STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2004
v	No. 241442 Kent Circuit Court
RAMON LEE BRYANT, Defendant-Appellant.	LC No. 01-008625-FC

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendant was charged with first-degree criminal sexual conduct, MCL 750.520b(1)(e) (actor armed with a weapon); armed robbery, MCL 750.529; and possession of marijuana, MCL 333.7403(2)(d). Following a jury trial, defendant was found guilty as charged. He was sentenced to 12 to 35 years' imprisonment on the first-degree criminal sexual conduct conviction, 12 to 35 years' imprisonment on the armed robbery conviction, and time served on the possession of marijuana conviction. Defendant appeals as of right. We affirm in part and remand.

The victim in this case testified that on August 5, 2000, she went to a "bad area of town" to buy crack cocaine. When she arrived, approximately ten people rushed towards her car vying for her business. Defendant jumped into her car, saying that she did not want to deal with the others, and ordered her to drive up the road. The victim drove to where defendant indicated, stopped, and told defendant that she wanted to buy $90 of crack. Defendant told the victim to drive up a few more blocks and park, which she did. Defendant then left her car stating he would be back in a few minutes. On defendant's return, he put a gun to the victim's head and demanded her $90. After searching for and finding the money, defendant ordered the victim to perform oral sex on him. The victim testified that she pleaded with defendant, but he took her car keys and stated, "You ain't going anywhere until you do." Defendant testified that the victim performed the sexual act in exchange for drugs, and that the money found on him at the time of his arrest was a birthday present from his mother.

Defendant first argues that he was deprived of his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community because there was only one African-American in the jury venire of forty-two people. Because defendant objected during the jury voir dire, he has preserved this issue. *People v Hubbard (After Remand)*, 217 Mich App 459,

465; 552 NW2d 493 (1996). We review de novo challenges of systematic exclusion of minorities from jury venires. *Id*. at 472.

It is well settled that "a criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *Id.*, citing *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975). In *Hubbard*, this Court succinctly explained the Sixth Amendment protection regarding impartial juries:

> This 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. Instead, the Sixth Amendment 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. [*Hubbard, supra* at 472-473.]

The Sixth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Duncan v Louisiana*, 391 US 145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1968). The Michigan Constitution also guarantees the right to trial by jury. Const 1963, art 1, § 14.

In order to establish a prima facie violation of the 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).]

Here, defendant satisfies the first prong of the *Duren* analysis, because "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes." *Hubbard, supra* at 473.

To satisfy the second prong of the *Duren* analysis, defendant must show that "the number of members of the cognizable group is not fair and reasonable in relation to the number of members in the relevant community." *Id.* at 473-474. "Explained another way, the second prong is satisfied where it has been shown that a distinctive group is substantially underrepresented in the jury pool." *Id.* at 474. Unfortunately, as our Supreme Court noted in *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000), "the United States Supreme Court has not specified the preferred method of measuring whether representation of a distinctive group in the jury pool is fair and reasonable," and that since *Duren, supra*, "the lower federal courts have applied three different methods of measuring fair and reasonable representation, known as the absolute disparity test, the comparative disparity test, and the standard deviation test." The *Smith* Court decided that all three approaches should be considered when measuring whether representation was fair and reasonable, and concluded that "no individual method should be used exclusive of the others," adopting a case-by-case approach. *Smith, supra* at 203.

In this case, because neither party presented evidence regarding the application of the standard deviation test at the jury array hearing or on appeal and because no court in the country has accepted this test alone as determinative in Sixth Amendment challenges to jury selection systems, we decline to conduct such an analysis. *Smith, supra* at 205 n 1.

The comparative disparity test "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service." *Ramseur v Beyer*, 983 F2d 1215, 1231-1232 (CA 3, 1992). "Comparative disparity is calculated by dividing the absolute disparity by the population figure for a population group." *Id*. at 1231. However, "most courts have rejected the comparative disparity analysis because when the distinctive group's population is small, a small change in the jury pool distorts the proportional representation." *Smith, supra* at 204. For the same reason, we do not believe that this test should be controlling in this case.[1]

The absolute disparity test has been most often applied in cases where the defendant challenges the representative nature of the jury venire. *Hubbard, supra* at 474. This test

> measures representativeness by the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire. The absolute disparity is obtained by subtracting the jury representation percentage from the community percentage. Under this test, absolute disparities between 2 percent and 11.2 percent are considered statistically insignificant and do not constitute substantial underrepresentation. [*Id.* at 475.]

The relevant statistic is the percentage of African-American adults over eighteen years of age and eligible to serve on juries.[2] "According to the 1990 census, 8.1% of Kent County's population is black, though black adults between the ages of eighteen and sixty-nine comprised 7.28% of the county's population."[3] *Smith, supra* at 211. At the jury array hearing, evidence was introduced that of the 183 jurors summoned to circuit court on January 28, 2002, 151 jurors responded, and 132 jurors actually appeared. Of the 132 jurors that actually appeared, 45 jurors were selected for the venire. A visual survey indicated that one of the jurors was African-

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[1] In 1990, African-Americans comprised less than ten percent of the population in Kent County. The comparative disparity was 63% (5.08% divided by 8.1%). Therefore, under this test, defendant's jury pool had 63% fewer African-American prospective jurors than could have been expected on the basis of the African-American population of Kent County.

[2] This is because, since 1987, Michigan has drawn its jurors from "a source list consisting of the names of county residents at least eighteen years of age drawn from the Secretary of State's driver's license and personal identification cardholder lists." *Hubbard, supra* at 469, citing MCL 600.1300, MCL 600.1301a, and MCL 600.1304.

[3] We use these numbers because the 2000 census that defendant provided, which indicated that 8.9% of Kent County's population was African-American, did not break out the percentage of adult African-Americans eligible for jury duty. Also, the specific percentage is not crucial to our analysis given that both censuses indicate that African-American constituted a small portion of the county's overall population.

American, or 2.2%. Therefore, the absolute disparity in the instant case was 5.08% (7.28% minus 2.2%). As such, this percentage does not constitute a substantial underrepresentation under this test for Sixth Amendment fair-cross-section purposes.

But we do not summarily reject defendant's challenge. This case is similar to the situation presented in *Hubbard* where the defendant challenged the array selection process in Kalamazoo County. In that case, the Court concluded that "the absolute disparity test is an ineffective measure of acceptable disparity when the constitutionally distinctive group composes a small percentage of the overall community population." *Id*. at 477. The *Hubbard* Court then adopted the approach taken in *United States v Osorio*, 801 F Supp 966 (D Conn, 1992), in which the defendant was found to have shown substantial underrepresentation where the disparity resulted from "non-benign" circumstances; that is, where the underrepresentation did not occur as the result of random chance. *Hubbard, supra* at 477-478, citing *Osorio, supra* at 978-979. This approach appears to meld the second and third prongs of the *Duren* test. As we discuss below, the evidence indicates that the disparity in this case quite possibly resulted from a lack of random selection. Thus, we assume for the moment that defendant has satisfied the second prong of the *Duren* test.

Under the final prong of the *Duren* test, defendant must show that "the underrepresentation of a distinctive group is due to systematic exclusion, i.e., an exclusion resulting from some circumstance inherent in the particular jury selection process used. A systematic exclusion is not shown by one or two incidents of a venire being disproportionate." *Hubbard, supra* at 481; citations omitted. Here, defendant did not present any evidence demonstrating a systematic exclusion of African-Americans from the Kent County Circuit Court jury pool. But plaintiff concedes "there was indeed a problem in the jury selection process in Kent County which occurred from late 2001 to July 2002," and explained,

> [I]n essence . . . a computer program used to select potential jurors chose a disproportionately large number of jurors from areas with lower zip codes, which had the unintended effect of selecting fewer jurors from areas of the county where African-Americans live. The assumption is that this led to an artificial shortfall of African-American jurors, though to what extent has never been determined.

This problem has been alluded to in several other cases, but has not been considered due to the defendants' failure to properly preserve the issue for review.[4]

In this case, defendant properly preserved the issue below and plaintiff recognizes that "it is of course difficult to expect anyone to raise an issue where the factual basis for the issue is unknown at the time." Further, plaintiff admits that "the factual predicate underlying the defendant's assumptions was not a matter of public knowledge [at the time of defendant's trial]

[4] See, e.g., *People v Perdue*, unpublished opinion per curiam of the Court of Appeals, issued 2/12/04 (Docket No. 242940); *People v Barnes*, unpublished opinion per curiam of the Court of Appeals, issued 1/15/04 (Docket No. 244590); *People v Parks*, unpublished opinion per curiam of the Court of Appeals, issued 8/14/03 (Docket No. 239728).

and not easily discernable." Given these circumstances, we find the appropriate remedy to be a remand to the trial court for an evidentiary hearing,[5] which will allow defendant an opportunity to present evidence that the Kent County jury selection system resulted in systematic exclusion of African-Americans causing this group to be substantially underrepresented in defendant's jury venire. If defendant is able to make "a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community, it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." *Duren, supra* at 368. If plaintiff cannot carry its burden, then defendant is entitled to a new trial.

In the event that the trial court determines that defendant is not entitled to a new trial on this basis, we take this opportunity to address defendant's remaining appeal issues. Defendant also argues that the trial court deprived him of due process by failing to instruct the jury that the verdict must be unanimous with regard to each separate charged offense. Because defendant failed to object at trial, we review for plain error only. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Error will not be found if the jury instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Knapp*, 244 Mich App 361, 376; 624 NW2d 227 (2001). "In order to protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement." *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). In the instant case, the trial court instructed the jury that "a verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agree on the verdict." The court also instructed the jurors not to reveal how their voting stood until they returned with a unanimous verdict. We find that the court's instructions adequately conveyed to the jury the requirement that their verdict be unanimous. Defendant has not shown plain error.

Defendant's reliance on *Cooks, supra*, and *People v Yarger*, 193 Mich App 532; 485 NW2d 119 (1992), is misplaced. In each case, the defendant was charged with only one count of criminal sexual conduct, yet the evidence indicated multiple penetrations. The *Yarger* Court found that the jury instruction was inadequate because, although the instructions themselves were not objectionable, the jury was not instructed that it must unanimously agree on *which* act(s) was proven beyond a reasonable doubt. *Yarger, supra* at 537. But, in *Cooks, supra* at 530, our Supreme Court overruled *Yarger* on this point, holding:

> [W]hen the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of defendant's guilt. Where neither of these factors is present, as in the case at bar, a general instruction to the

[5] MCR 7.216(A)(5).

> jury that its verdict must be unanimous does not deprive the defendant of his right to a unanimous verdict.

Because there was no dispute in this case as to the act that formed the basis for defendant's first-degree criminal sexual conduct charge, both of these cases are inapposite.

Defendant's next argument is without merit. He asserts that trial court improperly invaded the province of the jury when it advised the jury of the scientific validity of the polymerase chain reaction method of DNA testing that was used in this case. But it is not the jury's role to determine a test's scientific validity; that is within the trial court's province. *People v Tanner*, 255 Mich App 369, 393-394; 660 NW2d 746 (2003), overruled on other grds 469 Mich 437 (2003). Also, this Court has taken judicial notice of the general acceptance of the polymerase chain reaction method of testing DNA within the scientific community. See, e.g., *Tanner, supra* at 395; *People v Coy*, 243 Mich App 283, 291-292; 620 NW2d 888 (2000); *People v Lee*, 212 Mich App 228, 266-268; 537 NW2d 233 (1995). Furthermore, defendant admitted at trial that he wiped himself clean with the victim's shorts after she performed fellatio on him, implicitly acknowledging that it was his DNA found in the victim's mouth and on her shorts. Thus, there was no error.

Defendant also argues that the trial court erred in instructing the jury on the lesser-included offenses of unarmed robbery and third-degree criminal sexual conduct. Claims of instructional error are considered de novo on appeal. *Hubbard, supra* at 487. This Court has held that a court may not instruct on a lesser-included offense over the defendant's objection unless the language of the charging document gave the defendant fair notice that he might be charged with the lesser offense. *People v Darden*, 230 Mich App 597, 600-601; 585 NW2d 27 (1998). However, notice is adequate if the uncharged offense is a necessarily lesser-included offense of the original charge. *People v Cornell*, 466 Mich 335, 358; 646 NW2d 127 (2002).

Our Supreme Court has held that an instruction on a necessarily lesser-included offense is "proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser-included offense and it is supported by a rational view of the evidence." *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). Unarmed robbery is a necessarily lesser-included offense of armed robbery. *Id.* at 446-447. And third-degree criminal sexual conduct is a necessarily lesser-included offense of first-degree criminal sexual conduct. *People v Mosko*, 441 Mich 496, 501; 495 NW2d 534 (1992). Therefore, we must only determine whether the court's instructions were supported by the evidence. *Reese, supra* at 447.

"The element distinguishing unarmed robbery from the offense of armed robbery is the use of a weapon or an article used as a weapon." *Id.* Third-degree criminal sexual conduct, MCL 750.520d(1)(b), occurs where "force or coercion is used to accomplish the sexual penetration," whereas first-degree criminal sexual conduct, MCL 750.520b(1)(e), involves the defendant being "armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be weapon." Here, the victim testified that defendant (1) put a gun to her head and stated "I'm going to have to have that $90," (2) had the gun on her while she performed oral sex on him, and (3) only lowered the gun when his mother approached the truck. Defendant denied having a gun and the police did not recover one in connection with this incident. Therefore, there was a factual dispute regarding an element of each charged offense

that was not part of the lesser-included offenses; namely, defendant's use of a weapon. Accordingly, the court's instructions were proper.

Lastly, defendant contends that the prosecutor committed misconduct warranting reversal when she referred to the victim's race in her closing argument. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. These issues are decided on a case-by-case basis and the prosecutor's comments must be viewed in context, in light of the defense's arguments and the evidence presented in the case. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002).

On cross-examination, defense counsel attacked the victim's credibility, by alluding to the likelihood that a Caucasian woman who went into a predominately African-American area of town, allowed defendant into her truck, and drove to a place where she could perform sexual acts in exchange for drugs, was a more plausible scenario than defendant being an aggressive drug dealer who got into the victim's truck so that he could make the sale instead of the other dealers. During closing argument, the prosecutor stated:

> The defendant claims that he was dealing on the corner there with his friends. Ladies and gentlemen, he wasn't dealing. He didn't have any cocaine on him. He didn't have any other drugs on him. He had two bags of marijuana. He was hanging around with his friends, and he was taking advantage of vulnerable people who pull up to buy drugs, and, you know what, how easy a victim is that? You can pick them right out. A white girl pulls into his area, he jumps into the car, he can make her do whatever he wants to because she's downtown buying drugs.

Our Supreme Court has cautioned that it "abhors the injection of racial or ethnic remarks into any trial because it may arouse the prejudice of jurors against a defendant and, hence, lead to a decision based on prejudice rather than on the guilt or innocence of the accused," and that it "is not hesitant to reverse where potentially inflammatory references are intentionally injected, with no apparent justification except to arouse prejudice." *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). It is apparent from the record that the prosecutor in this case did not refer to the victim's race only to arouse prejudice. Rather, the prosecutor was refuting defense counsel's theory of the case by arguing that defendant was not selling drugs on the corner, but rather was waiting to take advantage of vulnerable people who came into the area to buy drugs. In this context, we cannot say that the prosecutor's remarks were improper. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Moreover, even if we were to find error, after an examination of the entire cause, it does not affirmatively appear that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). Thus, defendant has not met his burden of showing prejudice. *Id.*

Accordingly, we remand this case for the sole purpose of conducting an evidentiary hearing regarding defendant's challenge to the jury venire. In all other aspects, we affirm. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ David H. Sawyer