STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2010
v	No. 295916 Oakland Circuit Court
DIEP LENGOC DUONG, Defendant-Appellant.	LC No. 2009-225403-FH

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by right her jury trial conviction for felonious assault, MCL 750.82.[1] We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arose out of her assault on her then live-in boyfriend, Sheldon Behnke, with a kitchen knife and a broken bottle. At trial, defendant maintained that she used the items in self-defense because Behnke was attacking her. Behnke testified for the defense, along with defendant and her cousin, Hoang Le, who lived with the couple and witnessed the incident. The prosecution's case essentially rested on Behnke's statements to the police and medical technicians who treated him directly after the assault.

Defendant first maintains that the trial court erred when it allowed the prosecution to present evidence of Behnke's prior statements to police officers and others concerning the alleged attack. Defendant maintains that these testimonial statements were improperly admitted under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), resulting in a violation of her right of confrontation.

This argument is without merit because Behnke testified at trial and was subject to examination by defense counsel. *Crawford*, 541 US at 59 n 9 ("when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). Behnke was called as an adverse witness by the defense. At times during Behnke's testimony when the prosecutor argued that defense counsel was asking a

[1] Defendant was acquitted of an additional charge of assault with intent to do great bodily harm less than murder.

leading question, defense counsel replied that it was appropriate because Behnke was an adverse witness, and the trial court overruled the prosecutor's objection. Defendant has not shown that she was denied the right to fully question Behnke during trial. See MRE 611(c)(3). Defendant's claim is thus without merit.

Defendant, who is Asian, next argues that the trial court erred in denying her *Batson*[2] challenge concerning two potential jurors, one male and one female, who were excused when the prosecution exercised peremptory challenges. Our Supreme Court has provided the following concerning review of *Batson* challenges:

> [W]e conclude that the proper standard of review depends on which Batson step is before us. If the first step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law de novo. If *Batson*'s second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error. [*People v Knight*, 473 Mich 324, 345; 701 NW2d 715 (2005).]

"A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made." *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003).

The purpose of *Batson* is to prevent discriminatory exclusions of members of the jury venire on the basis of race or gender. *Knight*, 473 Mich at 351. A defendant is not entitled to a jury of a particular racial composition provided that no racial group is systematically and intentionally excluded. *Id*. This involves a three-step process. First, the party challenging the peremptory dismissal must make a prima facie showing of discrimination. *Id*. Second, if the challenger establishes a prima facie showing of discrimination, the burden shifts to the party exercising the peremptory challenge to articulate a race-neutral explanation for the strike. *Id*. at 337. Finally, "if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination." *Id*. at 337-338.

In this case, defendant essentially challenges whether the prosecutor's proffered race-neutral explanations were race-neutral and whether they were pretextual.[3]

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

[3] While plaintiff raises the question of whether defendant could actually make a prima facie showing concerning the female juror, this question is moot because the prosecutor offered a race-neutral explanation and the trial court ruled on the ultimate question of purposeful discrimination. *Knight*, 473 Mich at 338.

> Batson's second step "does not demand an explanation that is persuasive, or even plausible." *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Rather, the issue is whether the proponent's explanation is facially valid as a matter of law. *Id*.; *Hernandez v New York*, 500 US 352, 360; 111 S Ct 1859; 114 L Ed 2d 395 (1991) (plurality opinion). "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id*. [*Knight*, 473 Mich at 337.]

Here, the prosecutor contended that he was concerned that the male juror's occupation as an engineer would cause him to hold the prosecution to a higher standard when it came to evaluating the facts "not related to the elements" of the offenses. Occupation has been found to be a legitimate race-neutral reason for peremptorily challenging a prospective juror. See *Hall v Luebbers*, 341 F3d 706, 713 (CA 8, 2003) (social worker); *United States v Griffin*, 194 F3d 808, 823 (CA 7, 1999) (discussing jurors' social or medical work as proper factor to strike juror); *Roberts ex rel Johnson v Galen of Virginia, Inc*, 325 F3d 776, 780-781 (CA 6, 2003) (finding striking of janitor and laborer plausibly race-neutral). This rationale is facially race-neutral. As to the female juror, the prosecutor stated that he had decided to exercise his peremptory challenge to strike her from the jury because "she was having a difficult time following counsel's questions about the [reasonable doubt] presumption" and he "thought it would be difficult for her to follow the court's instructions and follow the court's testimony." This is also a facially neutral reason to use a peremptory challenge. See *Roberts*, 325 F3d at 780-781.

After reviewing voir dire, we find that the trial court did not clearly err in determining that these proffered reasons were not pretextual. When the male juror was questioned about his understanding of the prosecutor's burden, he appeared to express difficulty with the prosecutor's burden concerning questions of fact not related to the elements of the charged offenses. Given the prosecutor's stated concern that the jurors focus on the elements of the offense, and whether the prosecutor proved only those elements beyond a reasonable doubt, as opposed to proving all of the facts in the case beyond a reasonable doubt, and the male juror's somewhat unclear answer to the prosecutor's question, we find that the trial court did not clearly err when it determined that the prosecutor's rationale was not pretextual.

As to the female juror, the record provides support for the prosecutor's stated reason for using a peremptory challenge to strike her from the jury. While we may not have found her hesitation unusual given the lack of the public's familiarity with the technical aspects of reasonable doubt generally, we do not find the trial court's decision to credit the prosecutor's rationale clearly erroneous. The trial court was in a better position to observe the demeanor of both the juror, and the prosecutor, than is this Court on appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher