STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN FARROWLIN HILL,

Defendant-Appellant.

UNPUBLISHED
June 24, 1997

No. 176448
Ingham Circuit Court
LC No. 93-066635-FC

Before: Corrigan, C.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

In this prosecution for first-degree murder, defendant was convicted by a jury of the lesser included offense of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of twenty to forty years' imprisonment for the second-degree murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right, and we affirm.

Defendant first argues that he was denied his constitutionally protected right to be judged by an impartial jury when the prosecutor peremptorily challenged a potential juror solely on account of that juror's race. "[T]he state's privilege to strike individual jurors through peremptory challenges . . . is subject to the commands of the Equal Protection Clause." *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Accord *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989). "In looking at such an issue, the burden initially falls upon the defendant to make out a prima facie case of purposeful discrimination." *Barker, supra* at 705 (citation omitted). Defendant has failed to establish a prima facie case.

At trial, the juror's race was the only factor cited by defendant as proof of the state's alleged discriminatory intent. "[T]he race of a challenged juror alone is not enough to make out a prima facie case of discrimination." *Clarke v Kmart*, 220 Mich App 381, 383 (1996) (citing *Batson, supra*). On appeal, defendant attempts to use the prosecution's articulated reasons for striking the juror to substantiate his prima facie case. However, a defendant's prima facie case must be made out *before*

the state is required to explain its challenge. *Id*. Therefore, the prosecutor's articulated reasoning does not affect the viability of defendant's prima facie case. In any event, the state's articulated reasons were sufficient to overcome any presumption of discrimination.

Second, defendant argues that during his closing argument, the prosecutor improperly attempted to shift the burden of proof onto defendant. Because defendant failed to preserve this issue by raising a timely and specific objection at trial to the statements now being challenged on appeal, review by this Court is precluded absent a miscarriage of justice. *People v Dixon*, 217 Mich App 400, 407; 552 NW2d 663 (1996); *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Comment on an alternate theory does not amount to a shifting of the burden of proof onto defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Therefore, we find no threat of a miscarriage of justice.

Defendant's third argument is that he was denied due process when the trial court failed to instruct the jury on several lesser included offenses of first-degree murder. As was its responsibility, the trial court did instruct the jury on second-degree murder, *People v Herbert Smith*, 396 Mich 362, 363; 240 NW2d 245 (1976); *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975), and defendant was ultimately convicted of this offense. The record does not indicate that defendant ever requested instructions on the lesser offenses he now identifies. On appeal, error cannot be predicated on the trial court's failure to give instructions when the defendant has failed to request them. See MCR 2.516. intent

Fourth, defendant's claim of ineffective assistance of counsel is unpreserved and unmeritorious. Other than defendant's statement to the police, there was no evidence admitted at trial to show that defendant was threatened with deadly force. Additionally, even if defendant had been threatened with deadly force, defendant himself indicated in this very same statement that he shot Smith only after defendant had escaped from any immediate danger of harm. Thus, defendant's own words establish that he used excessive force, which in turn undermines his self-defense justification. *People v Heflin*, 434 Mich 482, 409; 456 NW2d 10 (1990) (observing that "an act committed in self-defense but with excessive force . . . does not meet the elements of lawful self-defense"). Defense counsel's failure to argue a defense that was not supported by the record does not support defendant's contention that he was denied effective assistance of counsel. *People v Bryant*, 129 Mich App 574, 582; 342 NW2d 86 (1983).

Finally, we disagree with defendant's argument that the sentence imposed by the trial court is disproportionate. Defendant's sentence falls within the minimum sentence range suggested by the sentencing guidelines, and is therefore presumptively proportionate. *People v Borden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

Affirmed.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra