

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DUANE CHILDS,
a/k/a DAVID DWAYNE CHILDS,

Defendant-Appellant.

UNPUBLISHED

June 26, 1998

No. 189500

Muskegon Circuit Court

LC No. 95-37947 FC

Before: MacKenzie, P.J., and Whitbeck and G.S. Allen, Jr.*, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.242(2). The trial court sentenced defendant to life imprisonment for the murder and assault with intent to murder convictions, thirty to sixty years for the armed robbery conviction, and two years' imprisonment for each of the felony-firearm convictions, to run concurrently with each other and consecutively to the other terms. Defendant appeals as of right. We affirm.

Defendant, an African-American, first argues that he was denied the effective assistance of counsel when his attorney failed to object to the prosecution's peremptory strike of the sole African-American venireperson. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In order to establish ineffective assistance of counsel, a defendant must demonstrate that trial counsel's performance was objectively unreasonable and that the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). Under the circumstances of this case, we conclude that defendant was not denied effective assistance of counsel.

The prosecution is prohibited from peremptorily striking African-Americans from a jury simply because of race when the defendant is also African-American. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *People v Barker*, 179 Mich App 702, 705; 446 NW2d

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

549 (1989). When the prosecution exercises a peremptory challenge to excuse an African-American venireperson, the burden initially falls on the defendant to establish a prima facie case of purposeful discrimination. *Id.* The burden then shifts to the state to come forth with a racially neutral explanation for the dismissal. *Id.*, p 706.

Assuming in this case that defense counsel could have established a prima facie case of purposeful discrimination in the selection of jury members, the prosecutor asserted legitimate race-neutral reasons for excusing the only African-American venireperson. The prospective juror's feelings of discomfort and pressure provided a sufficiently race-neutral rationale for the prosecution to use a peremptory challenge to excuse her from the jury. Furthermore, the evidence established that defense counsel's failure to object to the prosecution's peremptory challenge was strategic. The victims, the defendant, the main witnesses, and the investigating police officer in this case were all African-American, so defense counsel did not believe a juror's race would favor either the defense or the prosecution. Rather, counsel was concerned about impaneling jurors who would be sympathetic to defendant, and he was concerned that the stricken venireperson would sympathize with the victims. This was a legitimate strategy that this Court will not second-guess. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Because defense counsel's failure to raise a *Batson* challenge did not prejudice defendant and was a matter of trial strategy, defendant was not deprived of the effective assistance of counsel.

Defendant suggests that the underrepresentation of African-Americans in his jury array was the result of the state's failure to draw a jury from a fair cross-section of the community. However, defendant has failed to show that any alleged underrepresentation was due to systematic exclusion resulting from some circumstance inherent in the particular jury selection process used. *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997); *People v Hubbard (After Remand)*, 217 Mich App 459, 481; 552 NW2d 493 (1996). At best, defendant has established that African-Americans were underrepresented in his particular jury array. However, it is well settled that "[o]ne incidence of a jury venire being disproportionate is not evidence of a 'systematic' exclusion." *Howard, supra*, p 534, quoting *Timmel v Phillips*, 799 F2d 1083, 1087 (CA 5, 1986).

Defendant also argues that the evidence presented by the prosecutor in this case was so unreliable due to problems of witness credibility, that, when viewed in conjunction with the composition of the jury, the cumulative effect was to deny him a fair trial. We disagree. Defendant correctly asserts that witnesses in this case made inconsistent statements, lied in court, had felony records, and made deals with the prosecution in exchange for truthful testimony. Nevertheless, it is the function of the jury to determine what testimony is credible and to weigh the evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court must not interfere with the jury's role. *Id.* Because the composition of the jury was not flawed, and because the jury is the sole judge of the witnesses' credibility, we decline to reverse on this basis.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ William C. Whitbeck
/s/ Glenn S. Allen, Jr.