STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 16, 2013
V	No. 307104 Wayne Circuit Court
BERRY ROBINSON, Defendant-Appellant.	LC No. 11-004878-FC

Before: MARKEY, P.J., and TALBOT and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of first-degree felony murder, MCL 750.316, assault with intent to rob while armed, MCL 750.89, armed robbery, MCL 750.529, and assault with intent to murder, MCL 750.83. Because the trial court did not err by refusing to allow defendant to exercise a peremptory challenge to excuse a Caucasian male juror, defendant was not denied the effective assistance of counsel or his right to present a defense, the trial court did not abuse its discretion by denying defendant's motion for an adjournment, and the evidence was sufficient to support defendant's felony murder and assault with intent to murder convictions, we affirm.

Defendant's convictions stem from a shooting that occurred at a residence in Detroit. James Pounds was at the residence with James Reid when defendant and another man entered. Defendant asked for a deal on marijuana, and Pounds replied, "[n]ot right now." Defendant then hit Pounds in the face and the other man pulled out a gun. Defendant stated, "[d]on't play with us. You know what we're here for." Defendant searched Pounds's pockets and took money and marijuana from him while the other man fatally shot Reid in the chest. The other man then searched Reid, and defendant picked up money that had fallen on the floor. Pounds jumped out a window and ran. As he was running, someone in a car yelled something at him, and five or six gunshots were fired in his direction.

I. DENIAL OF PEREMPTORY CHALLENGE

Defendant first argues that he was denied his state and federal constitutional rights to due process when the trial court refused to allow defense counsel to use a peremptory challenge to excuse a Caucasian male juror. We note that defendant erroneously characterizes this issue as one of constitutional dimension. "The right to exercise peremptory challenges in state court is determined by state law." *Rivera v Illinois*, 556 US 148, 152; 129 S Ct 1446; 173 L Ed 2d 320

(2009). Peremptory challenges do not implicate the federal constitution and, accordingly, the denial of a peremptory challenge does not implicate federal due process rights. *Id*. at 152, 158. Similarly, peremptory challenges do not implicate the Michigan Constitution. In *People v Bell*, 473 Mich 275, 293; 702 NW2d 128 (2005) (opinion by CORRIGAN, J.), amended 474 Mich 1201 (2005), our Supreme Court stated:

> Because the right to a peremptory challenge in Michigan is not provided by the Michigan Constitution but, rather, by statute and court rule, we conclude, as did the United States Supreme Court, that the right is of non-constitutional dimension. Thus, under our jurisprudence, a violation of the right is reviewed for a miscarriage of justice if the error is preserved and for plain error affecting substantial rights if the error is forfeited.[1] [Footnotes omitted.]

A miscarriage of justice occurs if it appears that, more probably than not, the error was outcome determinative. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

"Under the Equal Protection Clause of the Fourteenth Amendment, a party may not exercise a peremptory challenge to remove a prospective juror solely on the basis of the person's race." *People v Knight*, 473 Mich 324, 335; 701 NW2d 715 (2005) (footnote omitted). In *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), the Court "set forth a three-step process for determining an improper exercise of peremptory challenges." *Bell*, 473 Mich at 282 (opinion by CORRIGAN, J.).

> First, there must be a prima facie showing of discrimination based on race. To establish a prima facie case of discrimination based on race, the opponent of the challenge must show that: (1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race. The *Batson* Court directed trial courts to consider all relevant circumstances in deciding whether a prima facie showing has been made.
>
> Once the opponent of the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge. The neutral explanation must be related to the particular case

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[1] Although five separate opinions were rendered in *Bell*, this aspect of Justice CORRIGAN's lead opinion garnered majority support. Justices YOUNG and MARKMAN concurred with Justice CORRIGAN, and Chief Justice TAYLOR stated:

> As noted by the lead opinion, peremptory challenges are granted to a defendant by statute and by court rule-not by the United States Constitution or the Michigan Constitution. Denial of the statutory right requires reversal of a conviction only if it resulted in a miscarriage of justice. MCL § 769.26. [*Bell*, 473 Mich at 301-302 (opinion by TAYLOR, C.J.).

being tried and must provide more than a general assertion in order to rebut the prima facie showing. If the challenging party fails to come forward with a neutral explanation, the challenge will be denied.

Finally, the trial court must decide whether the nonchallenging party has carried the burden of establishing purposeful discrimination. Since *Batson*, the Supreme Court has commented that the establishment of purposeful discrimination comes down to whether the trial court finds the . . . race-neutral explanations to be credible. The Court further stated, [c]redibility can be measured by, among other factors, the . . . [challenger's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. If the trial court finds that the reasons proffered were a pretext, the peremptory challenge will be denied. [*Id*., at 282-283 (quotation marks and citations omitted; first brackets added).]

The proper standard of review depends on the *Batson* step at issue. *Knight*, 473 Mich at 345.

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. [*Id*.]

In this case, defense counsel sought to excuse prospective jurors Zimmerman and Hill, both Caucasian males, after having previously exercised six peremptory challenges. The prosecution noted that defense counsel had used his three or four most recent peremptory challenges to excuse Caucasian males and argued that he was attempting to strike Caucasian males from the jury panel.[2] When the trial court asked defense counsel why he wanted to excuse Zimmerman, counsel responded that Zimmerman had a prior police contact and was unemployed. Zimmerman stated during voir dire that he was previously convicted of driving under the influence (DUI). Counsel denied that he wanted to excuse Zimmerman because of his race. The court indicated that there were other prospective jurors who were African-American and were unemployed. Defense counsel then stated that the jury pool was not representative of the community and contained only two black males. The trial court also indicated that there were several female prospective jurors with DUI convictions whom counsel did not seek to excuse. The court asked defense counsel if there was any other reason why he sought to excuse

[2] Defense used his first two peremptory challenges to excuse a female and an African-American male.

Zimmerman. Counsel responded that he wanted to excuse Zimmerman because of his body language, the way that he responded, and his voice cadence. When asked about Hill, the other Caucasian male that defense counsel sought to exclude, counsel indicated that Hill had previously sat on a jury in a similar case. The trial court allowed Hill to be excused, but denied defense counsel's attempt to use a peremptory challenge to excuse Zimmerman. Defense counsel then unsuccessfully moved for a mistrial.

On the second day of trial, defense counsel again argued that the trial court erroneously denied his attempt to exercise a peremptory challenge to excuse Zimmerman. The trial court stated that it had concluded that counsel did not provide a valid reason to excuse Zimmerman and that the court had determined that counsel wanted to excuse Zimmerman because of his race. Counsel again moved for a mistrial, which the trial court denied.

Defendant argues that the prosecution failed to satisfy the first *Batson* step because it failed to demonstrate a prima facie case of discrimination based on race. Defendant's argument lacks merit. Defense counsel excused four males, apparently all of whom were Caucasian, before attempting to excuse Zimmerman and Hill.[3] Counsel's use of his challenges thus "created a pattern of strikes against Caucasian males." *Bell*, 473 Mich at 288. "This pattern was sufficient to raise an inference that defense counsel was indeed excluding potential jurors on the basis of their race." *Id.* Therefore, the trial court did not clearly err by finding that the prosecution demonstrated a prima facie case of racial discrimination. In any event, because defense counsel offered a race-neutral explanation and the trial court ruled on the question of discrimination, whether the prosecution established a prima facie case of discrimination is moot. See *Knight*, 473 Mich at 338.

Defendant also argues that the trial court erred by concluding that the prosecution carried its burden of establishing purposeful discrimination. Defendant proffered several race-neutral reasons for wanting to excuse Zimmerman, including his prior DUI history, his unemployment, his body language, the way that he responded, and his voice cadence. The trial court determined that those reasons were not valid. The trial court stated:

> You were excusing white males, one after the other. I was sitting here waiting for it myself. And I was surprised because you excused juror – when you said juror number two, and it was the young lady, and then you went through this rigmarole about, "Oh, wait a minute. Wait a minute. I need new glasses and I need this. No, I didn't mean you. I didn't mean you." And then you excused a male. And then you've been just excusing them the entire time.
>
> And then you object when she excuses that young lady, which she had to do because of the big show that was made.
>
> But, anyway, I thought you had already preserved your record on that. Because, yes, I did find that you did not give me a valid reason for excusing Mr.

[3] Defendant does not dispute that all four men were Caucasian.

> Zimmerman, other than the fact you said, oh, I don't like the way – his body language; this, that, and the other thing.
>
> First, you told me, well, his contacts with the police, which he didn't have any. He did have a DUI, which most of the other – which several of the other people, who happen to be white women, had.
>
> So, all of your questioning – and when we listen to what was there, there was actually no reason. There were other jurors who I noticed, men, that you got rid of, who answered similarly or had no contact at all with police.
>
> So, anyway, my finding was you could not – it was not established. It looked to me, and I considered that the only reason Mr. Zimmerman was being excluded was because of his race, being a white male. That's what I decided.

A trial court's factual findings regarding discriminatory intent are entitled to great deference and will largely turn on the court's assessment of credibility. *Knight*, 473 Mich at 344. The trial court believed that defense counsel's reliance on the facts that Zimmerman was unemployed and had a DUI conviction was pretextual because there were other jurors who were unemployed and who had DUI convictions. Contrary to the trial court's statement, "several" of the other prospective jurors did not have DUI convictions. However, other prospective jurors had DUI convictions and several of the prospective jurors had close family members with DUI convictions. The trial court correctly stated that there were other jurors who were unemployed, although the race of those prospective jurors is unclear from the record. According great deference to the trial court's assessment of credibility, we cannot conclude that the court clearly erred by determining that defense counsel's stated reasons for seeking to excuse Zimmerman were merely pretextual and that the prosecution proved purposeful discrimination. *Id.* Accordingly, the trial court did not err by denying defendant's attempt to exercise a peremptory challenge to excuse Zimmerman.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next contends that he was denied the effective assistance of counsel because his attorney failed to timely obtain and review discovery materials, failed to conduct a reasonable pretrial investigation, and failed to adequately engage in plea negotiations. Because defendant failed to preserve this issue for appellate review by moving for a new trial or a *Ginther*[4] hearing, our review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Whether a defendant was denied his constitutional right to the effective assistance of counsel is a question of law, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

In order to prevail on a claim of ineffective assistance of counsel and "obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of

[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). The defendant must also overcome the strong presumption that counsel's actions and decisions constituted sound trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *Id*. at 445.

Defendant argues that his trial counsel failed to timely pick up and review discovery materials consisting of tapes containing "hours and hours" of defendant's recorded telephone conversations while he was in jail. Counsel filed an emergency motion regarding the discovery materials and a request for an adjournment. At the September 6, 2011, hearing on the motion, counsel admitted that he did not pick up the discovery materials until August 27, 2011,[5] and that he had not had an opportunity to listen to the tapes and review the matter with defendant. The prosecution indicated that the materials had been made available to defense counsel weeks before August 27, 2011. The prosecution further stated:

> The issue is, though, Judge, from the very beginning I spoke to [defense counsel] about the possibility of resolving this prior to trial because his client is not the shooter, and we wanted to speak to his client in terms of making a deal for him to testify against the shooter.
>
> Unfortunately, the problem has been because he has not been confronted with this information to see the advantages of that course of action --

The trial court indicated that it would not grant an adjournment and that trial would begin on September 12, 2011. Defense counsel then stated that he did not have all of the information and that there was information on the tapes may have compromised his ability to represent defendant fairly. Thereafter, on the first day of trial, defendant sought to exclude the recorded conversations, arguing that they were not relevant, were more prejudicial than probative, and would deny defendant a fair trial. The trial court denied defendant's motion without reviewing the conversations and ruled that they were admissible. Defense counsel again indicated that he had still not reviewed all of the conversations.

"Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Defense counsel admittedly failed to review all of the recorded conversations on the tapes before trial, and there is no indication that his failure to timely pick up and review the materials constituted sound trial strategy. Accordingly, defendant has shown that trial counsel's performance fell below an objective standard of reasonableness. *Trakhtenberg*, 493 Mich at 51. Defendant has failed to show, however, that there exists a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. See *id*. The failure to

[5] Defense counsel suggested that more recorded conversations became available after he picked up the materials on August 27, 2011.

investigate constitutes ineffective assistance of counsel only if it undermines confidence in the outcome of the trial. *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). Although defendant argues that trial counsel was unprepared to proceed with trial and was denied an adjournment, he fails to indicate how counsel's alleged unpreparedness affected the trial or what counsel could have done differently if he had timely picked up and reviewed the tapes. Moreover, defendant was aware of what was said on the tapes since they were recordings of his own telephone calls. Thus, defendant has failed to establish a reasonable probability that the outcome of the trial would have been different but for counsel's performance. See *Trakhtenberg*, 493 Mich at 51.

Defendant also argues that defense counsel's failure to timely obtain and review the tapes denied him the effective assistance of counsel because it denied him the opportunity to engage in plea negotiations. The record reveals that the prosecution was willing to negotiate a plea with defendant, and that, specifically, the prosecution was interested in negotiating a plea with defendant if he agreed to testify against the shooter. Defendant has failed to demonstrate, however, that the prosecution would have in fact offered him a plea, what the terms of the offer would have been, and that defendant would have accepted the offer. Generally, defense counsel has a duty to communicate formal plea offers from the prosecution to the defendant. *Missouri v Frye*, 566 US ___; 132 S Ct 1399, 1408; 182 L Ed 2d 379 (2012). Moreover, "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler v Cooper*, 566 US __; 132 S Ct 1376, 1387; 182 L Ed 2d 398 (2012). "[T]here is no constitutional right to plea bargain" however, and a prosecutor need not offer a plea "if he prefers to go to trial." *Weatherford v Bursey*, 429 US 545, 561; 97 S Ct 837; 51 L Ed 2d 30 (1977). "If no plea offer is made, . . . the issue raised here [involving the appropriate remedy for plea bargain-related ineffective assistance of counsel] simply does not arise." *Lafler*, 566 US at ___; 132 S Ct at 1387. Accordingly, defense counsel does not render ineffective assistance when no formal plea offer is made. Further, it is clear in this case that any offer would have involved defendant agreeing to testify against the shooter, which defendant has not indicated a willingness to do. Thus, defendant's claim that he was denied the ineffective assistance of counsel because counsel's actions deprived him of the opportunity to engage in plea negotiations fails.

III. DENIAL OF ADJOURNMENT

Defendant next contends that the he was denied his state and federal constitutional rights to present a defense and to the effective assistance of counsel when the trial court denied his request for an adjournment. We review for an abuse of discretion a trial court's grant or denial of an adjournment. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). An abuse of discretion occurs when the trial court's outcome falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). "In addition, a defendant must show prejudice as a result of the trial court's abuse of discretion." *Snider*, 239 Mich App at 421. We review de novo whether a defendant was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

"A motion for adjournment must be based on good cause." *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). "'Good cause' factors include 'whether defendant (1) asserted a

constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.'" *Id.*, quoting *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). It is well established that a criminal defendant has a constitutional right to present a defense. *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012). That right is not unlimited, however, "and is subject to reasonable restrictions." *Id.* "The right to present a complete defense 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

The trial court denied defendant's motion for an adjournment six days before trial, stating that defense counsel had "plenty of notice" and that defendant was aware of what he said during his recorded telephone conversations. The record shows that the discovery materials were made available to defense counsel weeks previously, but that he did not pick them up until August 27, 2011. Although defendant claims that he was denied his right to present a defense, as previously discussed, he fails to indicate what counsel could have done differently had he reviewed all of the recordings before trial. Moreover, defendant fails to provide any particulars regarding the defense of which he was purportedly deprived because of the trial court's denial of his motion. Thus, defendant has failed to establish good cause for the adjournment and failed to show prejudice as a result of the trial court's denial of the adjournment. As such, the trial court did not abuse its discretion by denying defendant's motion. Further, defendant has failed to demonstrate that he was denied his rights to present a defense or to the effective assistance of counsel as a result of the trial court's ruling.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence was insufficient to support his felony murder and assault with intent to murder convictions. We review de novo a challenge to the sufficiency of evidence. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). When reviewing such a challenge, "[w]e view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt." *Id.*

A. FELONY MURDER

Defendant contends that the evidence was insufficient to support his felony murder conviction because no evidence was presented that he knew of the shooter's intent. In order to prove felony murder, the prosecution must show:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b)[, including robbery]. [*People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009).]

Felony murder may also be proven under an aiding and abetting theory.

> To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

In order to establish the requisite malice, "the prosecution must show that the aider and abettor either intended to kill, intended to cause great bodily harm, or wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm." *Id.* at 140-141. A jury may "infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Aaron*, 409 Mich 672, 729; 299 NW2d 304 (1980). "Further, if an aider and abettor participates in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor is acting with 'wanton and willful disregard' sufficient to support a finding of malice." *Riley*, 468 Mich at 141. "An aider and abetter's knowledge of the principal's intent can be inferred from the facts and circumstances surrounding an event." *People v Bennett*, 290 Mich App 465, 474; 802 NW2d 627 (2010).

Contrary to defendant's argument, his knowledge of the shooter's intent can be inferred from the facts and circumstances surrounding the shooting. See *id*. Defendant went to the residence with the shooter, who was armed with a gun. Once inside, defendant asked Pounds for a deal on marijuana. Immediately after Pounds replied, "[n]ot right now," defendant struck Pounds in the face and the shooter pulled out his gun and shot Reid in the chest. Reid was standing with his hands up and was not resisting. At one point, defendant stated, "[d]on't play with us. You know what we're here for." Defendant took money and marijuana from Pounds and picked up money from the floor while the shooter began searching Reid. From these circumstances, a rational trier of fact could conclude that defendant was aware that the shooter was armed with a gun and intended to shoot someone in the residence. Moreover, malice can be inferred because defendant "intentionally set in motion a force likely to cause death or great bodily harm." *Aaron*, 409 Mich at 729. Pounds allowed defendant and the shooter to enter the house because Pounds knew defendant. By going to the house with the shooter to rob the individuals inside, defendant "intentionally set in motion a force likely to cause death or great bodily harm." *Id.* Accordingly, viewed in the light most favorable to the prosecution, a rational trier of fact could conclude that the intent element was proven beyond a reasonable doubt.

B. ASSAULT WITH INTENT TO MURDER

Defendant also argues that there was insufficient evidence to support his assault with intent to murder conviction because no evidence was presented linking him to the car from which gunshots were fired at Pounds after Pounds fled from the residence.

"[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). In order to convict a defendant of an offense, the prosecution must prove that the defendant either directly committed the offense or aided and abetted another in committing

the offense. See *People v Robinson*, 475 Mich 1, 5-7; 715 NW2d 44 (2006). Identity may be established through direct testimony or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

The circumstantial evidence presented during trial was sufficient to prove that defendant either fired gunshots at Pounds or that he aided and abetted his accomplice in firing gunshots at Pounds. Defendant and his accomplice robbed Pounds and Reid of money and marijuana after defendant hit Pounds in the face and his accomplice fatally shot Reid. Fearing that he would also be shot, Pounds jumped out a window and fled. As he was fleeing, a vehicle drove by and Pounds heard someone yell something before five or six gunshots were fired in his direction. Although Pounds could not identify the individuals in the vehicle, the circumstantial evidence was sufficient to establish defendant's identity as one of the perpetrators inside the vehicle. Thus, viewed in the light most favorable to the prosecution, a rational trier of fact could conclude that defendant either directly committed the offense or aided and abetted his accomplice in committing the offense.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Pat M. Donofrio