STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 2002
v	No. 224028 Bay County Circuit Court
ROBBERICK LONDELL HARDGE, Defendant-Appellant.	LC No. 99-001302-FH

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(iv), and delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as a second habitual offender, MCL 769.10, to consecutive prison terms of 60 to 360 months for each conviction, with credit for 333 days served. He appeals as of right. We affirm.

I

Defendant argues that defense counsel was ineffective for failing to raise a defense of entrapment. Because defendant did not raise this issue in a motion for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Thew*, 201 Mich App 78, 90; 506 NW2d 547 (1993). In order to justify reversal on the ground that counsel was ineffective, defendant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms," and that there is a "reasonable probability" that, but for counsel's deficient performance, "the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; ___ NW2d ___ (2001). Because defendant bears the burden of demonstrating both deficient performance and prejudice, he "necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Entrapment is found where (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated. *People v Ealy*, 222 Mich App

508, 510, 564 NW2d 168 (1997). "Entrapment will not be found where the police do nothing more than present the defendant with the opportunity to commit the crime of which he was convicted." *Id*.

Here, defendant contends that the police engaged in conduct that falls within the "so reprehensible that it cannot be tolerated" entrapment prong. The facts established that a police informant gave $40 to an accomplice, Beilby, of which $20 was to be used to purchase cocaine for the informant and the other $20 to purchase cocaine for Beilby. Defendant claims that the police improperly enticed Beilby to purchase cocaine and played upon her drug addiction in order to convict him. To be sure, it is somewhat troubling that a police operation allowed Beilby to obtain drugs, which she presumably used to support her drug habit. However, the facts also suggested that the police could not intervene to immediately arrest Beilby, or defendant for that matter, because they wanted to preserve their ability to use the confidential informant in future operations. This logic is reasonable, especially where the confidential informant was involved in forty to sixty cases. Thus, we are not persuaded that the police conduct in the instant matter was reprehensible, much less "so reprehensible that it cannot be tolerated." Therefore, defendant has failed to satisfy his burden of demonstrating a sufficient factual predicate to support his entrapment claim. Because counsel is not required to advocate a meritless position, defendant has failed to show that counsel was ineffective for not raising an entrapment defense. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

II

Defendant also argues that he was denied his right to a speedy trial where there was an eight-month delay between the time of his arrest and the beginning of trial. Defendant concedes, however, that he did not preserve this issue with a formal demand on the record. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 123 (1999);.

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions, as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; *Cain*, *supra* at 111. In determining whether a defendant has been denied a speedy trial, a reviewing court considers the following factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000).

Here, the eight-month delay was only two months longer than the six-month period of delay that is generally required to trigger judicial review of a speedy trial claim. *People v O'Quinn*, 185 Mich App 40, 47; 460 NW2d 264 (1990). While the reasons for the delay are not fully apparent from the record, at least a portion of the delay was attributable to an adjournment of the preliminary examination and two substitutions of defense counsel. As noted above, defendant did not assert his right to a speedy trial in the trial court. Moreover, although defendant alleges that he was prejudiced because of anxiety due to his incarceration while awaiting trial, he also admits that he was incarcerated because of a parole hold. Finally, there is no indication of actual prejudice to defendant's defense. Defendant's general allegations of

prejudice caused by the delay, such as the unspecified loss of evidence or witnesses' fading abilities to remember details of the incident, are insufficient to establish that defendant was prejudiced. *People v Gilmore,* 222 Mich App 442, 461-462; 564 NW2d 158 (1997). In sum, upon considering and balancing the applicable factors, we find no plain violation of defendant's right to a speedy trial.

III

Defendant also argues that his conviction must be reversed because he was deprived of a jury drawn from a fair cross-section of the community. We disagree.

"A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *People v Hubbard* (*After Remand*), 217 Mich App 459, 472-473; 552 NW2d 493 (1996). However, the "fair-cross-section requirement does not entitle the defendant to a petit jury that mirrors the community and reflects the various distinctive groups in the population." *Id.* Instead, we have recognized:

> [T]he Sixth Amendment [US Const, Am 6] guarantees an opportunity for a representative jury by requiring that jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to constitute a fair cross section of the community . . . . In order to establish a prima facie violation of the constitutional 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. [*Hubbard, supra* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

In the instant case, defendant, as an African-American, has satisfied the first prong of this test. *People v Smith,* 463 Mich 199, 203, 215; 615 NW2d 1 (2000); *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). However, "'[i]t is well settled that systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate.'" *Id.*, quoting *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Instead, defendant "has the burden of demonstrating a problem inherent within the selection process that results in systematic exclusion. *Williams, supra* at 527. A "bald assertion" that systematic exclusion has taken place will not be sufficient. *Id.* Here, defendant failed to present any evidence of improper systematic exclusion, apart from noting that his actual jury was composed of all white jurors. Defendant also failed to provide any information regarding the composition of African-Americans in the surrounding community, the process used to select potential jurors, or any indication of how the selection process systematically excluded minorities. Thus, defendant has not established a prima facie violation of the constitutional fair cross-section requirement.

IV

Defendant next argues that he was denied a fair trial because a police officer testified that he had prior "dealings" with defendant. Because defendant failed to object to this testimony at trial, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764. Considering the fleeting nature of this vague remark, which provided no indication that the prior dealings involved defendant's criminal activity, we conclude that defendant's substantial rights were not affected. Thus, appellate relief is not warranted on the basis of this unpreserved issue.

V

Defendant also argues that prosecutorial misconduct denied him a fair trial. Because defendant did not object to the alleged misconduct at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. Generally, outcome-determinative plain error will not be found in cases involving prosecutorial misconduct unless the prejudicial effect of improper remarks was so great that it could not have been cured by an appropriate instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), quoting *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant contends that the prosecutor improperly stated during closing argument that defendant was not required to testify on his own behalf. Generally, a prosecutor must generally refrain from commenting on a defendant's failure to testify or present evidence, *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). However, the prosecutor merely remarked that defendant had the right not to testify, a comment reflecting defense counsel's previous statement to that effect and which comported with the trial court's later jury instruction. Considering that the prosecutor did not misstate the law, and that the jury is presumed to follow its instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), we find no plain error affecting defendant's substantial rights. *Watson, supra* at 586.

Defendant also argues that it was improper for the prosecutor to refer to the neighborhood where the charged narcotics transaction took place as "the hood." Defendant asserts that the use of this term improperly prejudiced the jury against him simply because he resided in this area of the city. We disagree. The term "hood" was elicited at trial as background information concerning the location of the transaction, as well as the reasons why the police were conducting surveillance on Beilby and used a confidential informant rather than simply purchasing the drugs directly. Such evidence was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. MRE 401; MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). Additionally, the prosecutor's use of the term in closing arguments constituted proper commentary on the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, the prosecutor did not improperly argue or even imply that defendant was guilty simply because of his presence in the neighborhood. Accordingly, defendant has failed to demonstrate plain error in connection with this issue. *Watson, supra* at 586.

Defendant next argues that the prosecutor improperly bolstered the credibility of the confidential informant by implying that he would not have personally undertaken similar risks in assisting the police. Although a prosecutor may not vouch for the credibility of a witness by suggesting that he has some special knowledge that the witness is testifying truthfully, *Bahoda, supra* at 276, a prosecutor may argue from the facts that the defendant or another witness is not worthy of belief or that the prosecution's witness should be believed. *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, viewed in context, the prosecutor did not impermissibly suggest that he had special knowledge regarding the veracity of either witness, but instead, argued from the evidence why the witnesses were worthy of belief. Thus, defendant has again failed to demonstrate any plain misconduct by the prosecutor.[1]

Finally, defendant contends that the prosecutor improperly denigrated defendant and his alibi defense. Defendant is correct that a prosecutor may not denigrate defense counsel or the defendant. *Bahoda, supra* at 263; *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991). Here, although remarking that the jury should not believe defendant's alibi defense, the prosecutor did not personally attack or belittle either defendant or defense counsel. Instead, the prosecutor's statements were fair commentary on the evidence presented by defendant in support of his alibi defense. *Bahoda, supra* at 282; *Launsburry, supra* at 361. Accordingly, we find no error.[2]

VI

Defendant also argues that defense counsel was ineffective for allowing the trial court to read a stipulated statement outlining the terms of the prosecution's plea agreement with Beilby. The record reveals that the trial court presented defendant with a number of options regarding Beilby's plea agreement: (1) not disclosing the terms of the plea agreement at all; (2) reopening the proofs and allowing Beilby to be cross-examined concerning the terms of the plea agreement; or (3) providing the jury with a stipulated statement concerning the terms of the agreement. Defense counsel indicated that defendant had elected the third option. The trial court then asked defendant whether he agreed with defense counsel's decision and defendant indicated that he did, asserting that he did not wish Beilby to testify again. Because defendant personally consented to the conduct that he now argues was improper, we find that this issue has been affirmatively waived. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

VII

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[1] Similarly, although not properly listed in defendant's statements of questions presented, he appears to challenge comments made by the prosecutor with respect to Beilby's veracity. Again, however, we find that these comments were merely commentary on the evidence presented.

[2] In light of our conclusion that the prosecutor did not commit misconduct, we also reject defendant's concurrent claim that defense counsel was ineffective for failing to object to the alleged acts of misconduct. Counsel was not required to make a meritless objection. *Snider, supra* at 425.

Finally, defendant argues that reversal is required because the prosecutor introduced prior bad acts evidence, without complying with the notice requirement of MRE 404(b)(2), when he elicited from Beilby that she "had bought from [defendant] before." Because defendant did not object to the testimony in question, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

We agree that the testimony in question constitutes evidence of prior bad acts, MRE 404(b), and that the prosecutor's failure to provide the notice required by MRE 404(b)(2) constituted plain error. *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001). However, we are satisfied that this single reference, viewed in conjunction with the remaining evidence establishing defendant's guilt, was not so prejudicial that it affected defendant's substantial rights, i.e., that it affected the outcome of trial. *Carines*, *supra* at 763-764. Accordingly, defendant is not entitled to appellate relief on the basis of this unpreserved issue.[3]

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper

[3] To the extent that defendant also characterizes this issue as a deprivation of his constitutional right to effective assistance of counsel, our finding that the plain error was not outcome determinative also prevents a finding that trial counsel was ineffective for not objecting to this testimony. *Rodgers*, *supra* at 714.