

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 7, 2014

v

CHRISTIAN BELL,

No. 315196
Wayne Circuit Court
LC No. 12-006721-FJ

Defendant-Appellant.

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Christian Bell of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Bell raises several challenges to his convictions and sentence, most of which are unpersuasive. But because the trial court failed to apply the three-step inquiry required under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), we must remand for a properly conducted *Batson* hearing. Accordingly, we affirm in part, but retain jurisdiction and remand for a *Batson* hearing conducted pursuant to this opinion.

I. UNDERLYING FACTS AND PROCEEDINGS

Early on a February morning, defendant's 18-year-old sister, Chesica Bell, collapsed and died in the bathroom of her home. Eventually, an autopsy revealed that Chesica had an enlarged heart and abnormal coronary vasculature, and had suffered an acute heart attack. Before the pathologist could explain Chesica's tragic and unexpected death, defendant concluded that Chesica's boyfriend, Nathaniel Webb, had killed his sister. Hours after Chesica's death, defendant texted his father: "daddy, my sista is really gone because of him. I'm gonna kill him."

That same day, mourners including Webb and defendant gathered at Chesica's family home. Defendant's mother described defendant as "devastated" over Chesica's death, the cause of which would remain unknown to the family for a few more days. Defendant obtained a handgun from inside the home and confronted Webb. In his trial testimony, defendant described the events preceding the shooting as follows:

I walked outside, I seen [sic] Nate and I said can I talk to you. He was getting into his car; I ran up to his car; put my door [sic] in his-between his door before he closed it and I asked him can I talk to you. He wanted me to move my

arm and I just kept asking him can you please talk to me; and then I got emotional, I start crying. I said can you at least come in the house and talk to my mama. He just-he said [f***] you and your mama.

Defendant admitted that he “just lost it,” his “emotion[s] took over,” and he started shooting. He explained, “I wasn’t thinking. My head wasn’t straight, I just blanked out.”

After firing three times, defendant disposed of the gun in a dumpster, threw his cell phone on the ground, and fled to Kentucky. Webb died at a nearby hospital. While defendant remained on the lam, the police obtained a warrant to search defendant’s cell phone history and text messages. The police eventually apprehended defendant and he stood trial in the Wayne Circuit Court. He now appeals his second-degree murder conviction and his sentence.

II. JURY COMPOSITION

A. THE VOIR DIRE

We begin by considering defendant’s contention that the prosecutor improperly exercised two peremptory challenges during jury selection based on racial motivations, and that the trial court erred by failing to properly evaluate defendant’s objection to the challenges pursuant to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Our review of the voir dire confirms that the trial court misapprehended its *Batson* responsibilities and thereby denied defendant a meaningful *Batson* hearing.

The voir dire of potential jurors consumed the entire first trial day and part of the second. On the first day, the prosecutor exercised her third peremptory challenge to strike Ethel Thomas, an African-American woman. With her fifth strike, the prosecutor eliminated Gary Fizer, an African-American man, from the jury. At that point, defense counsel asked for a sidebar conference with the court. The sidebar conversation was not transcribed. The record indicates that the court permitted the challenge and dismissed Mr. Fizer.

The next morning’s session commenced with the following colloquy:

Defense Counsel: Yesterday, your Honor, during the process of jury selection, sister Counsel began by -- I shouldn’t say began -- dismissed Prospective Juror Ethel Thomas, in Se at [sic] No. 14. She was an African/American female.

Your Honor, I believe, and I think my count -- I might be off by one, but I think I’m pretty accurate. We started off with eight or nine African/Americans, in this particular pool.

As the Court is aware, three of whom basically took themselves off, for reasons of; they could not be fair; they’d either suffered tragedies, or what have you. They could not be fair.

So now we're down to six, which is not the fault of anyone. Not the fault of the Court, and I don't even -- I certainly wouldn't put that on Ms. Clark [the prosecutor].

But the facts remain that obtaining some kind of diversity within the jury panel, that's reflective of the community, is a goal that is -- that is a goal that's sought to be achieved. It's being addressed by the Federal Courts. And I believe it has been addressed by this particular Court.

Ms. Thomas was removed by peremptory, and certainly sister Counsel doesn't have to justify the use of peremptories.

But what we're concerned about is the establishment of a pattern of getting rid of African/Americans without -- for an issue that is not -- for reasons that are separate from race.

Ms. Thomas indicated that she could be fair. She seemed to have issues on both sides. Some that could be interpreted pro defendant; some could be interpreted pro People

But she said she could be fair. Ms. Clark decided to get rid of her. That's her right.

We then had Mr. Fizer, who's an African/American gentlemen [sic] who was sitting in Seat Five.

Mr. Fizer indicated that he could be fair. Mr. Fizer indicated that he sat on several juries before. And that he basically could be a fair jurist.

Ms. Clark then got rid of him. I believe -- and this is strictly up to the Judge's interpretation -- there is no case law which says how many blacks, or minorities, or individuals of certain race do you have to get rid of to establish a pattern.

But I'm going to argue, given the small number of African/Americans within the jury pool, and the fact that Ms. Thomas was already gotten rid of, that getting rid of Mr. Fizer, who's been qualified to sit on many juries, who said he could be fair, really established that pattern.

And after the man said he can be fair, you can sometimes read one's body language, when a individual seems to be hedging, or somewhat reluctant, you're almost pulling it out of them, "Yes, I think I can be fair."

This man was adamant to the extent that he said he can be fair to both sides.

I believe a pattern was established by Ms. Hagaman-Clark, and I'm not trying to disparage her, but I think a pattern was established, in violation of Batson.

And I brought this to the Court's attention at sidebar. The Court ruled against me. Allowed -- I asked that Mr. Fizer stay; the Court rules against me. But I wanted to make my record for the Appellate Court.

Thank you.

The Court: Okay.

Would you like to make a record, Ms. Hagaman-Clark?

Prosecutor: If I could just have one moment.

In order to raise the issue of a Batson challenge, which is Batson versus Kentucky, under 476, [sic] US 79, a 1986 case, the defendant must first initially establish a prima facie case of purposeful discrimination, based on race.

To establish a prima facie case, the following must be shown:

First, the defendant is a member of a -- or the juror is a member of a consignable [sic] racial group.

Second, the plaintiff has exercised a peremptory challenge to exclude a member of a certain racial group from a jury pool.

And that all the relative circumstances raise an inference that the proponent of the challenge excluded a prospective juror on the basis of race.

That the Prosecutor did not try to remove all blacks from the jury is strong evidence against the showing of discrimination.

The Defense in this case cannot even rise to the level of showing a prima facie case of discrimination.

There were, I believe this Court has excused six people for Cause. Three of them were black females.

This court has excused more blacks than I have.

There were two white males and one white female that were excused.

I have excused two black folks; one black woman, one black man. I've used a total of six peremptory challenges. And the remainder of my peremptory challenges have been on white females.

There are still black folks on the jury. I believe that there's still one perspective [sic] juror in the pool that is African/American. And there are currently three sitting.

We don't even have a prima facie case. And it is a three step process. In order to move on to Step 2 and 3, the Defense first has to rise to that level. And he can't.

So, unless the Court now is directing me to put my reasons on the record, I don't believe that he's even gotten to that point yet.

The Court: That is the Court's ruling, that there is not a prima facie showing at this time.

Also, I would not [sic] that Ms. Thomas, Juror No. 14, who was dismissed, I believe her brother had been killed within the last two years in the City of Detroit.

And you know, obviously she had said she could be fair, but that's certainly a reasonable reason that that might have been playing on the Prosecutor's mind.

And also, with regard to Juror No. 5, I distinctly remember several times him mentioning that the defendant reminded him of his grandson. And he has some hesitation in saying, "Well, this bothers me because he reminds me of my grandson."

I think those are articulable reasons, as well. Even though we don't have to go beyond the prima facie that there's a reason why those jurors may not have been right to sit on this jury.

And therefore, I'm going to deny your Batson Motion, and we are ready to proceed.

The racial composition of the jury that convicted defendant does not appear in the record.

B. THE *BATSON* FRAMEWORK

Trial courts faced with a *Batson* challenge must proceed according to a well-established, three-step framework. Evidence raising merely an inference of discrimination surmounts the first *Batson* step, creating a prima facie case. Here, the trial court erroneously adopted the prosecutor's unsound legal reasons for rejecting that defendant demonstrated a prima facie case. The trial court compounded that error by offering its own reasons for the prosecutor's strikes, and (unsurprisingly) by deeming those reasons nondiscriminatory. Because the trial court's process bore no meaningful similarity to the *Batson* framework, we must remand for a proper *Batson* hearing.

In *Batson*, 476 US at 89, the United States Supreme Court held that a prosecutor is forbidden from challenging potential jurors based solely on their race “or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.” The Supreme Court explained in *Batson* that racially-motivated peremptory challenges harm not only the accused, but also the excused jurors and “the entire community.” *Id.* at 87. “Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” *Id.* More recently the Supreme Court elucidated: “When the government’s choice of jurors is tainted with racial bias, that ‘overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. . . .’ ” *Miller-El v Dretke*, 545 US 231, 238; 125 S Ct 2317; 162 L Ed 2d 196 (2005) (citation omitted).

In *Batson*, the Supreme Court set forth a three-step framework for discerning whether a prosecutor has improperly exercised a peremptory challenge. First, the defendant must establish a prima facie case of purposeful racial discrimination “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” *Batson*, 476 US at 93-94. If a prima facie case is made out, the burden shifts to the prosecutor, who must offer race-neutral explanations for her exercise of peremptory challenges. *Id.* at 97. Once the prosecutor has made that proffer, the defendant may argue that the stated reasons are pretextual. The trial court then makes a final determination of whether the defendant has established purposeful discrimination. *Id.* at 98. As we emphasize later in this opinion, a *Batson* challenge should be assessed when raised. Postponing a *Batson* analysis until after the challenged jurors have left the courtroom and the racial composition of the jury has changed, as likely occurred here, renders the task of reviewing *Batson* challenges unnecessarily difficult.

C. THE PRIMA FACIE CASE

The three-step burden-shifting inquiry outlined in *Batson* mirrors that used in employment discrimination cases. *Id.* at 93. To establish a prima facie case, the opponent of the strike must show that “the totality of the relevant facts gives rise to an inference of discriminatory purpose.” *Id.*, quoting *Washington v Davis*, 426 US 229, 239-242; 96 S Ct 2040; 48 L Ed 2d 597 (1976). The predicate inference consists of three parts. First, the defendant “must show that he is a member of a racial group capable of being singled out for differential treatment,” *Batson*, 476 US at 94, and second that the prosecutor used peremptory challenges to excuse from the venire members of the defendant’s race. *Id.* at 96.¹ Lastly, the defendant must draw upon the facts and “any other relevant circumstances” to create an inference that the prosecutor excluded prospective jurors because of their race. *Id.* “For example, a ‘pattern’ of strikes against black jurors included in the particular venire might give rise to an inference of

¹ The Supreme Court later clarified that the party challenging allegedly unconstitutional peremptory juror strikes need not share the race or ethnicity of the challenged jurors. *Powers v Ohio*, 499 US 400, 415-416; 111 S Ct 1364; 113 L Ed 2d 411 (1991). In such cases, the defendant is deemed to raise “third-party equal protection claims of jurors excluded by the prosecutor because of their race.” *Id.* at 415.

discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Id.* at 97. Demonstration of a prima facie case does not entail an "onerous" showing." *Johnson v California*, 545 US 162, 170; 125 S Ct 2410; 162 L Ed 2d 129 (2005).

Here, the parties disagree only regarding the third aspect of the prima facie case: whether the prosecutor's strikes of two African-American jurors raised an inference of discrimination. Accordingly, we train our sights on that question.

D. THE PRIMA FACIE CASE, APPLIED

People v Knight, 473 Mich 324; 701 NW2d 715 (2005), guides our review of the trial court's *Batson* ruling. Pursuant to *Knight*, the first *Batson* step presents "a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review. A trial judge must first find the facts and then must decide whether those facts constitute a prima facie case of discrimination under *Batson* and its progeny." *Id.* at 342. Application of the clear error standard is impossible because the trial court made no factual findings.² Compounding that error, the trial court adopted wholesale the legal arguments advanced by the prosecution. And those arguments were deeply flawed.

Defense counsel's *Batson* objection rested on two allegations: that a pattern of discrimination had been established by the elimination of Ms. Thomas and Mr. Fizer, and that the challenged jurors' voir dire answers reflected their qualifications to sit, thereby suggesting that race motivated the strikes. The prosecutor advanced three grounds for rejecting that defendant had established a prima facie case. First, the prosecutor contended that her failure "to remove all blacks from the jury is strong evidence against the showing of discrimination." She continued:

I have excused two black folks; one black woman, one black man. I've used a total of six peremptory challenges. And the remainder of my peremptory challenges have been on white females.

There are still black folks on the jury. I believe that there's still one perspective [sic] juror in the pool that is African/American. And there are currently three sitting.

² The trial court and counsel conducted an unrecorded discussion regarding defendant's *Batson* challenge, which counsel raised immediately after the prosecutor struck juror Fizer. Unfortunately, the trial court did not address defendant's objection at that time. As discussed in greater detail below, without the benefit of a snapshot of the jury's composition at the time of defense counsel's *Batson* challenge, we cannot determine whether defendant succeeded in establishing a prima facie case.

We acknowledge that this Court has previously stated, in dicta, “ ‘[t]hat the prosecutor did not try to remove all blacks from the jury is strong evidence against a showing of discrimination.’ ” *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004), quoting *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). This dicta incorrectly states the law.

Batson contemplates that “a single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.” *Batson*, 476 US at 95 (quotation marks omitted). The Supreme Court reiterated this point in *Johnson*, 545 US at 172: “Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race.” In *Lancaster v Adams*, 324 F3d 423, 434 (CA 6, 2003), the Sixth Circuit further elaborated:

Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor’s impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*. Recently, this Court reached precisely this conclusion when we rejected the proposition that “the failure to exclude one member of a protected class is sufficient to insulate the unlawful exclusion of others.” [*Id.*, quoting *United States v Harris*, 192 F3d 580, 587 (CA 6, 1999).]

In *United States v Battle*, 836 F2d 1084, 1086 (CA 8, 1987), the Court of Appeals for the Eighth Circuit emphasized that “under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.” The United States Supreme Court cited this statement approvingly in *Snyder v Louisiana*, 552 US 472, 478; 128 S Ct 1203; 170 L Ed 2d 175 (2008). In that case, the Supreme Court found that the trial court committed clear error by permitting the strike of a single African-American juror because the explanation for the strike was “by itself unconvincing and suffice[d] for the determination that there was a *Batson* error.” *Id.*

Batson does not require the trial court to insure that a defendant’s venire is racially balanced. But nor does *Batson* hold that the presence of some African-Americans on a defendant’s jury immunizes a racially-motivated peremptory strike. Fundamentally, *Batson* guarantees a defendant, the members of the venire, and the public a jury-selection process free from discrimination, whether manifested by a single improper strike or a series of them. Thus, the prosecutor’s decision to forego challenging some African-American jurors does not automatically negative an otherwise established inference of discrimination.

The prosecutor’s second argument against a prima facie case, that the trial court “has excused more blacks than I have,” lacks any relevance whatsoever to whether the trial court could infer that the *prosecutor’s* strikes were improperly motivated. The trial court struck jurors for cause. The number of those strikes adds nothing to the *Batson* inquiry.

The prosecutor's third argument against the existence of a prima facie case involves mathematics. The prosecutor insisted that she had exercised more peremptory challenges against Caucasian jurors than against African-Americans, and that three African-American jurors remained in the jury box. The prosecutor asserted: "I have excused two black folks; one black woman, one black man. I've used a total of six peremptory challenges. And the remainder of my peremptory challenges have been on white females."

Because the trial court did not hold a contemporaneous *Batson* hearing and made no independent factual findings, we are unable to simply accept the prosecutor's representation regarding the number of African-American jurors in the venire at the time defendant raised his objection. The racial composition of defendant's venire on the second day of voir dire may or may not have mirrored the racial composition of the jury at the relevant moment—when defendant invoked *Batson*. While the prosecutor's numbers likely were accurate when she offered them, they do not necessarily reflect the composition of the jury at the time of the challenge.

After the prosecutor dismissed Mr. Fizer, two additional jurors were peremptorily removed, and (including the juror who replaced Mr. Fizer) three new jurors were seated. These changes, involving almost half the number of potential jurors eventually seated, may have altered the jury's racial composition. Cold review of the transcript does not permit us to ascertain the relevant data point: the number of African-American jurors in the venire *when the prosecutor struck Mr. Fizer*.³

Thus, the record also does not allow us to evaluate the accuracy of defense counsel's claim that "given the small number of African-Americans within the jury pool," the elimination of Ms. Thomas and Mr. Fizer "really established [a] pattern." Had there been no other African-American jurors in the venire at that time, or only one or two, the strikes of Thomas and Fizer would have eliminated from the venire a substantial percentage of the minority jurors, thereby raising an inference of discrimination. We reiterate that an inference of discrimination may also arise independent of the numbers. At the prima facie stage, evidence merely suggesting discriminatory purpose suffices to move the inquiry to the next stage. Defense counsel offered such evidence by arguing that Ms. Thomas and Mr. Fizer qualified as unbiased jurors.

The requisite inference of discrimination is simply "a conclusion reached by considering other facts and deducing a logical consequence from them." *Johnson*, 545 US at 168 n 4 (quotation marks and citation omitted). A defendant may create an inference of discrimination

³ We take this opportunity to point out yet another flaw in the prosecutor's reasoning regarding the establishment of a prima facie case. The prosecutor posited that no prima facie case had been established because only two of her six peremptory challenges involved black jurors. But as Judge Easterbrook explained in *Hooper v Ryan*, 729 F3d 782, 786 (CA 7, 2013), this equation focuses on the wrong "denominator." The correct method to determine a mathematically significant pattern of strikes involves consideration of the characteristics of the venire: "The denominator in such analysis is the number of black and white persons in the venire, not the number of peremptory challenges exercised." And that number does not appear in the record.

“by relying solely on the facts concerning . . . selection [of the venire] *in his case.*” *Batson*, 476 US at 95 (emphasis in original). Those facts include the number of African-Americans jurors in the venire at the time of the strikes, the voir dire answers of those who were struck as compared to those who were not struck, and the prosecutor’s statements and questions during the voir dire. An inference of discrimination may arise even absent a discernible “pattern” of strikes. The Supreme Court has clarified that in *Batson*, “[w]e declined to require proof of a pattern or practice because ‘[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.’” *Johnson*, 545 US at 169, n 5 (some quotation marks and citation omitted).

With the first *Batson* step, the defendant need not establish that race motivated the prosecutor’s strikes. As we have emphasized, the defendant need only produce “sufficient facts and any other relevant circumstances” that “raise an *inference* . . . of purposeful discrimination.” *Batson*, 476 US at 96 (emphasis added). Steps two and three are designed to resolve whether discriminatory purpose actually motivated the strikes.

Moreover, at no time does the trial court’s personal speculation concerning the reasons for the strikes play any part in the inquiry. A trial court’s expression of hypotheses supporting the prosecutor’s reasons for exercising certain peremptory challenges runs afoul of *Batson*, which instead focuses on the motives of the person who actually made the strike. See *Johnson*, 545 US at 172-173. The Supreme Court made it abundantly clear in *Johnson* that neither trial nor appellate courts may supply justifications for peremptory challenges that otherwise raise an inference of discrimination. See also *Miller-El*, 545 US at 252 (noting that the *Batson* analysis is not a “mere exercise in thinking up any rational basis” for a prosecutor’s decision).

Here, none of the legal arguments made by the prosecutor sufficed to rebut a prima facie case, and the trial court made no factual findings that assist us in deciding whether a prima facie case existed. Accordingly, we must remand for a proper *Batson* inquiry. In selecting this remedy we are guided by the decisions of numerous other appellate courts confronting abbreviated or improper *Batson* inquiries. The Vermont Supreme Court has observed:

[T]he decisions are uniform that unless the passage of time makes it impossible, the appropriate remedy where the trial court fails to follow *Batson*, and does not make a finding that the challenger has made out a prima facie case of discrimination, is a new *Batson* hearing in which the trial court must go through the three-step process mandated by that decision. [*State v Donaghy*, 171 Vt 435, 442; 769 A2d 10 (2000) (collecting cases).]

On remand and within the next 42 days, the trial court and the parties must reconstruct the racial composition of the venire at the time the prosecutor struck Mr. Fizer. If the parties are successful in this endeavor, the trial court must then consider defendant’s argument that the strikes of jurors Thomas and Fizer gave rise to an inference of discrimination. In ruling on this question, the trial court must place its factual findings and legal conclusions on the record. If the

parties and the trial court are unable to confidently reconstruct the racial composition of the jury at the time of the challenge, the trial court must proceed to step two of the *Batson* inquiry.⁴

If the trial court determines that defendant has established a prima facie case of discrimination or if the parties stipulate to the existence of a prima facie case, the burden shifts to *the prosecutor* to articulate race-neutral reasons for the strikes. *People v Bell*, 473 Mich 275, 283; 702 NW2d 128 (2005). “The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing.” *Id.* Only after considering the prosecutor’s stated reasons for the challenge, and after permitting such argument on the subject as the trial court deems appropriate, may the trial court decide whether the defendant has demonstrated purposeful discrimination. *Id.* We retain jurisdiction regarding this issue.

III. CELL PHONE SEARCH

Defendant further contends that the investigating officers violated his Fourth Amendment rights by securing a search warrant without probable cause and based on inadequate information. In the search warrant affidavit, Detroit police sergeant Michael McGinnis described that he went to the home of defendant’s father, Chestria Bell, in an attempt to locate defendant. Bell informed Sergeant McGinnis of defendant’s cellular telephone number. Sergeant McGinnis requested a court order to secure and search defendant’s cell phone records, including the content of text messages and tracking information, which motion was granted.

Defendant filed a motion to quash the search warrant and suppress the information gathered during the search, arguing that Sergeant McGinnis took no steps to investigate the reliability of the sole informant named in the affidavit, i.e. defendant’s father. Specifically, defendant challenged that Sergeant McGinnis failed to determine whether defendant and Chestria “keep[] up with” each other so that Chestria would know that the cell phone number “allegedly given is not stale.” Defendant argued that the affidavit failed to provide any verification that Chestria was actually defendant’s father or that the informant truthfully identified himself as “Chestria Bell.” Defendant’s challenge continued that the affidavit included “no information that there’s anything in the phone that relates to this homicide.” The trial court rejected defendant’s challenge. As a result, evidence that defendant texted his father about his desire to kill Webb was admitted at trial.

A search warrant must be based on probable cause. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). Probable cause exists when “all the facts and circumstances would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched.” *Id.* When reviewing a magistrate’s decision that probable cause existed to issue a search warrant, our review is limited to determining whether “ ‘the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed.’ ” *People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct

⁴ Alternatively, the parties may stipulate that defendant established a prima facie case of discrimination, and move on to the second step.

2317; 76 L Ed 2d 527 (1983). “Because of the strong preference for searches conducted pursuant to a search warrant, a magistrate’s decision regarding probable cause should be paid great deference.” *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006). When reviewing a trial court’s decision on a motion to quash a search warrant, however, we review the court’s factual findings for clear error and the application of constitutional standards to uncontested facts de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

The problem with defendant’s challenge to the adequacy of the search warrant is that “Michigan courts . . . consider identified citizens and police officers to be presumptively reliable.” *People v Powell*, 201 Mich App 516, 523; 506 NW2d 894 (1993). See also MCL 780.653(a). In an attempt to avoid this maxim, defendant contends that the man named “Chestria Bell” identified in the search warrant affidavit is not an “identified citizen” because the affidavit does not assert that the officer inspected the man’s driver’s license to verify his identity. There simply is no legal requirement that an officer include such information in a search warrant affidavit. In fact, a court must read a search warrant affidavit “in a commonsense and realistic manner to determine whether a reasonably cautious person could have concluded that there was a substantial basis for finding probable cause.” *Martin*, 271 Mich App at 298. Reading the current search warrant affidavit in a reasonable and commonsense manner, the officer did all that was required to support his probable cause assessment. The officer visited an address connected to defendant’s father in order to search for defendant. At the residence, the officer met Chestria, the person identified as defendant’s father. Chestria spoke to the officers as defendant’s father and provided defendant’s cell phone number. Even if the officer did not ask to review Chestria’s driver’s license, he had reason to believe that Chestria was who he said.

Defendant also contends that the affidavit failed to provide any connection between the homicide and defendant’s cell phone. In reviewing Sergeant McGinnis’s affidavit in a commonsense and realistic manner, a substantial basis existed for the court to conclude that there was a fair probability that evidence of the homicide could be found on defendant’s cell phone. *Ulman*, 244 Mich App at 509. The search warrant affidavit provided that defendant’s sister, who had a child with the deceased, had passed away earlier that day. The affidavit then described the details of the shooting, and provided that defendant had been identified as the shooter in a photographic lineup and could not be located. On the basis of the facts and circumstances surrounding the homicide, a reasonable person would believe that evidence of defendant’s whereabouts and conversations before and after the shooting, defendant’s state of mind, and the location of physical evidence, could be found on defendant’s cell phone. Consequently, the affidavits were adequate to support a determination that probable cause existed to issue the search warrants and therefore the trial court properly denied defendant’s motion to suppress.

IV. MANSLAUGHTER JURY INSTRUCTION

At the close of proofs, defendant requested that the court instruct the jury on the lesser offense of voluntary manslaughter. The court refused and instructed the jury on first and second-degree murder alone. We discern no error in this regard.

We review de novo claims of instructional error, *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), but for an abuse of discretion the trial court’s determination whether a jury instruction is applicable to the facts of the case. *People v Dobek*, 274 Mich App 58, 82; 732

NW2d 546 (2007). Voluntary manslaughter is a necessarily included lesser offense of murder because the elements of voluntary manslaughter are subsumed by the elements of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). A court must give a requested instruction for a necessarily included lesser offense “if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

A voluntary manslaughter instruction was not supported by a rational view of the evidence in this case. In order to prove voluntary manslaughter, “one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.” *Mendoza*, 468 Mich at 535. Provocation is a circumstance that negates the presence of malice, by causing a reasonable person to lose control. *Id.*; *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The provocation must cause a reasonable person to act out of passion rather than reason, and the determination of what is reasonable provocation is a question of fact for the fact finder. *Pouncey*, 437 Mich at 390. The *Pouncey* Court emphasized that although the determination of what is reasonable provocation is a question of fact:

the judge does play a substantial role. The judge furnishes the standard of what constitutes adequate provocation, i.e., that provocation which would cause a reasonable person to act out of passion rather than reason. When, as a matter of law, no reasonable jury could find that the provocation was adequate, the judge may exclude evidence of the provocation. [*Id.*]

Defendant was likely distraught due to his sister’s death earlier in the day, and, as he claims, defendant may have “just lost it” and “blacked out.” It is also possible that Webb uttered profanities directed toward defendant and his mother just before the shooting. However, the evidence suggests that defendant was not acting in the heat of passion upon adequate provocation. Defendant interacted with Webb throughout the day as the family gathered to mourn the loss of his sister. During that time, defendant questioned Webb concerning the events surrounding his sister’s death and suspected that Webb somehow played a role. Approximately 40 minutes before the shooting, defendant left the home and went to the store, where he sent a text message to his father that stated, “daddy, my sista is really gone because of him. I’m gonna kill him.” Defendant then went back to the house, and consciously obtained a handgun from his mother’s upstairs closet before he went outside to talk with Webb and Webb’s brother. While defendant did not fire until Webb used a profane expression, defendant had armed himself before deliberately initiating a hostile confrontation. Furthermore, although words may sometimes suffice to supply adequate provocation, more than “mere insults” are usually required. *Pouncey*, 437 Mich at 391. Under these circumstances, the trial court did not abuse its discretion in declining to read the voluntary manslaughter instruction.

V. OFFENSE VARIABLES

Finally, defendant challenges the scoring of offense variables (OVs) 3, 6, and 19 in calculating his minimum sentencing guidelines range. When this Court reviews a claim that the scoring of the sentencing guidelines was erroneous, the trial court’s findings of fact are reviewed

for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). “Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.*

OV 3 is scored to reflect the physical injury suffered by a crime victim. A court must score 25 points if the victim suffered “[l]ife threatening or permanent incapacitating injury. MCL 777.33(1)(a). The court assigned 25 points because Webb died as a result of his injuries. Our Supreme Court upheld the scoring of 25 points for OV 3 when the victim’s death is caused by a convicted act of homicide. *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005). Defendant contends that *Houston* was wrongly decided and argues based on MCL 777.33(2)(a), that a defendant cannot be scored points for OV 3 when he or she is convicted of homicide. The statute merely provides that a court may not score 100 points for OV 3 when the sentencing offense is homicide. Moreover, we are bound by *Houston* to affirm the scoring of this variable. *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

OV 6 is scored to reflect a defendant’s intent to kill or injure another. And the sentencing court is required to score OV 6 “consistent with the jury verdict unless the judge has information that was not presented to the jury.” MCL 777.36(2)(a). The sentencing court assigned 25 points for OV 6, reflecting that defendant “had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result,” MCL 777.36(1)(b), consistent with defendant’s second-degree murder conviction. Defendant contends that the court’s failure to give a voluntary manslaughter jury instruction improperly interfered with his right to be scored 10 points for OV 6, reflecting that his “intent to injure or the killing was committed in an extreme emotional state caused by an adequate provision and before a reasonable amount of time elapsed for the offender to calm.” See MCL 777.33(1)(c). As discussed above, however, the evidence did not support the reading of this instruction and defendant cannot claim prejudice in the scoring of his offense variables on this identical ground.

A defendant is scored under OV 19 when his or her conduct involves a “threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services.” MCL 777.49. The trial court scored OV 19 at ten points, which is appropriate when “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice.” MCL 777.49(c). This score was based on defendant’s acts of leaving the crime scene, disposing of the gun, and fleeing to Kentucky after the shooting. This Court affirmed scoring 10 points for OV 19 based on evidence that the defendant hid the evidence of his crime in *People v Ericksen*, 288 Mich App 192, 204; 793 NW2d 120 (2010). Accordingly, defendant’s act of disposing of the murder weapon standing alone was sufficient to support his score.

We affirm in part, but remand to the trial court to conduct a *Batson* hearing consistent with this opinion. We retain jurisdiction.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher

Court of Appeals, State of Michigan

ORDER

People of MI v Christian Bell

Docket No. 315196

LC No. 12-006721-FJ

Jane M. Beckering
Presiding Judge

Joel P. Hoekstra

Elizabeth L. Gleicher
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, *People v Bell*, unpublished opinion per curiam of the Court of Appeals (Docket No. 315196), the trial court is ordered to conduct a *Batson* hearing. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 07 2014

Date


Chief Clerk