STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2008
v	No. 277614 Wayne Circuit Court
WALTER GARFIELD HOGUE, Defendant-Appellant.	LC No. 06-008607-01

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of assault with intent to murder Earl Brown, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

On appeal, defendant first argues that "the matter should be remanded to the trial court for a Walker hearing as the trial judge never ruled upon nor resolved the issue of whether appellant's custodial statement was voluntary." Defendant misrepresents the facts. The purported "custodial statement" to which defendant refers occurred after he was arrested and was given *Miranda*[1] warnings. En route to the police station, a police officer was asking defendant basic information, such as his full name, height, weight, and address. He was not asked anything about the crime itself. Defendant became irate and began cursing. At some point, he blurted, "I did it. I tried to kill that mother fucker for my money." This outburst was not in response to any questioning, but rather was a spontaneous statement unprovoked by any interrogation.

The trial court admitted defendant's statement under MRE 801(d)(2), as an admission by a party opponent. We agree with that determination. The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. Thus, a defendant's statements made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A custodial interrogation is " questioning initiated by law enforcement officers after [the defendant]

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

has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999) (citations omitted). Here, although defendant was in police custody at the time he made his statement, he was not being questioned—it was a spontaneous and voluntary statement of admission. Thus, the trial court properly denied defendant's counsel's apparent oral motion to suppress this statement which was made during the second day of trial. See *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005).

Next, defendant argues that the trial court denied his constitutional right to confront witnesses against him when it denied his request to examine the crime scene, "while permitting the officer in charge and the prosecutor to inspect the house instead." A trial court's decision regarding discovery is reviewed for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant's constitutional right to confrontation, US Const, Am VI; Const 1963, art 1, § 20, is violated when limitations are placed on his ability to cross-examine a witness to bring out facts from which bias, prejudice, or lack of credibility might be inferred. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). However, "'[t]here is no general constitutional right to discovery in a criminal case . . . .'" *People v Stanaway*, 446 Mich 643, 664; 521 NW2d 557 (1994). Rather, discovery is within the trial court's discretion. *Id*. at 680.

> "Discovery will be ordered in criminal cases, when, in the sound discretion of the trial judge, the thing to be inspected is admissible in evidence and a failure of justice may result from its suppression. The burden of showing the trial court facts indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition, rests upon the moving party." [*Id*., citing *People v Maranian*, 359 Mich 361, 368; 102 NW2d 568 (1960).]

Furthermore, if a party fails to comply with the discovery deadlines ordered by the trial court, then the trial court may, in its discretion, fashion a remedy that it deems "just under the circumstances." MCR 6.201(F) and (J). '"The exercise of that discretion involves a balancing of the interests of the courts, the public, and the parties.'" *People v Davie* (*After Remand*), 225 Mich App 592, 598; 571 NW2d 229 (1997), citing *People v Loy-Rafuls*, 198 Mich App 594, 597; 500 NW2d 480, rev'd on other gds 442 Mich 915 (1993). The trial court should inquire into the circumstances surrounding the party's noncompliance and actual prejudice to the opposing party. *Id*. at 598.

In this case, defendant's trial counsel filed a motion to personally inspect the victim's home, with an expert, to discover evidence of the alleged bullet holes in the home. Defendant's trial counsel claimed, that from his preliminary view of the exterior of the home, he saw no bullet holes. The prosecutor noted that she did not have physical evidence, such as photographs,

of the victim's home, but rather, intended to rely on witnesses' observations of the shooting and resulting damage. Nevertheless, defendant's trial counsel noted that a lack of physical evidence of the shooting would support other proposed witness testimony that defendant shot into the air. Meanwhile, such evidence would impeach the victim's proposed testimony that defendant shot at him, but missed and hit the doorway. This motion was filed after the trial court's motion deadline.

In its ruling, the trial court stated that defendant's motion was filed late. Nevertheless, in lieu of ordering an inspection of the scene by defendant's trial counsel and his expert, the trial court ordered that the officer in charge send an evidence technician to photograph the original damage to the victim's home and any subsequent repairs. The trial court also noted that if this order could not be executed before the scheduled trial, the parties would be limited to testimony of witnesses' observations and, perhaps, a personal examination of the home by the jury. Photographs depicting six bullet holes in the victim's home were obtained, provided to defendant's trial counsel and admitted into evidence at trial.

