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I. FACTS

The Commonwealth of Virginia charged Hambrey Millton Cudjoe with rape and aggravated sexual battery and brought him before the Circuit Court, City of Richmond. During the jury selection process, opposing counsel questioned the twenty-person jury panel.[1] Both counsel exercised their statutory right to peremptory strikes pursuant Virginia Code 19.2-262.[2] The trial judge then inquired whether counsel had any motions, at which point the defense attorney objected to the Commonwealth's striking of three minority jurors.[3] The Commonwealth offered its reasons for the peremptory strikes. The trial court upheld two of the three strikes.[4] Defense counsel's objections are not at issue in this case. The Commonwealth's Attorney then objected[5] to the defendant's striking of four Caucasian jurors.[6] The court upheld two of the strikes and disallowed the third, that of Walter Craigie. This necessitated an additional strike by the defense.[7]

As grounds for striking Craigie, defense counsel stated, "I don't think he could relate with a person of Mr. Cudjoe's standing."[8] The Commonwealth offered no argument in support of its opposition to the strike, and did not allege that the asserted reason for the peremptory strike was pretextual.[9] Moreover, the trial judge did not undertake any findings of fact and did not explicitly rule that the strike was racially motivated, which is a clear violation of the Equal Protection Clause.[10] Yet, the trial court disallowed the strike, thereby seating Mr. Craigie on the jury and forcing defense counsel to strike another juror.[11] The record is void of any indication as to the racial makeup of the jury as finally sworn.[12] At trial, the jury convicted the defendant, Hambrey Milton Cudjoe, of rape and aggravated sexual battery.[13]

II. HOLDING

The Virginia Court of Appeals reversed the trial court's decision. The appellate court found that the Commonwealth failed to show the defendant's explanation for the strike was pretextual.[14] In addition, the Commonwealth offered no basis at trial for its current contention that the defendant's explanation for the Craigie strike was unbelievable.[15] The appellate court further held that absent a violation of the Equal Protection clause, the trial court denied appellant his statutory right to a peremptory strike.[16] The court reasoned that no curative instruction could have been given to correct the trial court's error.[17] The trial court's error is presumed prejudicial, "unless it plainly appears that it could not have affected the result."[18] The appellate court found no evidence that the jury's verdict was unsupported by the weight of the evidence or that the record demonstrated any lack of soundness in the verdict.[19] Despite the apparent validity of the verdict the error was "substantial and significant,"[20] precluding the court from finding that the appellant received a fair trial on the merits.[21]

III. ANALYSIS/APPLICATION

A. CONTEMPORANEOUS OBJECTION RULE

While the defense did not raise a contemporaneous objection, the court precluded this as a possible argument, finding that the appellant's explanation for striking

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[1] *Cudjoe v. Commonwealth*, 23 Va.App. 193, 475 S.E.2d 821 (1980).

[2] Code § 19.2-262 provides in pertinent part:

(2) Twelve persons from a panel of twenty shall constitute a jury in a felony case...

(3) The parties or their counsel, beginning with the attorney for the Commonwealth, shall alternatively strike off one name from the panel until the number remaining shall be reduced to the number required for a jury.

[3] *Cudjoe* at 199.

[4] *Id.*

[5] *Id.*

[6] Defense counsel corrected the Commonwealth, stating that he struck only three Caucasian jurors.

[7] *Cudjoe* at 200.

[8] *Id.*

[9] *Id.*

[10] *Id* at 197.

[11] *Id* at 200.

[12] *Id.*

[13] *Id* at 193.

[14] *Id* at 202.

[15] *Id.*

[16] *Id* at 203.

[17] *Id* at 205.

[18] *Caldwell v. Commonwealth*, 221 Va. 291, 296, 269 S.E.2d 811, 814 (1980).

[19] *Cudjoe* at 205.

[20] *Id* at 206

[21] *Id* at 206.

Craigie sufficiently complied with Rule 5A:18.[22] The Court of Appeals held that when the trial court made its ruling, the trial court, ". . . had the positions of both parties clearly before it and fully understood the issues involved."[23] No subsequent objection by the appellant was necessary to preserve the right to challenge the court's ruling on appeal.

