

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN LLOYD BRADLEY, JR.,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 230567

Kalamazoo Circuit Court

LC No. 99-001215-FH

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with a dangerous weapon, MCL 750.82, and sentenced to eighteen months to four years' imprisonment. He appeals as of right, and we affirm.

Defendant first argues prosecutorial misconduct. Because defendant failed to preserve this issue by objection below, *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW 2d 130 (1999). Defendant must show clear or obvious error that was outcome determinative. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). We find no such error.

The test of prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A prosecutor may not make a statement of fact that is unsupported by the evidence *Stanaway*, *supra*, 686, but may argue the evidence and reasonable inferences arising therefrom as they relate to his theory of the case. *Bahoda*, *supra*, 282.

The prosecutor stated in closing argument, "First of all, the defendant doesn't honestly believe his life was in danger. He has lied to the police at the time that this happened, at the time of the interview and he has lied on the stand. He is not honest."

A prosecutor may argue from the facts that the defendant is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW 2d 16 (1997). Here, there was evidence that defendant had lied to the police when he told them that he had hit the victim with his fists.

Further, the prosecutor's argument was addressed to the focal issue in the case - - whether defendant acted in self-defense; in particular, whether defendant had an honest and reasonable belief that he was in danger. The prosecutor followed the complained-of remarks by arguing that defendant's belief in the danger was not reasonable, based on defendant's own testimony. The prosecutor pointed to defendant's admission that he could see that the victim did not have a gun when he put his hands up to ward off the bat wielded by defendant, and to defendant's testimony of chasing the fleeing victim and continuing to strike him. The prosecutor argued that "the evidence shows . . . that isn't the way it happened" and "defendant hasn't told you the truth."

Viewed in context, the remarks were comments on the evidence and the prosecutor's theory that defendant did not "honestly and reasonably" act in self-defense. Moreover, the trial court's instructions that the jury must base its decision only on the evidence and that attorney comments were not evidence, dispelled any prejudice to defendant. *Bahoda, supra*, 281. We are satisfied the challenged remarks did not affect the trial's outcome.

Defendant next challenges his sentence. Because the instant offense was committed after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(1), (2); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). Although defendant argues that his sentence is disproportionate, he does not contest that MCL 769.34(10) precludes appellate relief because defendant's sentence was within the guidelines recommended range. *People v Libbett*, ___ Mich App ___; ___ NW2d ___ (Docket No. 227619, issued 5/14/02) slip op p 5; *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Defendant contends that the statute violates Michigan's constitutional guarantee of an appeal of right (except on a guilty or nolo contendere plea) in a criminal case. Const 1963, art 1, § 20. Defendant also argues that subsection 10 invades the constitutional separation of powers, Const 1963, art 3, § 2, and interferes with the appellate authority vested in the judiciary, Const 1963, art 6, § 1. We review constitutional issues de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

In *Babcock, supra* at 73, this Court opined concerning MCL 769.34(10):

The clear language of this subsection compels the conclusion that the Legislature intended to preclude any appellate scrutiny of sentences falling within the appropriate guidelines range absent scoring errors or reliance on inaccurate information. This conclusion is supported by the mandatory language requiring that this Court "shall affirm" sentences inside the guidelines, *People v Kelly*, 186 Mich App 524, 529, 465 NW2d 569 (1990), and by another provision in the same statute, which requires trial courts to advise a defendant that the defendant may appeal only when the sentence "is longer or more severe than the appropriate sentence range." MCL 769.34(7).

In *People v Coles*, 417 Mich 523, 538; 339 NW2d 440 (1983), upon which defendant relies, our Supreme Court recognized that the "Legislature has the exclusive authority to determine the appropriate length of imprisonment for a felony and that a court, in imposing a sentence, has only limited discretion to act within the parameters set forth in the statute." In *People v Hall*, 396

Mich 650, 657-658; 242 NW2d 377 (1976), our Supreme Court upheld a mandatory life sentence for first-degree murder, MCL 750.316, in the face of constitutional challenges based on due process, equal protection and cruel and unusual punishment. The Court also held the statute's mandatory life sentence did not violate the separation of powers doctrine:

The power to establish sentences historically has resided in the Legislature. The separation of powers clause, Const 1963, art 3, § 2, is not offended by the Legislature delegating sentencing discretion in part and retaining sentence discretion in part. 'The courts have no discretionary power in this respect unless it be conferred upon them by law.' *People v Palm*, 245 Mich 396, 404; 223 NW 67, 69 (1929). [*Hall, supra*, 396 Mich at 658.]

This Court has held that the mandatory two-year sentence for possession of a firearm while committing or attempting to commit a felony, MCL 750.227b, does not violate the doctrine of separation of powers. *Wayne Co Prosecutor v Recorder's Court Judge (People v Meeks)*, 92 Mich App 433, 443; 285 NW2d 318 (1979). "The Legislature is free to retain or delegate sentencing discretion when defining offenses and setting punishment." *Id.* More recently, in *People v Conat*, 238 Mich App 134; 605 NW2d 49 (1999), this Court considered the constitutionality of legislation requiring trial courts to impose adult sentences when certain juveniles are convicted of specified felonies in circuit court, and found no constitutional violation, noting the interplay between the three branches of government in a criminal prosecution: "the Legislature defines the sentences, the court fashions and imposes individual sentences within the legislatively defined parameters, and the prosecutor brings charges against defendants that inevitably affect which sentences are available for the court to impose." *Id.*, 147. In *Babcock, supra*, 68, this Court noted that "there has never been any legitimate dispute that the Legislature holds ultimate authority for determining the appropriate sentencing scheme for our state." *Id.*, 71, citing Const 1963, art 4, § 45.

We conclude that the legislative sentencing guidelines are thus a constitutional exercise of the Legislature's authority to establish the punishment to be imposed on conviction of a crime, and confer or withhold discretion on the judiciary to impose sentence.

Defendant cites no authority to support that subsection 10 violates substantive or procedural due process and does not explain how it denies "fundamental fairness." Moreover, defendant argues, in effect, that he is entitled to have this Court review the proportionality of his sentence. Were we to engage in such a review, we would find the sentence proportionate.

In a brief filed in propria persona, defendant argues he was denied the right to a jury trial by his peers when the only two black prospective jurors were removed by the prosecution's use of peremptory challenges. *Batson v Kentucky*, 476 US 79, 96; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

A trial court's rulings on a challenge to a peremptory jury strike on the basis of alleged purposeful discrimination are reviewed for an abuse of discretion. *Howard, supra*, 536; *Clarke v Kmart Corp*, 220 Mich App 381, 384; 559 NW2d 377 (1996). A trial court is accorded great latitude and its finding of facts are reviewed for clear error. MCR 2.613(C); *Batson, supra*, 98 n 21.

Defendant preserved his claim as to one of the black jurors by timely raising the issue, and the prosecutor conceded that defendant had raised a prima facie challenge. Once a defendant makes a prima facie showing of purposeful discrimination, the burden shifts to the prosecutor to offer a race-neutral reason, which need not rise to the level sufficient to justify a challenge for cause, for the exercise of the challenged peremptory strike. *Id.*, 97.

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible. At this second step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. [*Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769, 1771; 131 L Ed 2d 834 (1995); citations and internal punctuation omitted.]

In the present case, the prosecutor offered several race-neutral reasons for peremptorily striking the juror. The trial court found that the reasons were race-neutral and denied the challenge. On appeal, defendant does not argue, nor does the record establish, that the trial court abused its discretion. *Howard, supra*, 536.

Defendant did not object to the other black juror being struck. The prosecutor offered to present race-neutral reasons for his peremptory strike of this juror (who was a friend of defendant's fiancée and at one point admitted being biased), but defendant remained silent. Defendant thus waived this claim by not challenging the peremptory strikes, by acquiescing to the trial court's announcement that no other *Batson* challenges had been raised, and by expressing satisfaction with the jury as impaneled. *People v Ho*, 231 Mich App 178, 183-185; 585 NW2d 357 (1998).

Defendant next argues he was denied a fair and impartial jury by the seating of two jurors; one who stated that she would follow the trial court's instructions unless they were "in extreme contradiction" to her moral beliefs, and the other who stated that if two of her children told conflicting stories, she would punish both until they worked out what the truth was.

Defendant failed to preserve this claim below. The first juror could not have affected the trial's outcome because she was excused before deliberations. The second juror stated that she would follow the court's instructions on the law, and decide the case based solely on the evidence presented at trial. The general rule is that prospective jurors are presumed to be impartial and a juror's answer under oath that she can set aside preconceived opinions and decide the case based on the evidence at trial is sufficient to protect a defendant's right to a fair trial. *People v Jendrzejewski*, 455 Mich 495, 515-516; 566 NW2d 530 (1997); *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001). We find no error.

Defendant next argues ineffective assistance of counsel. Defendant bears the burden of overcoming the presumption that counsel was effective and must show that counsel's

performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Strickland v Washington*, 466 US 668, 687-689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Defendant must show the deficiency was so serious that he was deprived of a fair trial, *Pickens, supra*, 309, so that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

First, defendant argues counsel erred by failing to insist that the prosecutor proffer a race-neutral reason for striking the first black juror. Because defendant did not develop a factual record below, this Court's review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). The record shows that the juror was a high school friend of defendant's fiancée, who was also a witness in the case. The prospective juror at one point stated she would be biased in favor of her friend's testimony, but later testified she could be impartial. While the record may not have supported a dismissal for cause, as the trial court initially was inclined to do, the juror's friendship with a witness having a close relationship to defendant would be an adequate race-neutral reason to strike the juror. *Clarke, supra*, 384. Failing to raise meritless or futile objections does not constitute ineffective assistance of counsel. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant argues that trial counsel erred by failing to challenge for cause or peremptorily strike two jurors. Defendant can not establish prejudice, however. The first juror could not have affected the trial's outcome because she was excused before deliberations. The other juror affirmed she would decide the case based on the evidence and in accordance with the trial court's instructions. Jurors are presumed to follow the trial court's instructions, *People v Milstead*, ___ Mich App ___; ___ NW2d ___ (Docket No. 224916, issued 3/12/02), slip op 7, and are presumed impartial. Defendant has not shown outcome determinative error, *Johnson, supra*.

Finally, we reject defendant's argument that trial counsel's failure to move for a directed verdict constituted ineffective assistance. The testimony of the victim, his fiancée and a neighbor, taken in the light most favorable to the prosecution, established all of the elements of the charged offense and that defendant was not acting in self-defense. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, mod 441 Mich 1201 (1992). Defense counsel is not required to make futile motions. *Sabin (On Second Remand), supra*, 660.

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens