STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 2, 2001
v	No. 213742 Genesee Circuit Court
GEORGE HENRY MCGHEE, Defendant-Appellant.	LC No. 96-054903-FC

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) (sexual penetration by force or coercion), and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced, as a second habitual offender, MCL 769.10; MSA 28.1082, to 13 to 22½ years in prison for each CSC conviction. The CSC sentences are concurrent, but consecutive to a two-year sentence for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

I

Defendant first argues that he was deprived his right to a fair and impartial jury because the prosecutor used peremptory challenges to discriminate against African American jurors in violation of the procedures outlined in *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). This Court reviews a trial court's *Batson* ruling under an abuse of discretion standard. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997).

To establish a prima facie case of discrimination, the defendant must "show that he is a member of a cognizable racial group," that "the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race," and "that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Batson*, *supra* at 96. Once the defendant makes a prima facie showing of an inference of discrimination, the burden shifts to the prosecutor to "articulate a neutral explanation related to the particular case being tried." *Howard*, *supra*. "The United States Supreme Court has stated that unless a discriminatory intent is inherent in the reason offered, which does not have to be persuasive or even plausible, the

reason will be deemed race-neutral." *Clarke v Kmart Corp*, 220 Mich App 381, 384; 559 NW2d 377 (1996), citing *Purkett v Elem*, 514 US 765; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Once the prosecutor has articulated the reason for the challenge, "[t]he trial court must then determine if the defendant has established purposeful discrimination." *Howard, supra*.

Defendant, an African American, is a member of a cognizable racial group and the prosecutor used two peremptory challenges to excuse Calvin Ziglar and James Luster, the only two African American jurors to survive challenges for cause. The prosecutor explained her reasons for excusing the two jurors as follows:

> I was going to say the reasons are similar as to both of them. They were just giving some indication – Mr. Ziglar when he was talking about the robbery that he felt – Mr. Ziglar was sitting here and was the shorter bearded gentleman, was talking about the robbery and the case worker and that – I was just – I was getting bad vibes.
>
> I didn't feel that that was enough to challenge for cause. He didn't specifically tell me no, I couldn't be fair to you. But from the comments that he was making I got the feeling from his responses that the person who – who may suffer from any testimony that [sic] given would be the People.
>
> Same thing as I made choices as who I made to peremptorily challenge before. That's why you have the perempts. You don't have the reason other than the gut feeling, reactions from answers.
>
> And again, my recollection is rather the same thing as to Mr. Luster. There were – the – the interaction that I was gleaning information from was between the Court and Mr. Luster in the general questions.
>
> But as to – I'm sorry, Mr. Ziglar I had some interaction with him personally to clarify my feelings.

We conclude that there is no discriminatory intent inherent in the reasons offered by the prosecutor. A detailed review of the record reveals that the prosecutor could have reasonably believed Ziglar and Luster might be biased against the prosecution based on their comments about past experiences. Ziglar stated twice that his personal frustration with police might interfere with his ability to be a fair juror and that he might be prejudiced because of his experience. Also, Luster's three children were involved with the penal system and he specifically stated that his lengthy exposure to the court system would "[a]bsolutely" interfere with his ability to be a fair juror. While both Ziglar and Luster backed down from their initial statements when questioned further, it was reasonable for the prosecutor to conclude that they might not deliberate impartially if seated in this case.

Although not artfully stated, the prosecutor expressed that her concern for impartiality was the reason she peremptorily challenged both jurors. The prosecutor did not repeat specific comments made by each juror in justifying her challenges; however, the persuasiveness of her argument is not of paramount significance. *Purkett, supra* at 768. Having just heard the

potential jurors' responses, the trial court reasonably concluded that the prosecutor's action was non-discriminatory. A trial court abuses its discretion when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *People v Bahoda*, 448 Mich 261, 289 n 57; 531 NW2d 659 (1995), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). In light of the prosecutor's race-neutral explanation and defendant's failure to articulate a compelling argument for finding a discriminatory purpose,[1] we conclude that the trial court did not abuse its discretion in finding that defendant failed to establish purposeful discrimination.

II

Defendant also argues that he was entitled to a mistrial because the prosecutor failed to disclose a police report written by Davison Police Officer Barry Burghdorf. This Court reviews a trial court's decision to grant or deny a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*., quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Officer Burghdorf was present during defendant's arrest in Davison. However, because the sexual assaults took place in the City of Flint, Police Officer Dennis Smalley of the Flint Police Department took over the investigation. During cross-examination of Officer Burghdorf, it became apparent that he had referred to a police report that had not been produced by the prosecutor prior to trial. Defense counsel made an oral motion for a mistrial. The prosecutor asserted that she was unaware of the existence of the report prior to Officer Burghdorf's trial testimony.

Although not filed with this Court on appeal, the report at issue appears to corroborate Officer Burghdorf's testimony that one of the rape victims, Dixie Jackson, acknowledged the rapes on the day of defendant's arrest. This was contrary to the testimony of Jackson and Officer Smalley, who both stated that Jackson did not tell police that defendant raped her and the other victim, Cynthia Kauffman, until two months after the incidents.

It is well-established that a prosecutor has an affirmative duty to disclose to a criminal defendant evidence which might be exculpatory. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Holtzman*, 234 Mich App 166, 188; 593 NW2d 617 (1999). MCR 6.201(B) requires the prosecutor, upon request, to provide the defendant: (1) any exculpatory information or evidence known to the prosecutor; (2) any police reports concerning the case; (3) any written or recorded statements by the defendant; (4) all search and seizure information; and (5) any plea agreements or immunity agreements in connection with the case.

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[1] Defendant's counsel asserted merely that the prosecutor's peremptory challenges were "unfair" given that "the black-white issue" would come out during trial.

In this case, the police report was *inculpatory* in that it revealed that Jackson acknowledged to Officer Burghdorf the morning after the incidents that she and Kauffman were raped. Our Supreme Court has not definitively established whether a due process violation can occur when the prosecution fails to disclose *inculpatory* evidence. See *People v Elston*, 462 Mich 751, 762 (Corrigan, J.), 771 (Kelly, J., dissenting); 614 NW2d 595 (2000); see also MCR 6.201(B) (referencing only exculpatory evidence). Moreover, there is nothing to suggest that the prosecutor had any knowledge of Officer Burghdorf's report prior to trial. The parties obtained one or more reports from the Davison police prior to trial, but apparently were not provided the Officer Burghdorf's report.[2] In addition, the prosecutor did not attempt to use the contents of Officer Burghdorf's report as evidence at trial and the report was not offered as an exhibit. The prosecutor elicited Officer Burghdorf's testimony, without reference to the report. Because Officer Burghdorf was identified on the felony information as a potential witness, defense counsel had the opportunity to interview him and to discover the substance of his testimony prior to trial.

We also note that defendant has not shown he was prejudiced by nondisclosure of Officer Burghdorf's report. Defense counsel argued in his opening statement that Jackson did not tell the police the rapes occurred until two months after defendant's arrest. His theory appears to have been that Jackson became jealous after learning defendant was involved with an old girlfriend and later decided to join Kauffman's story about the rapes as revenge. Defendant maintains that his defense would have been different had he known about Officer Burghdorf's report. However, defendant was acquitted of all charges relating to the alleged crimes against Jackson whose statement was at issue in Officer Burghdorf's report. It appears, therefore, that the jury accepted defendant's contention that Jackson did not perceive their sexual encounter as rape. In contrast, it is undisputed that Kauffman immediately told police defendant assaulted her. It is unlikely that Officer Burghdorf's reference to his report had a direct affect on defendant's convictions with respect to his assaults on Kauffman. Finally, we refuse to conclude that defendant was prejudiced by the nondisclosure because defendant had not yet begun his case and he declined the trial court's offer of additional time to prepare in light of the undisclosed report. Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

III

Defendant next argues that the trial court erred in excluding Kauffman's preliminary examination testimony to impeach her during cross-examination at trial. This Court reviews a trial court's decision to exclude evidence for an abuse of discretion. *Howard, supra* at 551.

On direct examination at trial, Kauffman stated that defendant held a lit cigarette on her arm as he made her count to ten. When Kauffman reiterated her statement on cross-examination, defense counsel had her read an excerpt from her preliminary examination testimony. Thereafter,

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[2] Contrary to defendant's argument on appeal, it does not appear that the prosecutor wholly neglected to request reports from the Davison police department. Instead, it appears that the Davison police neglected to send the report at issue.

Kauffman acknowledged that she had testified defendant made her count "one, one thousand one, two, one thousand, three, one thousand." On redirect, Kauffman clarified that when she testified about the cigarette burn at defendant's preliminary examination, she began to count, merely to demonstrate the manner she was made to count, and that defendant actually held the cigarette to her arm until she counted to ten. On re-cross, defense counsel sought to read the portion of Kauffman's preliminary examination testimony referencing her and Jackson's cigarette burns. The trial court sustained the prosecutor's objection to the admission of the prior testimony.

We conclude that the trial court acted within its discretion in excluding further cross-examination on the issue. As noted above, Kauffman had already testified on redirect that the preliminary examination testimony at issue was her attempt to explain *how* defendant made her count, not *how high* he made her count. During the prior cross-examination, defense counsel actually read to Kauffman the question and her answer from the preliminary examination about the length of the cigarette burn. Further questioning about the issue would have been merely repetitive; defense counsel pointed out the discrepancy and Kauffman explained it.

To the extent Kauffman's preliminary examination testimony referenced the length of time defendant held the cigarette on Jackson's arm, that testimony was not inconsistent with Kauffman's trial testimony and, therefore, was not relevant to impeach her. Kauffman had not testified at trial about how long defendant burned Jackson and did not testify that he burned Jackson for a shorter period than herself. Therefore, Kauffman's preliminary examination testimony that defendant burned Jackson for a longer period was not contradictory evidence that would tend to disprove her exact trial testimony. See *People v McGillen No. 1*, 392 Mich 251, 268; 220 NW2d 677 (1974). In short, defense counsel had already tried to impeach the victim with the only portion of her prior testimony that may have been inconsistent or relevant to her testimony. It is well-settled that trial courts have the discretion to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, or relevance. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

IV

Finally, defendant argues that he is entitled to resentencing because the trial court based his sentences on an impermissible factor. This Court reviews a defendant's sentence for an abuse of discretion. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

Before sentencing defendant, the trial court noted that it was considering defendant's two previous felonies and multiple misdemeanors, which demonstrated defendant had "not been a socially compliant person during [his] life." The court stated that it was "appalled by the factual recitation of what happened" in this case and opined that defendant treats "women as chattel, as beasts and as slaves." The court further stated, "I find you to be dangerous. And I'm afraid that [the crimes] could happen again." The court noted that defendant was on a tether when he committed the crimes and that defendant falsified passes to go to work when he was actually unemployed. The court concluded that such conduct indicated defendant did not "respect the Court's rules." Prior to imposing the sentences, the court further noted that defendant "[s]howed little responsibility" to the three children he fathered out of wedlock.

On appeal, defendant claims that his sentences constitute an abuse of discretion because the trial court improperly considered the fact that he was an unwed father when imposing the sentences. In fashioning a defendant's sentence, the trial court should carefully consider the background of the offender and the circumstances surrounding the offense. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). Courts should consider those factors in light of the following objectives: "(1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses." *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999), citing *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).

While we do not believe a defendant's status as an unwed parent, itself, is a legitimate factor supporting an increased sentence, resentencing is not required in this case. The sentencing transcript indicates that the trial court based defendant's sentences on the circumstances of his crimes and defendant's criminal, social and personal history. It reasonably appears that the court's oral and written comments regarding defendant's marital status were intended to admonish defendant for his lack of concern about his children through his choice to continue a criminal lifestyle, without undertaking the responsibilities of being a parent. It is evident that the court sought to punish defendant for his crime and his consistent pattern of behavior that reflects a refusal to rehabilitate his irresponsible and criminal behavior, not for fathering children out of wedlock. A sentencing court may properly consider the circumstances of the crime, the nature of the crime, and the defendant's social and personal history. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). Finally, the trial court's comments did not constitute an exercise of impermissible personal bias. As this Court stated in *People v Antoine*, 194 Mich App 189; 486 NW2d 92 (1992):

> Sentencing is the time for comments against felonious, antisocial behavior recounted and unraveled before the eyes of the sentencer. At that critical stage of the proceeding when penalty is levied, the law vindicated, and the grievance of society and the victim redressed, the language of punishment need not be tepid. [*Id.* at 191.]

Under these circumstances, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Brian K. Zahra