STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 1999
v	No. 174649 Kent Circuit Court
ROBERT PALMER, Defendant-Appellant.	LC No. 93-063788-FH AFTER REMAND

Before: Hoekstra, P.J., and Markey and J.C. Kingsley*, JJ.

PER CURIAM.

Following a seven-day jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798, and he subsequently pleaded guilty to being a third habitual offender, MCL 769.11; MSA 28.1083. The trial court sentenced defendant to ten to thirty years' imprisonment to be served consecutively with defendant's current term of imprisonment. Defendant appeals as of right. We affirm.

I.

First, defendant argues that the prosecutor's improper arguments regarding reasonable doubt made during closing statements effectively shifted the burden of proof to defendant. In light of defendant's failure to object to the alleged misconduct at trial, our review is precluded absent a miscarriage of justice, which we do not find in this case in light of the context in which the statements were made and the court's curative instructions. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). As in *People v Lee*, 212 Mich App 228, 254-255; 537 NW2d 233 (1995), the prosecutor's definition of "reasonable doubt" may have caused some confusion among the jurors, but the prosecutor informed the jury that "we must prove to you each and every element beyond a reasonable doubt of the crime," and the court properly instructed the jury on the prosecution's burden of proof and reasonable doubt. See *People v Hubbard (After Remand)*, 217 Mich App 459, 487-448; 552 NW2d 493 (1996). Moreover, because prosecutors have the freedom to argue the evidence and all reasonable inferences from the

* Circuit judge, sitting on the Court of Appeals by assignment.

evidence as it relates to their case, the prosecutor could infer from the testimony that defendant retrieved his car from the service department of Berger Chevrolet before January 23, 1993 and returned it after the alleged assault occurred that day. See *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991).

II.

Second, defendant argues that the trial court abused its discretion by permitting the prosecution to admit evidence that defendant used an alias before the crime occurred, thereby improperly impeaching defendant's credibility. We agree, but we find that the error is harmless and does not warrant reversal particularly in light of the overwhelming evidence against defendant. See *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995), citing MRE 103(a); MCL 769.26; MSA 28.1096; *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Despite some disagreement among prior panels of this Court, we believe that evidence of a defendant's past use of an alias has very little probative value when it is being offered merely to impeach credibility, and the danger of unfair prejudice is great because jurors may perceive that only a "criminal" or someone who is "up to no good" would use an alias. *People v Thompson*, 101 Mich App 609, 613-614; 300 NW2d 645 (1980). Where, as here, the prosecutor did not overly emphasize defendant's prior use of aliases and in light of the overwhelming evidence of defendant's guilt,[1] however, we find that the error was harmless.[2] *Price, supra* at 546; *Thompson, supra*; see also *People v Bowens*, 119 Mich App 470, 473; 326 NW2d 406 (1982).

III.

Third, defendant asserts that he was denied a fair trial because the court erred in admitting into evidence the improper and highly prejudicial rebuttal testimony of Rosalind Farr. Farr was called to rebut the testimony of Lynell Cummings, defendant's girlfriend and alibi witness with respect to Cummings' credibility, not with respect to Cummings' alibi testimony. The decision to admit rebuttal testimony will not be disturbed on appeal absent an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). We find no abuse of discretion.

Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending to directly weaken or impeach the same." *Figgures, supra* at 399. The test for rebuttal evidence is whether it is justified by the evidence it is offered to rebut. *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). Generally, rebuttal evidence must relate to a substantive rather than a collateral matter, and contradictory evidence is admissible only when it directly tends to disprove a witness' exact testimony. *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994).

The trial court heard Farr's testimony outside the jury's presence, determined that no separate notice of Farr's testimony was required because Farr was not rebutting Cummings' alibi testimony, and limited the prosecution's ability to ask Farr about potentially prejudicial subjects, including her knowledge of defendant's parole, probation, or imprisonment, defendant's assault of Farr, and defendant's alleged hold up of a woman at a gas station in July 1993. When questioned before the jury, Farr testified that in January 1993, Cummings introduced Farr to defendant as "Bobby Foster," and that Cummings told her defendant was in a line-up because he "stuck up a white girl" and wanted to move because he was scared. Her testimony directly rebutted Cummings' testimony that she had no knowledge of defendant's use of an alias and that she did not come forward as an alibi witness sooner because she did not know the specific allegations against defendant and did not know why defendant was wanted for the police lineup. We believe that Farr's testimony did not impeach Cummings on a collateral matter. Cummings' delay in stepping forward as an alibi witness, allegedly due to the fact that she didn't know the specific allegations against her boyfriend, bore directly on her credibility as an alibi witness. Thus, we find no abuse of discretion in the admission of her rebuttal testimony.

IV.

We also find no error in the admission of Farr's testimony that defendant had assaulted her, despite the trial court's prior ruling excluding this evidence. We agree with the trial court that defense counsel opened the door to the testimony on cross-examination by eliciting Farr's testimony that she and defendant had been in an argument, and Farr said she would "take care of him." The statement needed to be explained further so the jury would not be left with the belief that Farr's testimony was prompted by her desire for revenge against defendant. Indeed, the prosecution is not required to use alternative means of presenting proofs. *People v Mills*, 450 Mich 61, 70 n 6; 537 NW2d 909 (1995). Notably, defense counsel also opened the door to the implication that defendant may have been involved in another crime when he asked Farr on cross-examination, "Did you tell detective Vasquez that [defendant] stuck up a white lady at a gas station on his birthday?" We therefore find no abuse of discretion in the admission of this testimony into evidence. *Figgures*, *supra*.

V.

Finally, defendant argues that he was denied his constitutional right to an impartial jury drawn from a fair cross-section of the community because African-Americans are underrepresented in Kent County Circuit Court jury arrays. Defendant did not object to the jury at the conclusion of voir dire, but he did object before the jury was sworn on the following day. Because a challenge to the jury array is timely if it is made before the jury has been impaneled and sworn, *Hubbard, supra* at 465-467, defendant's objection was timely and preserved this issue for appeal. Cf. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). We also believe that defendant did not waive his challenge to the jury composition by expressing satisfaction with the jury as impaneled. *Hubbard, supra* at 467.

We review de novo questions regarding the alleged systematic exclusion of minorities from jury venires. *Hubbard, supra* at 472. As this Court observed in *Hubbard, supra* at 473:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Defendant satisfies the first prong of the *Duren* test because African-Americans are considered a constitutionally cognizable group for a Sixth Amendment fair-cross-section analysis. *Hubbard, supra* at 473. For the second prong, defendant must show that a distinctive group is substantially underrepresented in the jury pool. *Id.* at 473-474. To satisfy the third prong, defendant must show that the underrepresentation of this distinctive group was due to systematic exclusion, i.e., "an exclusion resulting from some circumstance inherent in the particular jury selection process used." *Id.* at 481.

Unlike in *Hubbard, supra*, defendant did not create an evidentiary record at the trial court regarding the workings of the Kent County jury selection process.[3] See *id.* at 481. This Court, on its own motion, remanded the case to the Kent County Circuit Court for an evidentiary hearing to determine how jury venires were selected.

At the evidentiary hearings, the Kent County Circuit Court Administrator testified that for the year October 1, 1993 through October 1, 1994, the Circuit Court Administrator's Office made several changes in the jury selection process, including requesting from the Secretary of State the entire driver's license list and identification card list for Kent County rather than requesting only a certain number of names from that office. Jurors were also selected first for the Kent County Circuit Courts jury pools. In the past, city residents were selected first for the district courts before county residents were selected for the circuit court jury pools. When initial juror questionnaires were not returned, the court sent a second letter[4] and eventually held show cause hearings for those qualified juror prospects who failed to appear.

Because there was no way of identifying a potential juror's race, the Administrator's Office took no steps to compensate for those minority jurors who were statutorily excluded from jury duty because they were under sentence for a felony conviction or for those who, once they were summoned to jury duty for a given month, received an excuse from service because of transportation, day care, or other reasons. Neither the information that the Secretary of State provided nor the juror questionnaires contained information concerning race or asked the respondent to divulge his or her race. Thus, for

1993-1994, when the Administrator decided whether to excuse someone from jury duty, he did so without knowing the potential juror's race.

Based upon the record before us, we believe that any underrepresentation of minorities in the jury array available to defendant resulted from "benign" random selection, i.e., minorities failed to return the juror questionnaires or sought and received an excuse from service, thereby excluding themselves from the pool of potential jurors. Cf. *Hubbard, supra* at 480-481. As the trial court observed, Kent County has taken steps to mandate the return of juror questionnaires and to compel attendance for jury duty after a City High school government class study of the Kent County juror selection process. Moreover, none of the witnesses who testified at the evidentiary hearing testified that the cause of minority underrepresentation was a problem inherent in the juror selection system itself.

While this Court is cognizant of the problems that local courts face with respect to recruiting qualified minority jurors, we also recognize that the problem of minority underrepresentation is not one easily resolved. We cannot, however, agree that defendant's expert witness' estimations of minority underrepresentation in jury venires are sufficient to establish both the second and third prongs of the *Duren* or *Hubbard* analysis regarding Kent County's juror selection process. Simply put, nothing in the selection process creates or accounts for the underrepresentation of minorities that the trial courts and litigants alike observed beginning in October 1993. Cf. *Hubbard, supra* at 480-482.

We also note that where more drastic measures are taken to ensure that the minority population in the community and on jury venires mirror each other, courts have struck down those efforts. For example, in *United States of America v Ovalle*, 136 F3d 1092, 1095-1098 (CA 6, 1998), the Sixth Circuit Court of Appeals struck down the jury selection program for the Eastern District of Michigan as violative of the Jury Selection and Service Act, 28 USC 1861 *et seq.*[5] where one in five non-African-Americans were randomly selected to be removed from the jury wheel simply because of that person's race. Apparently, the random reduction of non-African-Americans was intended to ensure that the percentage of blacks on the qualified jury wheel closely approximated the percentage of blacks in the population. *Id.* The Hispanic defendants in *Ovalle* successfully argued, however, that qualified Hispanic jurors were being randomly removed from the jury pool because the jury selection process only recognized African Americans as a "cognizable group" within the community. *Id.* 1097, 1100. Thus, at least one defendant's conviction was reversed, and his case remanded for retrial with a properly selected jury. *Id.* at 1100.

Although defendant would require that the Kent County Circuit Court Administrator's Office do more to ensure a fair cross-section of the community on circuit court juries, *Ovalle* clearly establishes that the end does not always justify the means. Merely because other effective means of recruiting qualified minority jurors had neither been identified nor implemented as of January 1994 does not require that we find systematic exclusion of minorities from Kent County juries during that time. Minority underrepresentation on jury venires continues to be evident, and steps are being taken to

address this on-going problem. Nevertheless, because the juror selection system in place for the jury year October 1993 through October 1994 did not systematically

exclude minorities, we find no *Duren* or *Hubbard* violation in the case at bar.

Accordingly, we affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ James C. Kingsley

[1] Specifically, the victim and her brother-in-law who chased after the assailant positively identified defendant in a photographic lineup and at trial. The victim's sister and brother-in-law gave the license plate number from the involved vehicle to the police and described the vehicle as a late 1980s model blue Ford Taurus or Topaz; the license plate number was registered to defendant and the vehicle description that the witnesses gave to the police fit defendant's vehicle. These witnesses also testified at trial that the assailant limped and did not move quickly as he ran to his car after the attack, and defendant testified at trial that he suffered a hip injury that makes it difficult for him to run.

[2] Further, the prosecutor referred to defendant's use of an alias after the date of the assault, which the trial court ruled was admissible, in light of defendant's claim of innocence and alibi defense, to show consciousness of guilt. See, e.g., *People v Cutchall*, 200 Mich App 396, 399-401; 504 NW2d 666 (1993). Thus, all references to defendant's use of an alias were not erroneous and defendant does not challenge in his appellate brief the admission of his subsequent use of an alias.

[3] Although defendant requested that this Court remand the case to the trial court for evidentiary hearings on this issue, this Court denied the request.

[4] Some time after 1994, the Administrator's Office began sending undeliverable juror questionnaires to other addresses within the same zip code as one means of addressing low responses from certain minority groups. This was one of the recommendations proposed by the City High School government class study regarding the underrepresentation of minorities in Kent County juries.

[5] The purpose of the Jury Selection and Service Act, 28 USC 1861 *et seq.*, like the Sixth Amendment, is to entitle litigants in federal court to "the right to grand and petit juries selected at random from a fair cross section of the community in the district or division where the court convenes." *Ovalle*, *supra* at 1099. Moreover, challenges under the JSSA are typically reviewed under the same standard as Sixth Amendment claims regarding the denial of a jury representing a fair cross section of the community requiring a showing that a distinct group is underrepresented. *Id.*