STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL FLYNN TRUSS,

Defendant-Appellant.

UNPUBLISHED
March 4, 1997

No. 191384
Jackson Circuit Court
LC No. 95-072916-FH

Before: O'Connell, P.J., and Markman and M. J. Talbot,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted for possession of a weapon by a prisoner, MCL 800.283(4); MSA 28.1623. Defendant's sentence of three to five years on that conviction was enhanced to five to fifteen years on a finding by the trial court that defendant was a habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant appeals as of right from his conviction and sentence. We affirm in part and reverse in part.

First, defendant argues that he was denied his right to a trial by a jury which adequately represented a cross-section of the community. We disagree. We review de novo issues regarding the systematic exclusion of minorities from jury venires. *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 593 (1996). A criminal defendant is entitled to trial by a jury from a fair cross section of the community. *Hubbard*, *supra*, at 472; *People v Guy*, 121 Mich App 592, 599; 329 NW2d 435 (1982). This does not entitle a defendant to a jury venire that mirrors the community and each of its distinctive population groups. *Hubbard*, *supra*, at 472. A prima facie case of a violation of the right to a jury drawn from a fair cross section of the community requires a showing that (1) the allegedly excluded group is a "distinctive" group, (2) the group was unfairly and unreasonably underrepresented in jury venires, and (3) the underrepresentation reflects a systematic exclusion of the group from the jury selection process. *Id*. (quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979)).

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* Circuit judge, sitting on the Court of Appeals by assignment.

African-Americans are considered a constitutionally cognizable "distinctive" group; therefore, the first requirement is met. *Hubbard*, *supra*, at 473. However, defendant has failed to provide any evidence that African-Americans are underrepresented in Jackson County jury venires nor that there was a systematic exclusion of members of this group from jury service. The mere fact that no person from some group is on a specific jury panel does not establish systematic exclusion. *People v Sanders*, 58 Mich App 512, 514; 228 NW2d 439 (1975). Therefore, we conclude that defendant has failed to make out a prima facie case of a violation of the right to a jury selected from a fair cross section of the community. For the same reasons, we reject defendant's claim that he was denied equal protection due to the alleged "underrepresentation."

Next, defendant argues that the trial court erred in applying the amended habitual offender statute to his criminal offense because that offense occurred prior to the effective date of the statute. We agree. The proper interpretation of a statute is a question of law, and we review questions of law de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995). By 1994 PA 110, the Legislature completely revised the procedures for sentence enhancement on the basis of a defendant's status as a habitual offender. MCL 769.13; MSA 28.1085. This amendment abolished the requirement of a separate information for a habitual offender charge and abolished the statutory right to a jury trial on such a charge. *People v Zinn*, 217 Mich App 340, 344-347; 551 NW2d 704 (1996). 1994 PA 110, specifically states that the amendment took "effect May 1, 1994, and [applies] to prosecutions for criminal offenses committed on or after that date." See MCL 769.13; MSA 28.1085.

In the present case, the underlying criminal offense took place on April 17, 1994. Yet, the trial court applied the amended habitual offender statute over defendant's objection. Clearly, the trial court erred in utilizing the amended procedures, thereby denying defendant the right to jury trial on the habitual offender charge. Therefore, we vacate the trial court's finding on the habitual offender charge and the enhanced sentence pursuant to that finding.

Defendant also argues that the trial court erred in admitting improper rebuttal evidence over defense counsel's objection. We disagree. The decision to admit evidence is within the sound discretion of the trial court and we will not disturb that decision absent an abuse of that discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). The determination whether rebuttal evidence was properly admitted is not whether it could have been offered during the case-in-chief; rather, it is whether it is responsive to evidence introduced or a theory developed by the defendant during the presentation of his case. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). So long as rebuttal evidence satisfies this standard, it is proper. *Id*.

Here, defense counsel raised the issue of what witness Wesley Rivers saw in order to support his assertion that the prison guards had apprehended the wrong man in defendant. The prosecution attempted to rebut this theory by presenting the testimony of the investigating officer regarding what Rivers told the officer during the investigation. This testimony was responsive to the defense theory of improper identification. Therefore, we conclude that the trial court did not abuse its discretion in allowing the evidence. Moreover, the testimony merely reiterated Rivers' earlier testimony. Hence,

there was no prejudicial effect to a substantial right which would warrant reversal. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993).

Defendant next argues that his trial counsel's reference to the fact that defendant had refused to speak to the investigating officers violated his constitutional right to silence. We disagree. The right to silence derives from the constitutional prohibition against compelling a defendant to be a witness against himself in a criminal trial found in US Const, Am V and Const 1963, art 1, § 17. *People v Schollaert*, 194 Mich App 158, 162; 486 NW2d 312 (1992). Here, defendant, through his attorney, chose to admit, as a matter of trial strategy, that he had invoked his right to remain silent. The apparent purpose was to underscore defense counsel's assertion that the burden of proof in this case rested exclusively with the prosecutor and that defendant had no obligation of any kind to assist in this effort. Since defendant was not compelled to bear witness against himself in any sense, we conclude that there was no violation of his right to remain silent.

Next, defendant argues that reversal is required due to two instances of alleged prosecutorial misconduct. We disagree. Defendant did not object to any of the prosecutor's comments at trial. Therefore, the issue has been waived unless a failure to review it would result in manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1995). Review of an issue of prosecutorial misconduct is done on a case by case basis. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). This Court examines the pertinent record from the lower court and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995); *Legrone*, *supra*, at 82-83.

Defendant first finds error in the prosecutor's argument that the testimony of the prison guards was more credible than the testimony of the prisoners because the guards have nothing to lose by telling the truth. Defendant presents no authority to support the assertion that this form of argument was improper. The argument was merely addressed to the proper issue of potential bias. Therefore, there was no error in this line of argument.

In addition, defendant asserts that the prosecutor's statement that defendant would "go free" if he was acquitted was an improper comment on the possible consequences of the jury's verdict. As a rule, the jury should not be concerned with the question of punishment for a conviction; it should only be concerned with guilt or innocence. *People v Szczytko*, 390 Mich 278, 285; 212 NW2d 211 (1973). However, here, the prosecutor's remark was an isolated statement that was intended merely as short-hand for the term "acquitted." Due to the fleeting nature of the reference and the absence of any prejudicial effect, we conclude that defendant was not denied a fair trial by the comment.

Finally, defendant argues that the trial court abused its discretion by admitting evidence of witness Wesley Rivers' prior theft convictions without specifically finding that the crimes were probative on the issue of credibility. We disagree. We review a trial court's decision to allow evidence of a witness' prior convictions for the purposes of impeachment for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). Under MRE 609(a)(2), evidence that a witness has been convicted of a crime is admissible for impeachment purposes where:

[T]he crime contained an element of theft, and;

(A) the crime was punishable by imprisonment in excess of one year or death under the law which the witness was convicted, and;

(B) the court determines that the evidence has significant probative value on the issue of credibility. [MRE 609(a)(2).]

In the present case, pursuant to defendant's motion in limine, the trial court properly ruled that evidence of prior convictions would be allowed if they complied with the criteria set forth in this court rule. In order to mitigate any damage evidence of the prior convictions might do, defense counsel introduced Rivers' criminal record during direct examination. The trial court was never called upon to make a specific determination regarding the admissibility of any of the convictions. Therefore, we conclude that there was no abuse of discretion.

We affirm the conviction on the underlying weapons possession offense, but reverse the trial court's finding on the habitual offender charge and vacate the sentence pursuant to that finding. We remand for further proceedings on the habitual offender charge consistent with the law. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Stephen J. Markman
/s/ Michael J. Talbot