

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMES DRAIN,

Defendant-Appellee.

UNPUBLISHED

January 20, 2009

No. 275327

Wayne Circuit Court

LC No. 02-004012-01

Before: Gleicher, P.J., and O’Connell and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, 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, all of which were affirmed. *People v Drain*, unpublished opinion per curiam of the Court of Appeals, issued June 29, 2004 (Docket No. 246014), lv den 472 Mich 867 (2005). In 2006, defendant filed a motion for relief from judgment, which the trial court granted. The prosecution now appeals by leave granted. We reverse.

A defendant may seek post-appeal judgment relief under MCR 6.500 *et seq.*, but relief is unavailable to a defendant who “alleges grounds for relief . . . which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter” MCR 6.508(D)(3). A defendant may avoid application of this bar, however, if he can demonstrate good cause and actual prejudice.¹ MCR 6.508(D)(3)(a) and (b); *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). Although, a trial court may waive the good cause requirement “if it concludes that there is a significant possibility that the defendant is innocent of the crime,” *id.*, it does not appear that the trial court did so in this case, as it made no specific finding regarding defendant’s actual innocence. Alternatively, a showing of ineffective assistance may establish good cause. *People v Reed*, 449 Mich 375, 378-379; 535 NW2d 496 (1995). To demonstrate prejudice under MCR 6.508(D)(3)(b), a defendant must show that “but

¹ We note that although the trial court cited the plain error standard of review, it is clear from its opinion that it appropriately reviewed defendant’s motion for good cause and actual prejudice under MCR 6.508(D).

for the alleged error,’ [he] ‘would have had a reasonably likely chance of acquittal,’” or that “‘the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case’” *McSwain, supra* at 688, quoting MCR 6.508(D)(3)(b)(i) and (iii). Thus, the issue before us is whether defendant’s claim of ineffective assistance of counsel established good cause and actual prejudice to preclude the application of MCR 6.508(D)(3) to bar his claims.

The trial court found that defendant was denied effective assistance of counsel because his trial counsel failed to object to a *Batson*² violation and to various instances of prosecutorial misconduct, and that defendant suffered actual prejudice from these violations. We review a trial court’s grant of relief from judgment under MCR 6.508 for an abuse of discretion, but review its factual findings for clear error. *McSwain, supra* at 681. “An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003).

The prosecution first argues that the trial court erred in finding defense counsel ineffective for failing to object to a *Batson* violation. Because we find that there was no *Batson* violation, we agree.³

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel’s performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel’s error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel’s conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001) (citations omitted), *aff’d in part, mod in part on other grounds* 468 Mich 233 (2003).]

Under *Batson*, a prosecutor is prohibited from using peremptory challenges to strike a juror from a defendant’s jury on the basis of race. *People v Bell*, 473 Mich 275, 278; 702 NW2d 128, amended 474 Mich 1201 (2005). Whether a prosecutor’s challenge was discriminatory involves a three step process: (1) a defendant must initially establish a prima facie case of purposeful discrimination based on race; (2) the prosecutor must then provide a race-neutral explanation for the challenge at issue; and (3) the trial court must then decide whether a defendant has proved purposeful discrimination. *Id.* at 278-279. “[A] trial court may sua sponte raise a *Batson* issue.” *Id.* at 287.

² *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

³ We find the law of the case doctrine inapplicable to this issue. Defendant framed this issue as one of ineffective assistance of counsel, and this Court did not rule on the merits of the *Batson* issue in the initial appeal. See *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

In discussing the prosecutor's peremptory challenges of black jurors, the trial court noted that the prosecutor dismissed one juror the prosecutor suspected was sleeping, a second juror on the grounds that "she would weigh the evidence for 'a shadow of – I mean a reasonable doubt'" – even though that juror made no reference to applying any standard other than a reasonable doubt, a third juror because the juror could not objectively evaluate the testimony of a drug dealer or police officer, three jurors because they thought a drug user may be less credible depending on how drugs affected the person's judgment, and a seventh juror based on her age.

At defendant's trial, the court raised the *Batson* issue sua sponte. Based on our review of the record, however, we conclude that a prima facie showing of purposeful discrimination was dubious at best. To establish a prima facie case, the following must be shown: "(1) [defendant] is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race." *People v Knight*, 473 Mich 324, 336; 701 NW2d 715 (2005). "That the prosecutor did not try to remove all blacks from the jury is strong evidence against a showing of discrimination." *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004), quoting *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). The prosecutor did not exclude only black jurors, but also excused two white jurors. Additionally, the trial court noted after the *Batson* hearing that four black jurors remained on the panel, and it appears these minority jurors later were part of defendant's jury.

However, even assuming a prima facie showing, the court erred by combining the second and third steps of the *Batson* inquiry into one. "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, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995), quoting *Hernandez v New York*, 500 US 352, 360; 114 L Ed 2d 395; 111 S Ct 1859 (1991) (alteration in *Purkett*). Here, the court required the prosecutor to offer both race-neutral and persuasive reasons in support of her peremptory challenges of black jurors. When the prosecutor offered explanations that were race-neutral on their face, the court found these explanations unpersuasive because white jurors remaining on the panel were similarly situated to the challenged black jurors. However, "[i]t is not until the *third* step that the persuasiveness of the justification becomes relevant -- the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett, supra* at 768 (Emphasis in original). In essence, by requiring the prosecutor to offer persuasive reasons for her peremptory challenges, the trial court shifted the burden of proof. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Bell, supra* at 297-298, quoting *Purkett, supra* at 768.

In any event, the trial court's evaluation of the prosecutor's race-neutral explanations during the *Batson* arguments was unsupported by the record.⁴ Specifically, in ruling that a *Batson* violation occurred, the court pointed out that the prosecutor did not excuse three white

⁴ The trial court failed to make any findings regarding this issue in its opinion and order.

jurors who claimed that a drug user would not be a credible witness even though the prosecutor had excused a black juror for the same reason.⁵ In making this finding, the court identified by name the three white jurors to whom it was referring. However, two of these jurors indicated that they would not dismiss a witness's testimony because the witness was a drug user, and the third juror was not even asked a question regarding this issue. The court also noted at the *Batson* hearing that the prosecutor had excused a black juror due to her youthful age, but pointed out that the prosecutor failed to excuse Paul Reger, a white juror, who was "obviously the youngest juror on here" Although the record indicates that Reger was a student at Central Michigan University, his age is not revealed.

Even if the trial court was correct, "*Batson* is not violated whenever two veniremen of different races provide the same responses and one is excused and the other is not. This is so because counsel must be entitled to make credibility determinations in exercising peremptory challenges." *Matthews v Evatt*, 105 F3d 907, 918 (CA 4, 1997) (citations omitted). Moreover, because the trial court did not permit the prosecutor to explain the basis for her peremptory challenges of white jurors, it was impossible for the court to have adequately evaluated the prosecutor's proffered race-neutral explanations because the prosecutor may have excused both white and black jurors for the same reasons.

Notwithstanding the court's refusal to allow the prosecutor to explain her peremptory challenges of white jurors, the record contains an explanation for the dismissal of one white juror (later dismissed by a peremptory challenge) because the prosecutor made a record in her initial attempt to dismiss this juror for cause. Specifically, the prosecutor challenged this juror's ability to evaluate a drug user's testimony. This reason was identical to several of the reasons the prosecutor proffered in explaining her peremptory challenges of black jurors.

We note that one of the prosecutor's explanations for a peremptory challenge was unsupported by the record. Specifically, the record did not support the prosecutor's challenge of Johnie Trotter on the ground that she would "weigh the evidence for 'a shadow of – I mean a reasonable doubt.'" Implausible justifications for the exercise of a peremptory challenge *may* support a finding of pretext for discrimination. *Purkett, supra* at 768. We conclude, however, the lack of record support did not give rise to a pretext for discrimination in this case. Indeed, the record did not contradict any of the prosecutor's other reasons for challenging black jurors – several of which were identical to the prosecutor's reason to remove a white juror for cause (i.e., that the juror could not fairly evaluate a drug user's testimony). Also, the prosecutor indicated that she waited to challenge Trotter because she "wanted to see what the rest of the composition of the jury was like before I made the decision to dismiss [Trotter]." As previously noted, the fact that four black jurors remained on the panel in this case "is strong evidence against a showing of discrimination." *Eccles, supra*. In addition, it is worth noting that at the *Batson* hearing, the trial court only assessed discriminatory intent as it related to the challenged black jurors collectively. Had the court assessed such intent on a case-by-case basis, it may have found the prosecutor's reasons for exercising her peremptory challenges credible. This, in turn, would

⁵ It is worth noting that the trial court initially identified four white jurors in this context, but later opined that one of these jurors "from her appearance . . . is Hispanic."

have undercut any inference that the single challenge at issue (i.e., the challenge of Trotter) was racially motivated. Thus, it appears the prosecutor, in attempting to recall the reasons for seven peremptory challenges, provided a mistaken reason out of oversight rather than out of discrimination. Consequently, there was no *Batson* violation in this case.

There being no *Batson* violation, we conclude that the trial court erred in finding that defendant's counsel was ineffective. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). For the same reason, defendant has also failed to show ineffective assistance of appellate counsel. "The test for ineffective assistance of appellate counsel is the same as that for trial counsel," *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002), and appellate counsel "[does] not render ineffective assistance by failing to present meritless claims." *Reed*, *supra* at 402.

The prosecution next contends that the trial court erred in finding that during voir dire the prosecutor improperly referenced a prior judicial proceeding involving defendant. We agree. Prosecutorial misconduct occurs if a defendant is denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). In evaluating issues of prosecutorial misconduct, we examine the prosecutor's remarks in context, on a case-by-case basis. *Id.* Unpreserved claims are reviewed for plain error. *Id.* Because "[t]he function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially," *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996), it is proper for a prosecutor to ask questions relevant to a prospective juror's impartiality. See *People v Dunham*, 220 Mich App 268, 270; 559 NW2d 360 (1996).

During voir dire, Chris Koka, one of the prospective jurors, indicated that he would not want someone like himself on a jury if he, himself, were charged with murder "[bec]ause of what [he saw during] 22 years of being a parole officer." Although Koka claimed he would have no problem presuming defendant innocent, he noted that in his job, "they're all innocent when they come to see me," and added he could not be fair in this case. After these statements, the following exchange ensued:

The prosecutor: You realize that not everyone that's arrested is convicted, right?

Koka: Correct.

The prosecutor: And not everyone that's arrested is necessarily guilty, right?

Koka: Correct.

The prosecutor: Before they get to the point where they come to see you, there is a process they have to go through that involves a prosecutor like me somewhere, right?

Koka: Correct.

The prosecutor. What we're trying to figure out is - - and I think you have been real honest. I don't want to kind of belabor it, but can you participate in this part of the - - let me see I an phase - - [sic].

Koka: That in my mind would probably say if he went this far with the police reports and everything else, I tend to be guilty [sic].

* * *

The court: I'm sorry to interrupt but let me ask this question. You understand to get this far all you have to show is that there is a probability? I mean you don't have to show even a preponderance to get this far. You understand that?

Koka: Uh-huh.

Reviewed in context, we conclude the prosecutor's questions to Koka were not improper. Although Koka initially indicated he would presume defendant innocent, he insinuated that due to his experience as a parole officer, he could not be fair because all parolees assert their innocence. In asking Koka if he was aware that parolees participate in a judicial process involving a prosecutor before meeting with a parole officer, the prosecutor was merely trying to determine if Koka was aware that defendant's status was markedly different from that of a parolee. This bore directly on Koka's impartiality. Further, it was the trial court's question to Koka that indicated defendant had participated in a judicial process preceding trial. But, given Koka's assertions, the purpose of the court's question was identical to the prosecutor's, i.e., to determine Koka's impartiality. In any event, any possible prejudice was cured by the trial court's instruction that defendant did not have to prove his innocence. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005).

Because the prosecution's questioning during voir dire was proper, the trial court erred in concluding it constituted prosecutorial misconduct. Additionally, any objection to this questioning would have been futile, so that defense counsel's failure to object and appellate counsel's failure to raise the claim did not constitute ineffective assistance of counsel. *Goodin, supra*; *Reed, supra* at 402. Therefore, the trial court also erred in finding ineffective assistance of counsel.

The prosecution also argues that the trial court erred in concluding the prosecutor improperly elicited and made arguments regarding a witness's prior consistent statements. Although we find the prosecutor acted improperly, we conclude the error was harmless.

All relevant evidence is admissible unless the rules of evidence, or the United States or Michigan Constitutions, provide otherwise. MRE 402. Under MRE 802, hearsay is inadmissible absent an exception. *People v Dhue*, 444 Mich 151, 159; 506 NW2d 505 (1993). MRE 801(d)(1)(B) provides that a statement is not hearsay if "[t]he declarant testified at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . .

consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." The following must be established to admit a prior consistent statement:

(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (internal quotes and citation omitted).]

Here, the trial court correctly found that during her direct examination of Baker, the prosecutor elicited evidence that Baker had provided a statement to police and testimony at an investigative subpoena hearing that was identical to her trial testimony, with the exception of Baker's assertion at trial that she was going to buy heroin rather than marijuana at the drug house. The prosecutor also elicited evidence that Baker provided testimony at the preliminary examination that was identical to her trial testimony. The elicitation of this evidence was improper. Indeed, defense counsel made no charge of recent fabrication, improper influence, or motive, and did not challenge Baker's statements at the investigative subpoena until cross-examination – a time *after* the prior consistent statements were offered.

The prosecution argues that because defense counsel attacked Baker's testimony during her opening statement, the elicitation of the prior consistent statements was proper. Specifically, defense counsel asserted during opening statement that "the testimony of Andria Baker will be incredible, unreliable, a flat-out misrepresentation and lies," and noted that the physical evidence would not support the prosecutor's theory of the case. In context, it is clear that defense counsel's statements amounted to a general attack on Baker's credibility. Indeed, defense counsel did not challenge any specific statement or testimony that Baker would provide. Thus, this argument fails.

Given the impropriety of these statements, it was also improper for the prosecutor to reference these statements during closing argument.⁶ *Watson, supra* at 588; see also, e.g., *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). However, the prior consistent statements and arguments pertaining to them did not prejudice defendant. Although Baker was the only eyewitness to the shooting, making her credibility a significant issue, defense counsel did little to impeach her testimony. Thus, the prior consistent statements were of little or no consequence with respect to Baker's credibility. Given this analysis, the failure of trial counsel to object to the admission of the prior consistent statements or to the prosecutor's reference to them during closing argument was not outcome determinative. As such, defendant was not denied the effective assistance of counsel.

⁶ Specifically, the prosecutor stated that Baker had consistently provided an accurate version of events with the exception of her lie that she was going to buy marijuana instead of heroin.

Because we find no *Batson* violation and no prejudicial prosecutorial misconduct, there can be no finding of ineffective assistance of counsel for failure to make futile objections.⁷ Without a valid ineffective assistance of counsel claim, defendant has failed to show good cause under MCR 6.508(D)(3). Additionally, defendant has failed to show that, absent the singular error of the prosecutor's reference to Baker's previous testimony, he had a reasonably likely chance of acquittal or that it affected the integrity of the proceedings. *McSwain, supra* at 688. Having failed to show good cause and actual prejudice, defendant was barred by MCR 6.508(D)(3) from raising his claims. Accordingly, the trial court's grant of defendant's motion for relief fell outside the range of principled outcomes and constituted a clear abuse of discretion. *Babcock, supra*.

Reversed.

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly

⁷ For this reason, defendant's claims of cumulative error must also fail, as there are no errors to aggregate. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).