STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEWAYNE PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
June 14, 2002

No. 225047
Calhoun Circuit Court
LC No. 99-002852-FC

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b (felony-firearm). The trial court sentenced defendant to life imprisonment for the murder conviction to run consecutive to a two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that he is entitled to a new trial on grounds of ineffective assistance of counsel. His claim is based on the fact that another attorney in his counsel's office was representing prosecution witness Sherod Reed in an unrelated criminal matter. Defendant argues that this presented a conflict of interest, of which he was unaware and did not waive. We find no merit to defendant's claim.

At the end of defendant's first trial, which resulted in a mistrial, the prosecution received additional information that led to the identification of Sherod Sedore and three others as new witnesses. On the first day of trial, the prosecution moved to amend its witness list to add them and was allowed to do so. When Sherod Sedore testified, however, he testified that his name was Sherod Reed. After the verdict was rendered in the case, defense counsel learned that another attorney in his office was representing Reed in another matter. Apparently, counsel checked to see if his office represented Sherod Sedore when the name first came to light; however, he never checked with respect to Sherod Reed.

A conflict is never presumed or implied. See *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). Rather, the defendant has the burden of establishing a prima facie case of ineffective assistance of counsel by demonstrating the existence of an actual conflict of interest that adversely affected the adequacy of his representation. *Id.*, citing *Cuyler v Sullivan*, 446 US 335, 348-350; 100 S Ct 1708; 64 L Ed 2d 333 (1980). In *People v Fowlkes*, 130 Mich App 828, 836; 345 NW2d 629 (1983), the defendant's counsel was aware of a potential conflict

and brought it to the trial court's attention on the first day of trial. The defendant's counsel was a member of the public defender's office and learned that another lawyer in the office had represented a codefendant earlier with respect to the case. The defendant planned to call the codefendant as a witness. *Id.* Because the codefendant had pleaded guilty and already was sentenced, this Court concluded that the defendant was not deprived of his counsel's undivided loyalty and that the defendant's defense was not "slighted for that of" the codefendant. *Id.* More importantly, this Court noted that it was impossible for the defendant to express how his counsel's representation may have been affected. *Id.* "To warrant reversal, the prejudice shown must be actual, not merely speculative." *Id.* See also *People v Clark*, 133 Mich App 619, 629; 350 NW2d 754 (1983).

In this case, defense counsel did not know of a potential conflict of interest and was completely unaware that another attorney in his firm was representing Reed. Under the circumstances, defendant cannot demonstrate any prejudice, i.e., he cannot articulate how his counsel's representation was affected by a conflict about which counsel was unaware. Thus, we find no actual conflict or prejudice.[1]

Defendant next argues that the prosecutor admitted irrelevant and prejudicial evidence that the police recovered a handgun, drugs, ammunition, and a sunbeam electronic scale from the residence where the shooting of the victim took place. Defendant argues that there was no foundation for the admission of the evidence, that the evidence was not related to the crime, and that it constituted other "bad-act" evidence in violation of MRE 404(b). When reviewing unpreserved evidentiary issues, we must determine if defendant has demonstrated the existence of a plain error, which affected his substantial rights, i.e., affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). If defendant demonstrates the aforementioned, this Court must then exercise its discretion in deciding whether to reverse. *Id.* at 763.

> Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id.* (citation omitted).]

Defendant's argument that the prosecutor denied him a fair trial by admitting this evidence is clearly misleading. The information about the gun, ammunition and scale was first introduced by defense counsel. In pursuing the defense theory that defendant was misidentified as the shooter, defense counsel cross-examined Rochelle James about the .45 caliber handgun that was found in the James' house. Defense counsel also elicited testimony from Rochelle that it was not uncommon for lots of people, whose names were unknown, to visit the James' house. Counsel then specifically asked Rochelle about the boxes of ammunition and "scales" that were

[1] To the extent that defendant argues that actual prejudice need not be shown, we disagree. Defendant relies on *People v Gallagher*, 116 Mich App 283, 287; 323 NW2d 366 (1982), however, unlike the defendant in *Gallagher*, defendant herein cannot articulate an actual or specific conflict that interfered with or potentially interfered with his counsel's representation. *Lafay*, *supra* at 530. Thus, defendant has not met his burden of showing that he was deprived of the effective assistance of counsel.

found in the house. On cross-examination of Bryan James, defense counsel asked about the .45 caliber gun, ammunition and illegal drugs. He asked Bryan about whether it was common for people visiting the house to use only their street names. Only after the evidence was mentioned by defendant did the prosecutor elicit related information from police witnesses. Defense counsel subsequently questioned the detective who collected the evidence and the detective admitted that firearms, scales and ammunition are things that can be found at a drug house.

Defense counsel asked about the items that were found at the James' house in order to better argue defendant's misidentification defense and to cast doubt on the credibility of Rochelle, Bryan and Sheila James. By design of defense counsel, the jury was informed that a lot of people came and went from the house, that the occupants did not know all of the people who came and went, that the occupants did not know the real names of people who came and went, and that items normally found in a drug house were found in the James' house. In addition to being relevant to the defense, the evidence was not prejudicial to defendant. Defendant did not live at the James' house and he maintained that he had never been there. His counsel elicited that his fingerprints were not found there. The evidence at issue reflected only on the credibility of the prosecution's witnesses. Because defendant introduced the evidence to support his defense and because the evidence was not prejudicial to the outcome of his trial, we find no plain error requiring reversal. We further note that "[a] defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "To do so would allow a defendant to harbor error as an appellate parachute." *Id.*

Defendant next argues that reversal is required because the prosecutor engaged in misconduct when he asked defendant's sister and grandmother during cross-examination whether they visited defendant *in jail*. Defendant argues that information that he was incarcerated was highly prejudicial. Because defendant did not object to the prosecutor's questions, this issue is not preserved.

> [A] defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error. In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." [*People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citations omitted).]

We disagree that any error requires reversal. Defendant's witnesses testified that they were present when defendant was arrested. Defendant's grandmother did not provide any alibi information to the police at that time or at any other time before trial and his sister claimed that she did not know the details of the crime until right before trial. The prosecutor attempted to discredit the alibi testimony by eliciting evidence that the witnesses may have spoken with defendant about the facts of the case and learned details to assist in providing the alibi defense. Toward this end, the prosecutor asked the witnesses whether they had talked to defendant since he was in jail. Defendant argues that the reference to his being in jail requires reversal. We disagree.

While the prosecutor could have refrained from referring to defendant's being in jail, any prejudice could have been cured by a curative instruction. See, e.g., *People v Taylor*, 110 Mich

App 823, 835; 314 NW2d 498 (1981) (where the prosecutor questioned the defendant about whether he received love letters while in jail, this Court found no error requiring reversal where a cautionary instruction was given that was adequate to dispel any prejudice). Further, defendant herein cannot demonstrate that the prosecutor's two references to defendant's jail status affected the outcome of the case. It was clear to the jury that defendant was arrested for the crime on which he was tried. The reference to his being in jail did not allude to any former confinement for any other crime. More importantly, defense counsel himself asked defendant about being in jail and Larry Williams testified, without objection, that he met defendant in jail. Therefore, the jury was aware or should have been aware that defendant was in jail after being arrested. There is no plain error requiring reversal. *Watson, supra.*

Defendant next argues that the trial court improperly excused the prosecutor from producing three witnesses. The prosecutor argued that, despite the exercise of due diligence, the witnesses could not be produced. Defendant objected to the request to excuse production of the witnesses. Thus, the issue is preserved. "The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales,* 243 Mich App 571, 577; 624 NW2d 439 (2000). This Court will not overturn a trial court's decision with respect to due diligence absent an abuse of discretion, and the determination of due diligence is a factual matter that will not be reversed unless clearly erroneous. *People v Lawton,* 196 Mich App 341, 347-348; 492 NW2d 810 (1992). The test for due diligence is whether diligent, good-faith efforts were made to produce the witness. *Id.*

At trial, a special record was made, outside the presence of the jury, about the prosecution's attempts to produce the three witnesses at issue. Having reviewed the special record, we uphold the trial court's rulings. With respect to Linda Simms and Denise Powell, the prosecution and police made diligent, good-faith efforts to locate them. They were not required to take every measure possible to secure and produce the witnesses at trial. *People v Cummings,* 171 Mich App 577, 585; 430 NW2d 790 (1988). With respect to Charles Brim, his name came to light only after the first trial, which ended in a mistrial on November 29, 1999. Nevertheless, the witness was located and actually served with a subpoena. He chose to ignore the subpoena. There was no information that the prosecutor anticipated this and it appears that Brim purposefully eluded testifying by not responding to the subpoena. Under the circumstances, the prosecutor took reasonable measures to secure Brim's presence at trial.

Defendant next argues that the trial court abused its discretion in allowing the late endorsement of Sherod Reed. The prosecutor learned about potential witness Michael Sedore toward the end of the first trial. The police investigated this lead and other names came to light. On December 3, 1999, the prosecutor notified defendant that it wanted to add four witnesses, including Sherod Sedore (a/k/a Reed) to its witness list. On the first day of trial, the trial court heard the prosecution's motion to add the new witnesses as possible alibi rebuttal witnesses. Defense counsel argued unfair surprise and pointed out that the witnesses were more likely res gestae witnesses, not alibi rebuttal witnesses. The trial court agreed that the witnesses' testimony belonged in the case-in-chief and it allowed the prosecution to add them to its witness list. It also informed defendant that he would have the opportunity to interview the witnesses and that an adjournment or recess could be taken.

> A trial court's decision to allow a late endorsement of a witness is reviewed for an abuse of discretion. An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. Stated differently, an abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. [*People v Gadomski,* 232 Mich App 24, 32-33; 592 NW2d 75 (1998) (citations omitted).]

"A prosecutor's late endorsement of a witness is permitted at any time upon leave of the court and for good cause shown. MCL 767.40a(4)." *People v Canter,* 197 Mich App 550, 563; 496 NW2d 336 (1992). In *Canter,* good cause was found where the witness was not identified until the middle of trial. *Id.* Here, too, good cause was shown. Michael Sedore was not identified until sometime at the end of the first trial. Only after investigating did the police learn of Sherod Sedore (a/k/a Reed). Within days, the prosecution attempted to add him to its witness list. We further note that, under the circumstances, the listing of the witness was not technically late because the prosecution had no duty to learn about Reed at an earlier time. See *People v Burwick,* 450 Mich 281, 290-291; 537 NW2d 813 (1995). It was only required to give advance notice of witnesses *known* to the prosecution. *Id.* Because the prosecution did not know about the witness, it could not have listed him at an earlier time. Moreover, the trial court provided defendant an opportunity to interview Reed and prepare for cross-examination. Thus, the trial court fashioned a remedy to account for any "unfair surprise." There was no abuse of discretion.

Defendant next argues that the trial court committed error requiring reversal when it refused to instruct the jury on the cognate lesser offense of voluntary manslaughter. We disagree. Where a defendant is convicted of first-degree murder and the jury rejects other lesser included offenses, the trial court's failure to instruct on voluntary manslaughter is harmless. *People v Sullivan,* 231 Mich App 510, 520; 586 NW2d 578 (1998), citing *People v Beach,* 429 Mich 450, 481, 490-491; 418 NW2d 861 (1988). Here, the jury rejected second-degree murder. Thus, any error with respect to the voluntary manslaughter instruction was harmless. *Sullivan, supra*. See also *People v Coddington,* 188 Mich App 584, 605-606; 470 NW2d 478 (1991).

Next, defendant argues that his first-degree murder conviction must be reduced to second-degree murder because there was insufficient evidence of premeditation and deliberation. When reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman,* 225 Mich App 103, 111; 570 NW2d 146 (1997).

In order to convict defendant of first-degree, premeditated murder, the prosecution had to prove that defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Kelly,* 231 Mich App 627, 642; 588 NW2d 480 (1998).

> Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from circumstances surrounding the killing. [*Id.* (citations omitted).]

Minimal circumstantial evidence is sufficient to prove an actor's state of mind. See *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). In *People v Plummer*, 229 Mich App 293, 300-301; 581 NW2d 753 (1998), this Court examined the issue of premeditation and stated:

> "[I]t underscores the difference between the statutory degrees of murder to emphasize that premeditation and deliberation must be given independent meaning in a prosecution for first-degree murder. The ordinary meaning of the terms will suffice. To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. As a number of courts have pointed out, premeditation and deliberation characterize a thought process undisturbed by hot blood. While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a 'second look.'["]
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> Though not exclusive, factors that may be considered to establish premeditation include the following: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. Premeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation.
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> A pause between the initial homicidal intent and the ultimate act may, in the appropriate circumstances, be sufficient for premeditation and deliberation. However, the Legislature's use of the words "willful," "deliberate," and "premeditated" in the first-degree murder statute indicates its intent to require as an element of that offense substantially more reflection on and comprehension of the nature of the act than the mere amount of thought necessary to form the intent to kill. As the Supreme Court has stated, "when a homicide occurs during a sudden affray ... it would be 'a perversion of terms to apply the term deliberate to any act which is done on a sudden impulse.'" To speak of premeditation and deliberation being instantaneous, or taking no appreciable time, destroys the statutory distinction between first- and second-degree murder. [Citations omitted.]

In this case, viewed in a light most favorable to the prosecution, there was sufficient evidence of premeditation and deliberation. Defendant attempted to control the actions of the victim and the person with whom the victim was arguing. When defendant was ignored, he fired a warning shot into the porch after stating, "Do y'all think I'm playin." When the victim turned to look at defendant, defendant raised the gun, pointed it at the victim's head, and fired. The evidence indicated that this occurred somewhere between a couple of seconds and a couple of minutes after the first shot. The evidence, viewed most favorably to the prosecution, indicates that defendant and the victim did not engage in any argument before defendant put the gun to the victim's head and shot. The gun was so close to the victim's head at the time of shooting that gun powder tattooing was found by the orbit of the victim's eye where the bullet entered. A

witness testified that defendant later stated that he was dating the victim's girlfriend and that, when the victim and "the girl" argued, defendant told the victim to leave. When the victim did not, defendant went inside the house, obtained a gun and shot it into the ground. He then raised the gun and shot the victim in the face. A rational jury could have found premeditation and deliberation based on the evidence presented.[2]

Defendant next argues that the trial court improperly denied his *Batson* challenge during jury voir dire. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Defendant objected when the prosecutor used a peremptory challenge to excuse the only black juror on the panel at the time. Defendant argues that the juror's removal was improper and that removal of the only juror of defendant's race satisfies the requirements necessary for a successful *Batson* challenge. Defendant's argument has no merit.

A *Batson* ruling is reviewed for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). *Batson* prohibits a prosecutor from exercising peremptory challenges to strike jurors solely on the basis of their race. *Batson*, *supra* at 96. "It is well-settled that the party opposing the strike must make a prima facie showing of discrimination before the burden shifts to the other party to provide a race-neutral rationale for striking the juror." *Clarke v Kmart Corp (After Remand)*, 220 Mich App 381, 383; 559 NW2d 377 (1996). In deciding whether a defendant has made a prima facie case of discriminatory dismissal,

> the trial court must consider all relevant circumstances, including whether there is a pattern of strikes against black jurors, the questions and statements made by the prosecutor during voir dire and in exercising his challenges, all of which may support or refute an inference of discriminatory purpose. [*People v Barker*, 179 Mich App 702, 705-706; 446 NW2d 549 (1989), aff'd 437 Mich 161 (1991), habeas corpus gtd on other grounds 199 F3d 867 (1999) (citation omitted).]

This Court also has stated that

> the race of a challenged juror alone is not enough to make out a prima facie case of discrimination. 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 showing of discrimination. [*Clarke*, *supra*, citing *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989).]

If there is no prima facie showing of purposeful discrimination, a prosecutor is not required to offer a neutral explanation for the use of the peremptory challenge. *Id.*; *Barker*, *supra* at 706.

> To overcome a claim of discriminatory purpose, the prosecution must provide a racially neutral explanation for peremptorily excluding racial minorities from the venire, and the trial court must decide if the defendant proved purposeful discrimination. [*People v Ho*, 231 Mich App 178, 184; 585 NW2d 357 (1998).]

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[2] We disagree with defendant that the evidence showed an accidental shooting.

In this case, there was no prima facie showing of purposeful discrimination. Defendant did nothing but point to the race of the juror who was removed. This is insufficient. *Clarke, supra.* Further, at the time defendant made the *Batson* challenge, the juror at issue was the first juror of defendant's race to be removed from the jury and the record indicates that there were other potential jurors of defendant's race in the venire. It is unclear whether any of those potential jurors sat on defendant's jury. Defendant failed to demonstrate any facts or circumstances to support an inference that the juror at issue was excused because of her race. Thus, the trial court did not abuse its discretion in denying defendant's *Batson* challenge.[3]

Finally, defendant argues that his sentence of life imprisonment without the possibility of parole is an unconstitutional determinate sentence, which violates Const 1963, art 4, § 45. He also argues that the sentence constitutes cruel and unusual punishment. Both arguments are without merit.

In *People v Snider*, 239 Mich App 393, 426-428; 608 NW2d 502 (2000), citing *People v Cooper*, 236 Mich App 643, 660-664; 601 NW2d 409 (1999), this Court specifically rejected a claim that a determinate life sentence without the possibility of parole offends Const 1963, art 4, § 45. Contrary to defendant's argument, the constitutional provision does not bar determinate sentencing. *Id.* Further, a mandatory life sentence without the possibility of parole is not cruel or unusual punishment when imposed on an adult. *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996).

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell

[3] We also note that the prosecutor offered valid, race neutral reasons for removing the juror. The prosecutor indicated that he excused the juror because she sat on a previous panel in Calhoun County that month and the prosecutor believed that the panel had acquitted the defendant in that case. In addition, at defendant's first trial, several of the jurors were women. The prosecution did not want as many women on the panel for the second trial. Both of these reasons are race neutral. The fact that the prosecutor removed the only black juror from the panel at one point in time is simply insufficient to sustain a *Batson* challenge.