STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL EARL YOUNG,

Defendant-Appellant.

UNPUBLISHED
April 8, 1997

No. 176222
Saginaw Circuit Court
LC No. 93-008386-FC

Before: Markman, P.J., and O'Connell and D. J. Kelly*, JJ.

PER CURIAM.

At a jury trial in connection with the 1990 murder of Marvelle Toney, defendant Young was convicted of first-degree murder, MCL 750.316; MSA 28.548, carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423, and use of a firearm in the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). He was tried together with codefendants Rosie Lee Miller (No. 176226) and Martha Calbert (No. 176224). Young was sentenced to concurrent prison terms of life without possibility of parole for first-degree murder and three and a third to five years for carrying a dangerous weapon, both of which were to be served consecutive to the mandatory two-year sentence for felony-firearm. We affirm.

The evidence at trial established that, in the late evening of May 26, 1990, Marvelle Toney and Miller were involved in a dispute outside a nightclub (Soul Survivors Club) during which Miller chased Toney with a crowbar that she removed from the trunk of her car. After the altercation, Miller went to Calbert's house and said that she was going to kill the person who had fought with her. Calbert is Miller's sister. Once at Calbert's house, Miller went into a room and was seen loading and cocking a gun. Young, a nephew of Miller and Calbert, said that Miller should let him (Young) kill the guy and he placed a long gun in the trunk of Miller's car. The three defendants, along with Jennifer Clemmons, Barbara Barns and one other person, then drove to the Soul Survivors Club. En route, they discussed who would lure Toney out of the club. When they arrived at the club, Calbert lured Toney into a

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

position where Young could shoot him by telling Toney that she had car trouble. Young shot Toney twice and he died of a gunshot wound.

Defendants were not arrested for Toney's murder until 1993. On December 31, 1993, while awaiting trial in the instant case, Young was mistakenly released from prison. In a separate prosecution, it was charged that, after this release, he killed a clerk at a 7-Eleven store in Saginaw. Young was undergoing the preliminary examination for the charges arising from the 7-Eleven killing when this trial was about to begin and, as a result, there was considerable television and newspaper coverage focused upon Young. One newspaper article stated that Young was awaiting trial for a 1990 slaying and that eight of his relatives were "behind bars," including four who were facing charges of murder.[1]

Young first claims that the trial court abused its discretion when it denied his motion for a change of venue in light of pretrial publicity relating to the 7-Eleven killing. He also makes a related claim that the trial court erred in refusing to excuse several jurors for cause on the basis of their exposure to this pretrial publicity. This Court reviews decisions to deny a challenge for cause for an abuse of discretion. *Jalaba v Borovoy*, 206 Mich App 17, 23; 520 NW2d 349 (1994); *People v Thomas*, 86 Mich App 752, 761 (1978); 273 NW2d 548 (1978).

Pretrial publicity, alone, does not necessitate a change of venue. *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992).

> Rather, to be entitled to a change of venue, the defendant must show that there is either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it, or that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice.
>
> When a juror, although having formed an opinion from media coverage, swears that he is without prejudice and can try the case impartially according to the evidence, and the trial court is satisfied that the juror will do so, the juror is competent to try the case. [*Passeno*, *supra* at 98-99; citations omitted.]

In *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996), this Court held:

> A defendant who chooses to be tried by a jury has a right to a fair and impartial trial. The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially. In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire. *People v Tyburski*, 445 Mich 606, 619, 518 NW2d 441 (1994); MCR 6.412(C). [Citations omitted.]

Here, Young presented the trial court with copies of two newspaper articles and argued that the television coverage was extensive but did not demonstrate that the publicity was such that jurors

exposed to it could not remain impartial, that the jury was actually prejudiced against him or that the atmosphere surrounding the trial created a probability of prejudice. The trial court carefully conducted individual voir dire of potential jurors and excused those jurors who were unable to swear that they could try the case impartially. The trial court was able to assemble a jury of persons who swore that they were capable of setting aside any information they had previously heard regarding defendants. While there may have been close questions regarding whether jurors might have been genuinely "unconsciously influenced" by the pretrial publicity, see *Poet v Traverse City Osteopathic Hospital*, 433 Mich 228, 239; (1989), we find no abuse of discretion in the trial court's decisions to deny the challenges for cause at issue. A review of the voir dire in this case convinces us that jury impaneled was fair and impartial, and therefore, that Young was not entitled to a change of venue.[2]

Young next argues that the trial court abused its discretion in denying his motion for additional peremptory challenges. MCR 6.412(E)(2) states in pertinent part, "On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges." At the end of the fifth day of voir dire, Young requested additional peremptory challenges because of the pretrial publicity. He argues that additional peremptory challenges were necessary because he had already used all of his peremptories while the prosecutor had nine or ten peremptories left. The trial court properly noted that it had carefully excused for cause those jurors who could not decide the case impartially; in the selection process, it struck more than twenty-five percent of the potential jurors for cause. Although Young knew of the pretrial publicity prior to the start of voir dire, he waited until five days had passed before asking for additional peremptories. While the prosecutor entered the final day of jury selection with more remaining peremptories, the fact that Young had none remaining was his own choice because he knew the number of peremptory challenges available at the beginning of voir dire. Accordingly, the trial court did not abuse its discretion in determining that the pretrial publicity did not constitute good cause for granting additional peremptory challenges here. See *People v King*, 215 Mich App 301, 304; 544 NW2d 765 (1996).

In a reply brief, Young raises for the first time a claim that the voir dire procedure violated MCR 2.511(F). Because Young did not object below to the procedure used by the trial court, a violation of this court rule would not require reversal. See *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987). We will nonetheless briefly address this issue. Young's specific complaint is that challenged jurors were replaced in a predetermined order rather than by blind draw.[3] MCR 2.511(F) states:

> After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge exercised, another juror must be selected and examined before further challenges are made. This juror is subject to challenge as are other jurors.

MCR 2.511(F) does not specifically direct the manner in which the trial court is to select a juror to replace the seat of a successfully-challenged juror; it states only that a replacement juror must be "selected and examined before further challenges are made." The procedure used here adequately complied with this requirement. We find no manifest injustice occurred as a result of this jury selection process.

Finally, in a supplemental brief, Young claims that he was denied a fair trial by the prosecutor's closing argument that allegedly referred to the unrelated 7-Eleven murder charges pending against him. He specifically challenges the following portion of the prosecutor's closing argument:

> Murder is murder, whether it happened in the south side of Saginaw or Frankenmuth or Saginaw Township. Doesn't matter whether the victim of a murder is a young black man, an older white lady from the suburbs, murder is murder.

The charges at issue arose out of the murder of a young, black man on the south side of Saginaw while the unrelated charges involved the murder of an older white woman from the suburbs at a 7-Eleven store in Saginaw Township. When preserved, this Court reviews claims of prosecutorial misconduct by evaluating the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Here, Young's counsel immediately objected to the reference to "white" and "suburb." The trial court stated, "I think he's moving on to a different area. I'm going to overrule it." The prosecutor did, in fact, immediately move on to a different topic. In his supplemental brief on appeal, Young concedes: "There was nothing wrong with the prosecutor's argument that the jury should take the murder of a young black man of questionable lifestyle as seriously as the murder of any other citizen." We believe that it was extremely bad judgment on the part of the prosecutor to make the challenged comments in light of the concern during voir dire regarding the publicity surrounding the unrelated charges. However, the comments were brief, ambiguous and arguably inadvertent. In the context of an otherwise appropriate closing argument, we do not find that they denied defendant a fair and impartial trial.

For these reasons, we affirm Young's judgment of sentence.[4]

Affirmed.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Daniel J. Kelly

[1] In addition to the three family members involved in the instant killing, a cousin of Young's was a codefendant in the 7-Eleven killing.

[2] Defendant Young also argues that the jury panel was further contaminated by talk among the jurors even after the trial court instructed them not to discuss the case. The record does not support this argument. After being questioned about this allegation, jurors indicated that the only discussion in the jury room was confined to a few comments regarding what trial they were being called for and the procedures to be used. None of the jurors heard anything substantive about the case in the jury room.

[3] Here, after the initial individual pretrial publicity voir dires, the procedure used was to initially seat twenty-eight potential jurors for general voir dire; to allow challenges to those seated in seats one

through fourteen; and to replace struck jurors with potential jurors seated in seats fifteen through twenty-eight in order. Then lots were drawn to seat another fourteen potential jurors in seats fifteen through twenty-eight for general voir dire and the jury selection process was continued using the jurors in seats one through fourteen as the base jury. This procedure continued until a jury was selected.

[4] Appellant's motion to file supplemental brief is granted.