

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES JHALMA DRAIN,

Defendant-Appellant.

UNPUBLISHED

June 29, 2004

No. 246014

Wayne Circuit Court

LC No. 02-004012

Before: Owens, P.J., and Kelly and Gribbs,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, 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, MCL 750.227b. Defendant was sentenced to time served for the felon in possession of a firearm conviction, life imprisonment for the first-degree murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant first argues that a new trial is required because the prosecutor violated his equal protection rights by using peremptory challenges in a discriminatory manner to excuse African-American jurors. The proper focus of such a claim generally requires consideration of whether the defendant established that the prosecutor improperly used peremptory challenges to excuse prospective jurors on account of their race and, if so, the appropriate remedy for this error. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

Ordinarily, when a defendant raises a *Batson* challenge to a prosecutor's use of peremptory challenges, a three-step process is employed. First, the defendant must make out a prima facie case of purposeful discrimination.¹ *People v Barker*, 179 Mich App 702, 705; 446

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

¹ To establish a prima facie showing of racial discrimination in the exercise of peremptory challenges, "the opponent of the challenge must (1) show that members of a cognizable racial group are being peremptorily removed from the jury pool and (2) articulate facts to establish an
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NW2d 549 (1989), aff'd 437 Mich 161 (1991). Second, if the defendant makes the requisite showing, the prosecutor must come forth with a racially neutral explanation for the challenged juror. *Batson*, supra at 97; *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). The trial court must then decide whether the defendant established purposeful discrimination. *Batson*, supra at 98; *Howard*, supra at 534. The critical question in resolving this third step is the persuasiveness of the prosecutor's justification for the peremptory challenge. *Miller-El v Cockrell*, 537 US 322, 338-339; 123 S Ct 1029; 154 L Ed 2d 931 (2003). The trial court's decision is a finding of fact that is entitled to deference by an appellate court. *Id.* at 339-340. The trial court's findings of fact in evaluating a *Batson* claim are reviewed by an appellate court under the clearly erroneous standard. *Id.* at 340.

But a defendant's need to establish a prima facie case as part of the *Batson* process is rendered moot if the prosecutor offers a race-neutral explanation for a peremptory challenge and the trial court rules on the ultimate question of purposeful discrimination. *United States v Jackson*, 347 F3d 598, 604-605 (CA 6, 2003). In *Batson*, supra at 99 n 24, the United States Supreme Court indicated that the decision regarding how to implement its decision, and possible remedies for curing a finding of discrimination, would be left to the state courts, but suggested two possible remedies: (1) to discharge the venire and select a new jury from a panel previously not associated with the case, or (2) to disallow the discriminatory challenge and resume jury selection with the improperly challenged juror reinstated to the venire.

Here, defendant did not raise the *Batson* issue at trial. Rather, the trial court sua sponte raised the issue by stating, "I note for the record that [the prosecutor] has excused nine jurors, seven of whom are black women, I'm sorry, six black women and one black male. And I'm challenging you for cause on that and you will have to give me a reason for excusing any other black jurors in this case." Defendant remained silent as the prosecutor offered reasons for excusing past prospective African-American jurors and the trial court determined that the prosecutor was "consistently excluding black jurors based on their race." Notwithstanding the trial court's determination that the prosecutor had excused African-American jurors based on their race, defendant continued to remain silent as the trial court elected to proceed with jury selection, with the sole remedy for the alleged earlier discrimination being that the prosecutor would be required to give a reason for excusing any additional African-American jurors. Subsequently, after one more African-American was peremptorily excused as a juror, defendant again remained silent as the trial court stated, "Ladies and gentlemen, you will be the jury in this case. We are going to go with 13 jurors rather than 14 jurors."

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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. *Batson v Kentucky*, 476 US 79, 96; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Here, the parties agree that defendant is African-American and that the challenged jurors at issue were also African-American. Thus, the first element of the prima facie case was established. However, because the trial court raised the issue of the prosecutor's use of peremptory challenges sua sponte, the second element was not clearly established since the trial court simply announced that the prosecutor had excused six African-Americans, that it was clear to the judge that the prosecutor had "consistently excluded black jurors based on their race," and that "It is a systematic exclusion."

Although a trial court may sua sponte raise a *Batson* issue to challenge a litigant's use of peremptory challenges to prospective jurors, a trial court's decision to do so does not excuse it from properly implementing the *Batson* process to resolve the claim. See *People v Bell (On Reconsideration)*, 259 Mich App 583; 675 NW2d 894 (2003), lv grt'd __ Mich __ (2004). Nor does it excuse a defendant from preserving his rights by objecting to the prosecutor's conduct or to the ultimate jury empanelled at trial. "[T]o properly preserve a challenge to the jury array, a party must raise the issue before the jury is empanelled and sworn." *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003), citing *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996).

The record in this case discloses that the trial court did not properly implement the *Batson* procedure when sua sponte finding that the prosecutor had excused African-American jurors based on their race. Nonetheless, we conclude that defendant waived the error, thereby extinguishing this issue. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001); *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). As our Supreme Court stated in *Sampeer v Boschma*, 369 Mich 261, 265; 119 NW2d 607 (1963), quoting from *LeBeau v Telephone & Telegraph Construction Co*, 109 Mich 302, 305; 67 NW 339 (1896), "It seems to be pretty well settled that, after one has knowledge of an irregularity, he cannot remain silent, and take his chances of a favorable verdict, and afterwards, if the verdict goes against him, base error upon it."

Here, the record indicates that the trial court proceeded in a manner acceptable to defendant, notwithstanding defendant's knowledge of the trial court's finding of a *Batson* violation. The defense sat silently as the prosecutor offered her reasons for excluding African-American jurors, as the trial court announced its determination that the prosecutor had exercised peremptory challenges in a discriminatory manner and that the prosecutor would be required to give a reason for excusing any additional African-American jurors as a remedy for the past discrimination, and when, following the peremptory dismissal of one more juror, the trial court announced that a jury had been selected and trial would proceed with the jury as then seated. To hold otherwise would permit defendant to harbor error as an appellate parachute. *Riley, supra* at 448. Because a waiver extinguishes any error, we need not consider this issue further. *Carter, supra* at 216.

II

Defendant next argues that there was insufficient evidence of premeditation and deliberation to sustain his conviction of first-degree murder. We disagree. The elements of a crime may be satisfactorily proved from circumstantial evidence and reasonable inferences arising from that evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Viewed in a light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), the testimony describing the circumstances under which the victim was shot was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant killed the victim with premeditation and deliberation. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003); *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). The evidence indicated that the victim was seated in a car that was parked along a street with the engine running. The victim told a pedestrian, Andria Baker, that she was waiting for defendant. Baker observed defendant

approaching the victim's car. Baker subsequently heard a gunshot and saw sparks coming from a gun that defendant was firing into the car where the victim sat. The victim sustained three gunshot wounds to her head and upper body, one of which entered her back, passed through her lung, and lodged in her heart, causing her death. There was no evidence that the victim was armed or that the shooting was provoked by an action of the victim. After the shooting, defendant saw Baker fleeing from the scene and, before departing, he took the time to let Baker know that he saw her and could identify her.

The foregoing evidence was sufficient to enable the jury to infer beyond a reasonable doubt that defendant had an opportunity to subject the nature of his response to a "second look." *Gonzales, supra* at 641; *Plummer, supra* at 300. It was not necessary for the prosecutor to disprove every reasonable theory consistent with innocence. *Nowack, supra* at 400. Hence, the evidence was sufficient to sustain the premeditation and deliberation elements of defendant's first-degree murder conviction.

III

Defendant next argues that the trial court erred by failing to properly instruct the jury on the order of deliberations, contrary to *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). We hold that defendant waived this instructional claim by responding negatively to the trial court's question whether there were any objections to the court's instructions. *Carter, supra* at 215; *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Nonetheless, we will consider the issue because defendant alternatively argues that his attorney's failure to object to the trial court's instructions constituted ineffective assistance of counsel. *People v Curry*, 175 Mich App 33 42; 437 NW2d 310 (1989). "To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Viewed as a whole, *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003), the trial court's instructions did not convey, expressly or implicitly, that the jury must acquit defendant of first-degree murder before considering the lesser offense of second-degree murder. Therefore, defendant has not established the requisite prejudice to prevail on a claim of ineffective assistance of counsel, because he has not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

IV

Finally, defendant argues that the trial court abused its discretion in denying his motion for a new trial.² We disagree.

² We reject the prosecutor's claim that defendant abandoned this issue by not providing a
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Initially, we note that defendant's failure to cite the factual basis for his arguments could preclude appellate review. A party may not leave it to this Court to search for a factual basis to sustain or reject a position. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Regardless, we are not persuaded that the trial court abused its discretion by denying defendant's motion.

A trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). An appellate court reviews a trial court's decision to deny a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A mere difference in judicial opinion does not establish an abuse of discretion." *Id.* at 691, citing *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999). We review the trial court's factual findings for clear error. *Id.* Factual findings are sufficient if it appears that the court was aware of the issues in the case and correctly applied the law. *People v Armstrong*, 175 Mich App 181, 185; 437 NW2d 343 (1989).

Here, the record shows that the trial court appropriately analyzed defendant's motion under the standards governing newly discovered evidence, giving due regard to specific standards that have been judicially applied in situations involving recanted testimony. *Cress*, *supra* at 692; *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977); see also *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). As the trial court observed, courts have traditionally regarded recanted testimony as suspicious and untrustworthy. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992).

It is apparent from the trial court's decision that it viewed the audiotape of the posttrial conversation between Baker and defendant's mother with suspicion. The trial court found Baker's trial testimony that she was threatened by defendant and his girlfriend before testifying in this case to be compelling. Baker provided little substantive testimony under oath at the evidentiary hearing because she pleaded the Fifth Amendment in response to many questions. In general, no inferences can be drawn from a witness' exercise of the Fifth Amendment. See *People v Dyer*, 425 Mich 572, 579; 390 NW2d 645 (1986). At the evidentiary hearing, Baker did not recant her trial testimony. Rather, she indicated that her discussion with defendant's mother was about a police detective.

Regardless, the evidence regarding the audiotaped conversation was consistent with Baker's trial testimony that she saw defendant at the shooting scene. It did not directly contradict Baker's trial testimony that she saw sparks coming from a gun, but rather indicated that Baker expressed a willingness to admit to perjury, made broad statements about committing perjury, and made a specific statement that she did not see defendant pull the trigger. The evidence regarding the audiotaped conversation was also consistent with trial evidence that Baker was a reluctant witness. Although the audiotaped conversation focused on whether Baker was pressured to testify at trial by a police detective, the evidence at trial indicated that Baker was a reluctant witness from the onset, providing statements for the police and prosecutor's

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transcript of the evidentiary hearing in connection with this issue. The transcript was filed after the parties' briefs were filed.

office in which she identified defendant as the perpetrator only after being contacted by the police for questioning, and testifying at the preliminary examination only after being arrested as a material witness.

Examining defendant's proffered evidence in the context of both the testimonial proofs at the evidentiary hearing and the trial record, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. Although the trial court did not articulate a specific finding that defendant's proffered evidence was not such as to render a different result probable on retrial, it is apparent from the trial court's findings that it was aware of this issue and properly resolved it. *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992), citing *People v Armstrong*, 175 Mich App 181, 185; 437 NW2d 343 (1989). The trial court could properly question the veracity of defendant's proffered evidence and its probable result on retrial. Its denial of a new trial did not result in a miscarriage of justice. Accordingly, we affirm the trial court's decision denying defendant's motion for a new trial.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs