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Yarbrough v. Commonwealth 551 S.E.2d 306 (Va. 2001)

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I. Facts

The defendant, Robert Stacy Yarbrough ("Yarbrough") was convicted in a jury trial of capital murder and sentenced to death for the willful, deliberate, and premeditated killing of Cyril Hugh Hamby during the commission of a robbery in violation of Virginia Code Section 18.2-31(4). In his first appeal to the Supreme Court of Virginia, Yarbrough's conviction was affirmed but the case was remanded for a new penalty determination because the trial court failed to give a jury instruction that a life sentence would mean life imprisonment because the defendant would not be eligible for parole. On remand, a different jury sentenced Yarbrough to death based on a finding of "vileness." On appeal to the Supreme Court of Virginia, Yarbrough raised the following issues: (1) the trial court erred in allowing the Commonwealth's peremptory strike of an African-American prospective juror in violation of *Batson v Kentucky*;[1] (2) the trial court failed to grant Yarbrough's motion for mistrial based on improper comments made by the prosecutor during closing arguments; and (3) the trial court erred in imposing a sentence of death.[2]

II. Holding

The Supreme Court of Virginia held that the peremptory strike of an African-American prospective juror did not violate the rule of *Batson* because the prosecution sufficiently explained the peremptory strike.[3] The Supreme Court of Virginia further ruled that the motion for mistrial based on the prosecutor's improper remarks during closing was procedurally defaulted.[4] The court determined the death sentence was not imposed under influence of passion, prejudice, or any other arbitrary factor and was not excessive or disproportionate.[5] Thus, the Supreme Court of Virginia affirmed Yarbrough's death sentence.[6]

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1. 476 U.S. 79 (1986).

2. Yarbrough v. Commonwealth, 551 S.E.2d 306, 307-312 (Va. 2001); *see* Batson v. Kentucky, 476 U.S. 79, 97 (1986) (holding that purposeful discrimination based on race in selecting jurors violates the Equal Protection clause of the Fourteenth Amendment of the United States Constitution).

3. *Yarbrough*, 551 S.E.2d at 310; *see Batson*, 476 U.S. at 97.

4. *Yarbrough*, 551 S.E.2d at 311.

5. *Id.* at 312.

6. *Id.* at 313.

III. Analysis / Application in Virginia

A. Yarbrough's Batson *Challenge*

The Supreme Court of Virginia ruled that Yarbrough could not obtain relief under *Batson* because the trial court correctly ruled that the prosecution's explanations for striking a certain juror were race-neutral.[7] According to the United States Supreme Court, in order to establish a prima facie case of purposeful discrimination in the selection of a petit jury it is necessary for the defendant to show three things.[8] First, the defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.[9] Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."[10] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude people from the petit jury on account of their race.[11] The defendant has the burden of proving the prima facie case, but once proven, the burden shifts to the prosecution to articulate race-neutral reasons for that strike.[12]

Yarbrough claimed that the prosecution failed to present a valid race-neutral reason for making one peremptory strike because the prosecutor stated that he believed the juror made a "racial" comment.[13] The prosecutor was unable to hear the comment made by the juror but stated that he had reason to believe that the comment was "racial" in nature.[14] The Commonwealth gave several explanations for striking the juror: (1) inability to hear the juror's last comment; (2) belief that the juror's final comment was about race; and (3) concern that the juror, a teacher, might be sympathetic to the nineteen-year-old defendant.[15] The trial court ruled that the Commonwealth's explanation that the juror might be

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7. *Id.* at 310.
8. *Batson*, 476 U.S. at 96.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 97.
13. *Yarbrough*, 551 S.E.2d at 309.
14. *Id.* at 309. During the *Batson* hearing, the juror's actual statement was exposed. It occurred during the following exchange:

> [DEFENSE COUNSEL]: [Defendant] obviously is black. The [victim] is white. I know you realize that. Do either of you think that would influence you in any way? Do you think you might reach a different decision if they were both white?
> MR. WOODSON: I deal with both races everyday.
> [DEFENSE COUNSEL]: I know you do.

Id.

15. *Id.* at 308-09.

sympathetic to the nineteen-year-old was a sufficient race neutral explanation and therefore denied Yarbrough's *Batson* challenge.[16]

Under *Batson*, a trial court's determination whether the reason given for exercising a peremptory strike is race-neutral is entitled to great deference.[17] A trial court's determination will only be reversed on appeal if it is found to be "clearly erroneous."[18] The trial court in this case accepted the prosecutor's explanation.[19] The trial court's determination that the prosecution's explanations were race-neutral necessarily was based on the court's evaluation of the prosecutor's credibility.[20] The Supreme Court of Virginia did not find that the trial court's ruling was clearly erroneous, and therefore affirmed the ruling.[21]

B. Motion for Mistrial

Defense counsel moved for a mistrial based on the prosecutor's improper remarks during the Commonwealth's rebuttal to defense counsel's closing argument.[22] In rebuttal, the prosecutor argued: "We used to have parole eligibility, and then a few years ago the legislature decided to abolish that . . . . What [defense counsel] is asking you to do is take a pair of dice and roll them and hope that the law doesn't change again."[23] Defense counsel objected to the remark and the trial court instructed the jury to disregard the comment.[24] The prosecutor also remarked, "I don't know what is worse[,] the fear that he gets out[,] or the fear of what he is going to do with nothing to lose for the rest of his life."[25] Again defense counsel objected, but failed to ask for a mistrial.[26] It was nearly six months before defense counsel made the motion for mistrial based on the prosecutor's comments.[27] In the motion for mistrial, defense counsel also argued that the trial court's cautionary instruction to the jury was an insufficient remedy to cure the Commonwealth's improper closing argument.[28] The trial court, ruling

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16. *Id.* at 310.

17. *Batson*, 476 U.S. at 97; *see also* Atkins v. Commonwealth, 510 S.E.2d 445, 454 (Va. 1999) (holding that a trial court's determination as to whether the reason to strike a juror was race-neutral is entitled to great deference).

18. *Yarbrough*, 551 S.E.2d at 310 (quoting Hernandez v. New York, 500 U.S. 352, 369 (1991)); *see Atkins*, 510 S.E.2d at 454.

19. *Yarbrough*, 551 S.E.2d at 310.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

that the cautionary instruction was sufficient and refusing to assume that any juror did not follow the court's instructions, denied the motion.[29]

On appeal, the Supreme Court of Virginia held that the motion for a mistrial was untimely.[30] The court noted that a motion for mistrial based on an improper argument must be stated when the remarks at issue were made.[31] Because the motion was untimely the Court refused to review its substance on appeal.[32] When the prosecution makes a comment that is objectionable, defense counsel must immediately, after the comment is made, object to the comment and make a motion for mistrial or, if the court refuses to grant a mistrial, defense counsel must ask for a curative instruction. If defense counsel fails to make the objection, or makes the objection at the proper time but fails to ask for mistrial as a remedy, then defense counsel has procedurally defaulted the claim, and the issue will not later be reviewed on appeal or in collateral proceedings.[33]

C. *Proportionality Review*

The Supreme Court of Virginia is required under Virginia Code Section 17.1-313(C), to review a death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor; or whether it is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[34] The court ruled that the record failed to support Yarbrough's argument that the prosecutor's remarks caused the jury to act with passion, prejudice, or in an arbitrary manner.[35] The court also did not find that the trial court abused its discretion in declining to change the sentence set by the jury.[36] The court found, with some exceptions, that the death sentence has generally been imposed when there is a finding of vileness and the underlying crime was robbery.[37]

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29. *Id.*

30. *Id.* at 311.

31. *Id.*; *see also* Yeatts v. Commonwealth, 410 S.E.2d 254, 264 (Va. 1991) (holding that making a motion for mistrial means making the motion at the moment the objectionable words are spoken).

32. *Yarbrough*, 551 S.E.2d at 311; *see* Schmitt v. Commonwealth, 547 S.E.2d 186, 200 (Va. 200[1]) (holding that untimely objections to the Commonwealth's comments during closing arguments are waived).

33. *See* VA. SUP. CT. R. 5:25 (2001). The rule states:

> Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.

Id.

34. *Yarbrough*, 551 S.E.2d at 311; VA. CODE ANN. § 17.1-313(C) (Michie 2000).

35. *Yarbrough*, 551 S.E.2d at 311.

36. *Id.* at 312.

37. *Id.*

CASE NOTES:
Court of Appeals of Virginia