STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DORSEY JOHN JACKSON,

Defendant-Appellant.

UNPUBLISHED
August 22, 1997

No. 190901
Kalamazoo Circuit Court
LC No. 95-000880-FH

Before: Sawyer, P.J., and Bandstra and E. A. Quinnell*, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction of second-degree criminal sexual conduct, resulting, following his adjudication as a fourth offender, in an enhanced sentence of fifteen to forty years. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that trial counsel was ineffective in failing to challenge for cause or peremptorily challenge two jurors, both of whom were women who had themselves been victimized by sexual assault and one of whom knew that defendant had once been in prison (juror #113). It was the prosecutor who challenged juror #113 both for cause and peremptorily, which challenges were vigorously opposed by defense counsel, and both challenges were ultimately rejected by the trial court. Defense counsel wanted juror #113 to be seated because she was one of only three African-American jurors in the venire; defense counsel noted on the record that he had weighed the pros and cons of this juror's knowledge of defendant's criminal past and her own experiences with sexual crimes but nonetheless concluded that the benefits outweighed the risks. The record fails to establish that such an evaluation is outside the scope of a minimally competent criminal defense practitioner providing effective representation. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Other courts have recognized that such issues are properly matters of trial strategy. *Greenfield v Robinson*, 413 F Supp 1113 (Va, 1976); *United States v Pitera*, 5 F3d 624 (CA 2, 1993); *People v Sparman*, 599 NYS2d 202, 193 App Div 2d 1076 (1993). The cases cited by defendant involve jurors who withheld or falsified information on voir dire which prevented counsel from knowledgably exercising peremptory challenges or issuing challenges for

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

cause, e.g. *People v DeHaven*, 321 Mich 327; 32 NW2d 468 (1948); *People v Hannum*, 362 Mich 660; 107 NW2d 894 (1961). Further, *People v Roy Johnson*, 424 Mich 902; 384 NW2d 21 (1986), is distinguishable from the case at bar. First, it involved a different standard of ineffective assistance of counsel, which was rejected in *Pickens, supra*. Second, information about the defendant's criminal background was revealed to all jurors by defense counsel, rather than here where one juror knew only vaguely of defendant's criminal background and participated on the jury only after being instructed by the trial judge to make no mention of such fact to the other jurors.

As to prosecutorial opening argument, defendant has failed to show any bad faith in the misstatements of facts expected to be proved at trial, and a curative instruction could have eliminated any prejudicial effect of such remarks, and, therefore, error requiring reversal is not established. *People v Messenger*, 221 Mich App 171; ___ NW2d ___ (1997). As to closing argument, the prosecutor's remarks were based on the evidence and were not improper. *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995).

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Edward A. Quinnell