STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2005
v	No. 256568 Calhoun Circuit Court
MICHAEL ANDRE CARPENTER, Defendant-Appellant.	LC No. 2004-000215-FH

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and one count of domestic violence, MCL 750.81(2). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's first issue on appeal is that plaintiff improperly used peremptory challenges to exclude all African-American jurors in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Determining whether a trial court failed to follow the prescribed procedures after a *Batson* challenge requires review of a trial court's application of law, which this Court will review de novo. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005). The trial court's ultimate decision on discriminatory intent is reviewed for clear error. *Id*. *Batson* established a three-step process for determining whether peremptory challenges have been improperly exercised. *Id*. The party opposing the challenge must first establish a prima facie showing of discrimination by showing that "(1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race." *Id*. at 282-283, citing *Batson*, *supra* at 96. Once the opponent to the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge and that explanation must be related to the case being tried and provide more than a general assertion in order to rebut the prima facie showing. *Id*. at 283. If the challenging party comes forward with a neutral explanation, the trial court must decide whether the opposing party has carried the burden of establishing purposeful discrimination. *Id*. The reasonableness and improbability of the explanation are considerations in that determination. *Id.*

Defendant challenges the dismissal of two jurors. The first juror made statements during voir dire that she had a sick grandchild and may have a problem with availability. She also

stated that she was uncomfortable with the sexual language that would likely be used at trial. Plaintiff's reason for challenging this juror was that,

> [s]he was very evasive to the point of wishy-washy with her answers. I could tell she did not want to be here based on her answering of your questions about the sick child. She sat with her arms crossed. Her whole body language told me she didn't want to be here. Based on that, that's the reason that I used my preemptory [sic] challenge on her. It has absolutely nothing to do with race.

Plaintiff's reason is neither unreasonable nor improbable. As for the second juror, defendant failed to object during voir dire or otherwise develop an adequate record with regard to that juror. Therefore, defendant forfeited appellate review as to that juror. *People v Vaughn*, 200 Mich App 32, 40; 504 NW2d 2 (1993). Even if defendant had not forfeited this claim of error, plaintiff gave reasonable race-neutral reasons for excusing this juror (previous jury service on a murder trial and issues with lack of corroborating evidence). Therefore, on this record, we cannot conclude that the trial court clearly erred when it determined that defendant had not met its burden to establish purposeful discrimination. *Bell*, *supra* at 283.

Defendant's second issue on appeal is that the trial court improperly scored fifteen points for OV 8. Defendant's challenge is based on the decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has determined that Michigan's statutory guideline sentencing system is unaffected by the holding in *Blakely*. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Additionally, this Court has rejected the argument that *Claypool* is not binding on this Court. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello