STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2001
v	No. 216966 Ingham Circuit Court
LETHORN RAYE IRVING, Defendant-Appellant.	LC No. 95-069211-FH

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver 650 grams or more of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(i). The trial court sentenced defendant to thirty to forty five years' imprisonment. Defendant appeals as of right. We affirm.

I. Facts and Procedural Background

On January 13, 1995, this Court granted a petition to convene a multicounty grand jury that "shall consist of 17 jurors, selected as follows: 6 jurors from Ingham County, 6 jurors from Eaton County, and 5 jurors from Clinton County." *In re Petition for Multicounty Citizens' Grand Jury*, unpublished order of the Court of Appeals, entered January 13, 1995 (Docket No. 181751). The order also granted the prosecution's motion to suppress the record of the grand jury proceeding and the contents of the petition until further order of this Court under MCL 167.19f and MCR 7.216(A)(7).

On June 8, 1995, defendant was indicted by the multicounty grand jury on one count of conspiring to deliver 650 grams or more of cocaine. Appointed defense counsel filed an appearance and a demand for a speedy trial. On July 14, 1995, defendant retained counsel who was substituted for appointed counsel. On August 4, 1995, on the advice of retained counsel, defendant waived his right to a preliminary examination. On September 8, 1995, defendant's retained counsel was replaced by the original appointed counsel who again filed an appearance and a demand for a speedy trial. Appointed counsel also filed a motion to remand to district court for a preliminary examination, arguing that retained counsel was ineffective for advising defendant to waive the preliminary examination. The prosecutor did not oppose the motion and the circuit court remanded the case to the district court for a preliminary examination.

In September 1995, defendant was provided with copies of transcripts from the grand jury proceeding; however, the transcripts had been redacted by the prosecutor and had not been certified by the chief judge of the county in which the grand jury was convened pursuant to MCR 6.107. In October 1995, defendant filed a motion with the chief judge presiding over the grand jury to certify which grand jury transcripts would be made available. The parties stipulated to adjourn the preliminary examination until the transcripts were released to defendant. Defendant specifically waived his right to a prompt preliminary examination during this time. The grand jury transcripts were certified by the chief judge and released to defendant on February 28, 1996.

For reasons that are not clear from the record, the preliminary examination was not rescheduled until one year later on February 14, 1997. On February 13, 1997, the day before the preliminary examination was to be held, defendant filed a motion to dismiss the charges, alleging a violation of his right to a speedy trial. The following day, defendant filed a motion to quash the information, alleging that the grand jury indictment failed to specify the crimes to be investigated, the grand jury statute unconstitutionally precluded challenges to the jury array, and the grand jury was underrepresented by African-Americans. The district court denied the motions, but stayed the proceedings, including the preliminary examination, pending an appeal to circuit court. The circuit court found that much of the delay was caused by the proper purpose of redacting grand jury transcripts and, while much of the remaining delay was unexplainable, defendant was not prejudiced because he "had the appropriately redacted transcripts from which he could prepare his defense." The circuit court affirmed the district court's ruling and ordered that the preliminary examination be scheduled within fourteen days of the order. The circuit court also affirmed the district court's denial of defendant's motion to quash the indictment. Apparently, in the course of transmitting the file from the circuit court back to the district court, the file was lost and had to be reconstructed by counsel. The preliminary examination was eventually held on February 24, 1998 and defendant was bound over to circuit court for trial. A felony information charging defendant with conspiracy to deliver 650 grams or more of cocaine was filed on March 3, 1998.

On June 3, 1998, defendant filed another motion to dismiss the case based on an alleged violation of his right to a speedy trial, and another motion to quash the grand jury indictment. In his motion to dismiss, defendant argued that prejudice was presumed because the delay exceeded eighteen months. Defendant further argued that he suffered actual prejudice because the memories of prosecution witnesses had faded, impeding his ability to challenge specific testimony about the details of the charged offense. The circuit court denied defendant's motion, noting that only four months had elapsed since the preliminary examination and it had already held that defendant was not denied his right to a speedy trial before the preliminary examination.

In his motion to quash the indictment, defendant reiterated his argument that the grand jury statute was unconstitutional and that the jury composition discriminated against African-Americans. The circuit court denied the motion, finding that the absence of African-Americans on this grand jury panel did not automatically equate to a systematic exclusion and, in any event, the preliminary examination during which the prosecution established probable cause cured any defects in the grand jury selection process. Trial was scheduled for September 1998.

This Court denied defendant's application for leave to appeal the circuit court's order denying his motion to dismiss the charge and quash the information. *People v Irving*, unpublished order of the Court of Appeals, entered September 14, 1998 (Docket No. 213621). On September 16, 1998, defendant filed a third motion to dismiss the charge, arguing that the three additional months of delay since his previous motion was denied resulted in a violation of his right to a speedy trial. The circuit court denied the motion because the case was scheduled for trial in two weeks. A six-day jury trial commenced on September 29, 1998 and defendant was convicted as charged.

II. Analysis

A. Motion to Quash Indictment

Defendant argues that the trial court erred in denying his motion to quash the indictment because MCL 767.14, the statute under which the grand jury was organized, precluded him from challenging the grand jury array based on racial discrimination in the selection process in violation of his constitutional rights. We disagree.

Statutory interpretation and constitutional challenges are legal issues that are reviewed de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

MCL 767.13 provides:

> A person held to answer to any criminal charge may object to the competency of any 1 summoned to serve as a grand juror, on the ground that he is the prosecutor or complainant upon any charge against such person; and if such objection be established, the person so summoned shall be set aside.

MCL 767.14 provides:

> No challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed in any other case than that specified in the preceding section.

This Court recently held that "under a long line of United States Supreme Court precedence, it is beyond question that defendant may challenge the selection of the grand jury under the Equal Protection Clause of the Fourteenth Amendment." *People v Glass*, 235 Mich App 455, 463-464; 597 NW2d 876 (1999), rev'd on other grounds 464 Mich 266 (2001), citing *Vasquez v Hillery*, 474 US 254, 261; 106 S Ct 617; 88 L Ed 2d 598 (1986); *Strauder v West Virginia*, 100 US 303; 25 L Ed 2d 554 (1880). See also *People v Glass (After Remand)*, 464 Mich 266, 285 n 15; 627 NW2d 621 (2001).[1] The *Glass* Court further held that a defendant may

[1] While reversing this Court's decision in *Glass* on other grounds, our Supreme Court explicitly stated that:

> We agree with the Court of Appeals that a defendant can challenge the grand jury selection process on Fourteenth Amendment equal protection grounds,

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also allege a Sixth Amendment constitutional violation with respect to the selection of a grand jury.

> Therefore, despite the dictates of MCL 767.13; MSA 28.953 and MCL 767.14; MSA 28.954, a criminal defendant may certainly allege a constitutional violation with respect to the selection of a grand jury. These statutes cannot preclude a constitutional challenge to the grand jury selection process, and we do not read these provisions as attempting to do so. It is axiomatic that the Legislature cannot enact a statute that runs afoul of the constitution or attempts to narrow constitutional rights. Rather, the proper analysis is that challenges to the grand jury selection process may be based on the fair-cross-section requirement of the Sixth Amendment, the Equal Protection Clause of the Fourteenth Amendment, *or* an applicable statutory provision. [*Glass*, *supra* 235 Mich App 465-466; emphasis in original.]

Thus, contrary to defendant's argument, the statutes in question do not preclude constitutional challenges to the grand jury array based on alleged racial discrimination in the selection process; rather, the statutes "protect the grand jury from 'technical' challenges or defects." *Id*. at 466. See also *People v Lauder*, 82 Mich 109, 135; 46 NW 956 (1890). In fact, defendant's racially based challenge to the grand jury array was adjudicated and rejected by the lower court. Accordingly, the trial court did not err in denying defendant's motion to quash the indictment on this ground.

B. Racial Discrimination in Grand Jury Selection Process

Defendant next argues that he established a prima facie case of racial discrimination in the grand jury selection. We disagree.

Specifically, defendant contends that African-Americans were systematically excluded from the grand jury array in violation of his Sixth Amendment right to an impartial jury composed of members from a fair cross-section of the community, US Const, Am VI, and his Fourteenth Amendment right to equal protection, US Const, Am XIV. Defendant contends that Clinton County represents 13.8 percent of the total population of the three counties, but is only 3.85 percent African-American, Eaton County represents 21.47 percent of the total population of the three counties, but is only 3.56 percent African-American, and Ingham County represents 65.16 percent of the total population of the three counties, but is only 9.87 percent African-American.[2] Defendant thus argues that this Court's order directing that five grand jurors be selected from Clinton County, six jurors come from Eaton County, and six jurors be from Ingham County amounted to a systematic overrepresentation of Eaton and Clinton Counties and

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> notwithstanding MCL 767.13, 767.14, which the prosecutor argued precluded such challenges. [*People v Glass (After Remand)*, 464 Mich 266, 285 n 15; 627 NW2d 621 (2001).]

[2] These population figures are based on the 1990 census.

a systematic underrepresentation of Ingham County. Defendant maintains that if proper percentages had been used, eleven jurors would have come from Ingham County, four jurors would have been from Eaton County, and only two jurors would have been from Clinton County.[3]

This Court reviews claims of systematic exclusion of minorities from jury venires de novo. *People v Williams*, 241 Mich App 519, 525; 616 NW2d 710 (2000). In order to make out a prima facie case of the fair cross-section requirement under the Sixth Amendment protection, "a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *Glass*, *supra* 464 Mich 286, quoting *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000), citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). In order to establish a prima facie case of systematic racial discrimination under the Fourteenth Amendment, the defendant must show that (1) the defendant is a member of a distinct, recognizable group singled out for different treatment; (2) members of this group were significantly underrepresented on grand jury venires as compared to the community as a whole over a significant period; and (3) the procedure used to select the grand juries was susceptible to abuse or was not racially neutral. *Glass*, *supra* 464 Mich 285, citing *Castaneda v Partida*, 430 US 482, 494; 97 S Ct 1272; 51 L Ed 2d 498 (1977).

We note that defendant was indicted by the same grand jury that indicted the defendant in *Glass* and that defendant's statistical challenge of this grand jury is identical to the statistical challenge made by the defendant in *Glass*. *Glass*, *supra* 464 Mich 273-274, quoting *Glass*, *supra* 235 Mich App 459-460.[4] Thus, our decision regarding defendant's Sixth and Fourteenth amendment challenges is mandated by the Supreme Court's decision in *Glass*, *supra* 464 Mich 266. There, the Court agreed with the Court of Appeals decision that "defendant has not

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[3] Defendant attached to his motion an affidavit from a witness at the grand jury proceedings who stated that no African Americans served on the seventeen member grand jury.

[4] In *Glass*, the defendant's argued that:

> [T]he population of Clinton County is 3.85 percent African-American and 13.8 percent of the total population of the three counties, the population of Eaton County is 3.56 percent African-American and 21.47 percent of the total population of the three counties, and the population of Ingham County is 9.87 percent African-American and 65.16 percent of the total population of the three counties. Defendant thus contended that this Court's order that five grand jurors be from Clinton County, six from Eaton County, and six from Ingham Count amounted to a systematic overrepresentation of the counties with the smallest African-American population and a systematic underrepresentation of the county with the largest African-American population. Defendant further contended that if proper percentages had been used, Clinton County would have had four grand jurors, and Ingham County would have had eleven grand jurors. [*Glass*, *supra* 464 Mich 273-274, quoting *Glass*, *supra* 235 Mich App 259-260 (footnotes omitted).]

presented a prima facie case of discrimination under the Fourteenth Amendment"[5] and further held that the defendant would not be able "to establish a prima facie case upon further review of the grand jury proceedings because he will be unable to establish a discriminatory purpose." *Glass, supra* 464 Mich 285. In so holding, the Court stated that:

> Defendant does not challenge the manner in which the jury impaneling was implemented. Defendant's claim is premised solely upon the allegedly disparate effect of the 6-5-5 composition of grand jurors from the three counties chosen by the Court of Appeals. Defendant does not present evidence suggesting a discriminatory purpose, and noting in the grand jury record could conceivably aid defendant in his effort to prove that the Court of Appeals acted with discriminatory purpose in establishing the 6-6-5 split.
>
> The possibility of an adverse effect on the representation of blacks resulting from the 6-6-5 composition is relevant to discriminatory purpose, but is insufficient alone to establish that it was a purposeful device to exclude blacks from the grand jury. [*Id*. at 285-286 (internal citations omitted).]

In the instant case, defendant presents no greater proof in support of his claim than did the defendant in *Glass*. Therefore, we conclude not only that defendant failed to present a prima facie case of racial discrimination in the grand jury selection process under the Fourteenth Amendment, *Glass, supra* 464 Mich 285, but also conclude that because "defendant will be unable to establish a discriminatory purpose," defendant would not be able to present a prima facie case of racial discrimination even upon review of the grand jury proceedings. *Glass, supra* 464 Mich 286.[6]

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[5] In finding that the defendant's statistical evidence was insufficient to establish a prima facie case of discrimination under the Fourteenth Amendment, the Court of Appeals majority stated that:

> because [the defendant] has not provided evidence regarding the racial composition of the grand jury venire, he has not shown that the underrepresentation of African-Americans was due to a systematic exclusion of their members during the selection process, and he has not shown that the grand jury selection procedure was racially biased or susceptible to abuse. [*Glass, supra* 235 Mich App 470.]

[6] This finding is mandated because in this case, as in *Glass*, "defendant does not challenge the manner in which the jury impaneling was implemented." *Glass, supra* 464 Mich 285. We further find that "because defendant cannot, upon further discovery, establish a prima facie case under either the Fourteenth or Sixth Amendment, … the reasons for secrecy of grand jury proceedings outweigh the desirability of further discovery." *Id* at 289. Additionally, the Supreme Court in *Glass* expressly held that this Court abused its discretion when it ordered an in camera review of the grand jury proceedings in *Glass*. *Id*. Defendant here relies on the same facts and arguments relied upon by the defendant in *Glass* to support his contention that an in camera review of the

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Further, with regard to defendant's Sixth Amendment claim, we note that the Supreme Court in *Glass* stated:

> We need not decide whether Michigan should apply the fair cross section requirement to grand jury venires in this case because defendant has failed to allege a cognizable fair cross section claim. Defendant contends that Ingham County residents were underrepresented on the basis of the 1990 census figures. He argues that Ingham County should have had eleven positions on the grand jury rather than six. Defendant argues that the underrepresentation of Ingham County residents had the effect of systematically underrepresenting blacks. However, the fair cross section requirement does not guarantee that any particular jury chosen will literally mirror the community; rather, "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups . . . and thereby fail to be reasonably representative thereof . . . ." *Smith*, *supra* at 214 (opinion of Cavanagh, J.). Because defendant's challenge is relevant to the make up of his particular grand jury, he cannot succeed on his claim. [*Glass, supra* 464 Mich 287-288.]

