STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2011
v	No. 297858 Saginaw Circuit Court
IDRIS LADELL YOUNG, Defendant-Appellant.	LC No. 09-032752-FC

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of carjacking, MCL 750.529a; conspiracy to commit carjacking, MCL 750.529a and MCL 750.157a; possession of a firearm during the commission of a felony, MCL 750.227b; and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to prison terms of 23 to 45 years for the carjacking and conspiracy to commit carjacking convictions, 48 to 90 months for the CCW conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. FACTS

Terry Green testified that he left work in Saginaw just before midnight on October 14, 2008, and stopped at the Blue Diamond convenience store on his way home. As he exited the store a few minutes later, he observed two men approaching from the right and walking quickly toward him. One of the men was holding a silver gun down at his side and looked directly at Green. The other man, who was later identified as defendant, told Green to "check it in." Green looked directly at defendant and, being confused by defendant's comment, asked, "Check it in?" Defendant pushed his hand inside his pocket as though he had a gun and repeated back, "Check it in." Defendant then ordered Green to "Give up your keys." Green dropped his keys in defendant's hand. Defendant jumped into the driver's seat of Green's white Ford Expedition SUV and the other man got into the driver's side back seat. A shot was fired from inside the SUV as defendant put the vehicle in reverse and pulled off. Green and another man who had been inside a vehicle parked next to Green's SUV ran inside the store. Green identified defendant in a photographic line-up.

Officer Gerald Bentley of the Kalamazoo Public Safety Community Policing Unit testified that he was involved in an undercover operation on October 16, 2008, that was targeting breaking and entering and prostitution in an area known as the "Edison Neighborhood." Around 3:00 p.m., he noticed people in a large white SUV in the parking lot of a convenience store with a history of problems including crowds gathering, fights, etc. He observed a person wearing a white shirt walking in the parking lot away from the SUV and toward a pay phone. The person was looking around and acting suspicious. Officer Bentley radioed for an officer in a patrol car to run the plate on the SUV through the LEIN system. The LEIN check revealed that the SUV was stolen out of Saginaw. Officer Bentley identified defendant in court as the person he observed in the parking lot.

Officer Bentley positioned himself to the east of the store to watch the vehicle. When defendant returned from the pay phone to the vehicle and began driving, Officer Bentley attempted but failed to stop the SUV. He then advised the officers in marked patrol cars that the SUV was westbound on Lake Street. Officers responded to the area and initiated a pursuit of the SUV as it fled. Officers in pursuit of the vehicle later advised that the persons in the SUV had fled on foot. After a chase, defendant was ultimately apprehended. A search of the SUV revealed defendant's wallet containing his state ID card and his credit card, as well as some paperwork containing defendant's name and a camera containing photographs of defendant.

II. The Batson[1] Challenge.

The prosecutor peremptorily dismissed Juror No. 100, Ms. Lamping. Defense counsel objected to the dismissal of Ms. Lamping on the ground that Lamping "appeared to be the only black or African-American left in the jury pool." Defense counsel raised a *Batson* challenge on the ground that Lamping "was the only one of color, or you know, that was left. And the prosecutor excused her, basically eliminating any and all blacks from this jury." The prosecutor responded:

> THE PROSECUTOR: Your Honor, frankly, I don't know if she's African-American or not. Ms. Strudgeon, who's seated in Seat No. 1 has darker skin that Ms. Lamping had. And Mr. Lopez in Seat No. 12, is Hispanic. And frankly it didn't even enter my mind that Ms. Lamping might be African-American because of her skin color.
>
> Now, maybe the defendant's perceiving it otherwise, but what I was basing my decision on is that she's a very inexperienced young person who seems very confused, not terribly sharp. I asked her a number of questions during the voir dire process, to which she gave responses that made me very uncomfortable with her ability to comprehend the evidence that's going to be presented and simply felt that she was not an appropriate juror based on that obvious inexperience.

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

> I note that she has only a ninth grade education. And even [defense counsel] made the comment when he went to Ms. Lamping that she appeared to be nervous. So it's obvious to everybody who's in this courtroom that she's not a very stable person.

The court then stated:

> THE COURT: The Court would note that from my observations, when she was – this lady was being voir dired, that she did appear to express, in addition, reluctance to being here. And I believe the prosecutor's given valid reasons other than race as to why this lady was challenged to be excused.

Defendant argues that the trial court erred by denying his *Batson* challenge. A Batson challenge presents mixed questions of fact and law that this Court reviews under the clearly erroneous and de novo review standards, respectively. *People v Knight*, 473 Mich 324, 342-345; 701 NW2d 715 (2005).

The Equal Protection Clause of the Fourteenth Amendment prohibits a party from exercising peremptory challenges to remove a prospective juror solely on the basis of the person's race. *Knight*, 473 Mich at 335. 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 opposing a peremptory challenge must make a prima facie showing of discrimination. *Id*. at 336, citing *Batson*, 476 US at 96. Once a party establishes a prima facie case the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral basis for the challenge. *Knight*, 473 Mich at 337-338. The establishment of purposeful discrimination "comes down to whether the trial court finds the . . . race-neutral explanations to be credible." *People v Bell*, 473 Mich 275, 283; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005), quoting *Miller-El v Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003).

In this case, defendant failed to make a prima facie showing of discrimination. Defendant relies only on the allegation that Ms. Lamping was the sole remaining black juror on the panel. This allegation, without more, does not establish a prima facie showing of discrimination. Further, there is no evidence in the record to support a factual finding that Ms. Lamping was in fact black. Although defendant asserts that she was black, no affirmative evidence was placed on the record regarding her race. Indeed, the prosecutor indicated that "it didn't even enter my mind that Ms. Lamping might be African-American because of her skin color," and defense counsel had previously stated "I'm not sure if Ms. Lamping and Ms. Strudgeon are of African-American descent or not."

Even assuming that defendant made a prima facia showing of discrimination, *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 384 (1995). Rather, the issue is whether the proponent's explanation is facially valid as a matter of law. *Id*. "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*.

Here, the prosecutor provided a race-neutral reason for its decision to peremptorily strike Ms. Lamping based upon her age and his observations of her during voir dire. Specifically, the prosecutor stated that "she is 18 years old, appears to be very inexperienced. She has only a ninth grade education based on her questionnaire. Her answers to questions that I posed, she appeared to be very insecure, unsure of herself, gave some expression of doubt about even wanting to be here or participating in this process." The trial court denied the *Batson* challenge, finding that, "From my observations, when she was – this lady was being voir dired, that she did appear to express, in addition, reluctance to being here. And I believe the prosecutor's given valid reasons other than race as to why this lady was challenged to be excused." The trial court's decision to credit the prosecutor's rationale is not clearly erroneous. The trial court was in a better position to observe the demeanor of the juror than is this Court on appeal. The trial court did not clearly err in determining that these proffered reasons were not pretextual.

III. MOTION TO SUPPRESS

Defendant contends that the trial court erred by denying his motion to suppress his statement. This Court reviews de novo a trial court's ruling on a motion to suppress. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). Although this court engages in a de novo review of the entire record, it will not disturb a trial court's factual findings unless those findings are clearly erroneous. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). A factual finding is clearly erroneous if it leaves the Court with a definite and firm conviction that the trial court has made a mistake. *People v Atkins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

Defendant moved to suppress a statement allegedly admitting involvement in the present case. The statement was made to Deputy Garrett DeWyse as DeWyse was preparing to transport defendant back to jail following the preliminary examination in this matter. Defendant argued that he was in custody at the time and that DeWyse interrogated defendant without first advising defendant of his *Miranda*[2] rights.

DeWyse testified at the motion hearing that he transported defendant to and from the preliminary examination and that he was in the courtroom during the preliminary examination. DeWyse testified that he receives a "transport list" of the inmates being transported on any given day. On June 11, 2009, his transport list included the names of both Idris Young and his brother, Demarcus Young, for an appearance at 10:30 a.m. However, the preliminary examination pertained only to defendant Idris Young. Demarcus Young was not requested to be brought into the courtroom. As DeWyse was walking defendant out of the courtroom after the preliminary examination, he

> was curious as to whether his brother was going to be needed. I – so I asked him whether his brother was on this case, trying to plan out my next move whether –

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

> or when the courtroom was going to request Demarcus Young be brought in or if he was going to be brought in.
>
> So I asked him if his brother was on the case. He told me at this time when his brother was arrested he was not on that case, but he wasn't sure

The following colloquy then occurred between the prosecutor and DeWyse:

> Q. Did you ask him anything more than that?
>
> A. No I did not.
>
> Q. Did the defendant continue to talk?
>
> A. Yes. After I asked him that and he told me that his brother – he wasn't sure that his brother was on the case, he told me that the witness who had testified had been lying in the courtroom.
>
> Q. And what else did he say, if anything?
>
> A. He said that he did not have the gun, the other guy had the gun. The witness testified that Idris had the gun in this carjacking, and Idris told me that he did not have the gun, the other guy had the gun.

DeWyse testified that after defendant stated that the witness was lying, DeWyse responded, "What are you talking about." At this point, defendant "clammed up" and did not say anything more.

It is uncontroverted that defendant was in custody when the statement at issue was made. The failure to give *Miranda* warnings prior to a statement made during a custodial interrogation renders the statement inadmissible for purposes other than impeachment. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). "Interrogation refers to express questioning and to any words or action on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *Id*. at 479. However, statements made voluntarily by persons in custody do not fall with the purview of *Miranda*. *Id*.

We must first determine if an interrogation occurred. Defendant suggests that he was interrogated because the officer initiated questioning with defendant by asking whether his brother was "on the case." However, nothing in the evidence suggests that DeWyse's question regarding defendant's brother was likely to elicit an incriminating response. Further, defendant volunteered that the victim was lying and that defendant did not have a gun, but that "the other guy" had the gun. This voluntarily made statement was not in response to DeWyse's question and does not fall within the purview of *Miranda*. Additionally, to the extent that defendant might argue that the officer expressly questioned him by responding, "What are you talking about?", we note that DeWyse's testimony reveals that defendant did not respond to DeWyse's question but, rather, that defendant said no more. Defendant's statement was not the result of custodial interrogation and, therefore, the trial court properly denied defendant's motion to suppress the statement.

IV. GUIDELINES SCORING

Defendant argues that the trial court erred in its scoring of Offense Variables 1, 9, and 10. This Court reviews de novo the application of the sentencing guidelines, but reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant argues that the trial court erred by scoring 25 points for OV 1 because no evidence was presented to support a finding that the gun fired from the SUV was discharged at or toward a human being.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *Hornsby*, 251 Mich App at 468. This Court reviews preserved scoring issues to determine if the sentencing "court properly exercised its discretion and whether the evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Offense variable 1 pertains to "the aggravated use of a weapon," and is scored "by assigning the number of points attributable to the [subcategory] that has the highest number of points." MCL 777.31(1). This offense variable permits the trial court to score 25 points if "a firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon."

Defendant asserts that no evidence was presented to support a finding that the firearm was discharged at or toward a human being. However, Green testified at the preliminary examination that the gun was discharged during the course of defendant fleeing. Green stated that he started running into the store. He could not tell whether the gunfire was in his direction, but he suspected it was because "as they backed straight back and as it whipped like this, that's when the gun went off – that's when I ducked and took off that way." At trial, the victim testified that defendant looked at him, put the vehicle in reverse, pulled off, and "that's when the shot fired." Given that the gun was fired as defendant was driving away and Green perceived a need to "duck" to avoid the gunfire, this evidence supports the trial court's twenty-five point score of OV 1.

Defendant also argues that the trial court erred by scoring 15 points for OV 10 because the evidence did not reveal a sufficient amount of preplanning or victimization.

Fifteen points are to be scored for OV 10 where "[p]redatory conduct was involved. MCL 777.40(1)(a). "Predatory conduct" is defined as "pre-offense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a).

The evidence showed that defendant and his companion quickly approached Green as he exited a convenience store at approximately midnight. Both men approached Green and one of the men showed Green a gun and the other demanded the victim's keys. The evidence supports an inference that defendant and his companion engaged in pre-offense conduct designed to allow

them to quickly confront Green with a gun as he exited the store so that they could carjack Green's vehicle. The evidence supports the trial court's 15 point score for OV 10.

Lastly, defendant argues that the trial court erred by scoring ten points for OV 9. OV 9 addresses the number of victims. Ten points are to be assessed for OV 9 where there were "2 to 9 victims who were placed in danger of physical injury or death . . ." MCL 777.39. Defendant argues that "there was no evidence that the gun was pointed towards anyone, therefore, there was no evidence that anyone was placed in danger." However, both the victim and the man who had been in the car next to the victim's vehicle were in the parking lot as the gun was fired from the moving vehicle. The mere firing of a gun places people who are in the vicinity of the gunshot in danger. The evidence supports the trial court's ten point score for OV 9.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald