[Cite as *State v. Curtis*, 2005-Ohio-120.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2003 CA 74
v.	:	T.C. CASE NO. 03 CR 620
BRIAN CURTIS	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 14th day of January, 2005.

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FREDERICK N. YOUNG, J.

{¶ 1} Brian D. Curtis is appealing his conviction following a jury trial where the jury returned a verdict that Curtis was guilty of the offense of trafficking in crack cocaine

and that it occurred within one thousand feet of the boundaries of a school.

{¶ 2} On appeal, Curtis, represented by counsel, presents the following three assignments of error:

{¶ 3} "1. THE TRIAL COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS WHEN IT ERRED IN APPLYING AN IMPROPER AND INSUFFICIENT ANALYSIS OF STATE'S USE OF PEREMPTORY CHALLENGE TO EXCLUDE AN AFRICAN AMERICAN PROSPECTIVE JUROR WITHOUT ARTICULATING A PROPER RACE NEUTRAL REASON FOR SUCH EXCLUSION.

{¶ 4} "2. THE TRIAL COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS WHEN IT ERRED IN OVERRULING DEFENSE'S OBJECTION TO STATE'S USE OF A PEREMPTORY CHALLENGE TO EXCLUDE AN AFRICAN AMERICAN PROSPECTIVE JUROR WITHOUT ARTICULATING A PROPER RACE NEUTRAL REASON FOR SUCH EXCLUSION.

{¶ 5} "3. THE VERDICT OF GUILTY ON THE SPECIFICATION THAT THE SALE WAS WITHIN 1000 FEET OF A SCHOOL IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 6} In his first two assignments of error, Curtis essentially argues that the prosecutor's challenge and request to excuse juror number two, a Mr. Goodwin, who is black, violated the U.S. Supreme Court ruling in *Batson v. Kentucky* (1986), 476 U.S. 79. In her brief, counsel for the defendant admits that "after there is a finding of a prima facie case of discrimination, the court must then require that a race-neutral reason be articulated." (Brief, unnumbered page 8). Critical here is the fact that the trial court specifically did not find a pattern of discrimination, which would be the prima facie case

mentioned by Curtis' counsel. (Tr. 51 and 52). Defendant's trial counsel pressed the prosecutor to state his reasons for the challenge, and the prosecutor finally stated he was so willing to state those reasons, but did not concede that the defendant has met his initial burden of proving a pattern of racial discrimination. (Tr. 52, lines 9-12). The transcript of the trial shows the following dialogue on issue:

{¶ 7} "MR. COLLINS: [Prosecuting Attorney] I don't know if this works under a valid analysis or not, but I would certainly be willing to give that but not conceding that he's initially met his burden of proof.

{¶ 8} "THE COURT: I would agree he's not met it. Put your reasons on record.

{¶ 9} "MR. COLLINS: Mr. Goodwin is unemployed and the only unemployed – but not retired. There are several people on here that are retired; but had jobs, he's unemployed. Throughout my questioning of him, he was quite nonreceptive and actually appeared to be defensive of my questions of him and also just of my initial comments that were made during my opening argument and during the voir dire process, never made eye contact with me. He's fidgeting quite a bit in his seat and particularly more so during my questioning than in Mr. Morris's questioning [defense attorney] and that I noticed that he also seemed more receptive to Mr. Morris's questions during voir dire. I was specifically watching as Mr. Morris was making his questions to the various people; and he seemed much more responsive, more eye contact though with him than he did with me. So, therefore, I did not feel very comfortable with him.

{¶ 10} "THE COURT: The Court finds them generally. Thank you. He will be excused." (Tr. 52-53).

{¶ 11} The United States Supreme Court has pointed out that under the *Batson* jurisprudence: "Once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2)." *Punkett v. Elam* (1995), 514 U.S. 765, 115 S.Ct. 1769, 1770-71. Here, the trial court clearly found that the appellant failed the first step and did not demonstrate a prima facie case of racial discrimination. The mere fact that the State uses one of the challenges to excuse an African-American does not establish a prima facie case of racial discrimination. *State v. Hill* (1995), 73 Ohio St.3d 433, 445. In this case, there were two African-Americans on the panel and only one was challenged. The other was unchallenged and served throughout the trial and agreed in rendering the verdict the jury did.

{¶ 12} Furthermore, even though it was not necessary, the prosecutor's statements about his reasons for the challenge were certainly race-neutral, as quoted above, and provide no basis for either of the first two assignments of error, which are hereby overruled.

{¶ 13} In the third assignment of error, Curtis is contending that the jury's finding that the trafficking took place within one thousand feet of a school boundary is not supported by the evidence as the officer who testified as to the distance of the school did not measure from the place where the defendant entered into his car. However, the officer did testify that he measured from the area where he had a conversation with the defendant about buying twenty dollars worth of crack cocaine from the defendant. (Tr. 132). Officer Harrington testified at some length about his measuring the distance from

the school boundary to the place where the trafficking occurred, as follows:

{¶ 14} ". . . and my question for you, sir, is did you take any measurements after the Defendant's arrest to determine whether or not this offer to sell you the crack cocaine occurred within 1,000 feet of the boundaries of a school.

{¶ 15} "A. Yes, we did.

{¶ 16} "Q. What specifically did you do to make that determination that it was within a thousand feet?

{¶ 17} "A. The Drug Unit has a destination map within [sic] all schools and how far a thousand feet around the block from each school; but we use that as a basis to just check; and I personally measured the distance with an LTI 2020 laser which we use in traffic." (Tr. 127).

{¶ 18} The officer then proceeded to describe the device, how it works, and his qualifications to use it. (Tr. 128-129).

{¶ 19} The following dialogue from the transcript is instructive:

{¶ 20} "Q. And then you went out to the scene and did this measurement with this laser equipment?

{¶ 21} "A. That's correct.

{¶ 22} "Q. And where did you measure from?

{¶ 23} "A. I went from the intersection of Plum right at the west northwest corner and measured. There's a school sign eastbound on Pleasant. I couldn't actually see Keiffer [the school] from that location, so what I did, I measured to the school sign; and then by going to the school sign and shooting directly across to Keiffer, I got exact distances.

{¶ 24} "Q. Okay now, from where you started, is this the area from where the Defendant had offered to sell you crack cocaine?

{¶ 25} "A. Yes.

{¶ 26} "Q. And from that distance there to the school sign and from the school sign to Keiffer School itself, I take it you're hitting off of the building at that time?

{¶ 27} "A. Well, I did a parallel, like a parallel measurement, we call it. And that's not a direct. Like if I can see the building, I can get the reading from the building and directly at the intersection. Because I couldn't see the building, it actually increases the distance because I had to go what's called along the line and to the line. So I measured up and over, and that was directly across and that was 764 feet.

{¶ 28} "Q. And if you were able to have an unobstructed view from where you originally started to the building, then it just by necessity as the crow flies would be shorter even than that.

{¶ 29} "A. Yes, obviously a straight shot would be closer than going here and then measures across.

{¶ 30} "Q. What was that measurement again?

{¶ 31} "A. 764 feet.

{¶ 32} "Q. And that is of Keiffer School?

{¶ 33} "A. Yes." (Tr. 129-130).

{¶ 34} As the foregoing excerpts from the transcript show, Officer Harrington did measure directly from the spot where the defendant offered to sell the officer crack cocaine. The third assignment of error is overruled and the judgment will be affirmed.

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WOLFF, J. and FAIN, J., concur.

Copies mailed to:

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