

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE ARMSTRONG,

Defendant-Appellant.

UNPUBLISHED

October 7, 2003

No. 238863

Wayne Circuit Court

LC No. 01-004121-01

Before: Whitbeck, C.J., and Gage and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, assault with intent to commit murder, 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life in prison for the first-degree murder conviction, ten to twenty years in prison for the assault with intent to commit murder conviction, and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises out of the shooting of the victims Daniel Baxter and Timothy McClain. In the early morning hours of November 25, 2000, officers responded to a call of shots fired at 16762 Mansfield in Detroit, which was defendant's mother's house. The officers soon arrested three individuals nearby who fit the description of the assailants and went back to the house to inform defendant and his brother, Marcel Smith, that they made the arrest.¹ Later that day, defendant encountered Baxter and McClain at a party store. After leaving the store, defendant apparently made a telephone call and got into his car and began to follow Baxter and McClain. Defendant then got out of his car and began chasing McClain, firing shots at him, and ultimately killing him. Meanwhile, two other cars pulled up to the scene and an individual from one of the cars began firing shots, hitting Baxter in the leg.

Defendant was charged with first-degree murder for the death of McClain and assault with intent to murder Baxter, on the theory that defendant aided and abetted that assault. At trial,

¹ It is undisputed that the victims were not any of the individuals arrested.

the prosecution theorized that the victims were shot out of retaliation for the earlier shooting at defendant's mother's house.

Defendant first argues on appeal that the trial court abused its discretion when it ruled that defense counsel committed a *Batson*² violation during jury selection. We disagree. This Court reviews a trial court's *Batson* ruling for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). An abuse of discretion will be found "only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). An appellate court is to give great deference to the trial court's findings on this issue because they turn in large part on credibility. *Harville v State Plumbing and Heating Inc*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996).

The use of a peremptory challenge to strike a potential juror solely because of the potential juror's race violates the Equal Protection Clause of the Fourteenth Amendment, US Const, Am XIV. *Batson*, *supra*; *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989), *aff'd* 437 Mich 161; 468 NW2d 492 (1991), habeas corpus den 993 F Supp 592 (ED Mich 1998), habeas corpus relief granted on other grounds 199 F 3d 867 (CA 6, 1999). To establish a prima facie case of discriminatory dismissal based on race, the defendant must show that: (1) the defendant belonged to a recognized racial group, (2) the prosecutor exercised a peremptory challenge to excuse a prospective juror of the defendant's race, and (3) the facts and other relevant circumstances raise an inference that the prosecutor used the peremptory challenge in an effort to exclude the juror based on race. *Batson*, *supra* at 97; *Barker*, *supra* at 705. Once the defendant makes a prima facie showing of purposeful discrimination, the prosecutor must offer a racially neutral explanation for using a peremptory challenge to exclude the juror from the venire. *Batson*, *supra* at 97; *Howard*, *supra* at 534. The Supreme Court has extended the *Batson* rule to the conduct of a criminal defendant, finding that in the context of the exercise of peremptory challenges, a defendant's behavior is just as amenable to scrutiny as that of the prosecutor. *Georgia v McCollum*, 505 US 42; 112 S Ct 2348; 120 L Ed 2d 33 (1992).

During jury selection, defense counsel used several of his peremptory challenges to excuse white jurors. When questioned by the court, defense counsel argued that he excused the jurors, particularly jurors three and eight, at the behest of defendant, not because of their race. However, the record establishes that after peremptorily challenging only white prospective jurors and being questioned by the court, defense counsel readily admitted that, "I'm not going to excuse anything other than white people. That's just my policy. That's my rule." Defense counsel then attempted to shift the blame of his constitutional violations to defendant, arguing that "Defendant wanted him off, wanted both of them off. As a matter of fact, he wants another one off. And I'm going to do what the defendant requests me to do." The trial court reminded defense counsel that he was an attorney, trained in the rules of the law, and that violating the laws at the request of an untrained client is not a valid excuse. Defense counsel however

² *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), overruled in part, *Powers v Ohio*, 449 US 400; 111 S Ct 1364; 113 L Ed 2d 411 (1991) (holding that a defendant need not be of the same race as the excused jurors to raise a *Batson* challenge).

responded that “I have to do what the client wants because you’re not the one that’s going to respond to one of those grievances.” The trial court then declined defense counsel’s request to hear from defendant on the matter.

The trial court did not abuse its discretion in finding that defense counsel committed a *Batson* violation. A review of the record demonstrates that (1) defendant, a black male, belongs to a recognized racial group; (2) defense counsel used peremptory challenges to excuse only white jurors; and (3) the facts and other circumstances create an inference that defense counsel used the peremptory challenges in an effort to exclude the jurors based on race. *Barker, supra* at 705. Defense counsel failed to offer a racially neutral explanation for using peremptory challenges to exclude the jurors from the venire. *Howard, supra* at 534. Mere statements of good faith or denial of a discriminatory motive are insufficient; rather, the defendant must articulate a neutral explanation related to the particular case being tried. *Id.* Excusing white jurors due to defense counsel’s own “rule” or “policy,” or due to the request of defendant, are not sufficient neutral explanations related to this case.

Defendant also argues that *Batson* should not preclude a black defendant from exercising valid challenges of white jurors in an attempt to select a jury of one’s peers that more adequately reflects racial harmony. Defendant’s argument is without merit. While *Batson* addresses the issue of using peremptory challenges to excuse a prospective juror based solely on race, it does not address the issue of whether a defendant is entitled to a jury that reflects the racial composition of the community. Defendant failed to raise this issue before the trial court, and thus, defendant has failed to properly preserve this issue for this Court to review. *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). This Court reviews unpreserved constitutional issues for plain error that affected substantial rights in that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975), the United States Supreme Court held that while a criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community, US Const, Am VI, he is not entitled to a petit jury that exactly mirrors the community. See also *Howard, supra* at 532-533. To establish a prima facie violation of the fair cross-section requirement, a defendant must show “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *Id.* In this case, defendant “presented no evidence concerning the representation of African-Americans on jury venires in general.” *Id.* “Merely showing one case of alleged underrepresentation does not rise to a ‘general’ underrepresentation that is required for establishing a prima facie case.” *Id.* Defendant also failed to show that “any alleged underrepresentation was due to systematic exclusion, i.e., an exclusion resulting from some circumstance inherent in the particular jury selection process used.” *Id.* “It is well settled that one incidence of a jury venire being disproportionate is not evidence of a ‘systematic’ exclusion.” *Id.* at 534.

Defendant next argues on appeal that the prosecutor committed reversible error when she impeached a character witness with arrests that did not pertain to defendant. We disagree. Defendant failed to preserve this issue for appeal. *Stacy, supra* at 28. This Court may grant

relief based on this unpreserved nonconstitutional error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings. *Carines, supra* at 763.

A criminal defendant may offer reputation or opinion testimony of his pertinent character or personality traits. MRE 404(a)(1); MRE 405(a). Once a defendant has placed his character in issue, however, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed. *People v Leonard*, 224 Mich App 569, 594; 569 NW2d 663 (1997). In this case, while it would have been proper for the prosecutor to ask defendant's character witness about defendant's prior arrests, the prosecutor inadvertently asked about a person other than defendant, who had the same name and same date of birth as defendant. Although defendant did not object at the time the prosecutor asked about the inaccurate arrests, both parties later stipulated that the arrests mentioned did not pertain to defendant. The trial court also provided a cautionary instruction to the jury to disregard the prior arrests. Therefore, reversal is not required as the timely cautionary instruction cured any error. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant next argues on appeal that the prosecutor placed inadmissible hearsay before the jury. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object prior to or at trial, and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Defendant failed to timely object to the evidence at trial. Thus, the issue is not properly preserved. *Griffin, supra* at 44. This Court may grant relief based on this unpreserved nonconstitutional error if the error is plain and affected defendant's substantial rights. *Carines, supra* at 763.

Defendant argues that the trial court committed plain error by admitting inadmissible hearsay into evidence. Officers Walker and Crosby both testified that, on November 25, 2000, they responded to the report of shots fired at 16762 Mansfield, in Detroit. After arresting the three assailants and returning to the residence to follow up with defendant and Smith about pressing charges, Smith, in the presence of defendant, told the officers that, "They didn't need the police. They'd handle it themselves."

Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." MRE 801(c). MRE 803(3) provides that the following statements are not excluded by the hearsay rule, even though the declarant is available as a witness: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." See also *People v Coy*, ___ Mich App ___; ___ NW2d ___ (2003). Statements showing the state of mind of the declarant are admissible when that state of mind is pertinent to the matters at issue. MRE 803(3); *People v Ortiz*, 249 Mich App 297, 310; 642 NW2d 417 (2001). Smith's statement expressed his state of mind at the time it was made, and thus, could arguably be admissible as a statement of his then existing state of mind or emotion. Smith's state of mind was pertinent to the matters at issue because the prosecutor contended that defendant shot and killed McClain in retaliation for the earlier shooting at defendant's mother's house.

However, even assuming that the admission of the evidence constituted error, an evidentiary error will not merit reversal unless it involved a substantial right, and after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In other words, reversal is warranted only if the error resulted in the conviction of an innocent person, or seriously affected the fairness of the judicial proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002). Here, the other evidence presented supported defendant's convictions. Defendant has failed to demonstrate that the alleged error affected his substantial rights. Therefore, regardless whether the admission of the evidence constituted error, reversal is not warranted.

Defendant also argues that defense counsel's failure to object to the inadmissible hearsay constituted ineffective assistance of counsel. Because defendant failed to properly preserve this issue below, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed by the Sixth Amendment. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). The deficiency must be prejudicial to defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). To demonstrate prejudice, defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra* at 694; *Pickens, supra* at 414.

As already addressed, *supra*, regardless whether the evidence was properly admitted, the untainted evidence supported defendant's convictions. Under the circumstances, defendant has failed to demonstrate that there is a reasonable probability that but for counsel's error in failing to object to the evidence, the result of the proceeding would have been different. Therefore, reversal is not required on this basis.

Defendant next argues on appeal that the trial court's criticism of defense counsel denied him a fair trial. We disagree. To justify granting a new trial based on judicial misconduct, it must be established that the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). A trial court has wide, but not unlimited, discretion and authority in the matter of trial conduct. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. *Collier, supra* at 698. Expressions of annoyance or impatience are not enough to establish bias and impartiality. *In re Hocking*, 451 Mich 1, 13 n 16; 546 NW2d 234 (1996), citing *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

In this case, the trial judge expressed annoyance and impatience to defense counsel repeatedly asking questions that were irrelevant to the issues. Additionally, the trial judge instructed defense counsel not to disrespect the court after defense counsel let the trial judge know that he "was questioning the witness, not the court." The trial judge threatened defense counsel with contempt outside the presence of the jury. These expressions of annoyance and

impatience do not establish bias and impartiality. *Hocking, supra* at 13 n 16. The trial court's conduct or comments were not of such a nature as to unduly influence the jury and thereby deprive defendant of his right to a fair and impartial trial. *Collier, supra* at 698.

Finally, defendant argues on appeal that the errors complained of violated defendant's right to due process of law under both the state and federal constitutions. We disagree. Because defendant failed to list this issue in his statement of questions presented in his brief on appeal, as required by MCR 7.212(c)(5), this Court need not address this issue. Regardless, we find no errors for which reversal is warranted.

Affirmed.

/s/ Hilda R. Gage

/s/ Brian K. Zahra