

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE RUFFIN,

Defendant-Appellant.

UNPUBLISHED

March 9, 2004

No. 243414

Wayne Circuit Court

LC No. 01-013593

Before: Cavanagh, P.J., Gage and Zahra, JJ

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of twenty-two to fifty years for the murder conviction and forty to sixty months for the felon in possession conviction, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm in part and remand for further proceedings concerning whether the trial court properly denied defendant's peremptory challenges.

Defendant argues that reversal is required because the trial court erroneously denied three of his peremptory challenges. The court denied the challenges on the basis that they were racially motivated, contrary to *Kentucky v Batson*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Although defendant argues that the alleged error violated his constitutional rights to equal protection and an impartial jury, as explained in *People v Bell (On Rehearing)*, ___ Mich App ___, ___ NW2d ___ (2003) (J. Zahra, concurring), slip op, p 1, any error in denying the peremptory challenges does not implicate defendant's constitutional rights.

The court rules and statutes confer a right to exercise peremptory challenges, but the right is limited by the Equal Protection Clause, which prohibits both a criminal defendant and the prosecutor from using peremptory challenges to exclude potential jurors on the basis of race, gender or ethnic origin. *Bell, supra* (J. Fitzgerald), at 4 n 4, citing *United States v Martinez-Salazar*, 528 US 304, 315; 120 S Ct 774; 145 L Ed 2d 792 (2000); *Georgia v McCollum*, 505 US 42; 112 S Ct 2348; 120 L Ed 2d 33 (1992). Pursuant to *Batson*, resolution of a claim that a party is using a peremptory challenge in a discriminatory manner consists of three steps. First, the opponent of the peremptory strike must make a prima facie case of purposeful discrimination. If a prima facie case is established, then the burden of production shifts to the proponent of the strike to state a race-neutral reason for the strike. If a race-neutral reason is provided, then the

court must decide whether the opponent of the strike proved purposeful discrimination. *Bell, supra* (J. Fitzgerald), at 4. The issue may be raised by the trial court sua sponte. *Bell, supra* (J. Fitzgerald), at 2-3.

To establish a prima facie case of purposeful discrimination, the opponent of a peremptory challenge must make a prima facie case of racial discrimination by “show[ing] that members of a cognizable racial group are peremptorily being removed from the jury pool” and by “articulat[ing] facts to establish an inference that the right to remove jurors peremptorily is being used to exclude one or more potential jurors from the jury on the basis of race.” *Bell, supra* (J. Fitzgerald), at 4.

In *Batson, supra*, at 96-97, the Court explained that in determining whether a prima facie case was established, a trial court should consider “all relevant circumstances,” e.g., whether the proponent of the strike has exhibited a “‘pattern’ of strikes” and the proponent’s “questions and statements during *voir dire* examination and in exercising his challenges . . . [which] may support or refute an inference of discriminatory purpose.” See also *United States v Sangineto-Miranda*, 859 F2d 1501, 1520 (CA 6, 1988); *State v Evans*, 100 Wash App 757, 769-770; 998 P2d 373 (2000).

In *Bell*, this Court concluded that the record was inadequate to determine whether a prima facie case of discrimination was established. The Court observed that the record did not reveal the racial identities of the prospective jurors and that,

[w]hile the prosecution claims on appeal that there was a pattern of discrimination because “[o]f seven defense peremptory challenges made, five were against white males,” we cannot find support for the conclusion that defendant’s counsel was acting with a discriminatory motive because the trial court did not make a record of the racial identities of the members of the jury pool.” [*Bell, supra* (J. Fitzgerald), at 4 n 5.]

In the present case, before the trial court denied defendant’s peremptory challenges, defendant had exercised six peremptory challenges, which he acknowledges were used to excuse five Caucasian and one African-American venirepersons. Because the excused African-American venireperson was a police officer who was both married and related to other police officers, defendant’s use of a peremptory strike against that individual would not necessarily negate a suspicion that defendant’s use of peremptory challenges to remove Caucasian jurors was racially motivated, as the trial court determined. Though the record does not indicate the racial identities of other members of the jury pool, it is reasonable to conclude that the trial court’s finding of an established pattern of strikes was made in relation to the racial identities of other members of the jury pool.

However, that does not end the inquiry. The second step of the *Batson* analysis requires that, upon finding a prima facie case of discrimination, the trial court must afford the proponent of the strike an opportunity to provide a race-neutral reason for the strike. The proponent of the strike must provide a “clear and reasonably specific explanation of his legitimate reasons for exercising the challenges.” *Batson, supra*, at 98 n 20. See also *Purkett v Elem*, 514 US 765, 767-769; 115 S Ct 1769; 131 L Ed 2d 834 (1995).

As in *Bell, supra*, the trial court here failed to give defense counsel an opportunity to provide race-neutral explanations for the peremptory challenges before denying them. Further, having failed to require defense counsel to state his reasons for the challenges, the court could not comply with the third step of the *Batson* analysis, in which the court is required to evaluate the credibility of the proffered justifications. As in *Bell*, the trial court collapsed the three-step process into one step. *Id.* (J. Fitzgerald), slip op, 4, citing *Purkett, supra*.

We next consider the appropriate remedy for the trial court's failure to comply with its obligations under *Batson* when denying defendant's peremptory challenges.

In *Bell*, the Court determined that the trial court's denial of the defendant's peremptory challenges violated the defendant's statutory right to peremptorily remove jurors and that reversal was required. The Court reasoned that under *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981), and *People v Schmitz*, 231 Mich App 521, 531-532; 586 NW2d 766 (1998), the wrongful denial of a peremptory challenge requires reversal, without any showing of prejudice.

Consistent with the prosecution's argument in the present case, Judge Zahra's concurring opinion in *Bell* noted that courts in other jurisdictions have determined that the appropriate remedy for a trial court's failure to comply with the *Batson* three-step inquiry is to remand for further proceedings, rather than reversal:

Preliminarily, it is worth noting that courts from other jurisdictions that have faced this issue have often elected to remand the case for a proper application of the *Batson* three-step process. See *Edmonds v State*, 812 A2d 1034, 1049-1050 (Md, 2002); *State v Donaghy*, 769 A2d 10, 16 (Vt, 2000); *McKenzie v State*, 476 SE2d 868, 875 (Ga App, 1996); *State v Pharris*, 846 P2d 454, 465 (Utah App, 1993). Remand is a desirable course of action because great deference must be given to the trial court's credibility findings in assessing the reasons proffered in support of peremptory challenges. *People v Rice*, 468 Mich 919-920; 664 NW2d 214 (2003); *People v Knight*, 468 Mich 920; 664 NW2d 213 (2003). If, after proper application of the three-prong *Batson* process, the court determines on remand that the defendant's exercise of peremptory challenges violated *Batson*, there would be no error resulting from the denial of the right to remove the challenged juror peremptorily. . . . [*Bell, supra* (J. Zahra, concurring), at 2 n 2.]

Further support for the proposition that remand, rather than reversal, is the preferred remedy can be found in decisions of the Sixth Circuit Court of Appeals, see *United States v Harris*, 192 F3d 580 (CA 6, 1999), and *United States v Hill*, 146 F3d 337 (CA 6, 1998), and two decisions of this Court involving trials that were held before *Batson* was decided, see *People v Hart*, 161 Mich App 630, 641; 411 NW2d 803 (1987) (remanding for *Batson* analysis), and *People v Williams*, 174 Mich App 132, 134; 435 NW2d 469 (1989) (indicating that the Court had previously remanded the case to the trial court for proper application of *Batson*.)

Although the deficiencies in the record led the Court in *Bell* to conclude that reversal was appropriate in that case, it is not necessary in every case. For example, in *Jordan v LeFevre*, 206 F3d 196 (CA 2, 2000), the district court's perfunctory handling of the defendant's challenge to the prosecutor's use of peremptory strikes failed to comply with the third step of the *Batson*

analysis. Although nine years had passed since the trial, the appellate court remanded the case to the district court for a hearing to “reconstruct the prosecutor’s state of mind at the time of jury selection,” but stated that the defendant should receive a new trial if the passage of time and other circumstances made the determination “impossible or unsatisfactory.” *Id.*, 202. On remand, the district court held an evidentiary hearing and determined that the prosecutor’s peremptory strikes were not racially motivated. *Jordan v LeFevre*, 293 F3d 587, 589-593 (CA 2, 2002). The defendant again appealed, arguing that the district court should have determined that reconstruction of the prosecutor’s state of mind nine years after jury selection was not feasible, particularly because the prosecutor acknowledged that he had limited independent recollection of the voir dire. The Second Circuit Court of Appeals explained that the trial court should make the determination whether the record could be adequately reconstructed:

We have noted that there may be cases in which so many years have elapsed since the time of trial that the court cannot make “a reasoned determination of the prosecutor’s state of mind when the jury was selected.” The determination of whether the passage of time has foreclosed a reasoned reconstruction is, in the first instance, a matter for the court that attempts the reconstruction, for that court will have before it not only the trial record, but also the parties whose recollections and explanations are to be explored. We view the reconstructing court’s assessment of the feasibility of reconstruction as entitled to substantial deference, assuming that there is no evidence casting doubt on that court’s ability to make reasoned findings as to the prosecutor’s intent. [*Jordan, supra*, 293 F3d 593-594 (citations omitted).]

We are not persuaded that the deficiencies in the record in this case are incapable of being cured on remand. Because the determination of whether the record is amenable to a proper *Batson* inquiry is a threshold matter that should be decided by the trial court initially, we remand for further proceedings concerning this matter.¹

On remand, the trial court shall within 35 days of the issuance of this opinion hold an evidentiary hearing and determine if a record may be adequately reconstructed to enable the trial court to properly apply the three-step analysis required by *Batson*. *Jordan, supra*, 293 F3d 594. If the court determines that reconstruction of the record is feasible, it shall then apply the three-step inquiry required under *Batson* to determine whether defendant’s peremptory strikes were racially motivated. The trial court shall cause a transcript of the proceedings on remand to be prepared and filed within 21 days after completion of the remand proceeding. The prosecutor must file with the clerk of this Court copies of all orders of the remand proceeding within 7 days after entry and must promptly file all transcripts with the clerk of this Court. We shall retain jurisdiction to consider the trial court’s decision on remand.

¹ Remand is particularly appropriate here because the record suggests that pertinent discussions concerning this issue occurred during side bar conferences that were not transcribed but may be recalled by the parties or the court following remand.

In a related argument, defendant asserts that the trial court prematurely declared a jury, before the defense had exercised or waived all of its peremptory challenges. We disagree. The record discloses that defense counsel indicated that the only remaining peremptory challenges he wanted to exercise were those that the court had already rejected. The trial court properly interpreted defense counsel's statements as a waiver of any remaining peremptory challenges, apart from those that the court already denied. Therefore, this issue does not provide an independent basis for relief.

We find no merit to defendant's remaining claims of error.

The trial court did not abuse its discretion in denying defense counsel's request for an appointment of an expert. Defense counsel did not provide the court with the expert's name or address, and did not show that a firearms expert would likely benefit the defense. MCL 775.15; *People v Tanner*, ___ Mich ___; 671 NW2d 728 (2003). The mere assertion that an expert "might have provided some unidentified assistance to the defense" does not demonstrate that a defendant cannot safely proceed to trial without expert assistance. *Id.*, 731.

Next, we reject defendant's claim that the evidence was insufficient to support his convictions. Contrary to what defendant argues, the testimony of Williams and Turner, viewed most favorably to the prosecution, was sufficient to establish that defendant was the shooter and that he acted with malice. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the factfinder's role in evaluating the credibility of witnesses. Although the testimony indicated that defendant and the decedent had an amicable relationship, it also established that defendant fired a shot in Smith's direction. One witness testified that defendant and Smith were exchanging profanity, but not arguing, and that defendant reached over and said, "what did you say [expletive deleted]," and was "like showing [the gun] to him, and the gun went off." The jury could reasonably infer that defendant fired the gun intentionally. Evidence that the shooting occurred at close range, that Smith was seated, that the decedent was shot in the chest, and that defendant owned and was familiar with guns also supports an inference that defendant intended to shoot Smith. Also, malice may be inferred from the use of a dangerous weapon. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

At sentencing, and in connection with his ineffective assistance of counsel claim, defendant asserted that he shot Smith accidentally. However, the only evidence to that effect at trial was a witness' testimony that defendant "said it was a mistake," and the witness' testimony at a prior proceeding that "[h]e tried to go [shoot] past him and scare him, but it went and hit directly at him." The jury was not obligated to accept this testimony. Further, even if the jury believed that defendant intended to shoot past the decedent, it could reasonably conclude that his act of firing a gun in the direction of the decedent was sufficient to establish that he had the requisite malice because he had the "intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

Next, the trial court did not abuse its discretion by refusing defendant's request for a cautionary instruction after an outburst by the decedent's brother, who had previously testified. *People v Elmore*, 92 Mich App 678, 683; 285 NW2d 417 (1979). The court reasonably concluded that giving the instruction at that point would emphasize the outburst. Furthermore, at

the conclusion of the trial, the court instructed the jury that it must decide the case based on the evidence, which “has been the sworn testimony of the witnesses, who testified in your presence, and any exhibits which were admitted by the Court.” This instruction is similar to the instruction given in *Elmore, supra*, at 683-684. As in that case, the instruction conveyed the “basic message” that a cautionary instruction would have conveyed. *Id.* at 683. Moreover, because the person who was involved in the outburst had previously testified, there was little danger that the jury would improperly treat the substance of the exclamation as evidence.

Defendant also challenges the trial court’s final instruction informing the jury that it may consider hostility exhibited by a witness, arguing that it improperly had a “subliminal” effect on the jury’s deliberations. Defendant did not preserve this issue with an appropriate objection at trial. Because defendant has not established that the instruction constitutes plain error, this unpreserved issue does not warrant appellate relief. *Carines, supra*.

Regarding defendant’s ineffective assistance of counsel claim, we conclude that defendant has not established the factual predicate for his argument. The foundation of his argument is that defense counsel misled him into waiving his right to testify. At an evidentiary hearing on remand from this Court, defense counsel and defendant testified. The trial court implicitly rejected defendant’s testimony and found that defense counsel’s account was more credible. This finding is not clearly erroneous. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002) Furthermore, defendant’s testimony at the evidentiary hearing refuted his claim that counsel misled him. Defendant essentially admitted that he agreed to follow counsel’s recommendation that he not testify because the jury may conclude that another person was the shooter. Thus, defendant’s ineffective assistance of counsel claim must fail.

Affirmed in part and remanded for further proceedings consistent with this opinion. The remand proceedings shall be heard and decided with 35 days of the date of this opinion. The transcript of the remand proceedings must be completed within 21 days after completion of the remand proceedings. The prosecutor must file with the clerk of this Court copies of all orders issued in the remand proceedings within 7 days after entry and must promptly file all transcripts with the clerk of this Court. We retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra