STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2009
v	No. 282349 Wayne Circuit Court
ALEX B. JACKSON, Defendant-Appellant.	LC No. 00-000792-FH

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 225 or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii),[1] and third-degree fleeing or eluding a police officer, MCL 257.602a(3). He was sentenced to concurrent prison terms of 20 to 30 years for the drug conviction, and one to five years for the fleeing or eluding conviction. He appeals as of right. We affirm.

I. Basic Facts

On December 8, 1999, Michigan State Troopers Cory Clark and Calvin Hart stopped defendant's vehicle for exceeding the speed limit. Defendant initially stopped, but fled when the trooper requested his driver's license. During a subsequent police pursuit, defendant's vehicle hit a pickup truck, and then defendant exited his car. Hart approached defendant while Clark remained in the police car. Clark testified that as defendant got out of his car, a plastic bag dropped onto the ground. After a foot chase, Hart arrested defendant. Clark retrieved the plastic bag, which contained 648 grams of cocaine. Clark testified that as he was showing the contents of the plastic bag to Hart, defendant said, "That's not mine. I don't know anything about it. [Y]ou didn't see me drop anything." Defendant gave the officer a different name, and produced a driver's license that showed that name. Subsequent fingerprinting revealed defendant's actual identity. Defendant failed to appear at court in March 2000, and was later arrested in August 2006. At trial, Hart positively identified defendant as the person he arrested in 1999, and Clark

[1] After the charged offense was committed, MCL 333.7401 was amended by 2002 PA 665 to reclassify the amounts of controlled substances. The current version of MCL 333.7401(2)(a)(ii) applies to amounts of 450 or more but less than 1,000 grams of a controlled substance.

testified that he was "90 percent sure," noting that it had been six years since the incident. A third officer, who retired in 2003, testified that he had contact with defendant in December 1999, but could not identify him.

II. Jury Venire

Defendant, an African-American, argues that he was denied his federal and state constitutional rights to an impartial jury drawn from a cross-section of his community because there was only one African-American in the 30-person jury venire. We review de novo questions concerning the systematic exclusion of minorities in jury venires. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003).

"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; 552 NW2d 493 (1996). To establish a prima facie violation of the fair cross-section requirement, defendant has the burden of proving the following:

> (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 under-representation is due to systematic exclusion of the group in the jury-selection process. [*People v Smith*, 463 Mich 199, 215; 615 NW2d 1 (2000), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Underrepresentation may be measured by measuring the disparity between how many of the distinctive group are in the jury array and how many are in the community. *Hubbard, supra* at 474. However, the requirement that a defendant be tried by a fair cross section of his community does not guarantee that any particular jury "actually chosen must mirror the community. . . ." *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975).

As an African-American, defendant is a member of a "distinct group" for purposes of the fair cross-section requirement. *Hubbard, supra* at 473. Defendant has failed, however, to demonstrate a systematic exclusion of African-Americans in Wayne County's jury-selection process. Defendant relies on a Third Judicial Circuit of Michigan Jury System Assessment Final Report, dated August 2, 2006, which identifies three reasons for disproportionate representation of African-Americans using zip code comparisons: (1) "the source list itself," (2) the "application of a suppression file in the jury automation system in which individuals who previously failed to respond to the qualification questionnaire were removed from consideration for jury service," and, (3) "disproportionately low rates" of qualification of "residents in predominantly African-American zip codes . . . mainly due to non-response rates." See Paula L. Hannaford-Agor & G. Thomas Munsterman, National Center for State Courts, Third Judicial Circuit of Michigan Jury System Assessment, Final Report, p ii (August 2, 2006). The report lists short-term, mid-term, and long-term implementation goals to address the underrepresentation of minorities in the jury pool. *Id.* at iii. Defendant notes that the recommendations were made five months before his trial, and contends that "the failure to adequately confront and correct these problem's spoiled [his] right to a Constitutionally fair trial."

However, "[a]ll that is required is that 'jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups . . . .'" *Smith*, *supra* at 226, quoting *Taylor*, *supra* at 538. The "influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans." *Smith*, *supra* at 206. Where discrepancies in the participation of a group are caused by forces outside the criminal justice system, for example, by a greater number of juror questionnaires that are undeliverable, individual jurors who are exempted by reason of hardship or disqualified by their lack of eligibility, or any other socioeconomic reason that is not built into the jury selection process, then any alleged underrepresentation stems from social factors beyond the control of the criminal justice system. *Smith*, *supra* at 203, 226-228. Here, defendant has failed to adequately demonstrate a reason for the alleged underrepresentation beyond forces outside the criminal justice system. Consequently, defendant has failed to establish a prima facie violation of the fair cross-section requirement.

III. *Batson* Challenge

Defendant also argues that he was denied his constitutional right to an impartial jury when the prosecutor used a peremptory challenge to strike the only African-American juror. See *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). This Court reviews a trial court's ruling regarding a *Batson* challenge for an abuse of discretion. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 320; 553 NW2d 377 (1996). This Court gives great deference to the trial court's findings "because they turn in large part on credibility." *Id* at 319-320.

In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits a prosecutor from using peremptory challenges to strike African-American jurors from an African-American defendant's jury simply because the jurors are African-American. The burden initially is on the defendant to make out a prima facie case of purposeful discrimination. *Id.* at 93-94. In deciding whether the defendant has made a requisite showing of purposeful discrimination, a court must consider all relevant circumstances, including whether there is a pattern of strikes against African-American jurors, and the questions and statements made by the prosecutor during voir dire and in exercising peremptory challenges. *Id.* at 97. If a defendant makes such a prima facie showing of a discriminatory purpose, the burden shifts to the prosecutor, who must articulate a racially neutral explanation for challenging African-American jurors. *Id.* at 97-98. The trial court must then determine if the defendant has established "purposeful discrimination." *Id*.

Defendant failed to establish purposeful discrimination. Defendant essentially argues that because the sole African-American juror was removed by peremptory challenge, the prosecutor's removal indicates discrimination. But the mere fact that a party uses a peremptory challenge in an attempt to excuse a minority member from a jury venire is insufficient to establish a prima facie showing of discrimination. *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996); *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989).

Even assuming that defendant established purposeful discrimination, the trial court found that the prosecutor provided a race-neutral reason for excusing the African-American juror. The prosecutor explained that the juror was removed because his son had been convicted of murder and was currently in prison. The juror sat through his son's trial and, in response to how he felt

about it, stated, "I'm still hurt about it, but I'm dealing with it." The prosecutor noted that she also removed a Caucasian juror who had a cousin that had been convicted of a serious drug offense and was in prison, explaining that both jurors had close relatives currently in prison for serious offenses.[2] In finding that the prosecutor provided a race-neutral reason, the trial court noted that the prosecutor's "explanation . . . is perfectly sound and almost traditional," that it could "readily understand why [the prosecutor] would be squeamish" about having a juror sit on a case where her own son, who was about the same age as defendant, was currently in prison, and that there is "no doubt" that the prosecutor had "legitimate concerns about the juror having some empathy or identification with the defendant" and about the juror's ability to be fair.

"[U]nless a discriminatory intent is inherent in the reason offered, which does not have to be persuasive or even plausible, the reason will be deemed race-neutral." *Clarke*, *supra* at 384, citing *Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Indeed, it was reasonable for the prosecutor to attempt to achieve a jury that did not have preconceived negative notions about the prosecutor's office, as well as one that would not be sympathetic to defendant. Consequently, giving deference to the trial court's finding that the prosecutor excused the juror for reasons that were race neutral, this claim does not warrant reversal.

IV. Prosecutor's Conduct

Defendant argues that he is entitled to a new trial because the prosecutor engaged in impermissible conduct. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Here, however, defendant failed to timely object to the prosecutor's remarks, and we review unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). This Court will not reverse if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A. Improper References to Defendant's Criminal History

Defendant argues that the prosecutor improperly informed the jury that he had committed another crime, other than the ones for which he was on trial, when she remarked during opening statement that he was "arrested again." Specifically, the prosecutor stated:

> Ladies and gentlemen, the evidence will show that back on December 8th . . . 1999, this young man, Alex Jackson, has in his possession 648 grams of cocaine. If you'll give me your attention for just a few minutes, I'll fill in the details.
>
> * * *

[2] Defendant argues that the prosecutor did not excuse other jurors who had relatives who had been convicted of crimes. The record shows that one juror's ex-husband had been convicted on that juror's own complaint, and that the other jurors' relatives were convicted of minor offenses and not imprisoned.

