STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2011
v	No. 298127 Wayne Circuit Court
LEONARD DANUDREY COOPER, Defendant-Appellant.	LC No. 09-030615-FH

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for voluntary manslaughter, MCL 750.321. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 12 to 25 years' imprisonment for the voluntary manslaughter conviction. We affirm.

I. *BATSON* CHALLENGE

Defendant argues that the trial court erred in dismissing his two *Batson*[1] challenges to the prosecution's use of two peremptory challenges to exclude two potential African-American jurors. A *Batson* challenge presents a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error and questions of law are reviewed de novo. *People v Knight*, 473 Mich 324, 345; 701 NW2d 715 (2005).

The purpose of the *Batson* rule 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*. There are three steps to a *Batson* challenge. 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. *Id*. at 337-338. "[T]he 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-

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

338. "[T]he 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).

To begin, defendant first argues, and we agree, that the trial court erred in determining that defendant failed to make a prima facie case regarding his first *Batson* challenge because it found no discriminatory pattern. *Knight*, 473 Mich at 336 n 9 (The requirement that a defendant make a prima facie showing of discrimination by reference to a practice or pattern of discrimination by the prosecution has been eliminated because "the striking of even a single juror on the basis of race violates the Constitution."). However, this issue is moot because the prosecution ultimately did offer race-neutral reasons for its use of peremptory challenges to excuse both jurors. *Id.* at 338 ("[I]f the proponent of the challenge offers a race-neutral explanation and the trial court rules on the ultimate question of purposeful discrimination, the first *Batson* step (whether the opponent of the challenge made a prima facie showing) becomes moot.").

The heart of defendant's *Batson* argument is his second one, that the prosecution's race-neutral reasons for excluding jurors Richard Wilson and Lonisha Moore were inadequate. "*Batson*'s second step 'does not demand an explanation that is persuasive, or even plausible.'" *Knight*, 473 Mich at 337, quoting *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.* "'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.*, quoting *Hernandez v New York*, 500 US 352, 360; 111 S Ct 1859; 114 L Ed 2d 395 (1991).

The prosecution gave the following explanation for its peremptory challenge of Wilson:

> With Mr. Wilson, I've had an opportunity to observe Mr. Wilson. Mr. Wilson's body language and his answers to the questions demonstrated to me that Mr. Wilson had no desire to be here, no desire to sit on this jury, therefore, I didn't want a person who doesn't want to be here on the jury, at least from my perspective.

Likewise, the prosecution explained its peremptory challenge of Moore by stating the following: "Miss Moore is too young in my opinion. I don't know her age. Just in looking at her and observing her, Miss Moore is too young. This is a very serious case." In response to the prosecution's proffered race-neutral explanations, the trial court stated:

> [T]he reason required does not require an explanation that it [sic] persuasive or even plausible. The only question at this stage is whether the proponent's explanation is facially valid as a matter of law. If the proponent's [sic] 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.

> All right. At this point, I will have to find that the reasons are facially valid, and at this point I cannot find that there is a pretext. So, I don't think that the challenge has been proved as a purposeful discrimination, and so I'm denying the challenge.

As a matter of law, the prosecution offered race-neutral explanations for its use of peremptory challenges on Wilson and Moore when it cited the jurors' demeanor and age, respectively. See *People v Howard*, 226 Mich App 528, 534, 536; 575 NW2d 16 (1997) (the articulation of a race-neutral explanation overcomes a prima facie showing of discriminatory purpose); see also *Roberts v Galen of Va, Inc*, 325 F3d 776, 780-781 (CA 6, 2003) (a juror's body language and demeanor may constitute race-neutral reasons for exercising peremptory challenges) and *US v Maxwell*, 160 F3d 1071, 1075-1076 (CA 6, 1998) (age may constitute a race-neutral justification for exercising a peremptory challenge). Consequently, the trial court did not clearly err when it found the prosecution's race-neutral explanations regarding its use of peremptory challenges on Wilson and Moore to be facially valid. And, though not raised by defendant, we also conclude that the trial court was in the best position to observe the demeanor of the prosecution and the jurors and it did not err in determining that the prosecution's proffered explanations were not pretextual. *Knight*, 473 Mich at 344-345 n 13.

II. INSTRUCTIONAL ERROR

Defendant also asserts that the trial court erred in denying his request that the jury be given the self-defense jury instruction. This Court reviews the trial court's determination that the facts did not support a self-defense instruction for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998).

The Self-Defense Act (SDA), MCL 780.971 *et seq*., effective October 1, 2006, modified the common-law duty to retreat that was imposed on a person who was not attacked inside his or her own home, *People v Conyer*, 281 Mich App 526, 530 n 2; 762 NW2d 198 (2008), but it continues to require an honest and reasonable belief of danger of death or great bodily harm to justify the use of deadly force, *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). MCL 780.972(1) provides:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

(b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

Although defendant was not engaged in the commission of a crime at the time he used deadly force, he did not have the legal right to be in the victim's home because the victim had previously told defendant to leave on at least two separate occasions during their verbal altercation that eventually escalated into a physical fight. Consequently, defendant's claim of self-defense is governed by Michigan's common-law, which imposes a duty to retreat. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).

The evidence presented at trial shows that after the victim and defendant began physically fighting, Keon Cooper broke the fight apart and defendant momentarily walked away from the victim before voluntarily entering back into the fight. Thereafter, the victim fell on his side and defendant got behind the victim and began to choke him. At this point, the victim attempted to end the fight by "tapping out" and he told defendant that he could not breathe; however, defendant ignored the victim and continued to choke him. This evidence does not support a self-defense instruction. Defendant had a clear avenue of retreat once Cooper broke the fight apart, but he chose to resume fighting. Additionally, defendant could not have reasonably believed that he was in imminent danger of death or great bodily harm when he choked the victim from behind after the victim fell to the ground because he was no longer in a position of danger and the victim was endeavoring to end the fight. Accordingly, the trial court did not abuse its discretion in refusing to read the self-defense instruction to the jury.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio