

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GREGORY WILLIS,

Plaintiff-Appellant/Cross-Appellee,

v

GENERAL MOTORS CORPORATION,

Defendant,

and

DELPHI AUTOMOTIVE SYSTEMS  
CORPORATION,

Defendant-Appellee/Cross-  
Appellant.

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UNPUBLISHED

March 9, 2004

No. 244739

Saginaw Circuit Court

LC No. 00-035200-NZ

Before: Sawyer, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals from a judgment of the circuit court entered on the jury's verdict of no cause of action on plaintiff's employment discrimination claim. We affirm.

Plaintiff was employed by defendant for a number of years in various positions, first on the shop floor, then in the metallurgy lab, then back to the shop floor. This case involves his employment in the metallurgy lab in Saginaw. Plaintiff claimed that he was subjected to discrimination, including a racially hostile work environment, while in the metallurgy lab. According to plaintiff, it was the work environment in the lab that caused him to transfer back to the shop floor, with a cut in pay. Plaintiff was subsequently injured on the job and did not return to work following the injury.

Although plaintiff alleges various incidents of discrimination, the primary focus of plaintiff's claim with respect to the issues raised in this appeal is an incident involving a hangman's noose in one of the offices. According to plaintiff, his job responsibilities in the metallurgy lab included the need on a daily basis to use a fax machine located in the shipping/receiving department. On one occasion in November 1997, plaintiff observed a hangman's noose with red paint on it (presumably representing blood) next to a supervisor's

desk in the shipping/receiving department. Plaintiff filed a complaint with the labor relations department, which directed the supervisor to take the noose down. When plaintiff again went into the department to use the fax machine a couple of days later, he noticed that the noose was still there. He again called the labor relations department, which again directed the supervisor to remove the noose. When plaintiff returned from a vacation, he noticed that the noose had in fact been removed.

Plaintiff ascribed the motivation for the hanging of the noose to be to intimidate or harass him for having filed discrimination claims with the Michigan Department of Civil Rights. Defendant has maintained that the noose was not directed at plaintiff, but had been placed there some fifteen years previously by a since-retired hourly employee who had hung it as a protest against defendant doing business in Korea, the retired worker allegedly responsible for the hanging of the noose being a Korean War veteran. (The retired worker has denied hanging the noose.)

Plaintiff's first issue on appeal is that the trial court erred in allowing all of the African-Americans on the venire panel to be excused. Two jurors were excused for cause and the third was excused through one of defendant's peremptory challenges. Plaintiff's argument on this issue breaks down into two components. First, whether the challenges for cause were properly granted, and, second, whether there is a violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), for improperly excusing jurors based upon race.

Turning first to the question whether the trial court properly granted defendant's challenge to certain jurors, we review that issue for an abuse of discretion by the trial court. *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 236-237; 445 NW2d 115 (1989). In the case at bar, following the voir dire, the parties agreed that five members of the venire should be excused for cause.<sup>1</sup> Plaintiff then challenged two additional jurors for cause, which challenges the trial court granted. Defendant then challenged three jurors, two African-American women and one white man, for cause. Defendant gave the same reason for all three jurors: that, during the voir dire, each of the three had expressed the view that the hanging of the noose could only have been for purposes of racial harassment. The trial court granted those challenges as well.

We are not persuaded that the trial court erred in granting those challenges. The portion of the voir dire that lead to these challenges started with defense counsel posing the following questions:

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<sup>1</sup> The jury selection method employed by the trial court was that voir dire was conducted for the entire venire, which was then followed by all challenges for cause as to any member of the venire. Following resolution of the challenges for cause, the parties could then exercise their peremptory challenges. Ultimately, when all challenges were finished, the jurors in the first eight seats would be the jurors seated, so peremptory challenges would only be directed towards those eight, with members of the venire moving up sequentially to fill any vacancy in those eight seats as jurors were excused.

Do any of you think you know enough about this noose right now to conclude without hearing any more whether that noose was a symbol of racial hatred or harassment? Any of you think you don't have to know any more about it, you hear noose, that you're satisfied that had to be an incident of racial harassment or hatred or intimidation? Anyone who thinks that has to be the case would you raise your hand.

Apparently, a number of the members of the venire raised their hands and defense counsel followed up with each of them. Turning to the three jurors who were ultimately challenged for cause on this basis, the following exchange occurred between defense counsel, William Schulz, and Juror No. 28:

MR. SCHULZ: And you – you're telling me, I think, that if you evaluate that testimony you could come to the conclusion, depending on the evidence, that this noose was not a sign of racial harassment. Depending on the evidence, correct? Or am I saying too much?

JUROR NO. 28: No. No. I would always believe that.

MR. SCHULZ: Okay. All right. No matter what the evidence –

JUROR NO. 28: No matter what.

With respect to Juror No. 19, the following exchange took place:

MR. STREET [sic, SCHULZ?]: Do you believe that those circumstances could very well explain the hanging of that noose as something other than a sign of racial harassment?

JUROR NO. 19: No.

MR. SCHULZ: Your mind is made up at [sic—as?] you sit here today that it is a sign of racial harassment no matter what the evidence says, correct?