> There are several court dates that precede a trial. One of them is called the final conference. You will have evidence that at the final conference on March 28, 2000, Mr. Jackson failed to appear in court. The legal term is he capiased. He failed to appear.
>
> Running is his thing. He ran from the police, then he ran from the court system. *Last August of 2006 he was arrested again.*

However, before opening statements the parties stipulated that defendant "was arrested in August of last year," so the prosecutor did not engage in misconduct by referring to that evidence during opening statement. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976) (partial concurrence of Kelly, J.), aff'd sub nom *People v Tilly*, 405 Mich 38 (1979) ("The purpose of an opening statement is to tell the jury what the advocate proposes to show."). Further, the prosecutor did not imply that the August 2006 arrest was related to any other criminal activity. Defendant has failed to show a plain error.[3]

B. Commentary on Defendant's Pretrial Silence

Defendant also argues that the prosecutor improperly commented on his pretrial silence when she made the following emphasized remark during closing argument:

> Ladies and gentlemen, he's charged in both of these counts. *He now claims for the first time that it wasn't him, he wasn't the man that they saw that day*. But you have Trooper Clark saying 90 percent sure that this is the same guy and you have Trooper Hart saying he's positive that's the guy.

After the prosecutor completed her closing argument, defense counsel approached the bench and a discussion was held off the record. Following the court's instructions, defendant's objection was placed on the record and the following exchange occurred:

[3] As part of this argument, defendant cursorily asserts that the prosecutor improperly introduced herself to the jury as "the principal attorney in charge of the Major Drug Unit for the Wayne County Prosecutor's Office," which defendant asserts improperly suggested that he is "a major drug dealer." Defendant does not provide any discussion or supporting authority explaining why such a remark would constitute a plain error or how it affected his substantial rights. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Although a prosecutor may not ask the jury to convict a defendant on the basis of the prestige of her office, *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995), the remark was simply a part of the prosecutor's general introduction and did not suggest that the jury should convict defendant on the basis of the prosecutor's position, nor did it suggest that defendant had a prior criminal record. Indeed, defendant was charged with a major drug offense, i.e., delivery of between 225 and 650 grams of cocaine, so it was not remarkable that the particular prosecutor was handling the case.

The prosecutor: Well, it wasn't my intention to have it come out that way. My intention was to comment on what appeared to me to be a change in strategy during the course of trial.

In her opening statement she never said the guy sitting here is not the guy they arrested seven years ago and it was only after Trooper Clark testified that he was 90 percent sure and after Tyrone Mitchell said he was not sure at all that it seemed to change into one of identification.

That's - - I was commenting on what happened at trial.

The court: It might have been better if you had said [defense counsel] never mentioned anything in opening statement to the effect that there was an identification issue. That probably would not have been objectionable. I mean, you know, technically it might be in some measure a comment - -

Defense counsel: Your honor, I'm sorry, I didn't finish. I guess if I make the objection and believe it's prejudicial I have to ask for a mistrial based on prosecutorial misconduct in order to follow through.

The court: Okay . . . if, in fact, it was an improper argument, and I'm not absolutely sure it was, but if it was I think it's largely harmless. It was a fleeting reference and [the prosecutor] didn't hammer on that notion.

And . . . I'm sorry we have to put it this way, [defense counsel], but this is one of those instances where an objection really has to be timely made at the time of the alleged misconduct because then there is an opportunity for [the prosecutor] to correct herself or for me to correct her which, of course, is gone now. And I realize that you refrained from objection out of courtesy and I appreciate that.

* * *

That's the kind of thing that can be cured. I think any objection that could be responded to by a cure on the spot is one that probably should be made promptly.

Well . . . . I think I can be fairly confident that I would have overruled the objection anyway even if it had been made precisely when the comment was made, but in any event you have protected the record on that.

The Fifth Amendment to the United States Constitution and Const 1963, art 1, § 17, provides that, in a criminal trial, no person shall be compelled to be a witness against himself. *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). Generally, a prosecutor

may not comment on a defendant's post-arrest, post-*Miranda*[4] silence. See *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Here, however, the prosecutor's brief, isolated remark was focused on refuting defendant's belated claim of misidentification. Immediately after the challenged remark, the prosecutor discussed the evidence that supported defendant's identity as the perpetrator. Even if the challenged comment could be viewed as improper, defendant's right to a fair trial was protected where, in its final instructions, the court instructed the jury that the lawyers' comments are not evidence, that it was to decide the case based only on the properly admitted evidence, and that it was to follow the court's instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions . . . .").

For the same reasons, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (a mistrial should be granted only for an irregularity that is prejudicial to the defendant and impairs his ability to receive a fair trial).

V. Sentence

Defendant challenges his sentence for possession with intent to deliver cocaine for several reasons. First, we disagree with defendant's claim that his 20-year minimum sentence is disproportionate. The minimum sentence was legislatively mandated by former MCL 333.7403(2)(a)(ii) and, as such, is presumptively proportionate. *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). Defendant has not set forth any persuasive reason to overcome the presumption of proportionality.

Defendant next argues that the following comments by the trial court during plea negotiations indicate that it "prematurely decided that there would be no substantial and compelling reasons to depart in the event of conviction," and that it improperly considered his failure to admit guilt when it subsequently refused to depart from the mandatory minimum of 20 years.

> That is correct. Okay. You want to go to trial. Mr. Jackson, I mean, I want to make sure that you understand what's going on here. You've got a case in which you're charged under the old law which means that if you're convicted of the charge your sentence will be 20 to 30 years and there is no sentencing guidelines that apply to the minimum sentence as there usually is now in most cases, but you will do a 20 year minimum unless I have some reason to depart which is not apparent to me now. It's a 20 year minimum. I mean, that's that. It's 20 years.
>
> The offer the prosecutor has made is ten years on the minimum sentence, ten years below that mandatory minimum sentence and even the maximum is ten years below the statutory max. I mean, that's a huge break for you. It may sound

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

like a long time to serve in prison, but it's a huge break. Ten to 20 is a lot better than 20 to 30 and then plus they're dismissing all your other cases.

Now, you know, you know the facts of this case. You know the truth as well as anybody at the scene. You ought to be able to assess whether or not this jury is going to find the prosecution's evidence credible or not. But unless you've got some kind of magic rabbit you can pull out of a hat, you're looking at some serious consequences here. You understand that? You want to roll the dice?

Defendant: I understand.

The court: And you want to roll the dice?

Defendant: I want to roll the dice.

The court: Okay. Well, we've got a jury panel waiting right outside.

"Resentencing is warranted if 'it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did.'" *People v Conley*, 270 Mich App 301, 314; 715 NW2d 377 (2006) (citation omitted). The challenged comments were not made while fashioning defendant's sentence and do not indicate that the court improperly considered defendant's refusal to admit guilt. Instead, the court was appropriately ensuring that defendant comprehended the significant difference between the sentencing consequences he was facing under the "old law" as compared to the current statutory scheme and that, if convicted, his probable minimum sentence would be twice as long as what was being offered by the prosecutor. The trial court did not ask defendant to admit guilt or instruct him to take the plea offered by the prosecution, but only sought to ensure that he understood the potential grave ramifications of declining the plea offer. Therefore, defendant's argument is without merit.

Next, while claiming that the trial court prematurely decided that there were no substantial and compelling reasons for departure, defendant also claims that the court did not recognize that it had discretion to depart below the mandatory 20-year minimum sentence. It is well established that if there is "no clear evidence that the sentencing court believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). The record shows that the trial court understood that it had discretion to deviate from the guidelines:

> And the old statute provided for the mandatory minimum sentence of 20 years, maximum of 30 *unless, of course, the Court departed for substantial and compelling reasons. I find no such reasons to exist.* So the Court is apparently obligated to sentence consistent with the statutory sentence range.

Therefore, resentencing is not required, and it is unnecessary to consider defendant's assertion that the case should be reassigned to a different judge in the event of a remand.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray