

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM HARRISON WATKINS, II,

Defendant-Appellant.

UNPUBLISHED

October 23, 2003

No. 240588

Ingham Circuit Court

LC No. 01-077130-FC

Before: Donofrio, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of involuntary manslaughter, MCL 750.321; felonious assault, MCL 750.82; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 9½ to 15 years' imprisonment for manslaughter, 32 to 48 months' imprisonment for felonious assault, and the mandatory consecutive two-year term for felony-firearm. We affirm.

Defendant first contends that the prosecutor violated defendant's right to equal protection under the state and federal constitutions, Const 1963, art 1, § 2, and US Const, Am XIV, by using two peremptory challenges to excuse the only African-American jurors seated on the prospective jury. This Court reviews a trial court's ruling regarding the use of peremptory challenges for racial discrimination for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997).

A prosecutor may violate a defendant's right to equal protection of the law by improperly using a peremptory challenge to excuse prospective jurors who are members of the same racial group as the defendant. *Batson v Kentucky*, 476 US 79, 84, 97-98; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

Defendant is African-American and the two jurors whose exclusion is challenged were also African-Americans. But defendant failed to make out a prima facie case because he failed to show "other relevant circumstances" that would raise an inference that the prosecutor was using his peremptory challenges in a racially discriminatory manner. *Id.* at 96.

Even if defendant had established a prima facie case, the prosecutor overcame that case by providing a racially neutral explanation for excluding the jurors. *Howard, supra* at 534, citing *Batson, supra* at 98. The prosecutor explained that one of the jurors had appeared to be asleep

during the proceedings and the other one had a prior felony conviction. There is no dispute that the juror had a prior felony conviction and that was a race-neutral reason to peremptorily exclude him. The record shows that between the time the other juror was seated and the time she was peremptorily excused, both counsel exercised a number of challenges. In fact, the prosecutor twice passed on the jury – which at the time included the African-American juror – but defendant exercised a challenge. On either of those occasions, had defendant not exercised a challenge, the jury would have been selected with the disputed juror on it. This fact, and defendant’s failure to dispute the prosecutor’s race-neutral explanation concerning the juror’s attentiveness satisfy the *Batson* standard.

Defendant next contends that insufficient evidence was presented by the prosecutor at the preliminary examination to support the bindover to circuit court. “This argument is without merit because a deficiency in the evidence at the preliminary examination does not require reversal where the defendant received a fair trial and was not otherwise prejudiced by the error.” *People v Brownridge*, 225 Mich App 291, 306; 570 NW2d 672 (1997), *aff’d in part and rev’d in part* on other grounds 459 Mich 456; 591 NW2d 26 (1999), amended 459 Mich 1276 (1999), on remand 237 Mich App 210; 602 NW2d 584 (1999), citing *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990).

Defendant also argues that the court erred by denying his motion for a directed verdict because the prosecutor presented insufficient evidence to permit the case to go to the jury on the charged offense of open murder. “When reviewing a trial court’s decision on a motion for a directed verdict, this Court reviews the record *de novo* to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Premeditation and deliberation may be inferred from the circumstances surrounding the death and minimal circumstantial evidence is required to prove an actor’s intent. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001).

Considered in the light most favorable to the prosecution, the evidence was sufficient to permit the jury to conclude that defendant acted with the premeditated and deliberate intent to murder Dinnerson Jones. Defendant and Jones had a dispute a week before this shooting that ended with Jones shooting and wounding one of defendant’s friends. Before this shooting began, defendant asked an acquaintance for a gun, remarking, “There is going to be trouble.” Defendant admitted that he shot at Jones, although he insisted that he did so in self-defense. One of his shots struck and killed the victim. Following the shooting, defendant drove to a nearby apartment complex and disposed of his gun; he then returned to the scene and, when questioned by police, denied any knowledge of the shooting. On these facts, the trial court properly denied defendant’s motion for a directed verdict.

Defendant next contends that the prosecutor committed misconduct by denigrating defense counsel, misstating the law and the evidence, and making an improper plea for the jurors to sympathize with the victim. Because defendant did not object to these alleged instances of prosecutorial misconduct, he is now required to demonstrate plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The remarks defendant complains of were made in the prosecutor's rebuttal argument in response to remarks made by defendant's counsel. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002), citing *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The prosecutor's remarks were properly responsive to the arguments of defendant's counsel, and reversal is not ordinarily predicated on a prosecutor's responsive comments. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Defendant next argues that the prosecutor misstated the law by telling the jury that defendant had an absolute duty to retreat. An individual is required to retreat if he may safely do so except in certain circumstances. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). Here the shooting took place in a public place and, according to defendant's own statements to the police, he knew that there was going to be trouble. The prosecutor was entitled to argue his theory of the case to the jury; under his theory, defendant shot at his alleged attacker instead of attempting to retreat to safety before the confrontation began. Furthermore, defendant did not object to the prosecutor's rebuttal remarks. Any misstatements of law could easily have been corrected if defendant had objected and requested a curative instruction. *Duncan, supra* at 18.

Defendant next contends that the prosecutor misstated the evidence when he claimed that a witness testified that she observed a man in an "orange" coat—the color of defendant's leather coat—when the witness actually said she saw a man in a "red" coat. There was strong circumstantial evidence that indicated the coat the witness observed was the one defendant was wearing. A police officer testified that the coat would have appeared red under the lights in the parking lot and defendant's counsel stated that the witness identified the coat as "orange-red." Any misstatement could have been resolved by a timely objection and curative instruction. In the absence of such an instruction, the trial court's general instruction that the arguments of counsel are not evidence was sufficient to dispel any minimal prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Defendant also contends that the prosecutor improperly appealed to the jury's sympathy for the victim. The prosecutor's comments were made in response to defendant's argument, and unobjected-to responsive comments are generally insufficient to justify reversal of a defendant's conviction. *Duncan, supra* at 18; *People v Abraham*, 256 Mich App 265, 276; 662 NW2d 836 (2003). In addition to their responsive nature, the comments were not a blatant "appeal to the jury's sympathy" and "[were] not so inflammatory as to prejudice defendant." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), citing *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999).

Defendant contends that his trial counsel failed to provide effective assistance of counsel because he did not request the trial court to give a jury instruction on the lesser offense of careless or reckless discharge of a firearm causing death. MCL 752.861. Our review of this claim is limited to the existing record because defendant failed to move for a new trial or an evidentiary hearing. *People v Sabin (On Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000), citing *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). This Court reviews the existing record to determine if defendant has demonstrated that his "counsel's performance fell below an objective standard of reasonableness, and that the representation so

prejudiced [him]” that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Careless or reckless discharge of a firearm causing death is a cognate lesser offense of the charged offense of first-degree murder because it is in the same class and shares some elements of the greater offense. In *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), our Supreme Court held that “MCL 768.32(1) does not permit cognate lesser instructions.” See also *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). The Court gave limited retroactive application to *Cornell* “to those cases pending on appeal in which the issue has been raised and preserved.” *Cornell*, *supra* at 367. Although defendant’s claim of appeal was filed before *Cornell* and his appeal was therefore arguably “pending,” the issue regarding cognate lesser-offense instructions was not raised and preserved because defendant did not request such an instruction.

Moreover, defendant has not demonstrated that his counsel was ineffective for failing to request—and thereby preserve—this claim. Defendant claimed that he intentionally discharged the firearm in self-defense, intending to scare his attacker away. Because defendant claimed that he was firing the gun intentionally, albeit in self-defense, a request for a jury instruction on the cognate lesser-offense of careless, reckless, or negligent discharge of a firearm causing death would have been properly refused by the trial court. *People v Dabish*, 181 Mich App 469, 474; 450 NW2d 44 (1989); *People v Cummings*, 458 Mich 877; 585 NW2d 299 (1998). His counsel “was not required to advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), citing *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Finally, in a Standard 11 brief, defendant contends that his counsel was ineffective for mentioning a bullet trajectory expert in closing argument without having obtained and presented such a witness. The decision whether to present a particular witness is a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). There is a strong presumption that counsel provided effective assistance and that his decisions were based on sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). This Court does not second-guess trial counsel on matters relating to trial strategy. *Id.*; *Pickens*, *supra* at 330.

Counsel’s argument was meant to highlight the fact that the prosecutor had not presented any expert testimony to establish that defendant fired the shot that struck and fatally wounded the victim. Furthermore, defendant has failed to provide any evidence that an expert in determining bullet trajectory would have supported defendant’s argument; the record is, quite simply, silent regarding what an expert might have told the jury. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Defendant has therefore failed to demonstrate that, had a bullet trajectory witness been presented, the outcome of the proceedings would have been different. *Id.*

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Peter D. O’Connell