

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO L. ASBERRY,

Defendant-Appellant.

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UNPUBLISHED

September 20, 2002

No. 233770

Wayne Circuit Court

LC No. 00-010210-01

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

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a controlled substance, MCL 333.7403(2)(b). The trial court sentenced defendant to eleven months in jail and two years' probation. Defendant appeals as of right. We affirm.

Defendant makes several allegations of prosecutorial misconduct. The record indicates that defense counsel objected to some of the instances of alleged misconduct, which objections the trial court sustained. Because defendant did not request further action of the trial court such as a curative instruction, we review these claims for plain error affecting defendant's substantial rights. *People v Nash*, 244 Mich App 93, 96-97; 625 NW2d 87 (2000), citing *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Similarly, we review for plain error the instances of alleged misconduct to which defendant did not object. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

We review prosecutorial misconduct issues on a case-by-case basis, examining the pertinent portions of the record and evaluating a prosecutor's remarks in context. *Schutte, supra* at 721. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *Id.*, citing *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra*.

Defendant claims that the prosecutor improperly argued to the jury regarding the police search of defendant, stating, "They're not going to stick somebody in a squad car who's got a gun on him, who's got contraband on him." Defendant maintains that because defendant did not have a gun when he was arrested, the prosecutor's reference to a fact not in evidence prejudiced him. We disagree. The prosecutor did not argue that defendant was armed. It is clear from the

context of the prosecutor's argument that he was explaining to the jury why the police perform a search on a person, and why the police searched defendant in this case.

Defendant also contends that the prosecutor improperly made the following argument addressing the legislative intent behind the law as well as facts not in evidence: "Because of the fact codeine is a protected substance, protected because we do not want people – at least the law I imagine does not want people driving with this item in their system mixing with alcohol, for whatever reason . . ." The prosecutor did not argue that defendant had codeine or alcohol in his system. Further, any error in the prosecutor's remarks concerning the reason for the law was harmless because it was made outside the context of a discussion of the specific elements of the crime that needed to be proved. *People v Grayer*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2002), (Docket No. 229267, issued 7/26/02), slip op p 5.

Next, defendant challenges the prosecutor's argument regarding defendant's statement that was read into the record. Although the evidence showed that defendant did not write the statement himself, the prosecutor argued to the jury that "[t]his gentleman wrote it and he can't take it back." The trial court sustained defense counsel's objection to facts not in evidence. We find no plain error affecting defendant's right to a fair trial. Defendant initialed his responses to each question, as written by the police officer interrogating defendant. The prosecutor incorrectly stated that defendant "wrote" his statement, but the statement was defendant's inasmuch as he voluntarily answered the questions posed to him and initialed the recording of his answers.

Defendant argues that the prosecutor made a second improper reference to a gun when no evidence about a gun had been introduced at trial by stating: "When the police ask you point-blank, you know, they ask you is the gun there yours, what do you say, yes, when it's not yours." The prosecutor's remark, although improper, did not deprive defendant of a fair trial. The prosecutor did not argue that a gun was involved in this case. After the trial court sustained defendant's objection, the prosecutor put the remark into context. It is clear from the record that the prosecutor was speaking hypothetically to make the point that defendant would not have falsely admitted to possessing codeine without a prescription. Moreover, any prejudice could have been cured by an instruction, which defendant did not request.

Defendant argues that in rebuttal the prosecutor improperly suggested that defense witnesses fabricated their testimony merely because there was no prior record with which they could be impeached, unlike the police officers who testified for the prosecution. The trial court sustained defense counsel's objection that the prosecutor had no knowledge whether there was any recording of the witnesses' testimony. Viewed in context, the prosecutor's remarks were responsive to defendant's closing argument, wherein counsel stated that the defense witnesses "are not seasoned witnesses" compared to the police officers "who are seasoned professionals who probably testify all the time." We find no plain error.

Defendant also challenges the prosecutor's labeling defendant "a convicted thief," on the basis of his prior conviction of unlawfully driving away an automobile (UDAA), as well as the prosecutor's argument to the jury that defendant had been impeached by a prior conviction. UDAA is not a theft offense, *People v Hendricks*, 446 Mich 435, 448-451; 521 NW2d 546 (1994), and therefore a conviction of UDAA may not be used to impeach a witness. MRE 609(a)(2). Defense counsel immediately objected on this basis and stated that defendant is not a

thief. The trial court sustained the objection. In light of the sustained objection, as well as the trial court's instruction to the jury that the arguments of counsel are not evidence, we do not believe that this argument deprived defendant of a fair trial.

Defendant contends that in rebuttal the prosecutor improperly told the jury that the reason the rental car was not seized by police was that it belonged to the rental company. Defense counsel objected that the prosecutor was testifying, and the trial court sustained the objection. No further relief was requested. In closing argument, defense counsel had mentioned the rental car in arguing to the jury that the fact that the car was returned to defendant's family and was not seized shows that defendant was not a drug dealer. In the context of defendant's closing argument, we do not conclude that the prosecutor's remarks constituted plain error which affected the outcome of the trial.

Defendant also claims that the prosecutor misstated the burden of proof. Defendant does not explain what he believes is improper about the prosecutor's comments. To the extent that we can discern from the record, it appears that the prosecutor merely told the jury that it is entitled to assess the credibility of defense witnesses in the same manner as that of the prosecution's police witnesses. We find no error in this statement. Finally, we do not believe that the cumulative effect of error warrants reversal.

Defendant also contends that he was denied the effective assistance of counsel as a result of his attorney's failure to object to some of the improper arguments of the prosecutor as well as the prosecutor's cross-examination of defendant regarding his UDAA conviction. This issue is not preserved for appeal because defendant did not move for a new trial or request an evidentiary hearing on this issue. Accordingly, our review is limited to errors apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). Defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001), citing *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). We also note that this issue is not properly presented for appeal because defendant does not raise it as an issue in his statements of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

The record indicates that defense counsel objected to many instances of the alleged misconduct, and the trial court sustained the objections. Although defense counsel did not request any further relief, the trial court instructed the jury that the arguments of counsel are not evidence. Defendant also contends that his counsel failed to object to the prosecutor's question to defendant about his UDAA conviction. As discussed previously, that conviction is not admissible to impeach defendant, and an objection should have been sustained. However, viewing the record as a whole and in light of the evidence against defendant we do not conclude that defendant was denied a fair trial. The record does not demonstrate that but for counsel's failure to object to the prosecution's question or arguments, a different result would have obtained. *Sabin (On Second Remand)*, *supra* at 659.

Defendant next argues that he was denied his right to a jury drawn from a fair cross-section of the community based on an underrepresentation of African Americans in the jury pool and due to a systematic exclusion of African Americans from Wayne County's jury selection process. Alternatively, defendant maintains that he was denied equal protection on the basis of

the jury selection system, which he argues gives disproportionate representation to “out county jurors”. We disagree on both counts.

“To establish a prima facie violation of the fair cross-section requirement, 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.” *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). Defendant has demonstrated neither. Defendant asserts, without any factual support for his position, that he has established a prima facie case of systematic exclusion of African Americans in the Wayne County jury selection process. The record is void of any evidence that African Americans were underrepresented in his jury pool, or of systematic exclusion of African Americans from Wayne County’s jury selection process. Although defense counsel objected on the basis that the jury pool did not represent a fair cross-section of the Wayne County community, the record does not contain any offer of proof regarding the number of African Americans in defendant’s jury pool. We are not persuaded of the need to remand this case for an evidentiary hearing.

Affirmed.

/s/ Michael R. Smolenski

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder