. Collins, 972 F.2d 1385, 1401 (5th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993), in order to raise his objection away from the jury. Carson previously had indicated that he wished to address a matter away from the jury. He did not, however, request a recess or a bench

conference when he indicated that he wished to object to jury selection.

Moreover, Carson's Batson contention is unconvincing on its merits. Defense counsel stated race-neutral reasons for striking Williams -- her evident lack of education and her perceived inattentiveness during voir dire. "Intuitive assumptions about a potential juror's interest and attitudes can be acceptable as a neutral explanation for a peremptory challenge. Roberts, 913 F.2d at 214. Additionally, inattentiveness is a legitimate reason to strike a potential juror. Moore v. Keller Indus., Inc., 948 F.2d 199, 202 (5th Cir. 1991), cert. denied, 112 S. Ct. 1945 (1992). The magistrate judge's implicit finding that defense counsel's reasons for striking Williams were legitimate and not in violation of Batson is not clearly erroneous.

C.

Carson next contends that the magistrate judge erred by allowing Major Raines to testify as an expert about Michael Unit policies. Carson argues specifically that he had objected to the defendants' witness list; that the parties had agreed that Raines would testify only about prison grievance procedures; that Raines lacked personal knowledge about Carson's case; and that Raines placed Carson in a bad light when he testified that prisoners confined in close custody have tendencies toward serious misconduct. Carson's contentions are without merit.

Carson withdrew his objection to the witness list after

remarking that the magistrate judge had granted his motion in limine to exclude testimony about his witness's criminal record. Carson said nothing about limiting Raines's testimony and did not object to Raines's credentials to testify as an expert, despite defense counsel's averment that Raines would testify as an expert. Carson did not object to Raines's testimony on direct examination.

We need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

No manifest injustice occurred because Raines was allowed to testify. Raines appeared to give disinterested and objective testimony about prison policy.

C.

Carson next contends that the magistrate judge erred by not allowing him to introduce evidence of Sheppard's reputation for using force against inmates and by prohibiting him from mentioning Sheppard's reputation in closing arguments. He also contends that the magistrate judge erred by not allowing him to question Sheppard about grievances against him. Carson's contentions are without merit.

We review a district court's ruling on the admission of evidence under the abuse-of-discretion standard. Brunet v. United Gas Pipeline Co., 15 F.3d 500, 505 (5th Cir. 1994).

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]
>
> . . . .
>
> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

FED. R. EVID. 404(a), (b).

Carson testified that Sheppard and Sias had reputations for brutality. Canty testified that he was familiar with Sheppard's and Sias's reputations. Witness James Brooks testified that he was familiar with Sheppard's and Sias's reputations. The court later sustained defense counsel's objection to testimony about the defendants' reputations and admonished Carson to avoid references to the defendants' reputations for using force during closing arguments.

Carson contends that his and Brooks's testimony somehow raised Sheppard's reputation for brutality as an issue at trial. None of the incidents during which Carson claims Sheppard and Sias violated his rights, however, involved use of force. Carson does not contend that extrinsic evidence regarding Sheppard's reputation would have been relevant to any substantive issue other than Sheppard's propensity to act in conformity with his reputation. Rule 404(b) prohibits use of evidence of other misconduct for that purpose.

Nor should the magistrate judge have allowed Carson to use evidence of Sheppard's alleged violent proclivities to impeach

Sheppard's testimony. Extrinsic evidence of specific instances of misconduct is not admissible to impeach a witness. FED. R. EVID. 608(b). Moreover, Sheppard did not testify that he had never been disciplined for using force. Any evidence of misconduct therefore would have been irrelevant for impeachment purposes.

On direct examination, Sheppard testified that prisoners had filed hundreds of grievances against him. On cross-examination, Carson asked Sheppard how many of those grievances had been sustained. The magistrate judge sustained defense counsel's objection to Carson's question. Id.

Carson does not contend that evidence of any legitimate grievances against Sheppard would have been relevant to any issue other than action in conformity with the previous grievances. It is not obvious from the record that evidence of previous grievances would have been relevant to any other issue.

Moreover, a witness may be asked about prior instances of his own misconduct if that misconduct is relevant to his "character for truthfulness or untruthfulness[.]" FED. R. EVID. 608(b). Sheppard testified that he had never been disciplined because of any of the grievances Carson had filed against him. Sheppard did not aver that he had never been disciplined because of a prisoner grievance or that officials had never found any grievances against him substantiated.

Revelation to the jury that some of the grievances against Sheppard were legitimate would not have reflected on Sheppard's character for truthfulness or untruthfulness. The magistrate judge

therefore properly sustained defense counsel's objection to Carson's question and also properly declined to allow Carson to refer to Sheppard's reputation in his closing argument.

E.

Carson finally contends that the court erred by denying his motion to appoint counsel to represent him at trial and to appoint an expert to rebut Raines's testimony. Carson's contentions are unavailing.

> There is no automatic right to the appointment of counsel in a section 1983 case. Furthermore, a district court is not required to appoint counsel in the absence of "exceptional circumstances" which are dependent on the type and complexity of the case and the abilities of the individual pursuing that case. [This Court] will overturn a decision of the district court on the appointment of counsel only if a clear abuse of discretion is shown.

Cupit v. Jones, 835 F.2d 82, 86 (5th Cir. 1987) (citations omitted). Among the factors a district court should consider when faced with a request for counsel are

> (1) the type and complexity of the case; (2) whether the indigent is capable of adequately presenting his case; (3) whether the indigent is in a position to investigate adequately the case; and (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross examination.

Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982) (internal citations omitted). The appointment of experts is left to the discretion of the district court. Fugitt v. Jones, 549 F.2d 1001, 1006 (5th Cir. 1977); FED. R. EVID. 706(a).

Carson's case presented no exceptional circumstances requiring

the assistance of counsel. First, his case was a straightforward prisoner's civil rights case involving easily comprehended issues and testimony. Second, Carson demonstrated an ability to present his case adequately. Additionally, Carson is an experienced litigator in the federal courts.[2] Third, Carson evidently had little difficulty investigating the facts and law pertaining to his case. Fourth, while greater technical skill in presenting evidence and conducting cross-examination might have been helpful to Carson, such skill was not critical to Carson, in light of the relatively straightforward nature of the facts and issues involved.

Carson does not allege what portions of Major Raines's testimony an expert witness might have called in question. Carson has not shown that the denial of his motion for appointment of an expert was an abuse of discretion.

AFFIRMED.

---

[2] See Carson v. Denby, No. 94-40322 (5th Cir. Jul. 19, 1994) (unpublished) (reversal and remand of retaliation and access-to-courts claims that had been dismissed as frivolous); Carson v. Kent, No. 93-5462 (May 25, 1994) (unpublished) (dismissal of appeal and warning that sanctions will follow from future frivolous appeals); Carson v. Perry, No. 93-4375 (5th Cir. Oct. 22, 1993) (unpublished) (summary judgment affirmed in part; vacated and remanded in part); Carson v. Collins, No. 93-4019 (5th Cir. Sept. 23, 1993) (unpublished) (dismissal of civil rights case as frivolous affirmed); Carson v. Collins, No. 92-1772 (5th Cir. Mar. 3, 1993) (unpublished) (one-judge order) (denial of certificate of probable cause); Carson v. Waldron, No. 92-4375 (5th Cir. Oct. 21, 1992) (unpublished) (dismissal of civil rights case as frivolous affirmed); Carson v. Collins, No. 92-1086 (5th Cir. May 20, 1992) (unpublished) (one-judge order) (denial of certificate of probable cause); Carson v. Pustka, No. 91-4611 (5th Cir. Mar. 9, 1992) (unpublished) (dismissal of civil rights case affirmed); Carson v. Hernandez, No. 91-1528 (5th Cir. Nov. 22, 1991) (unpublished) (dismissal of civil rights case as frivolous affirmed).