STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 3, 2002
v	No. 226714 Kalamazoo Circuit Court
JOHN LEE MOSELEY, a/k/a BRIAN SYKES, Defendant-Appellant.	LC No. 99-000991-FC

Before: Griffin, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, carrying a concealed weapon, MCL 750.227, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to life imprisonment for the assault conviction, 76 months' to 30 years' imprisonment for the carrying a concealed weapon conviction, 76 months' to 30 years' imprisonment for the felon in possession of a firearm conviction, all to run concurrently, and to a preceding consecutive two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in denying his *Batson*[1] challenge to the prosecutor's use of a peremptory challenge to excuse an African-American prospective juror. Defendant contends that the reason the prosecutor gave for exercising its peremptory challenge, i.e., the lack of a high school education, "was, and is, not truly a race-neutral reason, and is a pretext for a race-based challenge." In the end, no African-Americans were selected to serve on the jury panel. We review a trial court's *Batson* ruling for abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1998).

The party asserting that an opponent improperly used peremptory challenges to remove jurors from a panel for racially discriminatory reasons must make a prima facie showing of discrimination. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319; 553 NW2d 377 (1996). "The mere fact that a party uses one or more peremptory challenges in an attempt to excuse minority members from the jury venire … is not enough to establish a prima facie

[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

showing of discrimination." *Clarke v KMart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996). Once the party makes a prima facie case of discrimination, the burden shifts to the opponent to articulate a race-neutral reason for the exercise of the challenges. *Id.* at 383-384; *Harville, supra*.

Here, defendant relied on the exclusion by preemptory challenge of one African-American juror[2] to establish a prima facie case of discrimination. Resting on that ground alone to establish a prima facie case of discrimination is insufficient. *Clarke, supra* at 383. Further, even if defendant were able to maintain a prima facie case of discrimination or was excused from doing so because the trial court ruled on the prosecutor's proffered race-neutral explanation, see *United States v Bishop*, 959 F2d 820, 824 (CA 9, 1991), we find that the prosecutor's explanation regarding the juror's lack of education[3] was sufficient to establish a race-neutral reason for the exercise of the challenge. Although defendant suggests that education may not be a race-neutral reason, the circumstances in the instant case do not support such a conclusion. Moreover, defendant's argument focuses on the complexity, or the alleged lack thereof, of the case. Defendant argues that because the present case was not complex, the prosecutor's explanation must be a pretext. See *United States v Moeller*, 80 F3d 1053, 1060 (CA 5, 1996). We disagree with defendant's characterization of this multi-count capital case and, accordingly, we find that the trial court's *Batson* ruling was not an abuse of discretion.

Defendant next argues that the trial court's failure to sustain objections to certain questions the prosecutor asked defendant violated his constitutional right to silence. Specifically, defendant complains that the prosecution improperly impeached him with his postarrest, post-*Miranda*[4] silence when, after defendant testified to his exculpatory version of the events, the prosecutor asked defendant whether he had ever told the police this story. The decision whether to admit evidence is within the trial court's discretion and will be reversed only if there was an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, any underlying issue of law is reviewed de novo; it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id*.

A defendant waives his right against self-incrimination when he takes the stand and testifies, and he may be impeached with evidence of both pre-arrest and post-arrest, pre-*Miranda* silence. *People v Dixo*n, 217 Mich App 400, 405-406; 552 NW2d 663 (1996). However, the use of a criminal defendant's post-arrest, post-*Miranda* silence to impeach his exculpatory story at trial violates the Due Process Clause of the Fourteenth Amendment. *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001); *Dixon, supra* at 406. In *Doyle*, the Court explained that silence in the face of *Miranda* warnings, at the time of arrest, cannot be used as evidence to cast doubt on the defendant's credibility. *Doyle, supra* at 619; *Dennis, supra* at 573-574.

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[2] The prosecutor exercised a challenge on another African-American prospective juror, however, defendant withdrew any challenge to that juror's removal after the prosecutor explained the rationale for the challenge.

[3] The prospective juror had an eighth-grade education.

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant bases his claim on several instances when the prosecutor inquired of him regarding whether defendant had told his story to the police. The most direct and potentially prejudicial instance occurred during the following exchange:

Q. Did you ever tell what you told the jury to any police officer before today?

A. No, sir.

Q. You were--you were shot by a police officer.

A. Yes, sir.

Q. And, you had plenty of opportunities afterwards to talk to police and never gave a statement to the police.

A. No, sir.

We begin our analysis by noting that defendant concedes that the record is devoid of any reference to defendant having been advised of or invoking his *Miranda* rights. This fact is important because the rule of *Doyle* is that the use of defendant's post-arrest, post-*Miranda* silence to impeach his exculpatory story is constitutionally precluded only after defendant receives *Miranda* warnings. *Doyle, supra.* Further undermining defendant's claim is the open-ended nature of the questions asked of defendant. The prosecutor's questions to defendant do not reference a specific time and place, but rather encompass the entire course of events from the shooting to the moment defendant takes the stand. This fact significantly undermines defendant's ability to demonstrate that the prosecutor's questions referenced a point in time when defendant may have been advised of his *Miranda* rights and could have been asserting his right to remain silent. Finally, we are mindful of the fact that from the first prosecution inquiry in this regard and during redirect examination defendant testified that he desired to tell the police his exculpatory story, but was denied the opportunity. In the context of these facts, we find that defendant does not have a valid claim that his constitutional right to silence was violated. In our view, it is unreasonable to conclude that the prosecutor's questions implicate the issue raised by defendant on appeal when the questions are not time specific, when *Miranda* warnings are not addressed in the testimony, and when defendant repeatedly testified that the police would not listen to him. See *People v Allen*, 201 Mich App 98, 102-103; 505 NW2d 869 (1993); see also *People v McReavy*, 436 Mich 197, 217-218; 462 NW2d 1 (1990).

Further, we believe that on the facts of this case, the purpose for identifying a post-arrest, post-*Miranda* inquiry as a Fourteenth Amendment due process violation is not served. In *Dennis, supra* at 573-574, our Supreme Court articulated two reasons why "silence in the face of *Miranda* warnings cannot be used as evidence to cast doubt on the defendant's credibility": 1) silence may reflect nothing more than an exercise of *Miranda* rights, and 2) *Miranda* warnings implicitly assure that silence in reliance on those warnings will not be penalized. With no evidence that defendant exercised his right to silence, and in fact, actively desired, but was prevented from, speaking to the police, or that reliance on *Miranda* warnings by defendant is being penalized, we conclude that defendant has no grounds to claim a due process violation.

Finally, defendant argues that the prosecutor committed three instances of misconduct. We review de novo claims of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). "The key test in evaluating claims of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Watson*, 245 Mich App 572, 594; 629 NW2d 411 (2001). First, defendant contends that the prosecutor's use of his post-*Miranda* silence was misconduct. We have already determined that the prosecutor's questions regarding defendant's silence were not improper, and no misconduct occurred.

Next, defendant contends that during cross-examination of defendant the prosecutor misused evidence introduced by stipulation of the parties solely to show that defendant had a prior felony conviction. Even assuming that defendant is correct that the prosecutor misused this evidence to make an improper point, this claim is unpreserved because defendant made no objection at trial. We find that had defendant objected at trial, a cautionary instruction could have cured any prejudice defendant suffered, and thus defendant is entitled to no relief. *Watson, supra* at 586.

Further, we agree with defendant that it was improper for the prosecutor to inform the jury that defendant requested lesser-included instructions. Because defendant preserved this claim by a timely objection, we must determine if the misconduct harmed defendant's right to a fair trial. *Id.* at 594.

The prosecutor's comments were in the context of his closing argument regarding the inconsistent nature of defendant's alternative arguments, i.e., I did not do it, but if I did I am only guilty of a lesser type of assault, not assault with intent to commit murder. A prosecutor is permitted to comment on defendant's theory of the case, *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), but we do agree that it was improper for the prosecutor to mention which party had requested the lesser-included instructions. However, we conclude that it would be unreasonable to suggest that because the jury heard that defendant had requested the instructions, the jury did not give them due consideration. Furthermore, the jury was instructed to only consider the evidence presented and that arguments were not evidence. Thus, we conclude that it is not more probable than not that such an error was outcome determinative, *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *Lukity, supra* at 495-496, and that defendant was not denied a fair trial as a result, *Watson, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra