

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH T. ROBINSON,

Defendant-Appellant.

UNPUBLISHED

August 26, 1997

No. 195877

Recorder's Court

LC No. 95-010596

AMENDED

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree murder, MCL 750.316; MSA 28.548, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of felony firearm, MCL 750.227b; MSA 28.424(2). He appeals as of right. We affirm.

I

Defendant first argues the prosecution improperly used its peremptory challenges to exclude African Americans from the jury. We review for clear error. *Hernandez v New York*, 500 US 352, 364-369 (Kennedy, J), 372 (O'Connor, J); 111 S Ct 1859; 114 L Ed 2d 395 (1991). *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986) held that the prosecution violates the equal protection rights of the defendant and the excluded jurors if it uses its peremptory challenges to purposefully exclude members of the defendant's race from the jury that ultimately hears the case. The defendant bears the initial burden to establish a prima facie case of purposeful discrimination. *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989). Once a defendant has established a prima facie case of discrimination, the prosecution must articulate racially neutral reasons, particular to the case to be tried, for its peremptory challenges, though this explanation need not rise to the level of a for cause challenge. *Id.* at 706. After the prosecution offers its reasons the trial court must decide if the defendant has established purposeful discrimination." *Barker*, 179 Mich App at 706.

The trial court, which was able to assess the prosecution's credibility in proffering its reasoning, found that there was justification for the challenges based on one prospective juror's prior involvement as a criminal defendant, two jurors' reservations about passing judgment, and one juror's fear of losing

too much money while serving on the jury. These explanations are racially neutral on their face; we find no error in the trial court's determination that the prosecution was not engaged in purposeful discrimination.

II

Defendant next challenges the trial court's grant of a motion in limine that prevented defendant from inquiring about a previous incident when the decedent stabbed her husband during an argument. The ruling precluded defendant from presenting to the jury his alternative theory that the decedent and her husband had another argument in which they shot each other.

The trial court's exclusion of this evidence was proper under MRE 401 (a fact that was not "of consequence to the determination of the action.") Defendant had not questioned the decedent's husband about this confrontation when the husband testified prior to the motion in limine, and thus the trial court did not abuse its discretion by concluding that this inquiry would be a fishing expedition into the character of two of the victims rather than an inquiry into a fact of consequence to the determination of defendant's guilt or innocence.

The trial court also could have excluded the evidence under MRE 403 as evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Other than defendant's speculation, there was no evidence before the trial court at the time of the motion, or at any time during the trial, to substantiate a claim that the husband had killed the decedent.¹

III

Defendant's final claim of error is that the trial court improperly prohibited him from using a "Kango" hat during closing argument for demonstrative purposes. We find no abuse of discretion.

"The purpose of closing argument is to allow attorneys to comment on the evidence and to argue their theories of the law to the jury. Closing argument is not the time to introduce new evidence." *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987), *aff'd* 431 Mich 506 (). The hat defense counsel wanted to use was apparently never identified by any of the witnesses as comparable to the hat defendant was wearing on the day of the shooting. Because defense counsel's hat might have been larger, smaller, or of a different shape altogether, the trial court did not abuse its discretion in prohibiting defense counsel's use of the hat.

It is unclear from the record whether the third victim of the shooting, Collins Dingle, identified the hat at issue. If so, the trial court's decision might have been an abuse of discretion. Assuming this occurred however, any error was harmless. The jury was able to see at least one "Kango" hat during closing because defense counsel noted the unfairness of allowing the *prosecution* to use a hat for demonstrative purposes during its closing (although there had been no objection). Along with the witnesses' descriptions of the hat, the jury was fully able to evaluate how the hat might have affected one witness' ability to identify defendant from across the street and the credibility of another witness'

testimony that the hat remained on defendant's head during a foot chase. The jury rejected any confusion about the hat by rendering a guilty verdict, and, as a result, defendant cannot show any prejudice from the limited restriction on his use of a non-admitted Kango hat during closing argument.

Affirmed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ Henry William Saad

¹ Even if the trial court erred in not allowing the questioning, we believe any error was harmless. Defendant's case rested on the strength of his alibi witnesses; the jury's guilty verdict indicates they did not find those witnesses credible. Instead, the jury believed the eyewitness identification of three witnesses who knew defendant.