JUROR NO. 19: Yes.

Turning to the third juror, Juror No. 22, the following took place:

MR. SCHULZ: . . . you indicated that that was as – from what you heard so far, that noose is an indication of racial hatred or harassment, correct?

JUROR NO. 22: Yes, a noose, yes.

MR. SCHULZ: And I guess I would like to ask you the same questions that I've asked the others. You have an understanding that you haven't heard much about the circumstances so far, of that noose, correct?

JUROR NO. 22: I heard it was a noose.

MR. SCHULZ: And is that all you need to hear?

JUROR NO. 22: Yes.

MR. SCHULZ: Is your mind made up about that?

JUROR NO. 22: Yes, it is.

Defense counsel then followed up with each of the three asking them if they could be fair, to which each replied that they could not:

MR. SCHULZ: Okay. I take it, [Juror No. 19], your mind being made up on that subject, at this point it would really be kind of difficult to change, impossible for you to sit as a fair judge of the evidence in this case then?

JUROR NO. 19: Yeah. I don't think I would make a fair decision.

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JUROR NO. 28: I couldn't be fair.

MR. SCHULZ: You can't be fair in this case?

JUROR NO. 28: That's all I know.

MR. SCHULZ: . . . you likewise, I guess, just could not be a fair juror in this case, correct?

JUROR NO. 22: No.

MR. SCHULZ: I'm correct?

JUROR NO. 22: You're correct.

Other jurors were questioned regarding their opinions regarding nooses and while some indicated that they associated nooses with racial hatred, each of the others indicated that they could maintain an open mind and consider evidence that the presence of the noose was for reasons other than racial hatred.<sup>2</sup>

Although plaintiff argues on appeal that this does not present a legitimate basis for challenging for cause, he did not do so during the jury selection process. Rather, plaintiff noted that the jurors who expressed firm opinions regarding the noose were the first questioned about it

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<sup>2</sup> There was a fourth juror who had indicated that his mind was made up regarding the noose, but he was one of the five jurors excused by agreement of the parties.

and later jurors indicated that they could maintain an open mind. Then, after raising a concern about African-American members of the venire being challenged, plaintiff argued that the challenged jurors should be questioned further and given a chance to “rehabilitate” themselves:

MR. STREET [plaintiff’s counsel]: . . . . And I feel that it is understandable that many people, both African-American and Caucasian, will express views initially that it has to be a symbol of racial hatred, what else could it be; that they should be given an equal chance to at least rehabilitate themselves based on the responses they heard from the other jurors that have been questioned by defense counsel after the initial question was done . . . .

The trial court declined to conduct further voir dire on this point and granted the challenges for cause.

In any event, we disagree with plaintiff’s argument on appeal that this was not an appropriate basis for a challenge for cause. The noose was a central aspect to plaintiff’s case and the reason for its presence was a pivotal issue. Because the presence of the noose was undisputable, defendant had to convince the jury that its presence had nothing to do with creating a racially hostile work environment towards plaintiff. Defendant clearly could not do that with three jurors who would not consider any explanation for the presence of the noose other than to create a hostile environment and who affirmatively stated that they could not be fair.

Plaintiff further argues that allowing this to be a basis for a challenge for cause would allow the defense to secure an all-white jury in all such discrimination cases. Plaintiff’s argument is correct, however, only if it is true that all African-Americans believe that the only possible explanation for the presence of a noose is to racially harass someone regardless of how much evidence to the contrary might be presented. Plaintiff has presented no evidence to establish that African-Americans as a group are unable to weigh the evidence regarding the reasons for the placement of a noose and reach a rational conclusion based upon that evidence. We emphasize that defendant did not challenge all jurors who expressed the view that a noose could be a symbol of racial hatred, but only those (both black and white) who expressed the view it could be the only purpose of the noose and that no evidence to the contrary would change their minds.

Plaintiff also makes a general assertion that, during the voir dire, defense counsel engaged in a “subtle shift in the mode of questioning of the white jurors” (except for the one who was subsequently challenged on this basis) so as to produce differing results in the answers by the white jurors and the black jurors. After reading the voir dire, we fail to see any such shift in the mode of questioning that reflects a scheme by defense to produce the answers necessary to exclude the black jurors, but not the white ones.

Plaintiff also raises a *Batson* challenge, arguing an improper racial basis with respect to defendant’s use of a peremptory challenge to excuse the remaining African-American member of the venire. Plaintiff, however, has not adequately preserved this issue. At trial, plaintiff did not raise this issue after the peremptory was exercised. The remaining African-American juror was excused by defendant in the last round of peremptory challenges. After that juror was replaced by another member of the venire, plaintiff passed as to peremptories, followed by defendant

passing. The eight selected jurors were then sent to the jury room and the remaining members of the venire were sent back to the jury assembly room. Plaintiff's counsel then placed on the record the observation that of the three African-American members of the original twenty-eight-member venire, all had been dismissed by challenges and that the jury that was seated consisted of six Caucasian women, one Caucasian man and one Hispanic man.

At this point, the trial court inquired whether plaintiff was objecting to the composition of the jury. Plaintiff's counsel replied as follows:

Well, there is definitely an arguable *Batson* issue, but I do not know what remedy could possibly be available at this point in time. Given the fact that the original 28 were all voir dired, two African-American women were excused for cause at Delphi's request, and Miss Traylor, who was their second peremptory, was the only other African-American. I mean, there is no viable remedy because there weren't any other African-Americans available to fill in any of the other seats, Judge. But I simply would like the existing racial composition of this particular jury, for whatever reason may ultimately come out of it, to be adequately reflected in the record.

Despite the fact that plaintiff was not specifically objecting to the composition of the jury or requesting any specific remedy, the trial court gave defense counsel an opportunity to explain the reason for the challenges. After reiterating the reasons for the challenges for cause, defense counsel explained that he utilized a peremptory challenge on the remaining African-American juror because she had expressed the opinion that throughout her thirty years of employment she felt that she had been discriminated against on an on-going basis and that her employer had wrongfully disciplined her as the result of racial discrimination. Defense counsel believed that, because of the juror's experiences, she could not be a fair juror.

The trial court, while not formally ruling on an objection that had not formally been made, indicated that it believed that the reasons for the challenges were nonracial. The trial court indicated that the record on this point was complete and matters proceeded from there.

Ultimately, plaintiff was incorrect that there was no remedy available if, in fact, there had been a *Batson* violation. First, had plaintiff raised the issue at the time defendant exercised the peremptory challenge, and the trial court had agreed with plaintiff, the trial court could have disallowed the challenge. See *Batson, supra* at 99 n 24. Second, the trial court could have considered dismissing the jury entirely and starting over with a new venire. *Id.* In short, had there been a *Batson* violation, a remedy could have been fashioned. The comment by plaintiff's counsel that there was no possible remedy at that point and that he simply wanted "to have that as part of the record in the event any of this ever winds up on appeal," as he stated in the trial court, reflects not the effort to have a serious *Batson* issue addressed and remedied, but to create an appellate parachute. Accordingly, we decline to address the merits of plaintiff's claim. Defense counsel offered at the time a nondiscriminatory reason for the challenges, the trial court accepted them as being nondiscriminatory, and plaintiff supplied no response to those reasons nor did plaintiff request a remedy from the trial court. It is simply too late for plaintiff to now request a remedy from this Court.

Next, plaintiff argues that the trial court abused its discretion by excluding the testimony of plaintiff's expert witness, Dr. Robert Newby, a sociology professor at Central Michigan University, on the significance of the hangman's noose. We disagree. Defendant moved in limine to exclude Dr. Newby's testimony regarding the role of lynching and the hangman's noose in American culture. His testimony apparently would also have included references to a book on lynchings, *Without Sanctuary* by James Allen. The trial court took the motion under advisement and eventually granted it. The trial court excluded Dr. Newby's testimony on the basis that it would be cumulative and would potentially confuse the jury and cause delay. The court also expressed concern with the use of the book, in particular with the prejudicial effect of photographs in the books, which explicitly showed lynchings, which the trial court described as "some of the worse photographs I've ever seen in terms of people dying." The trial court additionally noted that defendant was not contesting the issue of lynchings of blacks in American history and that plaintiff would be able to establish his theory of a racially hostile workplace through the other evidence presented. In fact, defendant even agreed to stipulate to either a jury instruction or the court taking judicial notice of the fact that a hangman's noose may be a sign of racial intimidation.

We review the trial court's decision regarding admission of expert testimony for an abuse of discretion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999). We are not persuaded that the trial court abused its discretion in excluding Dr. Newby's testimony. MRE 403, upon which the trial court relied in part, provides as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Dr. Newby's testimony would have been, at best, minimally relevant. The significance of the noose to this case was whether it had been placed in the office for the purpose of intimidating plaintiff and whether, in fact, it did intimidate plaintiff. Testimony regarding the history of lynching in American history would have done little to enlighten either of those points. The fact that it could serve to intimidate and create a hostile work environment was not contested by defendant; in fact, defendant agreed to stipulate that it could have served such a purpose. Defendant's contention was that that was not the explanation for the presence of the noose. As to the other point, the impact of the noose on plaintiff, that was established through defendant's treating psychiatrist, Dr. Nagarkar. Indeed, in the argument on the motion in limine, plaintiff conceded that Dr. Nagarkar's testimony would be comparable to that of Dr. Newby.

Plaintiff argued that Dr. Newby's testimony was necessary to show that plaintiff's reaction to the noose was "not the product really of some sort of errant sensitivity on the part of African-Americans, but this [is] a cultural difference in the way we perceive things." But defendant did not argue that plaintiff was unduly sensitive to the presence of the noose. Rather, defendant's theory was that the noose was not placed for the purpose of intimidating plaintiff.

For the above reasons, we agree with the trial court that considerations of undue prejudice, delay, cumulativeness and confusion substantially outweighed the minimal relevance

of Dr. Newby's testimony. Therefore, we are not persuaded that the trial court abused its discretion in excluding the testimony.

In light of our resolution of the above issues, we need not consider plaintiff's remaining issue nor the issues raised on cross appeal.

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ Michael R. Smolenski