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ATTORNEY FOR APPELLANT:

DANIELLE GREGORY
Marion County Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WALTER WALKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1010-CR-691
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable James Osborn, Judge
Cause No. 49D15-0910-FD-89475

June 10, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Walter Walker appeals his conviction for Class D felony pointing a firearm. We affirm.

Issues

Walker raises three issues, which we reorder and restate as:

I. whether venue in Marion County was proper;

II. whether the trial court properly rejected his Batson challenge; and

III. whether the trial court properly declined to instruct the jury on self-defense.

Facts

Shortly before 5:00 p.m. on October 20, 2009, Mac Gerkin was driving a work truck with a passenger, Larry Day, eastbound on I-70. Gerkin was driving in the middle lane, east of Post Road in Indianapolis in Marion County, where the lanes reduced from three to two, when a blue Oldsmobile Cutlass driven by Walker "came flying around on the left side . . . after the third lane had already run out." Tr. p. 100. Gerkin was forced to slow down to avoid an accident. Walker got into the right lane and slowed down considerably. As Gerkin drove past Walker, Gerkin looked out the window and raised his hands like, "What the heck are you doing?" Id. Walker pulled behind Gerkin and began tailgating. Walker then pulled alongside Gerkin in the right lane and pointed a gun directly at Gerkin's passenger-side window. Gerkin sped up, Walker pulled up next to Gerkin's truck, and Walker pointed the gun a second time. Gerkin sped up again, and Walker pulled up a third time, pointing the gun at Gerkin's truck again. Gerkin reported

the incident to police, and Walker was detained after he exited I-70 at the Greenfield exit in Hancock County. A gun was found under Walker's seat.

The State charged Walker with Class D felony pointing a firearm. A jury found him guilty as charged. Walker now appeals.

Analysis

I. Venue

Walker argues that there is insufficient evidence to prove venue in Marion County. "The right to be tried in the county in which an offense was committed is a constitutional and a statutory right." Baugh v. State, 801 N.E.2d 629, 631(Ind. Ct. App. 2004) (citing Ind. Const. Art. 1, § 13; Ind. Code § 35-32-2-1). Because venue is not an element of the offense, the State need only prove it by a preponderance of the evidence and need not prove it beyond a reasonable doubt. Id. In determining whether the State established venue, we do not weigh the evidence nor resolve questions of credibility, but look to the evidence and reasonable inferences therefrom that support the conclusion of requisite venue. Morris v. State, 274 Ind. 161, 163, 409 N.E.2d 608, 610 (Ind. 1980). "Circumstantial evidence is no different from other evidence for this purpose, and standing alone may be sufficient." Id.

At trial the State established that the lane reduction occurs in Marion County at mile marker 91, that the Marion County-Hancock County border is at mile marker 94, and that Walker was detained near the Greenfield exit, which is at mile marker 104. Gerkin testified that Walker pointed the gun before they got to the Mount Comfort exit at mile marker 96. Regarding where the incident occurred, Gerkin testified that he did not

know where the county line is but that the incident happened "right after Post Road." Tr. p. 106. According to Walker, because the parties were traveling sixty miles-per-hour, the parties must have crossed into Hancock County when he first pointed the gun at Gerkin.

The State argues that venue in Marion County was proper based on Indiana Code Section 35-32-2-1(h), which provides, "If an offense is committed at a place which is on or near a common boundary which is shared by two (2) or more counties and it cannot be readily determined where the offense was committed, then the trial may be in any county sharing the common boundary." Based on this statute, it is not necessary to determine precisely where the gun pointing incidents occurred because the evidence clearly shows that the offense was committed at a place on or near a common boundary shared by two counties and it cannot be readily determined where the offense was committed. Thus, the trial was properly conducted in Marion County.

II. Batson Challenge

Walker contends the trial court erred in denying his Batson challenge after the State used preemptory challenges to strike three of the four African-American prospective jurors. In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), the United States Supreme Court determined that the prosecutor's use of a peremptory challenge to strike a potential juror solely on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment. Jeter v. State, 888 N.E.2d 1257, 1262 (Ind. 2008). "The Batson Court developed a three-step test to determine whether a peremptory challenge has been used improperly to disqualify a potential juror on the basis of race." Id. at 1263

> First, the party contesting the peremptory challenge must make a prima facie showing of discrimination on the basis of race. Second, after the contesting party makes a prima facie showing of discrimination, the burden shifts to the party exercising its peremptory challenge to present a race-neutral explanation for using the challenge. Third, if a race-neutral explanation is proffered, the trial court must then decide whether the challenger has carried its burden of proving purposeful discrimination.

Id. (citations omitted). "Upon appellate review, a trial court's decision concerning whether a peremptory challenge is discriminatory is given great deference, and will be set aside only if found to be clearly erroneous." Forrest v. State, 757 N.E.2d 1003, 1004 (Ind. 2001).

Here, after the jury was selected, Walker made a Batson challenge, the State proffered race-neutral explanations, and the trial court accepted the State's explanations. On appeal, Walker acknowledges that the removal of some African American jurors by itself does not raise an inference of racial discrimination, but argues that the State exhibited a pattern of race discrimination when using preemptory challenges to exclude 75% of the African American panel members "without factually correct race neutral reasons." Appellant's Br. p. 18.

The lynchpin of our jury system is a fair trial. It is understandable that where, as here, an African-American defendant is on trial and observes three of four African-Americans in the jury venire be excused, legitimate concerns arise. In Hardister v. State, 849 N.E.2d 563 (Ind. 2006), however, the State used peremptory challenges to strike five of the seven African-American prospective jurors, and our supreme court concluded, "Standing alone the removal of some African-American jurors by preemptory challenge

does not raise an inference of discrimination." Hardister, 849 N.E.2d at 576. The court held that, because Hardister did not make a prima facie case, the burden never shifted to the State to provide a race-neutral explanation. Id. at 576-77.

Here, the trial court noted that, even though the State had remaining preemptory strikes available, an African-American was seated on the jury. Following Hardister, as we must, we conclude that the use of preemptory challenges to strike some, but not all, of the African-American prospective jurors did not shift the burden to the State to provide race neutral explanations.

Nevertheless, we review the circumstances in this case to alleviate any concerns regarding racial discrimination. The prosecutor explained her apprehension regarding Ms. Jackson's possible child care issues, gun ownership, and views on self-defense. The prosecutor also pointed to Ms. McDaniel's hesitation to judge people because of her religious beliefs. The trial court accepted the State's explanations regarding these two jurors, and our review of the transcript does not show that the trial court's conclusion was clearly erroneous.

However, the prosecutor's explanation regarding Mr. Bowman warrants a closer examination. Referring to Mr. Bowman's race, the prosecutor told the trial court, "We didn't strike him because of that sole reason." Tr. p. 84. The prosecutor later stated that she "misspoke" and that race was "not any reason" for striking Mr. Bowman. Id. at 85. The trial court took the prosecutor at her word and considered the prosecutor's explanation for striking Mr. Bowman—that he did not want to be there—as valid.

Specifically, Mr. Bowman stated that he had served as a juror a year ago and that he believed he was entitled to an exemption. When questioned by defense counsel regarding whether he had a problem sitting and listening to the evidence, Mr. Bowman indicated that he did. He stated, "if I'm not supposed to be here, I don't really want to be here. If I—if he can let me—if there's any way you can let me go, I mean, I'd rather not be here." Id. at 40. Because the transcript supports the State's race-neutral explanation for striking Mr. Bowman, Walker has not shown that the trial court's conclusion was clearly erroneous. Thus, though Hardister indicates no burden-shifting need to have taken place as to race-neutral explanations, the State presented such explanations in a manner that passed the Batson test.

III. Self-Defense Instruction

Walker argues that the trial court improperly declined to instruct the jury on self-defense. The manner of instructing a jury lies largely within the discretion of the trial court, and we will reverse only for abuse of discretion. Henson v. State, 786 N.E.2d 274, 277 (Ind. 2003). To determine whether a trial court abused its discretion by declining to give a tendered instruction, we consider: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions that were given. Id.

The State does not dispute that Walker's self-defense instruction was a correct statement of law and was not covered by other instructions. The State argues, however, that there was no evidentiary foundation for the instruction because Walker testified and

denied pointing the gun. The State contends, "Defendant cannot have acted in self-defense when he claims that he did not act." Appellee's Br. p. 8.

Indeed, "A claim of self-defense requires a defendant to have acted without fault, been in a place where he or she had a right to be, and been in reasonable fear or apprehension of bodily harm." Henson, 786 N.E.2d at 277. Self-defense is a "legal justification for an otherwise criminal act." Id. Walker testified at trial that he did not point the gun. Walker's proposed self-defense instruction, which was based on the notion that he was justified in pointing the gun, is inconsistent the theory of his defense, which was that he did not point the gun at all. In the absence of evidence supporting the instruction, Walker has not established that the trial court abused its discretion by rejecting his self-defense instruction.

Conclusion

The State established that venue in Marion County was proper. Walker did not make a prima facie showing of discrimination to support his Batson challenge. Because Walker denied pointing the gun, there was no evidence to support his proposed self-defense instruction. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.