STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 11, 2014
v	No. 312433 Kent Circuit Court
VIDAL LEE SIMMONS, Defendant-Appellant.	LC No. 11-011131-FH; 11-011159-FH

Before: MARKEY, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant Vidal Lee Simmons appeals by leave granted his convictions after jury trial of third-degree criminal sexual conduct, MCL 750.520d(1)(a), and felonious assault, MCL 750.82. Defendant was sentenced to a term of 10 to 15 years' imprisonment for his third-degree criminal sexual conduct conviction and a concurrent term of 18 to 48 months' imprisonment for his felonious assault conviction, with 134 days' credit applied to both terms. We affirm.

Defendant first asserts that the trial court erred by denying his challenge to the jury selection process in which he argued that he was denied his right to the equal protection of the law because the prosecution used peremptory challenges to dismiss two prospective jurors solely on the basis of the potential juror's race. See *Batson v Kentucky*, 476 US 79, 86, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We find defendant's argument to be without merit.

A three-step analysis is used when invidious discrimination in the use of preemptory challenges is alleged. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005). First, the defendant bears the burden of making a prima facie case of discrimination based on race. *Id.*; *Batson*, 476 US at 93. This requires that the defendant show that (1) he or she is a member of a cognizable racial group, (2) that the prosecutor exercised peremptory challenges to exclude members of the defendant's race from the jury pool, and (3) the circumstances raise an inference that the peremptory challenges were based on race. *Id.* at 96; *Bell*, 473 Mich at 282-283. If the defendant makes such a prima facie showing of discrimination, the burden shifts to the prosecutor to offer a race-neutral explanation for challenging the jurors at issue. *Batson*, 476 US at 97; *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). The final step is the trial court's resolution of the defendant's challenge. *Bell*, 473 Mich at 283. The credibility of the prosecution's race-neutral explanation is at the heart of whether purposeful discrimination in

violation of the Equal Protection Clause has been established. *Batson*, 476 US at 98, n 21; *Hernandez v New York*, 500 US 352, 367; 111 S Ct 1859; 114 L Ed 2d 395 (1991).

We review de novo the ultimate constitutional question and whether as a matter of law the prosecution has proffered a race-neutral reason for its peremptory challenges. *Pellegrino v Ampco Sys Parking*, 486 Mich 330, 338; 785 NW2d 45 (2010); *People v Knight*, 473 Mich 324, 343-344; 701 NW2d 715 (2005). The trial court's determination to either accept the prosecution's race-neutral explanation of a peremptory challenge or find that invidious discrimination is the sole basis for the challenge is reviewed on appeal for clear error. *Hernandez*, 500 US at 369, 372; *Bell*, 473 Mich at 292. Because the trial court's determination regarding purposeful discrimination will largely depend on its evaluation of credibility, a reviewing court must ordinarily accord the trial court's determination great deference. *Hernandez*, 500 US at 364-365; *Batson*, 476 US at 98 n 21; MCR 2.613(C).

Initially, we recognize that the first step in the analysis is moot because the prosecutor offered race-neutral explanations for the challenges, and the trial court found these credible and race neutral. *Hernandez*, 500 US at 359 ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."). Regarding the second *Batson* step, our review of the record shows the prosecutor offered race-neutral explanations for the peremptory challenges, i.e., the prosecution's reasons were not inherently based on racial discrimination. See *Hernandez*, 500 US at 360 ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."). Finally, as to the trial's court's ultimate ruling, we conclude that defendant has failed to show that the trial court clearly erred in finding that the prosecutor's explanations were credible, race-neutral reasons.

The trial court found that the behavior of one of the stricken jurors was "utterly inappropriate." Regarding the other, the trial court found that his responses were slower than the other jurors; consequently, the prosecutor's concerns regarding attentiveness were credible. Further, the trial court explicitly found the prosecutor to be very credible. Because a trial court's "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province,'" *Hernandez*, 500 US at 360 (citations omitted), the trial court's findings are accorded great deference. *Batson*, 476 US at 98 n 21; see also MCR 2.613(C). Because nothing in the record contradicts its factual determinations, we conclude that the trial court did not clearly err by finding that the prosecutor's race-neutral explanations were credible.

Defendant also asserts that the trial court erred by failing to instruct the jury on self-defense for his felonious assault charge. A party waives claims of instructional error by approving or not objecting to the trial court's jury instructions. *People v Kowalski*, 489 Mich 488, 503-505; 803 NW2d 200 (2011). Waiver extinguishes any error leaving nothing to review on appeal. *Id*. at 503. Here, defense counsel approved the trial court's instructions; therefore, this issue has been waived, and appellate review is unavailable. *Id*.

Defendant finally asserts that defense counsel provided ineffective assistance because she agreed with the trial court that the evidence did not support a self-defense instruction. This issue has not been properly presented for our review because it was not identified in defendant's

statement of questions presented in his brief on appeal. See MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Nevertheless, we have reviewed defendant's argument and conclude that counsel was not ineffective because defense counsel is not required to assert frivolous or meritless motions. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). Where the evidence at trial did not support a self-defense instruction, any motion or objection regarding such an instruction would have been meritless.

We affirm.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray