

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY TOREAL TOWNSEND,

Defendant-Appellant.

UNPUBLISHED

February 7, 2006

No. 252371

Wayne Circuit Court

LC No. 02-012306-01

Before: Wilder, P.J. and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felony-murder, MCL 750.316(1)(b), first-degree murder (premeditated), MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 250.277b. Defendant was sentenced to life in prison for the felony-murder conviction, forty to sixty months in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction.¹ We affirm.

Defendant's convictions arise out of the fatal shooting of Detroit Police Officer Scott Stewart on the early morning of August 11, 2002. Defendant had attended a party at the home of his sister, Linda Little, and her husband and defendant's codefendant, Kenneth Little, on Corbett Street in Detroit. By the time Stewart and two other officers arrived in response to shots they heard earlier coming from this location, the party had swelled to over one hundred people. Stewart was in the process of arresting Little, when he was fatally shot in the head.

I. *Batson*² Challenge

Defendant first argues that the trial court committed reversible error when it refused to allow defendant to exercise a peremptory challenge on prospective juror Richard Hill. We disagree. Determining whether a trial court failed to follow the prescribed procedures after a *Batson* challenge requires review of a trial court's application of law, which this Court reviews

¹ The trial court vacated defendant's sentence for the first-degree murder conviction.

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

de novo. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005). The trial court's ultimate decision on discriminatory intent is reviewed for clear error. *Id.*

Batson established a three-step process for determining whether peremptory challenges have been improperly exercised. *Id.* The party opposing the challenge must first establish a prima facie showing of discrimination by showing that “(1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race.” *Id.* at 282-283, citing *Batson, supra* at 96. Once the opponent to the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge and that explanation must be related to the case being tried and provide more than a general assertion in order to rebut the prima facie showing. *Id.* at 283. If the challenging party comes forward with a neutral explanation, the trial court must decide whether the opposing party has carried the burden of establishing purposeful discrimination. *Id.* The reasonableness and improbability of the explanation are considerations in that determination. *Id.*

On the second day of jury selection, prospective juror Hill, a Caucasian male, informed the court that his son was an attorney who had recently passed the New Mexico bar examination. Hill indicated that his son did not have employment yet and was uncertain whether he was going to be a public defender or an assistant prosecutor. Hill represented that this son's occupation would not affect his participation in the trial. Shortly thereafter, defendant, an African-American male, attempted to use a peremptory challenge on Hill. The prosecutor asked to approach the bench, and the parties had an off-the-record discussion with the trial court. The court then went back on the record and declared a jury, which included Hill. The jury was excused and defendant was then allowed to note his objection for the record. Defendant indicated Hill had been employed for twenty-five years as a supervisor and had a son who may become employed as a public defender or a prosecutor. Defendant stated that there were “all kinds of reasons that has nothing to do with this man's race, why we want to excuse him.” Defendant confirmed that, based on the prosecution's objection, the trial court had determined that defendant's challenge was based on race and disallowed it. The court noted that defendant's challenges were mostly used to exclude white males.

The facts at issue in this case are remarkably similar to those at issue in *Bell, supra*³. In *Bell*, our Supreme Court held that the trial court did not commit reversible error when it collapsed all three *Batson* steps into one. Here, although the trial court did not have a hearing before disallowing defendant's peremptory challenge, it subsequently permitted counsel to make his objections on the record, thus curing any error in this regard. Defendant confirmed that the court had determined that his challenge was based upon race and that he was allowed to make a race neutral explanation for the challenge. Despite this explanation, the trial court determined that the challenge was based on race because of the pattern of defendant's peremptory challenges

³ We initially held this appeal in abeyance pending our Supreme Court's decision in *Bell, People v Townsend*, unpublished order of the Court of Appeals, entered March 9, 2005 (Docket No. 252371).

to white male jurors. While defendant's reason appears, on the surface, to be neither unreasonable nor improbable, the trial court's findings are given great deference because they turn in large part on a determination of credibility. *People v Eccles*, 260 Mich App 379, 387; 677 NW2d 76 (2004). Thus, we find no error requiring reversal.⁴

II. Mistrial

Next, defendant argues that the trial court abused its discretion when it denied defendant's motion for a mistrial and refused to allow defendant to question the jury regarding a newspaper article. We disagree. A mistrial should be granted only for an irregularity that is prejudicial to defendant's rights and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). Whether prejudice results must turn on the special facts of each case, and the question is left largely to the determination and discretion of the trial court. *People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997). A probability or suspicion that jurors may have read prejudicial articles is not enough; actual prejudice to defendant as a result of the exposure must be found. *Alter, supra* at 205.

At the conclusion of Shantell Foster's testimony, the trial court excused the jury. Immediately thereafter, the court remanded the witness into custody of the county jail, indicating that it "had heard this witness perjure herself over and over again, under oath. Admit that she said certain things, take it back, and state whatever suited her. This is perjury. The Court will not tolerate that." The court also told her, "You lied. And you lied right here in my presence." The following day, an article appeared in the Detroit Free Press quoting the trial court's statement that the witness lied. Defendant brought the article to the attention of the trial court. The court denied defendant's request to question whether the jury had seen the article and for a mistrial. When the court reconvened, it instructed the jury that the only evidence they were to consider when making a decision is what they have heard in the courtroom and physical exhibits admitted. During jury selection, the court had also explicitly informed the jury on two separate occasions that the reports they read in the paper are not evidence and cannot be considered when deciding defendant's case. At the conclusion of the parties' proofs, the trial court again gave the jury a lengthy instruction regarding what evidence they were permitted to consider.

On this record, we conclude that defendant was not denied a fair trial. The trial court specifically instructed the jury on several occasions that newspaper articles are not evidence that they may consider when making their decision, and a jury is presumed to follow their instructions. *People v Houston*, 261 Mich App 463, 469; 683 NW2d 192 (2004). Moreover, there is no evidence that any jury member was even aware of the article, but even assuming a jury member read the article, it merely revealed facts that the jury witnessed first-hand in the courtroom: Foster gave contradicting testimony and necessarily committed perjury at some point.

⁴ However, we note our Supreme Court's direction to trial courts that "[d]espite our ultimate conclusion that the trial court complied with the requirements of *Batson*, trial courts are well advised to articulate and thoroughly analyze each of the three steps In doing so, trial courts should clearly state the *Batson* step that they are addressing and should articulate their findings regarding that step." *Bell, supra* at 300.

We find that the trial court did not abuse its discretion by denying defendant's motion for a mistrial, or by failing to allow defendant to address the jury.

III. Cross-Examination

Defendant also argues that the trial court improperly limited his cross-examination of Tamika Gilmore. We disagree. Because defendant failed to make an offer of proof regarding the substance of the evidence sought to be elicited after the trial court sustained the prosecution's objection, defendant has not preserved this issue for appellate review. We review unpreserved claims of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

On direct and re-direct examination by the prosecutor, Gilmore testified that, shortly after defendant arrived at her house at approximately 3:30 a.m., defendant told her that he left the party on Corbett street after the police arrived, and needed Gilmore to drive him to another location, because he "wasn't gong to jail" and "because [Corbett] was hot." Gilmore also testified that, approximately six hours after defendant showed up at her apartment, she asked defendant, "What happened on Corbett Street?" Defendant replied, "somebody got shot." On re-cross-examination, defendant asked Gilmore, "You told the prosecutor that [defendant] said: 'It's hot over there on Corbett Street.' But he told you other things; didn't he?" Gilmore replied in the affirmative and the prosecution objected. The trial court sustained the objection because the proffered statement would have been a self-serving statement, not a statement against interest, and the prosecution had not opened the door allowing such evidence.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay evidence is generally inadmissible unless it falls within an exception. MRE 802. Certain statements, however, are excluded from the definition of hearsay by MRE 801(d), including statements made by a party offered against that party by a party opponent. MRE 801(d)(2)(A). Defendant's statements to Gilmore, offered by the prosecution, were admissible under this rule of evidence.

On re-cross-examination, defendant attempted to admit as substantive evidence additional out-of-court statements he made to Gilmore. These statements are not excluded from the definition of hearsay under MRE 801(d), because they are offered by defendant to support his own position, and thus, are not admissible unless they fit within a hearsay exception. On appeal, defendant also appears to argue that the statements were offered to bring forth the bias, prejudice, or credibility of Gilmore. However, as stated above, defendant failed to make an offer of proof and the record does not indicate the substance of these statements or provide any support for this position. We cannot find that any error affecting defendant's substantial rights has occurred.

IV. Res Gestae Witness

Defendant further argues that the trial court should have compelled the prosecutor to produce Lergiald Alexander, a purported res gestae witness. We disagree. Defendant has not preserved this issue for appeal. A defendant must move for an evidentiary hearing or move for a new trial to preserve the res gestae witness issue for appeal. *People v Dixon*, 217 Mich App 400,

409; 552 NW2d 663 (1996). Unpreserved claims of error are reviewed on appeal for plain error affecting defendant's substantial rights. *Carines, supra* at 774.

A res gestae witness is one who witnessed some event in the continuum of a criminal transaction and whose testimony would aid in developing a full disclosure of the facts. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). The prosecution has an obligation to provide notice of known res gestae witnesses and reasonable assistance to locate witnesses on a defendant's request. *People v Gadowski*, 232 Mich App 24, 36; 592 NW2d 75 (1998).

The prosecution endorsed Alexander as a res gestae witness. Defendant sought Alexander's testimony for the purpose of establishing that, due to the residue on Alexander's hands, it was plausible that he may have been the one to shoot Stewart. Although witnesses found at the scene of the crime can be considered res gestae witnesses, the record indicates that Alexander did not arrive on the scene until after the crime took place and defendant fled the area. Moreover, contrary to defendant's contention, expert testimony indicated that no gunshot residue was found on him. It is not clear that Alexander could have added anything helpful to defendant or the proceeding. Moreover, there is no evidence that the prosecution failed to provide reasonable assistance in locating him, given defendant's request for his production less than three hours before defendant rested his case. Consequently, the trial court's failure to compel the prosecutor to produce Alexander was not plain error affecting defendant's substantial rights.

V. Defendant's Statement

Defendant next argues that his ten-page statement confessing to the shooting of Stewart was not obtained voluntarily and should not have been admitted at trial. We disagree. "This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence. Although this Court engages in a review de novo of the entire record, this Court will not disturb a trial court's factual findings with respect to a *Walker* hearing unless those findings are clearly erroneous. A finding is clearly erroneous if it leaves us with a definite and firm conviction that the trial court has made a mistake." *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003) (citations and footnote omitted). Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Whether the defendant's statement was knowing, intelligent, and voluntary is a question of law that the court must determine under the totality of the circumstances. In determining voluntariness, the court should consider all the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence and experience of the defendant; whether there was unnecessary delay of or abused; and any promises of leniency. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). No single factor is determinative. *Id.*

At the *Walker* hearing, defendant claimed that police never informed him of his constitutional rights prior to eliciting a statement from him, they ignored over eight requests he made for an attorney, they hit him with a phonebook, they threatened to charge him and his sisters with murder, and they failed to feed him for almost twenty hours. Three police officers testified that, prior to giving a statement and on more than one occasion, defendant read his constitutional rights aloud and signed a waiver form, marking his initials after each listed right. Police also testified that defendant was coherent during the interrogation, they never hit him with

a phonebook, they never threatened him, and they fed him after approximately eight hours of detention. Thomas stated that defendant reviewed his statement after Thomas wrote it, made corrections in his own handwriting, initialed each of the ten pages and, at the end of the statement, defendant added comments in his own hand indicating that his family had nothing to do with what happened, expressing that he was sorry for the pain he had caused, and asking for forgiveness from Stewart's family. Also on the statement, defendant specifically indicated that Thomas did not threaten or physically harm him and that he had signed and read a constitutional rights waiver form. The trial court determined that defendant's statement was voluntary, finding that, prior to giving the statement, defendant was advised of his rights and understood those rights, as acknowledged by him on the constitutional rights form. The court indicated that it accepted police testimony and did not accept defendant's testimony.

"This Court will not disturb a trial court's ruling at a suppression hearing unless that ruling is found to be clearly erroneous. Resolution of facts about which there is conflicting testimony is a decision to be made initially by the trial court. The trial judge's resolution of a factual issue is entitled to deference. This is particularly true where a factual issue involves the credibility of the witnesses whose testimony is in conflict." *People v Geno*, 261 Mich App 624, 629; 683 NW2d 687 (2004), quoting *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). Here, the outcome of the suppression hearing hinged entirely on the credibility of the witnesses. Given the trial court's credibility determination and the deference owed to its factual finding, we find that the trial court did not clearly err in admitting defendant's statement at trial.

VI. Prior Inconsistent Statements

Finally, defendant argues that the trial court should not have admitted prior statements of three witnesses into the record. Prior to trial, witnesses Townsend, Foster, and Sochacki testified under oath at an investigative subpoena hearing and a preliminary examination. Defendant did not object to the admission of the statements and has failed to properly preserve this issue for review. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Unpreserved claims of error are reviewed on appeal for plain error affecting defendant's substantial rights. *Carines, supra* at 774. Upon review of the record, we conclude that the trial court properly admitted the witnesses' prior inconsistent testimony pursuant to MRE 801(d)(1)(A) and accordingly there was no plain error affecting defendant's substantial rights.

As we previously noted, out-of-court statements offered for their truth are generally inadmissible unless they fall within an exception to the hearsay rule; however, certain out-of-court statements are admissible as non-hearsay. MRE 801(d); MRE 802; *McDaniel, supra* at 412-413. MRE 801(d)(1) excludes from the definition of hearsay a prior statement of a witness when:

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

“Inconsistency” includes not only diametrically opposed answers, but also evasive answers, inability to recall, silence, or changes of position. *People v Chavies*, 234 Mich App 274, 282; 593 NW2d 655 (1999). If a prior inconsistent statement of a witness satisfies the requirements of MRE 801(d)(1)(A), then it can be used at trial for both impeachment purposes and as substantive evidence. *Id.* at 288-289.

We find the trial court properly admitted prior statements of these witnesses under MRE 801(d)(1) as substantive evidence. All three statements were given at a prior proceeding under oath subject to the penalty of perjury and directly contradicted statements made at trial. Defendant had an opportunity to cross-examine each of these witnesses regarding their prior statements. Each prior statement, therefore, was admissible as non-hearsay pursuant to MRE 801(d)(1)(A). Consequently, no error affecting defendant’s substantial rights occurred.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly