

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN CHICO COOK,

Defendant-Appellant.

UNPUBLISHED

February 17, 2005

No. 252377

Wayne Circuit Court

LC No. 03-007324-01

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to twenty-seven months' to ten years' imprisonment for the robbery conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

The complainant, Ryan Kempkens, testified that defendant and another man robbed him at gunpoint while he was working as a parking valet at a nightclub on June 5, 2003, at approximately 1:00 a.m. Kempkens stated that defendant held a gun and ordered him to the ground while the other man removed \$220 from his pockets. Kempkens identified defendant at a lineup, but was unable to identify the other suspect.

II

Defendant first argues that the prosecutor used his peremptory challenges to remove jurors based on race, contrary to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The prosecutor used peremptory challenges to excuse four prospective black jurors, Sanford, Lindsay, Holloway, and McKenzie. Defense counsel excused one black juror, Strickland. The final jury did not include any black persons.

In response to defense counsel's *Batson* objection, the prosecutor explained that he excused both Lindsay and Holloway because they were educators, and Sanford because she was a graduate student who never held a job. He excused McKenzie because she frowned at him the entire time she was in the jury box. The trial court found no *Batson* violation. We review the

trial court's decision for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997).

In *Batson*, *supra* at 89, the United States Supreme Court held that the Equal Protection Clause prohibits a prosecutor from challenging potential jurors solely on the basis of race. A defendant claiming a *Batson* violation must first make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose. *Id.* at 93-94. Once the defendant has established the prima facie case, the burden shifts to the prosecutor to adequately explain the racial exclusion. *Id.* at 94. To surmount a prima facie showing of discriminatory purpose, the prosecutor must provide a racially neutral explanation for challenging the jurors. *Howard, supra* at 534. The prosecutor cannot satisfy this burden with statements of good faith or denial of a discriminatory motive; he must give an explanation related to the specific case being tried. *Id.* The trial court must then determine whether the defendant has demonstrated purposeful discrimination. *Id.* An appellate court must give great deference to the trial court's findings on a *Batson* issue because they turn in large part on the prosecutor's demeanor and credibility, and these findings will not be overturned unless they are clearly erroneous. *Miller-El v Cockrell*, 537 US 322, 339-340; 123 S Ct 1029; 154 L Ed 2d 931 (2003).

In *Purkett v Elem*, 514 US 765; 115 S Ct 1769; 131 L Ed 2d 834 (1995), the United States Supreme Court clarified its statements in *Batson* regarding the prosecution's burden of production. The Court in *Purkett* held that the prosecution has the burden of proffering racially neutral reasons for excluding the jurors in question, but it is not obligated, at this step, to show that these reasons are plausible or persuasive. *Id.* at 767-768. The trial court must then determine whether the prosecutor's reasons are genuine, or merely a pretext for discriminatory intent. *Id.* at 768-769. The court may conclude that the prosecutor acted without a racial purpose if his reasons were genuine, even if the reasons were silly or superstitious. *Id.* at 768-769.

Here, the prosecutor satisfied its burden of production by proffering racially neutral reasons for excluding the four black jurors. Occupation, including membership in the teaching profession, is an acceptable, racially neutral reason for a prosecutor to strike prospective jurors. *United States v Smallwood*, 188 F3d 905, 915 (CA 7, 1999); *United States v Davis*, 40 F3d 1069, 1077 (CA 10, 1994); *United States v Johnson*, 4 F3d 904, 913 (CA 10, 1993). Lack of employment and lack of life experience also has been recognized as a racially neutral reason sufficient to defeat a *Batson* challenge. See *United States v Yang*, 281 F3d 534, 549 (CA 6, 2002) (prosecutor satisfied burden with explanation that one excluded juror was unemployed, and another lacked the "necessary background" to serve as a juror). Finally, display of a negative attitude is a racially neutral basis for excluding a juror. See *Roberts ex rel Johnson v Galen of Virginia, Inc*, 325 F3d 776, 780-781 (CA 6, 2003) (prosecutor's explanation that jurors were "scowling" accepted as racially neutral reason).

Deferring to the trial court's determination that the prosecutor's reasons were genuine, and not a pretext for discrimination, we conclude that the trial court did not abuse its discretion in denying defendant's *Batson* motion.

III

Defendant claims that the lineup in which Kempkens identified him was impermissibly suggestive because he was the only medium-complexioned man in the lineup, and because the other men were significantly older than him. He challenges the trial court's denial of his motion to suppress the identification evidence.

The trial court's decision to admit identification evidence, including an in-court identification, will not be reversed unless it is clearly erroneous. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Thus, we review a trial court's findings of fact pertaining to a motion to suppress an identification for clear error. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

“The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002), citing *People v Kurylczyk*, 443 Mich 289, 306, 311-312 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the prosecutor must establish by clear and convincing evidence that the witness has an untainted, independent basis for identifying the defendant before the in-court identification will be allowed. *Gray, supra* at 115.

Investigator James Blanks acknowledged at the *Wade*¹ hearing that defendant was twenty years old, and that the four other men in the lineup were forty-three, thirty-seven, thirty-two and twenty-five years old. He stated that there were other men available in the precinct who were closer in age to defendant, but they did not have facial hair. He acknowledged that defendant, who had a medium complexion, was next to a man with a light complexion, though he knew that the perpetrator of the robbery had not been described as light-complexioned. He stated that there were no other medium-complexioned men available for the lineup, and that he made the best choices he could from a pool of fifteen to twenty available persons in the precinct.

Daniel Bitar, the attorney present at defendant's lineup, testified that there were only five persons in the lineup instead of the usual six. Two men looked significantly older than defendant, though the other three appeared to be of similar age. One man had a lighter complexion than the others. Bitar informed the officer that he was concerned about the age disparity between defendant and the other men, and asked if any younger persons could be used, but the officer told him that no one else was available and the lineup would be conducted with the persons they had. He acknowledged that he signed the lineup paperwork, and that he indicated on the form that the suspects were “adequate” and the “best available” from the precinct.

The trial court found that the lineup was not unduly suggestive, and denied the motion to suppress Kempkens' identification. The trial court noted that the robbery had occurred at night, when Kempkens would not have had a good opportunity to accurately judge the robber's complexion. The trial court also found it important that Bitar had determined that the lineup was

¹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

adequate. However, the trial court commented that the decision might be considered a “close call,” because there were only five men in the lineup, and two were noticeably older than the others.

The trial court did not clearly err in finding that the procedure was not unduly suggestive despite some problems. *Gray, supra* at 115. “Physical differences between defendant and the other lineup participants goes to the weight of the identification and not its admissibility.” *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997), citing *People v Benson*, 180 Mich App 433; 447 NW2d 755 (1989), mod on other grounds 434 Mich 903 (1990). Because we find no clear error in the trial court’s decision, we need not consider whether Kempkens had an independent basis for the in-court identification. *Gray, supra* at 115.

Affirmed.

/s/ Christopher M. Murray

/s/ Patrick M. Meter

/s/ Donald S. Owens