

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE LAMAR RAWLS,

Defendant-Appellant.

UNPUBLISHED

September 27, 2007

No. 271472

Genesee Circuit Court

LC No. 05-017302-FC

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of kidnapping, MCL 750.349, armed robbery, MCL 750.529, carrying a concealed weapon, MCL 750.227, possession of a firearm during the commission of a felony, MCL 750.227b, possession of a firearm by a person convicted of a felony, MCL 750.224f, and two counts each of first-degree criminal sexual conduct, MCL 750.520b(1)(c) (sexual penetration in circumstances involving commission of another felony) and MCL 750.520b(1)(e) (sexual penetration by an actor armed with a weapon). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 25 to 50 years' imprisonment for the kidnapping, armed robbery, and criminal sexual conduct convictions, and five to ten years' imprisonment for the carrying a concealed weapon and felon in possession convictions, each to be served consecutively to a term of two years' imprisonment for the felony-firearm conviction. Because double jeopardy protections preclude defendant's conviction and sentence on four separate counts of first-degree criminal sexual conduct under the facts of this case, we vacate two of his convictions and sentences for first-degree criminal sexual conduct and remand this matter to the trial court for modification of the judgment of sentence. In all other respects, we affirm.

Defendant first argues that the prosecutor exercised a peremptory challenge against an African-American juror on the basis of race in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We disagree and conclude that the trial court properly found that the prosecutor dismissed the juror for credible, race-neutral reasons.

A peremptory challenge may not be used to strike a juror on the basis of race because it is a violation of the Equal Protection Clause. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005), citing *Batson*, *supra* at 89, 96-98. A three-step process is involved in determining whether a party improperly exercised a peremptory challenge. *Bell*, *supra*.

First, there must be a prima facie showing of discrimination based on race. To establish a prima facie case of discrimination based on race, the opponent of the challenge must show 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. The *Batson* Court directed trial courts to consider all relevant circumstances in deciding whether a prima facie showing has been made. [*Id.* at 282-283. (citations omitted).]

“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.” *People v Knight*, 473 Mich 324, 337; 701 NW2d 715 (2005), citing *Batson*, *supra* at 97. The proponent need not make “an explanation that is persuasive, or even plausible.” *Knight*, *supra*, quoting *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). “Rather, the issue is whether the proponent’s explanation is facially valid as a matter of law.” *Knight*, *supra*, citing *Hernandez v New York*, 500 US 352, 360; 111 S Ct 1859; 114 L Ed 2d 395 (1991) (plurality opinion). “Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination.” *Knight*, *supra* at 337-338, citing *Batson*, *supra* at 98.

In the present case, the trial court initially concluded that defendant made a prima facie showing of purposeful discrimination and that the prosecutor articulated a race-neutral explanation for the strike. On appeal, neither party challenges these findings by the trial court. Rather, defendant’s contention on appeal is focused on the third step of *Batson*, i.e., the trial court’s determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination. This Court reviews a trial court’s determinations in these regards for clear error. *Knight*, *supra* at 344-345.

The lower court record reveals that the prosecutor articulated three race-neutral reasons for dismissing the challenged juror. First, the prosecutor noted that the challenged juror was relatively young and, in a case involving a charge of first-degree criminal sexual conduct, a younger person might have difficulty handling the details of the case and interacting with her fellow veniremembers in a mature fashion. Second, the prosecutor noted that the challenged juror gave distinct and “tightlipped” answers to her questions, giving the prosecutor the impression that the challenged juror would not open up to the other jurors and “could possibly be a bit of a lone wolf.” Third, the prosecutor indicated that she watched the challenged juror enter the courtroom and noted that the challenged juror failed to make eye contact or engage her when she asked questions during voir dire.

Following the prosecutor’s argument relating to her race-neutral reasons for striking the challenged juror, defense counsel argued that the prosecutor’s reasons were insufficient. Defense counsel noted that other young female jurors, who were white, were still present on the jury. The trial court subsequently found that the prosecutor’s challenge of the challenged juror was not a pretext and that defendant had failed to show purposeful discrimination. The trial court partially based its decision on a comparison of the reasons the prosecutor dismissed two other African-American jurors, noting that a lack of nonverbal communication and a subjective feeling about a particular juror were sufficient race-neutral explanations for striking a juror.

We conclude that the trial court's findings were not clearly erroneous. "The United States Supreme Court has observed that [d]eference to trial court findings on the issue of discriminatory intent makes particular sense in this context because . . . the finding largely will turn on evaluation of credibility." *Knight, supra* at 344 (internal quotation marks and citations omitted). The prosecutor's proffered reasons for dismissing the challenged juror were sufficient and race-neutral. Further, there is little evidence in the lower court record to suggest to this Court that the prosecutor's reasons were a pretext. "[T]he best evidence" regarding the reasons for dismissing a juror "often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province." *Id.* at 345 n 13. Accordingly, defendant has failed to show that the trial court committed clear error.

Next, defendant argues that his convictions and sentences for four counts of first-degree criminal sexual conduct violate principles of double jeopardy. We agree. The United States and Michigan Constitutions protect against multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004). Here, evidence of only two instances of sexual penetration, both of which occurred during the commission of the kidnapping and while defendant was armed, were introduced by the prosecution at trial. The prosecution rightly concedes that because a single act of penetration accompanied by multiple aggravating circumstances cannot result in multiple convictions and sentences under MCL 750.520b, defendant could properly be convicted of only two counts of first-degree criminal sexual conduct. See *People v Johnson*, 406 Mich 320, 331; 279 NW2d 534 (1979). Accordingly, we vacate two of defendant's convictions and sentences for first-degree criminal sexual conduct, and remand this case for amendment of the judgment of sentence to specify that defendant stands convicted of two counts of first-degree criminal sexual conduct, each supported by two alternative theories, MCL 750.520b(1)(c) (sexual penetration in circumstances involving commission of another felony) and MCL 750.520b(1)(e) (sexual penetration by an actor armed with a weapon).

Affirmed in part, vacated in part, and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter