

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORTEZ SHISLER,

Defendant-Appellant.

UNPUBLISHED

October 20, 2005

No. 256122

Wayne Circuit Court

LC No. 04-000837-01

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316, and carrying or possessing a firearm during the commission or attempted commission of a felony (“felony-firearm”), MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree felony murder conviction and two years’ imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in finding that the prosecutor’s reasons for peremptorily dismissing five prospective African-American jurors had adequate race-neutral explanations and were not merely a pretext for racial discrimination under *Batson*.¹ We disagree.

The use of a peremptory challenge to strike a potential juror solely because of that juror’s race violates the Equal Protection Clause of the Fourteenth Amendment. US Const, Am XIV; *Batson v Kentucky*, 476 US 79, 84; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *People v Knight*, 473 Mich 324, 335; 701 NW2d 715 (2005). Under *Batson*, the United States Supreme Court set forth a three-step process for determining the constitutional propriety of the use of peremptory challenges. *Knight, supra* at 336. “First, the opponent of the peremptory challenge must make a prima facie showing of discrimination.” *Id.* “Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike.” *Id.* at 337. “Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then

¹*Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination.” *Id.* at 337-338.

The proper standard of review depends on which *Batson* step is at issue before this Court. *Knight, supra* at 338. Where the prima facie showing of discrimination by the opponent of the peremptory challenges is at issue, this Court reviews for clear error the trial court’s factual determinations and reviews de novo the trial court’s conclusions of law. *Id.* at 342. Where the issue is whether the proponent of the peremptory challenge articulated a race-neutral reason for the use of the peremptory challenge, this Court reviews the issue de novo. *Id.* at 343-344. Finally, whether the opponent of the peremptory challenge has satisfied the ultimate burden of proving purposeful discrimination is a question of fact that is reviewed for clear error. *Id.* at 344.

During voir dire, defense counsel made a *Batson* challenge after the prosecutor used peremptory challenges to excuse four African-American jurors and was preparing to excuse a fifth African-American juror. In response, the prosecutor explained his reasons for excusing the prospective jurors. The prosecutor said he excused juror Bowie because he appeared to be “slow” in answering questions during voir dire and excused juror Whitfield because she was an attorney and had worked for the Legal Aid and Defender’s Office. The prosecutor excused Riley-Hathorne because she was a school counselor and because she said she did not want to miss a scheduled meeting. The prosecutor excused juror Holmes because she had a son under the jurisdiction of juvenile court. Finally, the prosecutor stated that he wished to excuse juror Muhammad because he was young, unemployed, had things in common with defendant and glared at the prosecutor. The trial court found no *Batson* violation and ruled that the prosecutor’s race-neutral explanations for excluding the five African-American jurors were reasonable and determined that the prosecutor had not engaged in purposeful discrimination.

In this case, the first *Batson* step is moot because the prosecutor offered a race-neutral explanation for his peremptory challenge of the five African-American jurors, and the trial court ruled on the ultimate question of purposeful discrimination. *Knight, supra* at 338, citing *Hernandez v New York*, 500 US 352, 359; 111 S Ct 1859; 114 L Ed 2d 395 (1991) (plurality opinion). With regard to the second *Batson* step, a de novo review of the record indicates that the prosecutor provided race-neutral explanations for all the peremptory challenges used to exclude the five African-American jurors. Regarding juror Bowie, being “slow” in answering questions was a permissible race-neutral reason for the strike. See, e.g., *Ellis v Newland*, 23 Fed Appx 734, 735 (CA 9, 2001) (finding no *Batson* violation where one potential juror was challenged on account of her slow and halting answers to questioning); *State v Guess*, 318 SC 269, 271-273; 457 SE2d 6, 7 (1995) (holding that the trial court did not err in concluding the strike of a juror for being a little slow and not knowing what was going on was race-neutral). Regarding juror Whitfield, the prosecutor expressed legitimate concerns regarding the bias of the prospective juror because of her previous legal aid job. See, e.g., *United States v Johnson*, 941 F2d 1102, 1109 (CA 10, 1991) (holding that the prosecutor’s explanation for peremptorily striking a black juror because of her legal aid job was race-neutral). Regarding juror Riley-Hathorne, occupation, including membership in the teaching profession, is also an acceptable, racially neutral reason for a prosecutor to strike prospective jurors. See, e.g., *United States v Smallwood*, 188 F3d 905, 915 (CA 7, 1999); *Roberts ex rel Johnson v Galen of Virginia, Inc.*, 325 F3d 776, 780-781 (CA 6, 2003). The proffered reason for excluding juror Holmes was that

her son was under the jurisdiction of the juvenile court. Because the prosecutor's explanation was based on something other than the juror's race and discriminatory intent was not necessarily inherent, we find that the prosecutor's explanation was race-neutral. *Hernandez, supra* at 360. Regarding juror Muhammad, lack of employment and the display of a negative attitude are race-neutral reasons for using a peremptory challenge. See, e.g., *United States v Yang*, 281 F3d 534, 549 (CA 6, 2002); *Roberts ex rel Johnson, supra* at 780-781 (accepting prosecutor's explanation that jurors were "scowling" as racially neutral reason). Therefore, we hold that the prosecutor satisfied his burden of production by proffering racially neutral reasons for excluding the five African-American jurors.

Finally, proceeding to the trial judge's ultimate ruling, we cannot conclude that the trial court clearly erred in finding that these reasons were reasonable race-neutral explanations. The trial judge, who was in the best position to observe the demeanor and credibility of the prosecutor exercising the peremptory challenges, believed his explanations and concluded that the prosecutor did not engage in purposeful discrimination. Giving the appropriate degree of deference to the trial court's ultimate finding, *Knight, supra* at 344, we hold that the trial court did not clearly err in determining that no *Batson* violation occurred.

Next, defendant argues that he was denied his right to a fair trial by an impartial jury under US Const, Ams VI, XIV and Const 1963, art 1, § 20, when the trial court refused to dismiss the jury panel after two jurors allegedly spoke with a member of the victim's family or one of his friends. We disagree. We review a trial court's decision regarding whether a juror should be removed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *Id.*

Both the United States and Michigan Constitutions guarantee a criminal defendant a fair trial by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *Duncan v Louisiana*, 391 US 145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1968); *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). In this case, contrary to defendant's contention, the trial court took appropriate steps to ensure that defendant received a fair trial. The record shows that defendant's sister-in law, Nedrala McLaughlin, claimed that she saw a male member of the victim's family or one of his friends talking to two male jurors in the hallway. McLaughlin testified that she did not hear the contents of the alleged conversations. After McLaughlin identified the two male jurors in question, the trial court conducted a lengthy, individualized inquiry of the two jurors regarding whether they had conversations with a member of the victim's family or friends. After hearing the answers from the two jurors, the trial court determined that the jurors were not involved in improper conversations, and found that the two jurors' statements that they honored the court's directive not to discuss the case with anyone were credible. It is presumed that jurors honor their oaths and are truthful. *People v King*, 215 Mich App 301, 303; 544 NW2d 765 (1996). Also, "[i]t is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Both jurors testified that no one made any effort to talk to them and that they followed the court's instruction. Furthermore, there was no evidence corroborating the allegation that the conversations occurred or that defendant was prejudiced in any way by the conversations. Consequently, the trial court did not err.

Finally, defendant argues that the trial court violated his right to confront the witnesses against him under US Const Am, VI and Const 1963, art I, § 20, when the trial court allowed the prosecutor to introduce the hearsay statements of his codefendant to the codefendant's girlfriend, Allandra Carter, as adoptive admissions under MRE 801(d)(2)(b). We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). To the extent that this issue implicates the Confrontation Clause of the federal and state constitutions, the constitutional issue is reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

We agree with the trial court's ruling that codefendant's statements to Carter were not hearsay, but were adoptive admissions under MRE 801(d)(2)(B). An adoptive admission is admissible when it clearly appears that the defendant understood and unambiguously assented to the statements made. *People v Lowe*, 71 Mich App 340, 346; 248 NW2d 263 (1976). Whether the party's conduct manifested his assent to the statement of the other person is a preliminary question for the court. *Id.* In *Shemman v Am Steamship Co*, 89 Mich App 656, 673; 280 NW2d 852 (1979), this Court, quoting *Durbin v K-K-M Corp*, 54 Mich App 38, 50; 220 NW2d 110 (1974), explained:

An adoptive admission is the express adoption of another's statement as one's own. It is conduct on the *part of a party* which manifests circumstantially that party's assent in the truth of a statement made by another. The mere fact that a party had declared that he or another person made the statement is not in and of itself sufficient for a finding of adoption. In order to find adoptive approval of the other's statement the circumstances surrounding the other's declaration must be examined.

While it is improper to admit evidence of a defendant's failure to say anything in the face of an accusation as an adoptive statement under MRE 801(d)(2)(B), *People v Schollaert*, 194 Mich App 158, 167; 486 NW2d 312 (1992), in the present case, during the conversation in which codefendant described the facts of the crime, defendant not only failed to object to his codefendant's statements, but offered details during the conversation which directly implicated him in the crime. Under these circumstances, defendant's statements may reasonably be construed as manifesting his assent to the truth of the statements of his codefendant. See MRE 801(d)(2)(B). Therefore, the statements were not hearsay and were properly admitted by the trial court.

Even if the statements were hearsay, they were properly admissible as a statement against penal interest under MRE 804(b)(3). Statements against penal interest may be admitted as substantive evidence without violating the Confrontation Clause if the prosecution can establish that the person making the statement is unavailable and that his or her statements bore adequate indicia of reliability. *People v Washington*, 468 Mich 667, 671; 664 NW2d 203 (2003). In evaluating the indicia of reliability, the court must evaluate the circumstances surrounding the making of the statement as well as its content. *Id.* at 672, citing *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993).

In the present case, the codefendant was charged with the same crimes and, therefore, was presumptively unavailable. *Washington, supra* at 672. Furthermore, the codefendant's statements were voluntarily made to his girlfriend (i.e., to someone to whom he would likely

speak the truth), were made within a short period of time after the commission of the crime and were made without prompting or inquiry. Moreover, the codefendant did not minimize his role or directly implicate the defendant, but in fact stated that he (the codefendant) shot the victim. All of these factors weigh heavily in favor of finding adequate indicia of reliability. *Id.* at 672-673, citing *Poole, supra* at 165. Consequently, even if the statements were hearsay, they were admissible on other grounds. This Court will not reverse where the trial court reaches the correct result, albeit for a different reason. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001). Finally, even assuming that codefendant's statements were not admissible either as adoptive admissions or as declarations against penal interest, any error was harmless. Here, codefendant's statements did not directly implicate defendant and were cumulative to other properly admitted evidence, including Carter's testimony that she saw defendant with a gun before the charged offense and defendant's own incriminating statements to Carter that they had just robbed somebody and taken a car, a cell phone and a regular house phone. Improperly admitted hearsay evidence constitutes harmless error when it is merely cumulative of other properly admitted evidence. *People v Van Tassel (On Remand)*, 197 Mich App 653, 655; 496 NW2d 388 (1992). Accordingly, any error in the admission of codefendant's statements was harmless.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra