STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL BROWN,

Defendant-Appellant.

UNPUBLISHED
September 17, 2002

No. 231228
Wayne Circuit Court
LC No. 00-003904

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. As required by statute, the trial court sentenced defendant to life imprisonment for his murder conviction and to two years' imprisonment for his felony-firearm conviction. We affirm.

Defendant first argues that the prosecutor improperly used his peremptory challenges to exclude black jurors and that the trial court thus should have granted defendant's motion to dismiss the jury. We review the trial court's ruling on this issue for an abuse of discretion. *People v Ho*, 231 Mich App 178, 184; 585 NW2d 357 (1998).

The United States Supreme Court addressed the issue of racial discrimination in jury selection in *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Under *Batson*, the defendant bears the initial burden of demonstrating a prima facie case of purposeful discrimination. *Id.* at 93-94. To establish a prima facie case, the defendant must show that he is a member of a cognizable racial group, that the prosecutor exercised peremptory challenges to remove potential jurors of the defendant's race, and that these facts and any other relevant circumstances raise an inference that the prosecutor removed the potential jurors because of their race. *Id.* at 96. Moreover,

> [i]n deciding whether the defendant has made the requisite showing, the trial court must consider all relevant circumstances, including whether there is a pattern of strikes against black jurors and 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),

habeus corpus relief granted on other grounds sub nom *Barker v Yukins*, 199 F3d 867 (CA 6, 1999); see also *Batson, supra* at 96-97.]

However, "[t]hese examples are merely illustrative." *Batson, supra* at 97. The trial court must use its discretion and its experience in supervising voir dire in deciding whether a prima facie case has been established. *Id.*

We cannot conclude that the trial court in the instant case abused its discretion in deciding that defendant failed to establish a prima facie case of purposeful discrimination. First, the prosecutor used peremptory challenges to exclude five non-black persons as well as five black persons from serving as jurors. Moreover, and significantly, one black man remained as a juror even though the prosecutor had peremptory challenges remaining and could have removed that juror. "That the prosecutor did not try to remove all blacks from the jury is strong evidence against a showing of discrimination." *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Finally, our review of the voir dire transcript demonstrates plausible reasons for the prosecutor's removal of the five black jurors that he peremptorily dismissed. Under these circumstances, no abuse of discretion occurred.

Next, defendant argues that the trial court should have granted his motion for a mistrial following a police officer's comment that defendant had a pending "drug case." "We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion." *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). Absent a showing of prejudice, reversal on appeal is unwarranted. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). To warrant reversal, "[t]he trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice." *Id.*

Here, defendant has failed to meet his burden for reversal. We first note that the challenged comment was followed with a curative instruction to the jury to disregard the statement. Further, and most importantly, there were numerous other references to defendant's drug activities throughout the trial, and defendant does not challenge these additional references. Accordingly, the brief statement by the police officer about a "drug case" did not prejudice defendant, and reversal is unwarranted.

Next, defendant argues that the prosecutor committed misconduct requiring reversal by making improper statements in his closing argument. However, defendant did not object to the prosecutor's statements below, and we therefore review this issue for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To obtain relief, defendant must demonstrate the existence of a clear or obvious error that likely affected the outcome of the case. *Id.; People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant contends that the prosecutor improperly used testimony admitted solely to impeach the credibility of his alibi witness as substantive evidence of defendant's guilt. At trial, defendant's mother, Ollie Swanson, testified that her son was at home at the time of the murder. She denied telling the police that defendant had been "in and out" that night, as Officer Nicholas Giaquinto would later testify. We have reviewed the prosecutor's comments in the context of defense arguments, and we do not find that the comments amounted to using Giaquinto's testimony as substantive evidence of defendant's guilt. Rather, the prosecutor noted that inconsistent details surrounding defendant's alibi existed that served to weaken Swanson's

credibility. Moreover, as noted by the prosecutor, Swanson's testimony did in fact suggest that defendant was "in and out" of the house on the night of the murder. Under the circumstances, we discern no clear or obvious error with regard to the prosecutor's closing argument.

Next, defendant argues that the prosecutor presented insufficient evidence to warrant a first-degree murder conviction. Evidence is sufficient to support a conviction if a rational trier of fact could find that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999).

"In order to convict a defendant of first-degree murder, the prosecutor must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate." *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id.* at 370-371. "Circumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of the elements of the crime." *Id.*

Teresa Washington, who lived with the victim, testified that following a knock on the door, the victim went to the top of the stairs and asked who was there and when someone named "Kate" responded, the victim, who was then at the bottom of the stairs, asked if anyone was with her. According to Washington, she heard gunshots immediately after that. Carolyn Robinson, also called "Kay," testified that defendant approached her that same night and asked her to knock on the victim's door so that defendant could talk to him. Robinson testified that she did so, that the victim answered, that someone came down the stairs, that defendant entered the porch area of the house, that "[t]here was nobody else out" when she left the porch, and that "seconds" later, she heard gunshots fired. The scientific evidence revealed that several shots were fired from the porch into the area at the bottom of the stairs where the victim was standing, and these shots caused the victim's death. The above evidence was sufficient to show that defendant killed the victim. Moreover, an intent to kill may be proven by inference from the facts in evidence. See *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999). From the above evidence, a jury could have concluded that, because defendant fired multiple shots into a door, behind which, according to the testimony of Washington and Robinson, defendant must have suspected the victim to be standing, defendant intended to kill the victim and that the killing was done in a premeditated and deliberate fashion. Reversal for insufficient evidence is unwarranted.

Finally, defendant argues that the trial court erred by allowing Giaquinto to impeach Swanson with evidence of an prior inconsistent statement that was oral and not formally memorialized by Giaquinto. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).

MRE 613(b) states, in part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

This rule indicates that the only requirement necessary for admitting extrinsic evidence of a prior inconsistent statement is that the witness be afforded an opportunity to either explain or deny the

statement and that the opposing counsel have the opportunity to cross-examine the witness on the statement. The rule contains no requirement that the extrinsic evidence be offered in writing or in another formally-memorialized form. Accordingly, the trial court did not abuse its discretion in allowing the testimony.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Patrick M. Meter