

ORIGINAL

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO,

CASE NO. 2007-1741

Plaintiff-Appellee,

vs.

EDWARD LEE LANG, III,

Defendant-Appellant.

FILED
FEB 27 2012
CLERK OF COURT
SUPREME COURT OF OHIO

ON APPLICATION FOR REOPENING
PURSUANT TO S. Ct. Prac. R. 11.6

MEMORANDUM IN RESPONSE
OF PLAINTIFF-APPELLEE,
STATE OF OHIO

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STANDARD OF REVIEW

A criminal defendant has a constitutional right to effective assistance of counsel, and the standard for effectiveness is set forth in the *Strickland* case. Under the *Strickland* standard, a defendant has the burden of showing that his counsel's performance was deficient, and that this deficiency prejudiced him.¹ "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."² This constitutional guarantee of effective assistance of counsel applies to a convicted criminal defendant on his first direct appeal as well as at trial.³ In the context of an appeal, therefore, the defendant must show that there exists a reasonable probability that, but for appellate counsel's errors in failing to raise assignments of error, the result of the appeal would have been different.

The failure to raise any argument, however, does not automatically constitute ineffectiveness. Applying the *Strickland* standard to the particular context of appellate practice, the United States and Ohio Supreme Courts have recognized that appellate counsel does not necessarily perform deficiently for failing to raise every possible claim on appeal. The hallmark

¹*State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus (1989), cert. denied, 497 U.S. 1011 (1990) ("Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance.") (following *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Lytle*, 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623 (1976), vacated in part on other grounds, 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154 (1978).

²*Bradley*, supra, at paragraph three of the syllabus.

³*Evitts v. Lucey*, 469 U.S. 387, 397, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, ¶33; *State v. Watson*, 61 Ohio St.3d 1, 16, 572 N.E.2d 97, 109 (1991).

of effective appellate advocacy is actually the winnowing out of weaker arguments in order to highlight and emphasize the stronger ones, and not to diminish the strength of those stronger arguments by diluting them with weaker arguments.⁴

Thus, Lang must show that his proposed propositions of law, if raised, would have created a reasonable probability of a different outcome on appeal to this Court. None of Lang's proposed propositions, however, meet this strict and exactly *Strickland* standard.

1. Trial Counsel's Ineffectiveness and Trial Court Error – Limiting Instruction on Co-defendant's Guilty Plea.

For his role in the killings of Burditte and Cheek, Antonio Walker was charged with two counts of complicity to commit aggravated murder. He pleaded guilty to complicity to commit aggravated murder and received a prison sentence of eighteen years. During Lang's trial, Walker testified during the state's case-in-chief.

Lang now argues that his trial counsel was ineffective for failing to request a limiting instruction for the jury's use of Walker's guilty plea. Lang correctly notes that guilty pleas by a co-defendant cannot be used as substantive evidence of a defendant's guilt. *U. S. v. Sanders*, 95 F.3d 449, 454 (6th Cir. 1996). Guilty pleas, however, may be introduced if the co-defendant testifies at trial for credibility purposes and the and the jury is informed of the use of an accomplice's testimony. *Id.*

Here, Walker's guilty plea was properly admitted during trial for credibility purposes. The trial court gave an adequate jury instruction at the end of trial regarding the use of

⁴*State v. Phillips*, 74 Ohio St.3d 72, 87, 1995-Ohio-171, 656 N.E.2d 643, 660, cert. denied, 517 U.S. 1213, 116 S.Ct. 1835, 134 L.Ed.2d 938 (1996). See also *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

accomplice testimony and its credibility, explaining that the “admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion and require that it be weighed with great caution.” (Tr. 1310-1312.)

After his arrest, Lang gave a statement to Canton Police detectives which was admitted at his trial. Lang told the detectives that he was an active participant in the robbery of Burditte, but denied that he was the shooter, claiming instead that Walker was the shooter. Lang admitted to getting into Burditte’s car, using his coat to open the door handle, and jumping out after the two fatal shots were fired. The issue, then, for the jury was to decide whether Lang was the principal offender – the shooter – or whether Walker was the killer. Lang cannot demonstrate that he was unfairly prejudiced by the testimony of Walker and his reference to his guilty plea, i.e., that the outcome of the trial or direct appeal would have been different. The plea was not used as substantive evidence, but admitted for credibility purposes. It was used extensively by Lang during his cross-examination of Walker and in furtherance of his defense that he was not the shooter. The trial court adequately instructed the jury on the use of Walker’s testimony. And given this defense presented by Lang, trial counsel was not ineffective in failing to request a different jury instruction.

2. Trial Counsel’s Ineffectiveness and Trial Court Error – Batson Challenge.

Batson claims are reviewed under a three-part test. First, the party challenging the use of a peremptory challenge must make a prima facie showing of racial discrimination in the use of the peremptory challenge. Second, assuming a prima facie showing, the party seeking to use the peremptory challenge to remove a prospective juror must provide a racially neutral explanation for the challenge. Third, the trial court must conclude, based upon all the circumstances before

it, whether the challenging party has proved purposeful racial discrimination.⁵

In fleshing out the first prong of the *Batson* test, the Supreme Court has held that an opponent of the peremptory challenge may use a wide variety of evidence to make a prima facie showing, so long as the sum of the proffered facts give rise to the inference of discriminatory intent.⁶ The facts must be sufficient for the trial judge to draw an inference that discrimination has occurred in the use of a peremptory challenge.⁷ Thus, the use of a single peremptory challenge may be sufficient to support the opponent's prima facie case.⁸

With regard to the second prong of the *Batson* standard, the proffered reason for the peremptory challenge need not rise to the level of a challenge for cause.⁹ Self-serving comments by the party seeking to use the peremptory challenge are not sufficient to satisfy this requirement. The party, in other words, cannot simply proffer a conclusion that there is no discriminatory intent.¹⁰ This explanation, however, need not be persuasive or even plausible to satisfy the race-neutral-explanation requirement of *Batson*'s second prong.¹¹ The second prong of *Batson* only

⁵*Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

⁶*Batson*, 476 U.S. at 94.

⁷*Johnson v. California*, 545 U.S. 162, 170, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). The *Johnson* Court noted that the prosecutor's failure to give any explanation for the peremptory challenge would be additional support for an inference of discrimination. *Johnson*, 545 U.S. at 171 n.6.

⁸*Batson*, 476 U.S. at 95; *Johnson*, 545 U.S. at 169 n.5.

⁹*State v. Hernandez*, 63 Ohio St.3d 577, 582, 589 N.E.2d 1310, 1313 (1992), *cert. denied*, 506 U.S. 898, 113 S.Ct. 279, 121 L.Ed.2d 206 (1992); *State v. Gowdy*, 88 Ohio St.3d 387, 392, 2000-Ohio-355, 727 N.E.2d 579, 585.

¹⁰*Hernandez*, 63 Ohio St.3d at 584, 589 N.E.2d at 1314.

¹¹*Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

requires that the proponent's explanation be facially valid.

Under the third prong, which is Lang's focus, the trial court reviews and assesses the persuasiveness of the proponent's explanation. Thus, implausible or fantastic justifications may be viewed by the trial court as pretexts for purposeful discrimination. Nonetheless, a "legitimate reason" for the peremptory challenge need not be a reason that makes sense; it must simply be a reason that does not deny equal protection of the laws.¹²

The trial court, in making its third-prong determination, must necessarily make a credibility call, not only of the proponent's explanations, but also of the challenged jurors. Because of the trial court's advantageous position of making this credibility call on the scene, as opposed from a cold transcript record, "great deference" is to be accorded these calls by a reviewing court. As a result, they should only be reversed if they are clearly erroneous.¹³

Lang argues in this application that the trial court did not satisfy the third prong of the *Batson* test, and that appellate counsel was ineffective for failing to make this argument before this Court. The trial court, however, adequately and sufficiently applied the *Batson* test to the state's use of its peremptory challenge to remove Juror No. 405. It is clear from the trial court's ruling that it did not find that Lang had met his burden of demonstrating purposeful discrimination on the part of the prosecution. Lang therefore cannot show a reasonable

¹²*Purkett*, 514 U.S. at 768, 769. In *Purkett*, the Supreme Court upheld the trial court's acceptance of the proffered explanation as race neutral – that the prospective juror had long, unkempt hair, a mustache, and a beard. While removing a prospective juror on this basis might be seen as illogical or unreasonable, it is nonetheless a race neutral reason, which is all that equal protection requires. *Purkett*, 514 U.S. at 769.

¹³*Hernandez v. New York*, 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *Gowdy*, 88 Ohio St.3d at 393, 727 N.E.2d at 586.

probability that the outcome of the appeal would have been different had his appellate counsel challenged the trial court's application of *Batson's* third prong.

3. Trial Court Error – Exclusion of Mitigation Evidence – Grand Jury Testimony of Co-defendant.

Lang claims that the trial court's failure to allow him access to the grand jury testimony of Walker deprived him of its use during the mitigation phase of the trial. Lang admits that his appellate counsel argued grand jury access during his direct appeal (Proposition of Law No. 6), but claims that they failed to argue its use during mitigation, a use that was preserved by Lang's trial counsel during pre-trial proceedings. (Pretrial hearing, 5/9/07 at 4).

This claim is without merit because Lang's appellate counsel argued such a proposition and it was rejected by this Court. More important, there is no evidence in the record that Walker testified before the grand jury. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶42 ("But review of the grand jury testimony shows that Walker never testified before the grand jury. Thus, this claim lacks merit.").

The trial court's docket discloses the name of the witnesses who were scheduled to appear before the grand jury – Detectives Mark Kandel and Gabbard, Teddy Seery, Jr., Amber Walls, Tamia Horton and Eirene Gonzalez. (*State v. Lang*, Common Pleas Court, Case No. 2006 CR1824A, Nov. 15, 2006, Nov. 20, 2006.) The name of Lang's co-defendant, Antonio Maurice Walker, does not appear and the record does not demonstrate that he testified at the grand jury. Indeed, given that Lang and Walker were indicted at the same time, it is unlikely that Walker testified.¹⁴

¹⁴The grand jury transcripts were placed under seal for appellate review and presumably reviewed by this Court when it noted that Walker never testified before the grand jury.

Still, Lang cannot demonstrate prejudice. During pretrial discovery, the state disclosed all of the prior statements of Walker. The name of Walker was given to Lang as a potential witness and the statement he gave to detectives was provided.

Lang, therefore, cannot demonstrate that he was prejudiced by failing to access Walker's grand jury testimony for use during mitigation. Lang was able to argue that he was not the principal offender in the killings of Burditte and Cheek – a mitigating factor that was rejected by the jury. Deprivation of any grand jury testimony which Walker may have given – a very unlikely event - did not prejudice Lang.

4. Trial Court Error – Gang Evidence.

Lang also asserts that the trial court erred in allowing evidence of Lang's gang affiliation to be introduced at trial since there was no evidence that the killings were gang related. He faults appellate counsel for omitting any reference to the United States Supreme Court's *Dawson* decision in support of his argument on direct appeal that a brief, isolated reference to gang affiliation denied Lang a fair trial. According to Lang, reference to *Dawson* would have illustrated the radioactive nature of such evidence to this Court, resulting in a different outcome to the appeal.

At trial, Walker testified that Lang often wore red, demonstrating an affiliation with the Bloods street gang. In addition, Sgt. Dittmore testified about his position with the gang unit in the police department. This Court held that this evidence was irrelevant and should not have been admitted, but concluded that its admission did not constitute plain error or constituted harmless error. Citing *Dawson* would not have changed the harmless error-plain error calculus that this Court engaged in.

In *Dawson*,¹⁵ the U. S. Supreme Court held that it was constitutional error to admit a stipulation about the defendant's membership in the Aryan Brotherhood, a white racist prison gang, where that evidence was not relevant to any issue being decided in the punishment phase of the defendant's death penalty case. The Court held that the admission of this evidence at the mitigation phase of this death penalty trial was error given the narrow nature of the stipulation – limited to just the defendant's membership in this gang – and the lack of any evidence that his killings were related to his gang membership.

Dawson is not applicable to the instant case since the two isolated gang references were minimal in nature, were introduced during the guilt phase of the trial, and were determined by this Court to be harmless error in one case, and plain error in the other. The Supreme Court in *Dawson* in fact remanded that case in order for harmless error analysis to be done. In the instant case, that kind of analysis – assessing the impact of the error on the result of the trial – was done by this Court. Citing *Dawson* and arguing its applicability to the particular gang issue in Lang's case would not have affected the outcome of the *guilt*, as opposed to the *penalty*, phase of his trial.

5. Trial Counsel Ineffectiveness – Failure to Inquire Further into Juror.

In this proposition, Lang questions the effectiveness of his trial counsel in their handling of Juror No. 386 – a juror distantly related to one of the victims. Lang admits that this proposition was extensively raised in his direct appeal and rejected by this Court. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶¶60-61. But even so, he argues that trial counsel were ineffective for failing to request additional group questioning of the other jurors.

¹⁵*Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992).

This argument fares no better than similar arguments made in his direct appeal. As noted by this Court when discussing the issue, “[T]he scope of voir dire is generally within the trial court’s discretion, including voir dire conducted during trial to investigate jurors’ reaction to outside influences” *Lang, supra*, at ¶61, citing *State v. Sanders*, 92 Ohio St.3d 245, 2001-Ohio-189, 750 N.E.2d 90. The trial court’s questioning disclosed that Juror 386 did not discuss her relationship with the other jurors, and that she was promptly removed from the jury and replaced by an alternate juror. When she was specifically asked if she had disclosed her relationship to the victim with Juror 387, a juror sitting next to her, she again answered no. After she was dismissed, the remaining jurors were brought back into the court and indicated that Juror 386 had disclosed nothing about her relationship.

No further group questioning would have revealed any misconduct; the trial court received the appropriate responses from both Juror 386 and the remaining jurors.

Because this issue was raised in Lang’s direct appeal and any further group questioning would not have disclosed actual prejudice, this proposition should be rejected.

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PROOF OF SERVICE

A copy of the foregoing MEMORANDUM IN RESPONSE was sent by ordinary U.S. mail this 24th day of February, 2012, to LAURENCE E. KOMP, counsel for defendant-appellant, at P.O. Box 1785, Manchester, Missouri 63011.

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