Because defendant's motion in limine was untimely, it was in the trial court's discretion to fashion a just remedy. See *Davie (After Remand)*, *supra* at 597-598. There is no explanation in the lower court record for defendant's failure to move for this discovery during the seven months prior to trial. The trial court's accommodation of defendant's request balanced the interests of the court and the parties. First, because this trial had been rescheduled once, it was in the interest of judicial economy and the preservation of evidence to avoid additional delays. Second, the trial court's order accommodated defendant's goal, namely, to acquire physical evidence to corroborate or discredit the witnesses' observations of the bullet holes. Consequently, the trial court's remedy to defendant's untimely motion in limine fell within the range of principled outcomes and was not an abuse of discretion.

Finally, defendant argues that the trial court erred when it found the prosecutor's reasons for excusing two black jurors were not pretext for purposeful discrimination. Review of the first step of a *Batson*[2] challenge is mixed. *People v Knight*, 473 Mich 324, 342; 701 NW2d 715 (2005). This Court reviews questions of law de novo and factual findings for clear error. *Id*. Review of the second step of a *Batson* challenge is de novo. *Id*. at 343. "A trial court's determination concerning whether the opponent of the peremptory challenge has satisfied the ultimate burden of proving purposeful discrimination is a question of fact that is reviewed for clear error." *Id*. at 344-345.

In *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986), overruled in part *Powers v Ohio*, 499 US 400; 111 S Ct 1364; 113 L Ed 2d 411 (1991), the United States Supreme Court held that a peremptory challenge to strike a venire member may not be exercised on the basis of race. To determine if a peremptory challenge is improper, a party must make a prima facie showing of discrimination based on race. *People v Bell*, 473 Mich 275, 282; 702

[2] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), overruled in part *Powers v Ohio*, 499 US 400; 111 S Ct 1364; 113 L Ed 2d 411 (1991).

NW2d 128, amended 474 Mich 1201 (2005). In this prima facie showing, the party must demonstrate, considering all relevant circumstances, 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.]

Next, the burden shifts to the party making the peremptory challenge to come forward with a neutral explanation for the challenge. *Id*. at 283. This explanation must be related to the case being tried and must provide more than a general assertion. *Id*. If the challenging party fails to come forward with a neutral explanation, the challenge will be denied. *Id*.

Finally, the trial court must decide whether the opponent established purposeful discrimination. *Id*. at 283. The trial court must determine if the race-neutral explanations are credible, measuring factors such as the challenging party's demeanor and trial strategy and the rationale's reasonableness and probability. *Id*. The trial court should deny the peremptory challenge if it finds that the challenging party's rationale constituted pretext for purposeful discrimination. *Id*.

In *Batson*, the Supreme Court noted that a defendant may establish a prima facie showing of discrimination with a '"pattern' of strikes against black jurors." *Batson*, *supra* at 97. However, this Court has held that "the mere fact that the prosecutor used one or more peremptory challenges to excuse blacks from the jury venire is insufficient to make a prima facie showing of discrimination." *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Here, defendant's trial counsel merely objected to the peremptory challenge of two black venire members, claiming that the "five or six" blacks in the venire was a "glaring shortage." However, only two of the seven members that the prosecutor challenged were black. Therefore, because there was no evidence of a pattern of peremptory challenges to black members in the venire, defendant failed to establish a prima facie claim.

Even if defendant established a prima facie showing of discrimination, however, the trial court did not err when it found the prosecutor's rationales for excusing two black jurors were not pretext for purposeful discrimination. In response to trial counsel's objection, the prosecutor explained the she excused a black male member:

> because he was glaring at the court when the court was reading instructions. I didn't like how forcefully he was answering the court's questions. I also didn't like the way that he kept looking at the table and kept looking at the gun on the table.

She also explained that she excused a black female member "because for two days now she has continually sat in the box with her arms folded and looked completely bored and disinterested." The trial court ruled that these reasons were legitimate and race neutral. Defendant suggests that the rationale for excusing the female was pretext because the prosecutor claimed to observe her level of interest for "two days," as opposed to several hours over two days. Similarly, defendant claims the prosecutor should have questioned these members more thoroughly if she was truly uncertain of their ability to be fair. However, a trial court's ultimate factual finding whether a

claim that a peremptory challenge constituted purposeful discrimination is accorded great deference. *Knight*, *supra* at 344. Therefore, we defer to the trial court's examination of the prosecutor's demeanor and find that the trial court did not clearly err.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen