STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2004
v	No. 244590 Kent Circuit Court
TERRY LYNN BARNES, Defendant-Appellant.	LC No. 02-001495-FH

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of unarmed robbery, MCL 750.530. He was sentenced as an habitual offender, MCL 769.12, to seven to twenty-five years' imprisonment. We affirm.

In light of the appellate issues raised, it is unnecessary to explore in an extensive detail the nature of the offense. We shall, however, briefly review the facts of the case as established through trial testimony. The offense occurred in the early morning hours of January 12, 2002, when defendant and an acquaintance pulled up to Martha's Vineyard in Grand Rapids in a car driven by the acquaintance. They stopped near the female victim's station wagon, while she was in the process of delivering newspapers to Martha's Vineyard. Defendant alone left the vehicle in which he was riding, approached the victim's station wagon, confronted the victim, and demanded money. The victim acquiesced and gave defendant about $70.[1]

Defendant and his acquaintance drove off, and the victim wrote down the license plate number and then called 911. An officer who responded to the scene testified that the victim

[1] The victim testified that she was sitting in her vehicle at Martha's Vineyard doing paperwork related to her newspaper route when defendant approached her station wagon and leaned up against the passenger side of the vehicle; the passenger side door was open because she had unloaded newspapers from the front seat. Defendant, with one hand in a pocket, told the victim he wanted her money. After she turned over her money and defendant left, she noticed a large comb on the passenger side of her vehicle, which she assumed had fallen out of defendant's pocket. The victim picked defendant out of a photographic lineup, and identified defendant as the offender at trial.

appeared "really shook up," and she gave him details of the robbery and a description of the vehicle and offender, along with a piece of paper with a license plate number. Defendant's acquaintance, as a prosecution witness, testified that he and defendant had spent the night and early morning hours drinking alcohol, buying and using crack cocaine, and panhandling to obtain money for drugs. They eventually drove to Martha's Vineyard, where defendant alone left the car, approached the victim, and then returned to the car.

Defendant, who testified on his own behalf and was the sole defense witness, asserted that he had approached the victim at a Dairy Mart and offered to give her marijuana in exchange for $20 so that he could have his car towed. He further maintained that they agreed to meet at Martha's Vineyard, where the victim willingly gave defendant $50 in exchange for his promise to return later with some marijuana. Defendant left the comb with the victim as "collateral." He stated that he took the money with no plans to return with marijuana. Defendant admitted to being a self-described scam artist, and he freely acknowledged that he and his acquaintance had been drinking alcohol, buying and using crack cocaine, and panhandling around the time of the crime. The victim denied defendant's account of the events that transpired. An officer testified that defendant, when originally questioned, denied any involvement in the robbery or interaction with the victim, and even denied being out and about at the time of the crime. The jury convicted defendant of unarmed robbery.

Defendant first argues on appeal that, because of an error in Kent County's computer system that caused seventy-five percent of the county's eligible jurors to be excluded from jury selection, and in a manner that resulted in an under-representation of African-Americans, defendant was denied his constitutional right to a jury drawn from a fair cross-section of the community. Defendant, relying mainly on newspaper articles, argues in part:

> In a story that first appeared in the July 30, 2002, Grand Rapids Press, county officials conceded that their own review of their computer system revealed that "nearly 75 percent of the county's 454,000 eligible residents were excluded from potential jury pools since spring 2001" and that "[m]any blacks were excluded from . . . jury pools due to a computer glitch that selected a majority of potential candidates from the suburbs." The chief judge of the Kent County Circuit Court, George Buth, was quoted as saying, "There has been a mistake – a big mistake." The article states that troubleshooters detected the error in mid-July of 2002, and that the error had gone undetected for sixteen months. (See July 30, 2002 article attached as Appendix A). Jury selection in Mr. Barnes' case took place on July 16, 2002, so the potential jurors would have been selected within the period during which the error was occurring. [Alterations and omission in original.]

At the close of jury voir dire, defense counsel stated: "Your Honor, we're satisfied with the jury as constituted." The jury was then empaneled and sworn. There were no objections regarding the composition of the jury array made at any point in time during the trial. Although we cannot discern from the record the race of the individual members of the jury array, defendant states that he was "tried by an all-white jury." We conclude that defendant has waived this issue for purposes of appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant urges that the issue cannot be waived or forfeited because the improper manner in which jurors were selected was incapable of being known at the time. Defendant relies on *Amadeo v Zant*, 486 US 214; 108 S Ct 1771; 100 L Ed 2d 249 (1988), and *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996).

In *Hubbard*, *id.* at 465, a case concerning the constitutionality of the jury selection process in Kalamazoo County in which it was found to be unconstitutional, this Court concluded that defendant had made a timely challenge to the jury array by initialing raising it during voir dire. Further, the *Hubbard* panel rejected the prosecutor's argument that defendant had waived the issue by expressing satisfaction with the jury at the close of voir dire. *Id.* at 466. However, the basis for rejecting the prosecutor's argument was that defendant had already raised a challenge to the jury array. *Id.* at 467. The Court stated that "[w]e find nothing in the trial record to support a conclusion that defendant's expression of satisfaction with the jury was intended as a relinquishment of his belief that the venire was selected in an unconstitutional manner or that such expression was anything more than an exercise in practicality, given the trial court's earlier adverse ruling and the potential for jury alienation." *Id.* Here, there was no objection or challenge whatsoever to the jury array or to the jury composition as seated. Therefore, the issue was waived.[2]

We find *Amadeo* inapposite, wherein the United States Supreme Court stated:

> In considering petitioner's motion for a writ of habeas corpus, the District Court concluded that petitioner successfully established cause for his failure to raise in the state trial court a constitutional challenge to the composition of the juries that indicted him, convicted him, and sentenced him to death. *This case presents the question whether the factual findings upon which the District Court based its conclusion were clearly erroneous.* [*Amadeo, supra* at 216-217 (emphasis added).]

We recognize that perhaps the alleged unconstitutional jury selection process could not have been specifically identified at the time of trial. But, in light of the all-white jury, it was incumbent on defendant to make a timely challenge or raise an objection. A concern on defendant's part about the racial makeup of the venire should have arisen, and a timely challenge may very well have lead to discovery of possible problems in the selection process. To establish a prima facie violation of the fair cross-section requirement,[3] a defendant must prove "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 McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003), quoting *People v*

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[2] We note that in *People v Dixon*, 217 Mich App 400, 403-404; 532 NW2d 663 (1996), this Court refused to apply *Hubbard* in another case coming out of Kalamazoo County challenging the jury selection process, where a challenge to the jury array was not timely because it was made after the jury had been impaneled and sworn.

[3] A defendant in a criminal trial is entitled to an impartial jury drawn from a cross section of the community. *Hubbard, supra* at 472.

Smith, 463 Mich 199, 203; 615 NW2d 1 (2000). Because one of the elements is under-representation in a specific defendant's jury array or venire, defendant, when faced with an all-white jury, could have, minimally, raised an objection below.

Lending further support to our holding is this Court's ruling in *McKinney, supra* at 161-162, where that panel was apparently faced with an issue nearly identical to the one here, i.e., an unpreserved challenge to Kent County's jury selection process. This Court, rejecting the challenge, stated:

> [T]o properly preserve a challenge to the jury array, a party must raise this issue before the jury is empanelled and sworn. A review of the record in this case indicates that defendant failed to object to the composition of her jury array. Further, there is no evidence in the lower court record to support defendant's argument. Consequently, we have no means of conducting a meaningful review of defendant's allegations on appeal. We note that another panel of this Court previously denied defendant's request to remand to the trial court for an evidentiary hearing.
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> Nevertheless, we understand the difficulties that counsel would have faced in objecting to what was, according to defendant, a longstanding problem. Moreover, this opinion should in no way be viewed as approving of, or minimizing, any improper jury selection practices that may have occurred in this case. [*McKinney, supra* at 161-162.]

We conclude that defendant has waived this issue for appeal in the case at bar, and we note our agreement with the sentiments expressed in *McKinney* regarding the Kent County jury selection process.

Defendant next argues that he is entitled to a new trial, where the prosecutor invoked jury sympathy for the victim, thereby denying his due process right to a fair trial. We disagree.

The prosecutor in closing argument eluded to the negative impact the robbery had on the victim, stating that her life had changed and would never be quite the same, and stating that it was sad and horrible that anyone had to go through such an ordeal. There was no objection to the prosecutor's comments, and thus we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Appeals to the jury to sympathize with the victim of a crime is improper. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Here, the prosecutor's comments were isolated and brief, and the trial court specifically instructed the jury that sympathy could have no bearing on the verdict. We conclude that there was no plain error affecting defendant's substantial rights.

Finally, defendant argues that he is entitled to resentencing, where the trial court improperly permitted allocution by a person who was not a "victim" of the crime.

We first note that defendant does not identify the person who is alleged to have improperly spoken at sentencing. A review of the sentencing transcript, however, reveals that the only person to make a statement at sentencing was a representative of the neighborhood association where the crime was committed. She very briefly stated that defendant had wreaked

havoc in the neighborhood for about three or four years by running scams and scaring people, and was considered a suspect in an unsolved murder. Defense counsel questioned the appropriateness of allowing the association representative to speak but left the matter to the trial court's discretion. Although arguably the issue was preserved for appeal, defendant himself submits that the standard of review is for plain error affecting defendant's substantial rights under *Carines, supra*.[4] Therefore, we shall apply that standard.

In *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994), this Court, in finding no abuse of discretion, stated that, although the person who spoke at sentencing was not a "victim" under the statute, "a sentencing court is afforded broad discretion in the sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant's life and characteristics."

Here, the trial court, after first observing that defendant had a record of nine prior felonies and nineteen misdemeanors that would support an upward departure from the guidelines, decided to stay within the minimum guidelines range and sentenced defendant to a prison term of seven to twenty-five years. We find it unnecessary to decide whether the association representative qualified as a "victim" under MCR 6.425(D)(2) or MCL 780.765, or whether she had a right to speak at sentencing as she did regardless of "victim" status. Considering that the trial court chose to stay within the guidelines, we find no plain error affecting defendant's substantial rights.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot

[4] It is also arguable that the issue was waived where counsel deferred to the trial court. However, there is no basis for reversal regardless of how this issue is viewed.