STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 16, 1999
v	No. 206441 Crawford Circuit Court
ANTHONY ELLIOT PHILLIPS, Defendant-Appellant.	LC No. 96-001470 FH

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of possession of a controlled substance by a prisoner, MCL 800.281(4); MSA 28.1621(4). We affirm.

Defendant first contends that the trial court should have dismissed the charges against him when the prosecution failed to produce a res gestae witness—his cellmate, Billy Ray Lawson—at trial. This issue is not preserved for appellate review because defendant did not move in the trial court for a post-trial evidentiary hearing or a new trial. *People v Pearson*, 404 Mich 698, 722; 273 NW2d 856 (1979); *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). We will nonetheless review unpreserved issues for plain error, which requires a showing that the error was outcome determinative. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Here, the trial court resolved this issue in defendant's favor at trial and instructed the jury that they could infer that Lawson would have testified unfavorably to the prosecutor's case. CJI2d 5.12. This course of action was approved by the Supreme Court in *Pearson*, *supra* at 722, and defendant did not object that this was an insufficient remedy. Furthermore, defendant has failed to present any evidence to suggest that Lawson saw anything during the search that would have assisted the defense. Reversal on this ground is not warranted.

Defendant next contends that he was denied a fair trial by the admission into evidence of a written statement he made to the police. Defendant also contends that the prosecution's violation of the discovery order by failing to disclose before trial the existence of the statement entitles him to a new

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

trial. Because defendant did not object to the admission of his written statement and, in fact, affirmatively stated that he had no objection to its admission, appellate review of these issues is waived, absent a showing of manifest injustice. See *People v Acevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996); *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). We find no manifest injustice on these facts.

The written statement was made after defendant was advised of, and waived, his rights pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and defendant does not argue that the statement was involuntary. Defendant did not deny making the statement, and, in fact, he used the statement as the basis for his defense at trial, arguing to the jury that "[h]e has denied from—from the beginning that this marijuana belonged to him." Since it was his own statement that he freely gave to the police, defendant was presumably aware of its existence and its revelation at trial could not have caused him any surprise. *People v Taylor*, 159 Mich App. 468, 487-488; 406 NW2d 859 (1987). The fact that the prosecutor failed to turn this statement over to defendant prior to trial and thereby violated the court's discovery order does not require reversal since the appropriate remedy is a matter for the discretion of the trial court. *Id.* Defendant has not shown that the prosecutor acted in bad faith in failing to turn over the statement, and defendant's general assertion of prejudice is undercut by his failure to demonstrate any specific prejudice. *People v Clark*, 164 Mich App 224, 231-232; 416 NW2d 390 (1987). For these reasons, defendant has failed to establish manifest injustice.

Defendant also mentions in passing the admission of a letter purportedly written by him to an inmate at another prison camp; however, defendant fails to explain how admission of this letter constituted prosecutorial misconduct. A defendant may not merely state a position and leave it for this Court to search for authority to sustain his position. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). In any event, the record indicates that defendant was aware of the letter prior to trial. The letter was not an example of withheld evidence that supports defendant's claim of prosecutorial misconduct.

Furthermore, we reject defendant's claim that trial counsel was ineffective in failing to object to the admission of his written statement to police and to the trial court's assumption of the role of factfinder when it determined that the letter attributed to defendant was admissible. With respect to trial counsel's failure to object to the admission of defendant's written statement, we conclude that the decision not to object constituted reasonable trial strategy, given that the statement was consistent with defendant's theory of the case. This Court will not second-guess counsel on matters of trial strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). With respect to counsel's failure to object to the trial court's comment that "the jury could conclude that it [the letter sent to another inmate] was sent by Mr. Phillips or authored by Mr. Phillips," we again find no basis for concluding that counsel provided ineffective assistance. The trial court's statement did not constitute impermissible fact-finding, as defendant argues, but rather a preliminary ruling on foundational and admission of evidence issues, consistent with MRE 104(a). Accordingly, defendant has failed to demonstrate that counsel's performance was deficient. See *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Next, defendant, an African-American, argues that his right to equal protection was denied when the juror array from which his jury was selected did not include any African-Americans. Because defendant's challenge to the jury array was untimely—i.e., made after the jury had been selected and sworn, and after defendant expressed satisfaction with the jury—appellate review is waived. *Dixon*, *supra*, 217 Mich App at 404; *People v Hubbard (Aft Remand)*, 217 Mich App 459, 465, 482-483; 552 NW2d 493 (1996). In any event, were we to review this issue, we would find that defendant failed to demonstrate that African-Americans were underrepresented on jury venires in general or that any underrepresentation, if it did exist, was due to any systematic or purposeful exclusion of African-Americans. *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997).

We also reject defendant's assertion that, because the trial court concluded that the absence of African-American jurors did not result from purposeful exclusion, his alternative request for a change of venue should have been granted. Pursuant to MCL 762.7; MSA 28.850, a trial court may order a change of venue "upon good cause shown by either party." Here, defendant contends that good cause to support a change of venue was shown by the fact that he was unable to obtain a jury of his peers, given that there were no African-Americans in the jury array. Contrary to defendant's unsupported allegation of community bias, the record reveals no evidence that the jurors chosen to decide defendant's case were biased against him or African-Americans in general, that they had been exposed to excessive pretrial publicity regarding the case, or that they were otherwise incapable of arriving at a fair and impartial verdict.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ John W. Fitzgerald