Similarly, defendant here has only identified an isolated instance where African-Americans were underrepresented on a grand jury. Thus, because defendant has produced no evidence establishing that the grand jury selection process systematically excluded African-Americans, he has failed to show that the selection process was not reasonably representative of the community in which the grand jury was drawn. *Id*. See also *People v Hubbard (After Remand)*, 217 Mich App 459, 481; 552 NW2d 493 (1996). Accordingly, just as in *Glass*, because defendant's Sixth Amendment challenge fails to attack the grand jury selection process as a whole, and instead merely challenges a particular grand jury, defendant "cannot succeed on his claim." *Glass, supra* 464 Mich 288.[7]

C. Right to a Speedy Trial

Defendant argues that he was deprived of his constitutional right to a speedy trial and the benefit of the 180-day rule because over three years elapsed between defendant's arraignment and trial. We disagree.

Whether a defendant's right to a speedy trial has been denied is a constitutional question of law that this Court reviews de novo. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1996). However, any factual findings regarding the matter are reviewed for clear error. *People*

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grand jury proceedings is warranted. Thus, pursuant to *Glass*, we decline to order an in camera review as impermissible on these facts.

[7] Further, for the reasons stated previously, we hold that defendant would not be able to present a cognizable claim under the Sixth Amendment even if provided the opportunity to review the grand jury proceedings. See *Glass, supra* 464 Mich 285-289.

v Gilmore, 222 Mich App 442, 459; 564 NW2d 158 (1997). Whether the 180-day rule applies is also a question of law subject to review de novo. *Connor, supra* at 423.

Initially, we reject defendant's argument that he was denied the benefit of the 180-day rule for lack of merit. The 180-day rule, codified at MCL 780.131, provides that an inmate of a state correctional facility must be brought to trial for other untried charges pending against the inmate within 180 days of the Department of Corrections providing notice to the prosecutor of the place the inmate is imprisoned. The purpose of this rule "is to dispose of untried charges against prison inmates so that sentences can run concurrently." *People v Smielewski*, 235 Mich App 196, 198; 596 NW2d 636 (1999). Because defendant was not an inmate in a state correctional facility, the 180-day rule simply does not apply to him.

With respect to defendant's claim that he was denied his right to a speedy trial, considering all the relevant factors under the circumstances, we are not convinced that defendant's constitutional right was violated. When evaluating an alleged violation of a right to a speedy trial, this Court considers four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant." *Cain, supra* at 112; *People v Williams*, 163 Mich App 744, 755; 415 NW2d 301 (1987).

First, the length of the delay between defendant's indictment in June 1995 and his trial in September 1998 was certainly considerable. However, the length of the delay, alone, is not determinative. *Cain, supra* at 112. This Court has upheld delays even longer than the one in the instant case where appropriate. See e.g., *People v Simpson*, 207 Mich App 560, 563; 526 NW2d 33 (1994) (4½ years); *People v Smith*, 57 Mich App 556; 226 NW2d 673 (1975) (nineteen years). Nonetheless, because the delay exceeds eighteen months, defendant is entitled to a presumption of prejudice that the prosecution has the burden to rebut. *Cain, supra* at 112; *Gilmore, supra* at 460.

Second, the reasons for the delay in this case were varied. The brief delay from defendant's indictment in June 1995 until he waived his preliminary examination in August 1995 was inherent in the court system. Delays inherent in the court system are technically attributable to the prosecutor, but are given neutral tint and minimal weight. *Gilmore, supra* at 460. The delay from August 1995 to October 1995 is attributable to defendant because he moved to remand to the district court for a preliminary examination, arguing ineffective assistance of counsel. Time needed to adjudicate defense motions is charged to the defendant. *Id.* at 461. In November 1995, defendant specifically waived his right to a prompt preliminary examination until the redacted grand jury transcripts were released to him, which occurred in February 1996. This express waiver thus extinguished any error resulting from the delay. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

The record is unclear as to the reason for the one-year delay between defendant's receipt of the grand jury transcripts in February 1996 and the scheduled preliminary examination date of February 14, 1997.[8] Unexplained delays are attributed to the prosecution. *People v Ross*, 145

[8] The prosecutor asserts that the court file was lost during this one-year period; however, the (continued…)

Mich App 483, 491; 378 NW2d 517 (1985). However, this delay must be considered together with the third factor, defendant's assertion of his right to a speedy trial. Defendant waited until February 13, 1997, the day before the scheduled preliminary examination, to file a motion to dismiss and formerly assert his right to a speedy trial. Thus, the delay between February 1997 and December 1997, the time period required to adjudicate defendant's motion to dismiss and the resultant interlocutory appeal to circuit court, is attributable to defendant. *Cain, supra* at 113; *Gilmore, supra* at 461.

After the circuit court denied defendant's appeal, the court file was inexplicably lost while being returned to the district court and had to be reconstructed. This delay was attributable to the prosecution, but only accounted for two months because the preliminary examination was eventually held on February 24, 1998. Further, the delay from the preliminary examination until June 1998 resulted from normal docket congestion, which is attributable to the prosecution, but with a neutral tint. *Gilmore, supra* at 460. The delay from June 1998, when defendant again moved to dismiss for violation of his right to a speedy trial and filed an application for leave to appeal the trial court's ruling, until September 14, 1998, when this Court denied defendant's application, was attributable to defendant. *Id.* Trial commenced on September 29, 1998. In sum, the prosecution was responsible for approximately twenty months of the delay, while defendant was responsible for approximately nineteen months of the delay.

With respect to the third factor, defendant's assertion of his right to a speedy trial, the record reveals that although defendant demanded a speedy trial in defense counsel's initial appearance in June 1995, he did not move to dismiss the charge based on that right until the day before the preliminary examination was scheduled in February 1997, almost two years later. Thus, we conclude that defendant's failure to timely assert his right in this case weighs against a finding that he was denied a speedy trial. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993) (the defendant failed to timely assert his right when he demanded a jury trial initially, but did not pursue the issue until twenty months after his arrest).

Lastly, we consider the prejudice to defendant, both to the person and to the defense. *Gilmore, supra* at 461-462. Defendant was not incarcerated while awaiting trial, but had been released on bond; thus, there was no prejudice to the person. *Id.* at 462; *Wickham, supra* at 112. Although defendant claims that the delay caused witnesses' memories to fade, hindering his ability to effectively examine them, this general allegation is insufficient to establish prejudice to the defense. *Gilmore, supra* at 462. In any event, the fading of witnesses' memories would tend to assist defendant, rather than prejudice him. Indeed, a review of defense counsel's cross-examination of prosecution witnesses reveals that the witnesses' fading memories provided ammunition for defendant to impeach by prior inconsistent statements. Thus, although prejudice to defendant was presumed given the length of the delay, we conclude that the prosecutor has overcome that presumption of prejudice in this case.

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record demonstrates that the court file was not lost until after defendant's appeal to the circuit court in December 1997.

In sum, considering all the factors, we conclude that defendant was not denied his right to a speedy trial.

D. Prosecutorial Misconduct

Defendant contends that the prosecutor engaged in misconduct by: (1) interjecting factual and argumentative statements into the voir dire of prospective jurors, (2) vouching for the credibility of a prosecution witness, and (3) allowing knowingly false testimony to go uncorrected. We disagree.

With respect to defendant's claim that the prosecutor engaged in misconduct during voir dire, defendant failed to object to the alleged misconduct at trial and expressed satisfaction with the jury and he has thus failed to preserve this issue for appellate review. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000) *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). In addition, because defense counsel affirmatively expressed satisfaction with the jury, this issue has been waived. See *Carter*, *supra* at 214-216; *People v Tate*, 244 Mich App 553, 558; 624 NW2d 524 (2001). In any event, assuming that this issue was not waived, we note that this Court reviews unpreserved claims of prosecutorial misconduct for plain error, *Schutte*, *supra*, and in order to avoid forfeiture under the plain error rule, the defendant must demonstrate plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only where the plain error "resulted in the conviction of an actually innocent defendant" or where the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 763.

A review of the challenged comments during voir dire reveals that the prosecutor was simply explaining to the jurors the nature of the charge against defendant to discern whether jurors would be able to be fair and impartial in this case. The prosecutor was seeking to impanel an impartial jury by eliciting sufficient information to develop a rational basis for excluding those who are not impartial from the jury. *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (Mallett, J.); *People v Dunham*, 220 Mich App 268, 270; 559 NW2d 360 (1996). The prosecutor never promised the jurors what the evidence would show; rather, he merely informed them of what the allegations were. Accordingly, we conclude that the prosecutor's statements during voir dire were not improper. Defendant has not demonstrated plain error that affected his substantial rights. *Carines, supra*.

We also find no merit to defendant's claim that the prosecutor improperly vouched for the credibility of prosecution witness Tracy Edmonds by stating that the police had time to verify Edmonds' statements, implying that the police and the prosecutor knew he was telling the truth. Again, defendant failed to object to the comment during trial or request a curative instruction; thus, we review the claim for plain error. *Carines, supra* at 763; *Schutte, supra* at 720.[9]

[9] The trial court subsequently denied defendant's motion for a mistrial due to the prosecutor's comments.

Defendant objects to the following remarks made by the prosecutor during closing argument:

> But, again, he has been incarcerated since 1994. He hasn't had a chance to talk to Tamper Allen, Bill Sorrell, or Michael Sorrell. He has given multiple statements to the police, DEA, FBI, many people over this time period. He has testified in the Grand Jury, and preliminary exam, and in a trial over this time period. The police have had ample opportunities to check those statements out.

A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1998). However, a prosecutor may argue from the evidence that a witness is credible. *Howard, supra*. We find nothing improper with the challenged remarks in this case. The prosecutor did not expressly state that the police had verified Edmonds' statement; rather, he was simply arguing from the facts in evidence that the witness was credible. Further, many witnesses testified in this case regarding the multiple cocaine transactions in which defendant participated. Thus, this case was not a mere credibility contest between defendant and one witness. Cf. *People v Smith*, 158 Mich App 220, 231-232; 405 NW2d 156 (1987). On this record, we are not convinced that the prosecutor's statements constituted improper vouching for the credibility of a witness, nor do we find that defendant was denied a fair trial as a result of the remarks.

Defendant also contends that the prosecutor committed misconduct by failing to correct the knowingly false testimony of William Sorrell. Specifically, defendant argues that Sorrell perjured himself when he testified that he had not received anything in exchange for his testimony, even though the Tri-County Metro Narcotics Squad provided a letter, dated October 25, 1995, to the parole board on behalf of Sorrell. This letter indicated that Sorrell had been cooperative with law enforcement and prosecutors and requested that it be placed in Sorrell's parole file. Therefore, defendant contends that pursuant to *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976), because Sorrell was given leniency in exchange for his testimony against defendant, the prosecutor had a duty to disclose this to the jury.

However, while it is apparent that the Tri-County Metro Narcotics Squad provided this letter to the parole board, there is no indication that either Sorrell or the prosecutor knew of its existence or that it had any bearing in the parole board's decision to parole Sorrell. In addition, because the letter is dated October 26, 1995 and defendant trial took place in October of 1998, it is evident that the letter was sent based on cooperation Sorrell had provided long before defendant's trial. Because defendant has failed to show that Sorrell perjured himself, that the prosecutor knew of the letter or of Sorrell's perjury, or that the letter was provided in exchange for Sorrell's testimony at defendant's trial, we find this issue to be without merit. See *Atkins, supra* at 173-174.[10] Further, assuming Sorrell's testimony was untrue and that the prosecutor

[10] We also note that defense counsel never requested that the prosecutor inform the jury of the alleged leniency. Without such a request, it is doubtful that the prosecutor would have any duty to disclose the information. See *People v Woods* 416 Mich 581, 602; 331 NW2d 707 (1982) and (continued…)

knew that it was untrue, we note that it was elicited by defense counsel during cross-examination, not by the prosecutor during direct, and that the jury had the opportunity to consider what, if any, effect this letter may have had on Sorrell's testimony. Thus, since "the disclosure requirement may be considered satisfied where the 'jury [is] made well aware' of such facts 'by means of . . . thorough and probing cross-examination by defense counsel,'" *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990), quoting *Atkins*, *supra* at 174, we would find that the duty to disclose was met in this case. See also *People v Woods*, 416 Mich 581, 602; 331 NW2d 707 (1982) and *People v Wilson*, 242 Mich App 350, 358; 619 NW2d 413 (2000).

E. Other Acts Evidence

Defendant contends that the trial court erred in admitting evidence of other acts under MRE 404(b). Specifically, defendant argues that prosecution witness Tracy Edmonds improperly testified that he instructed defendant not to use violence in conducting the drug trade, implying that defendant was a violent person in the past. We disagree.

Defendant characterizes this issue as whether the trial court erred in admitting the challenged evidence; however, because defendant did not object to the evidence and ask that the remarks be stricken, the trial court did not have an opportunity to rule on the issue. Instead, defendant moved for a mistrial based on the remarks. Thus, the dispositive issue before this Court is whether the trial court abused its discretion in denying the mistrial. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). An abuse of discretion exists only when denial of the motion deprives the defendant of a fair and impartial trial. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997).

During the prosecutor's direct examination of Edmonds, the following exchange took place:

> *Q:* You talked about how you wanted to, or you counselled [sic] with the Defendant in terms of doing business?
>
> *A:* Um-hum
>
> *Q:* Describe for the jury what you mean by that?
>
> *A:* Well, first of all, I didn't need any violent - we didn't need any, because I was already being, I was under surveillance by the FBI. I just didn't need any more heat. I didn't want to go to prison. So when I talked to [defendant], he got into a lot of confrontations from time to time around town. I said, listen, we don't need no fighting.
>
> *Q:* Keep your voice up.

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People v Atkins, 397 Mich 163, 173 n 10.

> *A:* We don't need any fighting. We don't need anybody to come up dead. We don't need none of that. If somebody beaus us out of our money, you know, we may go talk to them and everything. But it's not worth getting a case about, getting another case. So I really wanted to try to tone him down from what you - how he used to be in the past.

Although Edmond's testimony may have inappropriately implied that defendant was involved in violent, confrontational activity in the past, we are not convinced that the admission of this brief and unsolicited testimony warranted a mistrial. Where error involved unsolicited remarks by a witness, "[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "This is especially true where the defendant has rejected the opportunity to have the jury charged with a cautionary instruction." *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

In this case, any prejudice caused by Edmonds' remarks could have been cured by a timely instruction to the jury. Indeed, the trial court offered to provide a curative instruction to remove any potential prejudice, but defendant refused the instruction, seeking to avoid any further emphasis of the remarks. Further, defendant does not argue, and the record does not show, that the prosecutor elicited the improper testimony or knew that Edmonds would make the challenged remarks. See *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990); *People v Barker*, 161 Mich App 296, 307; 409 NW2d 813 (1987).[11] Defendant was not denied a fair and impartial trial by Edmonds' testimony and the trial court did not abuse its discretion in refusing to grant a mistrial.

F. Claimed Trial Court Errors

1. Instructional Error

Defendant argues that because the testimony was varied and inconsistent regarding the amounts of each alleged drug transaction, the trial court erred in failing to instruct the jury on the requested lesser included offenses of conspiracy to deliver more than 225 but less than 650 grams of cocaine and conspiracy to deliver more than 50 but less than 225 grams of cocaine. We agree that the failure to instruct on the lesser offenses was error, but conclude that the error was harmless and does not warrant reversal.

Jury instructions are reviewed in their entirety to determine whether there was error requiring reversal. *People v Mass*, 238 Mich App 333, 339; 605 NW2d 322 (1999), rev'd in part on other grounds 464 Mich 615; 628 NW2d 540 (2001). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected

[11] After Edmonds' made the challenged remarks, a bench conference was held and the prosecutor instructed Edmonds not to discuss anything beyond what the prosecutor was directing his attention to.

defendant's rights. *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 721 (2001); *Mass, supra.* When reviewing the propriety of a requested lesser included offense instruction, the court must first determine if the lesser included offense is necessarily included in the greater charge, or if it is a cognate lesser included offense. *People v Bailey*, 451 Mich 657, 667; 549 NW2d 325, amended on other grounds 453 Mich 1204; 551 NW2d 163 (1996). The evidence introduced at trial must support a conviction of the cognate lesser offense in order for an instruction on that offense to be appropriate, *id.* at 668; however, regardless of the evidence in a given case, the jury must be instructed on necessarily included lesser offenses. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997); *People v Beach*, 429 Mich 450, 463; 418 NW2d 861 (1988).

In *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975), our Supreme Court explained the distinction between a necessarily included lesser offense and a cognate lesser offense:

> The common-law definition of lesser included offenses is that the lesser must be such that it is impossible to commit the greater without having committed the lesser. This definition includes only *necessarily* included lesser offenses. This definition, however, is generally conceded to be unduly restrictive, and thus most jurisdictions, including Michigan, have statutes that are broadly construed to permit conviction of "cognate" or allied offenses of the same nature, under a sufficient charge. These lesser offenses are related and hence "cognate" in the sense that they share several elements, and are of the same class or category, but may contain some elements not found in the higher offense. [Citations omitted; emphasis in original.]

The Court has since followed the distinction articulated in *Ora Jones, supra*, and defined necessarily included lesser offenses as those in which the defendant cannot commit the greater offense without also committing the lesser offense, and cognate lesser offenses as those that share several elements with the greater offense and are of the same class of crime, but contain additional elements not found in the greater offense. See e.g., *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999); *Lemons, supra* at 253; *Bailey, supra* at 667-668; *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994); *People v Mosko*, 441 Mich 496, 499-500; 495 NW2d 534 (1992); *Beach, supra* at 461-462.[12]

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[12] The prosecutor argued, and the trial court apparently agreed, that *People v Marji*, 180 Mich App 525, 531; 447 NW2d 835 (1989), governed the instant case. In *Marji*, this Court held that delivery of lesser amounts of cocaine were cognate lesser offenses of delivery of greater amounts of cocaine and an instruction on the lesser offenses was not appropriate unless the evidence supported the charges. *Id.* at 531. The *Marji* Court reasoned that although delivery of lesser amounts of cocaine are crimes within the same category as delivery of greater amounts of cocaine and share some elements with the greater offense, they also contain essential elements not present in the greater offense, namely, proof of lesser quantities of controlled substances. *Id.* Thus, delivery of lesser amounts of cocaine are considered cognate offenses, not necessarily included offenses. *Id.* However, we believe that *Marji* was wrongly decided. Because that case was decided before November 1, 1990, it is not precedentially binding on this Court and we decline to follow it. MCR 7.215(H)(1). Instead, we choose to follow the rule of law set forth by

(continued…)

In this case, defendant was charged with conspiracy to deliver more than 650 grams of cocaine. He requested instructions on conspiracy to deliver 50 to 225 grams of cocaine and conspiracy to deliver 225 to 650 grams of cocaine. The only distinction between the greater and lesser offenses is the quantity of cocaine involved; thus, we conclude that defendant's requested instructions were for necessarily included lesser offenses of the charged offense. *Lemons, supra*; *Ora Jones, supra*. Refusing to grant a requested instruction on a necessarily included lesser offense constitutes error. *Mosko, supra* at 501; *Ora Jones, supra* at 390. Accordingly, we find that the trial court's failure to instruct the jury on the lesser included offenses as requested was error.

However, a trial court's failure to grant a requested instruction is subject to the harmless error analysis. *Mosko, supra* at 502-503. In this case, the evidence overwhelmingly demonstrated that defendant conspired to deliver several kilograms of cocaine. Indeed, each prosecution witness testified that defendant was involved in cocaine transactions totaling far more than 650 grams, and many of the witnesses testified that defendant participated in multiple transactions of a kilogram, totaling thousands of grams of cocaine. Thus, it cannot seriously be disputed that the amount of cocaine involved in this case exceeded 650 grams. Under these circumstances, the jury could not reasonably have convicted defendant of the lesser offenses and the trial court's failure to instruct the jury on the requested lesser included offenses was harmless error.

2. Trial Court's Comments

Defendant also contends that he was prejudiced by certain comments made by the trial court during recross-examination of a prosecution witness.[13] Although defendant did not object

(…continued)

our Supreme Court in *Ora Jones* and its progeny, holding that the offenses of delivery of lesser amounts of controlled substances are necessarily included offenses of delivery of greater amounts of controlled substances and the jury must be so instructed upon request.

[13] The challenged comments occurred during the following exchange:

> *Q*. Sir, you testified earlier that you had gone to Central and Livernois in Detroit, one of the places you acquired drugs?
>
> *A.* Yes.
>
> *Q*. Now, that's – that's a location near the bridge to Canada; is that right?
>
> *A.* No.
>
> *Q*. Did you ever go to Canada with Mr. Irving and some other friends to have some fun?
>
> [*The Prosecutor*]: I'm going to object. This goes way beyond the scope –
>
> *The Court*: What's it relevant to?

(continued…)

to the challenged comments of the trial court below, because the comments were made by the trial court, we may review the issue to ensure that defendant was not deprived a fair trial. *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988); see also *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). In reviewing a trial court's conduct during trial, we must not review the challenged portion out of context; rather, we should review the entire record to determine if the trial court's comments pierced the judicial veil of impartiality. See *Id*.; *Collier, supra* at 697-698. "If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed." *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989), quoting *Collier, supra* at 698.

> The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby

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(…continued)

> [*Defense Counsel*]: It's relevant as to why he thinks that location was a drug house versus the fact that it wasn't.
>
> *The Court*: That he went to Canada, *Livernois and Central is no where near the bridge*?
>
> [*Defense Counsel*]: Well, that's – that's what he's saying.
>
> *The Court*: Yeah.
>
> *Q*. (*By* [*Defense Counsel*]): The location that you talked about near central [sic] and Livernois, did you ever pass that location on the way to Canada?
>
> *A*. No.
>
> *Q*. Never went there to go to one of the clubs?
>
> [*The Prosecutor*]: Your Honor, I'm going to object. What the relevance?
>
> *The Court*: You can ask whether he passed the location on his way to some club in Canada.
>
> *Q*. (*By* [*Defense Counsel*]): Did you ever go to a club in Canada with Mr. Irving?
>
> *A*. Yes, I did.
>
> *Q*. And that's not how you obtained that location you talked about that you claim was a drug house?
>
> *A*. No. [Emphasis added.]

> deprive the [defendant] of his right to a fair and impartial trial." [*Collier, supra,* quoting *People v Rogers,* 60 Mich App 652, 657; 233 NW2d 8 (1975).]

See also *Paquette, supra*; *Romano, supra*.

Here, a review of the whole record indicates that the trial court was trying to ascertain what the witness was being asked and what the relevance of that information was so that he could rule on an objection that had been placed by the prosecutor. Because the comment was made in this context and not meant to bolster the credibility of a prosecution witness, we conclude that the trial court's comments did not unduly influence the jury in this case and therefore did not pierce the judicial veil of impartiality. Accordingly, the trial court's comments did not deprive the defendant of a fair and impartial trial. See *Paquette, supra*; *Romano, supra* at 220-221.

G. Sufficiency of the Evidence

Defendant's final claim on appeal is that that the prosecution presented insufficient evidence to sustain his conviction for conspiracy to delivery 650 grams or more cocaine, MCL 750.157a(a); MCL 333.7401(2)(a)(i). Again, we disagree.

To determine whether the evidence was sufficient to sustain defendant's conviction, we review the lower court record in the light most favorable to the prosecution to determine whether a rational jury could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Oliver*, 242 Mich App 92, 94; 617 NW2d 721 (2000); *People v Noble*, 238 Mich App 647, 655; 608 NW2d 123 (1999). Our Supreme Court has stated that in order

> to be convicted of conspiracy to possess with intent to deliver a controlled substance, the prosecution [must] prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver *the statutory minimum as charge*, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the *statutory minimum as charged* to a third person. [*Mass, supra* 464 Mich 630, citing *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997) (emphasis added).]

Thus, in the instant case, the prosecution had to present evidence that proved beyond a reasonable doubt that plaintiff conspired to deliver more than 650 grams of cocaine. In this regard, we note that both Tamper Allen and Edmonds testified that they and defendant agreed to be partners with defendant in order to sell cocaine in the Lansing area. In addition, Edmonds testified that on at least two occasions he had supplied Allen and defendant with one kilogram of cocaine to sell and that on one occasion he supplied defendant with two kilograms for the purposes of sale. Michael Sorrell also testified that defendant had up to one kilogram of cocaine at a time and that he had sold more than four kilograms of cocaine on behalf of defendant. Based on this testimony, we conclude that when viewed in the light most favorable to the prosecution, the jury was presented with sufficient evidence that defendant was guilty beyond a reasonable doubt of conspiring with others to deliver more than 650 grams of cocaine.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck