STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 1, 2002
v	Nos. 227643;237165 Ingham Circuit Court
WILFRED NELSON, Defendant-Appellant.	LC No. 97-071596-FH

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant was convicted of perjury, MCL 750.422, in connection with his deposition testimony in a prior civil action to collect on a state lottery ticket that was forged after an $18 million winning ticket went unclaimed. Defendant was initially sentenced as a third habitual offender, MCL 769.11, to a term of six to thirty years' imprisonment. However, on remand from this Court, he was resentenced to a term of 6 to 22-1/2 years' imprisonment. Defendant appeals his conviction as of right in Docket No. 227643, and appeals his sentence as of right in Docket No. 237165. The appeals have been consolidated for this Court's consideration. We affirm.

I

Defendant first argues that he was denied a fair trial because, (1) the prosecutor failed to provide copies of a "Transaction Master Inquiry Report" computer printout as part of discovery,[1] (2) the trial court admitted into evidence a computer printout not previously provided during discovery, and (3) the trial court denied certain discovery requests.[2] This Court reviews

[1] Although defendant suggests on appeal that he was prejudiced because he was unable to have the computer printout examined by his experts because of the late production, the record shows that defendant's experts refused to review information or even formulate an opinion because they had not been paid. Defendant asked to be declared indigent and have the state pay for defense experts after the prosecution rested. A short time later, defendant announced that there had been a guarantee of payment and asked for an adjournment to permit additional witnesses to appear.

[2] The trial court denied defendant's motion to have the prosecutor produce computer printouts of lottery information from 2-1/2 months before the drawing at issue and denied defendant's request to have the information printed a second time while his representative was present. Defendant's representative was, however, permitted to be present when the computer printouts

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evidentiary matters, including the trial court's rulings on discovery issues, for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

We find no abuse of discretion. Defense counsel stated on the record that, prior to trial, he received a letter from the prosecutor regarding the computer information, which was available for defendant's inspection, and that the prosecutor provided copies of the printouts when requested to do so. According to defense counsel, the computer printout had been used at defendant's preliminary examination. Thus, we find no support for defendant's claim that the prosecutor withheld information or that defendant was denied his due process rights to discovery. *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998); *People v Tracey*, 221 Mich App 321, 324-325; 561 NW2d 133 (1997).

II

Next, defendant argues that he was denied a fair trial because the trial court allowed the state's "fraudulent documents section" to examine evidence after defendant's expert testified that the computer printout showed evidence of human intervention, and then allowed a witness to testify in rebuttal that the evidence had not been tampered with. The admission of rebuttal evidence is within the sound discretion of the trial court. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

The record indicates that defendant's expert was unwilling to tell the prosecutor the details of his opinion prior to testifying and, in fact, did not issue a report to either party. When the prosecutor asked to have the documents examined, defendant requested that an independent source examine the records rather than a state agency. The trial court denied defendant's request, but allowed defendant to have a representative present while the documents were being examined. "Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *Id.* at 399 (citations omitted). The evidence here was responsive to defendant's evidence. We find no abuse of discretion.

III

Defendant argues that the trial court erred in refusing to delay trial so that defense witnesses could appear. Defense counsel informed the court during trial that defendant had not paid his expert witness fees and that his experts refused to formulate an opinion or testify without payment. After the prosecution rested, defense counsel asked that defendant be declared indigent so that the state could pay his expert witness fees. Still later, counsel announced that defendant was able to pay his experts and asked that trial be delayed until the next morning so that he could call two experts and one lay witness, none of who had been subpoenaed. The trial court refused to allow the delay. Defendant now claims that this refusal "crippled" his defense.

Adjournment of a criminal trial is permitted only for good cause shown. MCL 768.2. The decision whether to grant a continuance is a matter within the trial court's discretion.

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were examined for evidence of fraud.

People v Dowell, 199 Mich App 554, 555; 502 NW2d 757 (1993). Although defense counsel argued below that defendant was not negligent in calling his late witnesses because of his alleged indigence, the prosecutor noted that trial had previously been delayed to allow defendant to call these same witnesses and defense counsel acknowledged that defendant had been responsible for prior delays. The trial court found that further delay would cause hardship to several jurors and that defendant had already "delayed and delayed and delayed." We find no abuse of discretion in the trial court's denial of defendant's request for a continuance.

IV

Next, defendant argues that he was denied a fair trial because the trial court permitted a prosecution expert to demonstrate how photocopied lottery tickets could be altered, but did not allow defendant to introduce lottery tickets containing apparent facial errors. Defendant argues that the trial court was not even-handed in its application of the rules. We disagree. Evidentiary rulings are reviewed for an abuse of discretion. *Fink, supra.* A decision on a close evidentiary question is not ordinarily an abuse of discretion. *Id.*

Here, a prosecution witness testified that the operations department of G-Tech Corporation created a fake wager to show how a photocopy could be created to resemble a winning lottery ticket. The prosecutor moved for admission of the photocopy and defendant objected on the grounds of relevance and prejudice. According to the prosecutor, defense counsel was allowed to observe the demonstration evidence the previous day, after it was created and before it was presented at trial. The trial court ruled that the evidence was admissible as a demonstration created by an expert to show "one way in which the result the People claim was reached could have been reached." Defendant later attempted to introduce into evidence lottery tickets that contained errors on their face. The prosecutor claimed she had not been allowed a prior opportunity to view this evidence or been given copies. Indeed, defense counsel told the prosecutor earlier that he was not planning to introduce the tickets as evidence. The trial court excluded the evidence because the prosecutor had not had the opportunity to review the evidence and review it with witnesses.

Contrary to defendant's argument, the trial court did not allow the prosecution to introduce evidence of which defendant had no notice. The record suggests that defense counsel was shown the prosecution's computer printouts and demonstration evidence before their introduction, whereas the prosecution claimed it had not been shown defendant's proposed evidence. Under these circumstances, we are not persuaded that the court abused its discretion in ruling on these matters.

V

Defendant also argues that he was denied a fair trial because there were no African-American jurors on his jury. Counsel recognized during voir dire that no one in the venire was African-American, and prospective jurors were questioned by both attorneys about possible prejudice. The next day, defendant challenged the make-up of the jury. The trial court denied defendant's challenge and noted that the jury pool was created from a pool of "everybody who lives in the county and has a driver's license or State of Michigan ID card," and that there was no evidence that the selection process was tainted.

Challenges regarding the systematic exclusion of minorities from venires are reviewed de novo. *People v Williams*, 241 Mich App 519, 525; 616 NW2d 710 (2000). African-Americans are a constitutionally cognizable group for purposes of a Sixth Amendment fair-cross-section analysis. *Id*. at 526. To make a prima facie showing that there has been a violation, a defendant must show that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and that the underrepresentation is due to systemic exclusion of the group in the jury selection process. *Id.* Here, although asserting that African-Americans were underrepresented in his particular array, defendant presented no evidence on jury venires in general. Showing one case of alleged underrepresentation is not sufficient, nor is it enough for a defendant to assert that systemic exclusion will be shown on remand. *Id.* Thus, defendant has not established a prima facie case of systematic exclusion. See also *People v Hubbard (After Remand)*, 217 Mich App 459, 481-482; 552 NW2d 493 (1996).

VI

Next, defendant argues that the trial court never established a factual basis for sentencing him as a third habitual offender and erroneously believed that it had no discretion in determining defendant's maximum sentence. On remand from this Court, defense counsel acknowledged at resentencing that defendant was a third habitual offender and the trial court indicated that it was aware of its discretion in determining the maximum sentence. In light of the proceedings on remand, we conclude that further relief is not warranted.

In Docket No. 237165, defendant argues that, in light of his good behavior while in prison, his minimum sentence is disproportionate. Although defendant asserts that his sentence is six times greater than the high end of the recommended range under the legislative guidelines, because defendant's crime was committed before January 1, 1999, the legislative guidelines do not apply. MCL 769.34(2). Further, the parties agree that the former judicial guidelines do not apply to the offense of perjury. *People v Honeyman*, 215 Mich App 687, 697; 546 NW2d 719 (1996).

This Court reviews a sentence imposed on an habitual offender for an abuse of discretion. *People v Rodgers*, 248 Mich App 702, 719-720; 645 NW2d 294 (2001); *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). A sentence within the statutory limits is not an abuse of discretion when the defendant's underlying offense, in the context of his previous felonies, demonstrates the defendant's inability to conform his conduct to the laws of society. *Id.* Here, the trial court noted at defendant's original sentencing that defendant's prior record established that he was "a recidivistic con man." Although defendant has evidently adapted well to prison, his underlying offense, in the context of his previous involvement in a "pigeon drop scheme" and an "arson fraud insurance scam," demonstrate that defendant is unable to conform his conduct to the laws of society. *Id.* We find no abuse of discretion.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens