STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELVIECCIO DONTE WALTON,

Defendant-Appellant.

UNPUBLISHED
October 6, 1998

No. 199286
Kent Circuit Court
LC No. 96-000430 FC

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

A jury convicted defendant, a juvenile at the time of the offense, of second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced defendant as an adult to eighteen to fifty years' imprisonment, and ordered defendant serve his sentence concurrently with the sentence in an unrelated case. Defendant appeals as of right. We affirm.

Defendant first argues the trial court's instruction on the burden of proof was constitutionally deficient because it failed to adequately inform the jury that proof beyond a reasonable doubt was required. Defendant contends the trial court's use of the phrase "high level of confidence" in its instruction allowed the jury to convict him under a lesser standard than that guaranteed by the constitution. We disagree. This Court reviews a claim of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

When read in its entirety, the trial court's instruction conveyed to the jurors that a reasonable doubt is an honest doubt based upon reason. *Hubbard, supra* at 488; *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988). While the trial court used the phrase "high level of confidence in the defendant's guilt," it also defined reasonable doubt as "an actual doubt which arises from the evidence, lack of evidence, or what inferences may follow" and conveyed to the jury that the doubt must be one based on reason. Contrary to defendant's suggestion, the trial court was not required to use the phrase "moral certainty" in defining reasonable doubt. *Jackson, supra* at 390-391. Moreover, the trial court's instruction did not convey to the jurors that they had to have a reason to doubt defendant's guilt. Instead, it properly conveyed to the jurors that the prosecution had the burden of

proving defendant's guilt. *Hubbard, supra* at 488; *Jackson, supra* at 392. The trial court clearly explained that the only way the presumption of innocence could be overcome is through proof of guilt beyond a reasonable doubt and stated several times the prosecution had the burden of proving its case. Accordingly, the trial court's instruction was proper.

Next, defendant argues the trial court erroneously advised the jury that it was required to sentence codefendant witnesses Sanders and Deans according to their plea bargains with the prosecutor. Defendant failed to object to the trial court's comments at trial. The prosecution correctly concedes that, despite the agreements between the witnesses and the prosecutor, the trial court retained its discretion in sentencing the witnesses. *People v Cobbs*, 443 Mich 276, 282; 505 NW2d 208 (1993); *People v Killebrew*, 416 Mich 189, 209; 330 NW2d 834 (1982). Accordingly, the trial court was mistaken when it advised the jury that it was required to impose the recommended sentences. However, because the error did not prejudice defendant, we decline to review this unpreserved issue.

Defendant also argues the prosecutor's conduct denied him a fair trial. We disagree. Defendant claims the prosecutor misstated the trial court's sentencing discretion regarding Sanders and Dean and claims the prosecutor improperly vouched for the credibility of Deans.[1] Any improper implication resulting from the prosecutor's remarks concerning the sentences to be received by Sanders and Deans in accordance with their plea agreements could have been cured by a timely instruction, and therefore, no miscarriage of justice will result by our refusal to review this unpreserved alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). Moreover, we find the prosecutor did not improperly vouch for the credibility of Deans. The prosecutor did not suggest to the jury that he had some special knowledge regarding the truthfulness of the witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Enos*, 168 Mich App 490; 494-495; 425 NW2d 104 (1988).

Next, defendant contends the cumulative effect of the errors in his trial deprived him of a fair trial. Defendant's argument is without merit. While we have found the jury was erroneously advised that the trial court was required to sentence codefendants Deans and Sanders according to their sentence agreements with the prosecutor, we have found this did not prejudice defendant. Defendant received a fair trial. *Bahoda, supra* at 261, n 64.

Finally, defendant contends he was denied the right to a fair and impartial jury drawn from a representative cross section of the community because there was only one African-American venireperson. Defendant claims that African-Americans were systematically excluded from Kent County jury pools, thus depriving him of his constitutional right to a jury drawn from a venire representative of a fair cross section of the community. We review questions of systematic exclusion of minorities from venires de novo. *Hubbard, supra* at 472.

The Sixth Amendment guarantees a criminal defendant the right to an impartial jury drawn from a fair cross section of the community. US Const, Am VI; *Hubbard, supra* at 472, citing *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975). Defendant is not entitled to a petit jury that mirrors the community, but 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. To establish a prima facie violation of the fair-cross-section requirement, 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." [*Id*. at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Defendant has satisfied the first prong of the *Duren* test because African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes. *Hubbard*, *supra* at 473. However, he has failed to satisfy the remaining requirements of establishing a prima facie case. Defendant asserts the second prong of the test is demonstrated by the trial court's comments on the record, which acknowledged that, in the past, minorities had been underrepresented on jury venires in Kent County. However, the trial court's comments later indicate that there has been a significant increase in the number of minorities in the jury pools as a result of efforts undertaken by the court prior to defendant's trial. Accordingly, we believe defendant has, at best, shown underrepresentation on his particular jury array, which is not enough to establish a prima facie case. *People v Howard,* 226 Mich App 528, 533; 575 NW2d 16 (1997). Defendant has also failed to show any evidence that any alleged underrepresentation of African-Americans was due to systematic exclusion. The trial court's comments on the record reveal that the current system in the county is designed to include, not exclude, minority jurors. We decline defendant's request to remand this case to the trial court for evidentiary hearings on this issue.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Henry William Saad

[1] Although defendant's brief states the prosecutor vouched for Sanders' credibility, he cites portions of the transcript containing Deans' testimony. Accordingly, we assume defendant meant to challenge the prosecutor's questioning of Deans.