STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES EDWARD GATEWOOD,

Defendant-Appellant.

UNPUBLISHED
March 28, 2000

No. 207814
Genesee Circuit Court
LC No. 96-054896-FC

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, and sentenced to a term of five to fifteen years' imprisonment. He appeals as of right. We affirm.

I

Defendant argues that he was denied a fair trial because of three instances of prosecutorial misconduct. Issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). The test is whether the defendant was denied a fair trial. *Id.*

A

Defendant first argues that he is entitled to a new trial because the prosecutor displayed a pocket knife for illustrative purposes during his opening statement, even though it was not the pocket knife used during the incident. To this extent, defendant argues that the pocket knife was likely considered as evidence by the jury. In *People v Brisco*, 15 Mich App 428, 429; 166 NW2d 475 (1968), this Court stated:

> It has been ruled in Michigan that evidence exhibited to the jury but not offered or introduced is to all intents and purposes considered as evidence. The use of

> evidence in court inadmissible by direct offer, cannot be condoned—entry through the back door cannot be allowed where entry through the front door has been refused.

Here, unlike the cases on par with *Brisco*, a proposed exhibit was not simply placed on counsel's table where the jury could see it and draw inferences, nor was an exhibit shown that was later ruled inadmissible. Compare, *Brisco*, *supra*, *People v Johnson*, 83 Mich App 1, 13; 268 NW2d 259 (1978), and *People v James*, 36 Mich App 550, 556; 194 NW2d 57 (1971). Rather, in this case, it was made clear that the knife was not the knife used in the incident, and was not to be considered as evidence or an exhibit. In fact, during opening statement, the prosecutor stated that counsel did not have the knife used during the incident, but only defendant's description that the blade was about three inches in length, which was similar to the pocket knife displayed. Further, there was no suggestion made during trial that the knife displayed was the actual weapon used, or that defendant owned or possessed the displayed knife or other knives. Moreover, following the parties' opening statements, the trial court instructed the jury that the knife displayed was not the knife used in the incident, and was not an exhibit. Also, during its final instructions, the trial court instructed the jury that they should consider as evidence only those items that the court indicated was evidence. Finally, there was no dispute that defendant had killed the victim by stabbing him with a pocket knife. Accordingly, under the circumstances, we conclude that defendant was not denied a fair trial by the prosecutor's conduct of displaying a pocket knife to the jury.

B

Defendant next argues that he is entitled to a new trial because the prosecutor used the word "butchered" during a sidebar, even though at least two jurors were less than two-feet away and possibly overheard the remark. We disagree. First and most compelling, the trial court denied defendant's motion for a mistrial on this basis, concluding that the two jurors did not overhear the prosecutor, who was whispering. In addition, the trial court instructed the jury that the lawyers statements and arguments were not evidence. Accordingly, defendant is not entitled to relief on this basis.

C

Defendant also claims that he is entitled to a new trial because the prosecutor used the term "butcher" in his closing argument. Because defendant did not object to the prosecutor's remark at trial, appellate review is precluded unless a curative instruction could not have eliminated any possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

Our review of the record reveals that the challenged remark was intended as emotional and "hard language," based on the undisputed evidence that defendant had stabbed the decedent five times, including once in the heart, plus two additional "slashes" or cuts considered to be defensive wounds. Although prosecutors have a duty to see that a defendant receives a fair trial, *People v Duncan*, 402 Mich 1, 17; 260 NW2d 58 (1977), they properly may use emotional or "hard language" when it is supported by evidence; they are not required to phrase their arguments in the "blandest of all possible

terms." *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Considered in this context, the prosecutor's remark was not improper. Moreover, any prejudice that did arise from the remark could have been cured by a timely objection and curative instruction. Therefore, a miscarriage of justice will not result from our failure to review this unpreserved claim.

II

Defendant, who is an African-American, next argues that he was denied his constitutional right to an impartial jury when the prosecutor used a peremptory challenge in a discriminatory manner to strike the only African-American male juror in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). This Court reviews a trial court's ruling regarding a *Batson* challenge for an abuse of discretion. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996). This Court gives great deference to the trial court's findings "because they turn in large part on credibility." *Id*. at 320

In *Batson*, the United States Supreme Court held that the Equal Protection Clause prohibits a prosecutor from using peremptory challenges to strike African-Americans from an African-American defendant's jury simply because the jurors are African-American. The burden initially is on the defendant to make out a prima facie case of purposeful discrimination. *Batson, supra* at 93-94; *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989). In deciding whether the defendant has made a requisite showing of purposeful discrimination, a court must consider all relevant circumstances, including whether there is a pattern of strikes against African-American jurors, and the questions and statements made by the prosecutor during voir dire and in exercising his challenges. *Batson, supra* at 97. If a defendant makes such a prima facie showing of a discriminatory purpose, the burden shifts to the prosecutor, who must articulate a racially neutral explanation for challenging African-American jurors. *Id.* Mere statements of good faith or denial of a discriminatory motive are insufficient; rather, the prosecutor must articulate a neutral explanation related to the particular case being tried. *Id*. at 98. The trial court must then determine if the defendant has established "purposeful discrimination." *Id*.

Here, defendant failed to establish purposeful discrimination. Rather, defendant merely argued that the African-American juror was the only African-American male on the jury and that there were no "objectionable factors" that justified excusing him. However, the mere fact that a party uses one or more peremptory challenges in an attempt to excuse minority members from the jury venire, which is at most what was shown in the instant case, is insufficient to establish a prima facie showing of discrimination. *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996); *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Accordingly, defendant is not entitled to any relief on this basis.[1]

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry W. Saad

[1] We decline to address defendant's claim that the trial court erred in instructing counsel to hold certain jury objections until after voir dire because it was not raised in the statement of issues presented, *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990), nor supported with citation to authority, *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998); *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).