B. BATSON CHALLENGES

On appeal, the court began its review of the trial court's decision by examining *Batson*[24] challenges. In Swain, the Supreme Court, stated that a peremptory challenge is one that is "exercised without a reason stated, without inquiry, and without being subject to the court's control,"[25] and one that compared to strikes for cause "permits rejection for a real or imagined partiality that is less easily designated or demonstrable."[26] *Batson* qualified this rule by guaranteeing a defendant the right to a trial by a jury that has been "selected pursuant to nondiscriminatory criteria"[27] and by prohibiting the use of peremptory strikes "to challenge potential jurors solely on account of their race."[28] *Batson* extends the protections of the Equal Protection clause to defendants during jury selection.[29] This protection now applies to peremptory strikes in both criminal and civil cases[30] and to strikes by the defendant.[31]

The court applied the same race prejudice test applied to the prosecution's use of peremptory strikes to determine whether the defendant's peremptory strike of Craigie was allowable.[32] Under this test, laid out in *James v. Commonwealth,*[33] the Commonwealth bears the burden of making a prima facie showing that the strike was based on race.[34] The defendant then bears the burden of showing a race-neutral explanation for striking the juror.[35] If the court determines the explanation to be race-neutral, the Commonwealth may show why the explanation, although facially race-neutral, is in fact pretextual.[36] Finally, the court must determine whether the Commonwealth satisfied its burden of showing intentional discrimination.[37]

As applied to the facts of this case, the test requires the court to evaluate the appellant's proffered reason for the Craigie strike. Appellant stated, "I think he may have difficulty relating to this case based on his name. He was reading the Wall Street Journal, and has a lot of activities on Main Street. I don't think he could relate with a person of Mr. Cudjoe's standing."[38] After presenting this race-neutral reason, the burden shifted to the Commonwealth to show the reason offered was pretextual. The trial court did not apply the *James* test. It heard no argument from the Commonwealth, whose attorney never disputed the nondiscriminatory nature of the strike and who did not argue that the peremptory strike was pretextual. The Commonwealth merely stated that Craigie is white and the appellant is black, failing to address the appellant's contention that the strike was based on background and economic status.[39]

On review, the Court of Appeals limited its review to the Commonwealth's contention that the reason for the Craigie strike was pretextual.[40] The proper test for review, as adapted from *Barksdale v. Commonwealth,*[41] states that "a court must determine whether, assuming the proffered reasons for the peremptory challenge are true, the challenges violated the Equal Protection Clause as a matter of law."[42] If the court concludes there was no violation of the Equal Protection Clause, the question

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[22] Virginia Rules of the Supreme Court of Virginia, Rule 5A:18 provides: No ruling of the trial court or the Virginia Worker's Compensation Commission will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to constitute a question to be ruled upon on appeal.

[23] *Id* at 197.

[24] *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712 (1986). Batson established the rule that peremptory strikes must be used in such a way as not to deny potential jurors a seat solely on the basis of their race, thereby violating the Equal Protection Clause.

[25] *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

[26] *Id* at 220.

[27] *Batson* at 85-86.

[28] *Batson* at 89.

[29] United States Constitution, Article IV, Section 2, Clause 1

[30] *Edmonson v Leesville Concrete Co.,* 500 U.S. 614, 11 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

[31] *Georgia v. McCollum,* 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

[32] *Buck v. Commonwealth,* 247 Va. 449, 450-51, 443 S.E.2d 414, 415 (1994). See also *James v. Commonwealth,* 247 Va. 459, 461-62, 442 S.E.2d 396, 398 (1994).

[33] 247 Va. 459, 461-62, 442 S.E.2d 396, 398 (1994)

[34] *Cudjoe* at 198.

[35] *Id.*

[36] *Id.*

[37] *Id* at 199.

[38] *Id* at 201.

[39] *Id* at 201. The Commonwealth based its appeal its belief that the trial judge "simply did not believe defense counsel when he states that he struck Craigie because of his financial and economic background, rather than because he was a different race than the defendant."

[40] *Id* at 200.

[41] *See Barksdale v. Commonwealth,* 17 Va.App. 456, 459-60, 438 S.E.2d 761, 763 (1993).

[42] *Cudjoe* at 201.

then becomes "whether counsel's race-neutral explanation for a peremptory challenge should be believed."[43] The appellate court found that the uncontradicted evidence showed the appellant struck Craigie for non-discriminatory reasons, and that the Commonwealth never showed the appellant's strike to be pretextual. The court ruled that the evidence did not support the trial court's decision to disallow the peremptory strike of Craigie.[44]

C. HARMLESS ERROR

The Commonwealth argued that even if the trial court erred in disallowing the Craigie strike, such error was harmless, as the right to a peremptory strike is statutory and not constitutional.[45] The court of appeals, citing *Ross v. Oklahoma,*[46] agreed that the error was statutory and not constitutional, but held that it must apply Virginia's harmless error statute,[47] in keeping with *Lavinder.*[48] The Lavinder test requires a criminal conviction to be overturned unless it plainly appears that the error did not affect the verdict.[49] Furthermore, "an error does not affect a verdict if a reviewing court can conclude . . . that, had the error not occurred, the verdict would have been the same."[50]

An error is presumed to be prejudicial "unless it plainly appears that it could not have affected the result."[51] Here, the court found that no curative instruction could have corrected the trial court's error. More importantly, the court held that "Craigie's presence on the jury in conflict with the appellant's expressed desire to remove him is indicative of prejudice."[52] Based on these factors, the court was unable to conclude that the defendant received a fair trial on the merits.[53] Therefore, the court reversed the appellant's conviction and remanded the case for a new trial.[54]

IV. CONCURRENCE/DISSENT

Judge Annunziata concurred in part and dissented in part. Judge Annunziata concurred with the majority in finding that the trial court erred in disallowing the Cragie strike, but deemed the error harmless.[55] The judge reasoned the error was harmless, as ". . . it has been well said that there is no such thing as a perfect trial. Every man is entitled to a fair trial and to nothing more . . ."[56] The dissent conceded that the defendant was denied the statutory right to strike, but concluded that the jury was nevertheless impartial and that Craigie was "indifferent to the cause."[57] Judge Annunziata reasoned that, given the combination of the evidence supporting the appellant's conviction beyond a reasonable doubt and the impartiality of the jury, the "conclusion is compelled that the record plainly shows that the erroneous denial of appellant's strike did not deprive appellant of a fair trail or substantial justice and, therefore, did not affect the verdict."[58] Based on this analysis Judge Annunziata would affirm the conviction.

V. CONCLUSION

Under *Swain,* a peremptory strike is one that may be exercised with little or no restrictions by the court. Unlike a challenge for cause, the peremptory challenge permits a potential juror to be rejected for "a real or imagined partiality."[59] The only restrictions placed on the use of peremptory strikes are those imposed by the Equal Protection Clause and cases such as *Batson* and its progeny. By invalidating the juror strike in question the trial court added conditions for a strike that are not found in either the Constitution or any statute. Furthermore, the court never stated what those condi-

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[43] *Id.*

[44] *Id* at 202.

[45] *Id* at 202.

[46] *Ross v. Oklahoma,* 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988).

[47] Va Code 1950, ß 8.01-678 states that: When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed:

1. For the appearance of either party, being under the age of eighteen years, by attorney, if the verdict, where there is one, or the judgment be for him and not to his prejudice; or

2. For any other defect, imperfection, or omission in the record, or for any error committed on the trial.

[48] *Lavinder v. Commonwealth,* 12 Va.App. 1003, 1005, 407 S.E.2d 910, 911 (1991) (en banc).

[49] *Id.*

[50] *Id* at 1005.

[51] *Caldwell v. Commonwealth,* 221 Va. 291, 296, 269 S.E.2d 811, 814 (1980).

[52] *Cudjoe* at 205.

[53] *Id* at 206.

[54] *Id* at 206.

[55] *Id* at 206.

[56] *Cudjoe* quoting *Oliver v. Commonwealth,* 151 Va. 533, 541 145 S.E. 307, 309 (1928).

[57] *Cudjoe* quoting *Breeden v. Commonwealth,* 217 Va. 297, 298 227 S.E.2d 734, 735 (1976).

[58] *Cudjoe* at 207.

[59] Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

tions were or why the striking party did not comply.

The trial court inferred racial animus toward the defense's strike of a white juror. Despite the fact that there were no allegations or findings of any racial prejudice, and that the commonwealth, at trial, did not dispute the basis of the strike in question, the court disallowed the defense's attempt to strike a white juror. The court disregarded the defense's race neutral explanation and made no findings of fact as to the basis for the strike.

In assuming a race-based motivation for the strike, the court made a decision with strong precedential consequences. Had the trial court's decision not been overturned on appeal, it created the possibility for a court to inject itself into an area from which it had been previously excluded. Particularly, this expansion of the role of the judiciary would have granted courts the power to determine the outcome of a case, by playing an active role in jury selection. Such a judicial role is not envisioned in the due process clause or in the *Batson* line of cases. *Cudjoe* marks the appellate court's repudiation of such overreaching by the trial courts.

Cudjoe further elaborates on the *Batson* line of cases by holding that even where the trial court's error cannot be shown to have affected the verdict, and where the error is statutory and not constitutional, justice has not been served and a new trial is required. *Cudjoe* also stands for the proposition that courts may not infer malice where one party seeks to uphold a strike that is challenged on the basis or race. Such a determination may only be the result of the application of the *James* test. Here, the defense sought to strike a juror for race neutral reasons. After the prosecution objected, the court disallowed the strike despite the defense's explanation. The appellate court implied, in reversing the lower court decision, that peremptory strikes will be upheld absent a clear showing that the strike was racially motivated.

The *Cudjoe* decision highlights the importance of the peremptory strike, as well as the trial court's power to affect the trial outcome by its rulings on peremptory strikes. This decision also reiterates the constitutional protections of the *Batson* challenge and the more recent adaptation of this rule to defense strikes. Further, in applying Virginia's harmless error statute, the court found that where a juror was erroneously allowed to sit on a jury, the defendant is denied a fair trial. This presumption of harm is extremely important, as it provides a criminal defendant with what amounts to automatic grounds for appeal whenever the trial court rules incorrectly on a peremptory strike, even where this error cannot be shown to have affected the verdict.

Summary and Analysis Prepared by:
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