STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2008
v	No. 273405 Oakland Circuit Court
ANTHONY TAIWAN ZIGLER, a/k/a ANTHONY TAIWAN ZIEGLER, Defendant-Appellant.	LC No. 2006-207186-FC

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant Anthony Taiwan Ziegler appeals as of right his jury trial convictions of two counts of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b, one count of felon in possession of a firearm, MCL 750.224f, and one count of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to two years' imprisonment for each felony-firearm conviction, one to ten years' imprisonment for his felon in possession of a firearm conviction, and 51 to 240 months' imprisonment for his assault with intent to do great bodily harm conviction. We affirm.

I. Facts

On the afternoon of February 2, 2006, Fatima Walker was in the parking lot of her apartment complex with her boyfriend, Carnell Warren (a/k/a "Cone"). When Walker and Warren saw defendant across the street, Warren confronted defendant regarding prior altercations that Walker had with defendant. Warren noticed that defendant had his hand in his pocket and asked defendant if he had a gun and if he would shoot him. Defendant denied having a gun and threatened to fight Warren. When Warren started to remove his jacket, Walker stepped between Warren and defendant. Defendant pulled out a gun, pointed it at Warren, and began shooting. Walker was shot in the back and arm. When she turned, Walker saw defendant, who was holding a black revolver, chasing and shooting at Warren as Warren fled toward the street, entered a friend's car, and drove off. Warren did not realize that he had been shot until he entered the car. Defendant returned to where Walker was standing, pointed his gun at her, and then ran into an apartment in the complex.

Walker called 911 and eight officers were dispatched to the scene to investigate. After Walker identified the apartment that defendant had entered and noted that defendant was armed, the officers went to the apartment in question and knocked on the door. When defendant's sister, Ashley Franklin, opened the apartment door, an officer saw defendant in the kitchen near the refrigerator and a box of ammunition on the kitchen table. The officers entered the apartment and took defendant into custody. They also found ammunition on the kitchen table and a gun inside an open charcoal bag, and an officer checked the basement to see if other individuals associated with the shooting were present.

II. Jury Instructions

Defendant argues that the court's instructions pertaining to his assault with intent to commit murder charge[1] permitted a verdict that was not unanimous because it did not specify to which victim the charge related. We disagree. Because defense counsel expressly approved the instructions, defendant has waived this issue on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Regardless, defendant's claim fails.

"A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006); see also MCR 6.410(B).

> [I]f alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).]

In this case, although defendant was originally charged with two counts of assault with intent to commit murder (one pertaining to Walker and the other pertaining to Warren), the prosecution amended the information to include only one charge of assault with intent to commit murder regarding "Fatima Walker and/or Carnell Warren." The trial court instructed the jury on this charge and provided the general unanimity instruction.

The general unanimity instruction was sufficient. Defendant started shooting at Warren after Walker stepped in front of Warren and continued shooting at Warren as Warren fled the scene. Thus, the alternative acts were not materially distinct. Further, Warren and Walker's testimony regarding the shooting was materially consistent. There is no reason to believe the jury was confused or disagreed about the factual basis of defendant's guilt. Therefore, no instructional error occurred.

[1] Defendant was convicted of the lesser-included offense of assault with intent to do great bodily harm less than murder, MCL 750.84.

Defendant claims that his counsel was ineffective for failing to challenge this instruction. We disagree. Because there was no instructional error, any objection would have been futile. "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). Therefore, counsel's performance was neither objectively unreasonable nor outcome-determinative.

III. Jury Selection

Next, defendant argues that his jury was improperly selected on the basis of race. We disagree. Defendant raised this issue during voir dire, and it is therefore preserved. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003).

The Equal Protection clause guarantees a defendant the right to a jury whose members are selected through nondiscriminatory methods. US Const, Am XIV, § 1; *Batson v Kentucky*, 476 US 79, 85-86; 106 S Ct 1712; 90 L Ed 2d 69 (1986). This guarantee prohibits a prosecutor from using peremptory challenges to strike a juror from a defendant's jury on the basis of race. *Id*. at 99; *People v Bell*, 473 Mich 275, 278; 702 NW2d 128 (2005). The determination 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 the defendant has proven purposeful discrimination.[2] *Batson*, *supra* at 96-98, 100; *Bell*, *supra* at 278-279.

"To establish a prima facie case of discrimination based on race, the opponent must show that: (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." *Knight*, *supra* at 336. To determine whether defendant has established a prima facie case, this Court must consider all relevant circumstances, including the prosecutor's pattern of strikes against minority jurors and the prosecutor's questions and statements in exercising his challenges. *Batson*, *supra* at 96-97. Although "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination," *Batson*, *supra* at 97, a showing "[t]hat 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).

Defendant has failed to establish a prima facie case of discrimination. Of the two black venire members the prosecutor struck from the jury, Diana Brown and Sarah Williams, defendant only challenged Williams' removal. Regardless, the circumstances surrounding the challenges of venire members do not raise the inference that the strikes were based on race. Indeed, although Brown indicated that she could be fair, when asked if she could base her

[2] "[T]he first *Batson* step is a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review." *People v Knight*, 473 Mich 324, 342; 701 NW2d 715 (2005). The second step is subject to de novo review, while step three is a question of fact that is reviewed for clear error. *Id.* at 344-345.

decision on the law, evidence, and common sense, Brown answered that she "would have to have a lot of proof" because "a lot of black men are incarcerated because of . . . circumstantial evidence." Further, the circumstances surrounding the prosecutor's challenge of Williams, i.e., her body language was "not transcribeable" and the prosecutor had a history of "inconsistent dealings" with teachers, do not give rise to the inference that this removal was based on race.[3] Moreover, it is noteworthy that the prosecutor did not try to remove any other blacks from the jury venire, and defense counsel also exercised a peremptory challenge to remove a black venire member. In light of this, defendant's *Batson* challenge fails.

Defendant contends that the trial court erroneously ruled that he must show a pattern of discrimination to sustain his *Batson* challenge. Although the court must consider a pattern of discrimination when determining whether defendant established a prima facie case, "the striking of even a single juror on the basis of race violates the Constitution." *Knight, supra* at 336 n 9. Thus, to the extent the trial court's ruling was based on the assumption that defendant must show a pattern of discrimination, the ruling was in error. Regardless, the court was correct in finding that defendant failed to establish a prima facie case of discrimination. "Where the trial court reaches the right result for the wrong reason, this Court will not reverse." *People v Brake*, 208 Mich App 233, 242 n 2; 527 NW2d 56 (1994).

IV. Evidence

Finally, defendant argues that the trial court erred in failing to suppress the handgun that the police seized as a result of their allegedly improper search of the apartment in which defendant was found. We disagree. Defendant preserved this issue by filing a pretrial motion to suppress evidence obtained from the apartment. We review the trial court's factual findings on a motion to suppress evidence for clear error. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993). We review de novo the trial court's conclusions of law and ultimate decision on a motion to suppress evidence. *People v Garvin*, 235 Mich App 90, 96-97; 597 NW2d 194 (1999).

Both the United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Bolduc*, 263 Mich App 430, 437; 688 NW2d 316 (2004). The search of a home is generally unreasonable absent a warrant issued on probable cause. *Maryland v Buie*, 494 US 325, 331; 110 S Ct 1093; 108 L Ed 2d 276 (1990). However, "[t]he Fourth Amendment permits a properly limited protective sweep in connection with an in-home arrest if the police reasonably believe that the area in question harbors an individual who poses a danger to them or to others." *People v Beuschlein*, 245 Mich App 744, 757; 630 NW2d 921 (2001). The purpose of this type of quick and limited

[3] Although defendant failed to establish a prima facie case and the prosecutor was therefore not required to provide race-neutral explanations, we note that the United States Court of Appeals for the Sixth Circuit has found that a juror's body language, demeanor, and occupation may constitute race-neutral justifications for exercising peremptory challenges. *Roberts ex rel Johnson v Galen of Virginia, Inc*, 325 F3d 776, 780-781 (CA 6, 2003); *McCurdy v Montgomery Co, Ohio*, 240 F3d 512, 521 (CA 6, 2001).

search is to ensure the safety of police officers and others. *People v Cartwright*, 454 Mich 550, 557; 563 NW2d 208 (1997). Furthermore, once police officers are lawfully in a position to view an item pursuant to a protective sweep, they may seize the item if its incriminating character is immediately apparent. *Beuschlein*, *supra* at 758, citing *People v Champion*, 452 Mich 92, 101-102; 549 NW2d 849 (1996).

Here, because Franklin consented to the officers' entry, they were lawfully inside the apartment. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). Upon seeing defendant, who matched the description of the shooter given by Walker and whom the police had reason to believe was armed, it was reasonable to conduct the protective sweep of the apartment. During this process, the gun was found in plain view lying inside an open bag of charcoal near where defendant had been standing. In light of these circumstances, the trial court's denial of defendant's suppression motion was proper.

Regardless, even if Franklin did not consent to the entry of her apartment, the police properly seized the gun. An exigent circumstance, such as the "hot pursuit" of a felon, is an exception to the warrant requirement. *In re Forfeiture of $176,598*, 443 Mich 261, 267-268; 505 NW2d 201 (1993); *People v Raybon*, 125 Mich App 295, 301; 336 NW2d 782 (1983).

> Pursuant to the exigent circumstances exception, we hold that the police may enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. If the police discover evidence of a crime following the entry without a warrant, that evidence may be admissible. [*In re Forfeiture of $176,598*, *supra* at 271 (quotation omitted).]

When the police arrived at the scene, Walker informed them that she and Warren had just been shot and identified the apartment to which defendant had fled. Further, the police had reason to believe the suspect was armed. Given this, the police lawfully entered the apartment in "hot pursuit" in order to protect others or prevent the suspect's escape. The subsequent discovery of the gun and its admission were, therefore, proper. In any event, the admission of the gun was harmless given Walker and Warren's identification of defendant as the shooter. *People v Rodriquez* (*On Remand*), 216 Mich App 329, 332; 549 NW2d 359 (1996) ("The erroneous admission of evidence is harmless if it did not prejudice the defendant.") Therefore, this claim fails.

Affirmed.

/s/ Donald S. Owens
/s/ Patrick M. Meter
/s/ Bill Schuette