STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2000
v	No. 218341 Kent Circuit Court
MARC ANTHONY KING, a/k/a MARC ANTOIN KING, Defendant-Appellant.	LC No. 98-003923-FC

Before: Neff, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to life imprisonment for the assault conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant first asserts, in propria persona, that in response to his voicing of dissatisfaction with his [original] assigned appellate counsel and his request that his counsel be replaced, the trial court penalized him by erroneously determining that he had forfeited his right to counsel on appeal, thereby forcing him to proceed in propria persona in this Court. Defendant requests the appointment of new counsel to represent him on appeal and to file a second motion for a new trial in the trial court. On prior order of this Court, however, the trial court appointed new appellate counsel for defendant. The record reflects defendant's new appointed appellate counsel filed a [second] motion for new trial. This issue is therefore moot, and we decline to address it further. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000).

II

Defendant claims he was deprived of a fair trial due to numerous alleged instances of prosecutorial misconduct. After examining the pertinent portions of the record and evaluating the prosecutor's remarks in context, we conclude defendant was not denied a fair and impartial

trial due to the alleged misconduct of the prosecutor. *People v Bahoda,* 448 Mich 261, 266-267; 531 NW2d 659 (1995).

There is no merit to defendant's first argument that the prosecutor deprived him of his constitutional right to be presumed innocent, his right to confrontation, and his right to a fair trial by arguing in closing that defendant's presence at trial gave him the opportunity to listen to the testimony and to weave a story that exculpated him, but meshed with the facts. Contrary to defendant's assertion on appeal, our Supreme Court's holding in *People v Buckey,* 424 Mich 1; 378 NW2d 432 (1985) – that a prosecutor *may* argue to the jury in closing argument that a defendant's presence at trial gives the defendant an opportunity to fabricate or conform his testimony to that of other witnesses – remains viable and is controlling here. See *Portuondo v Agard,* 529 US 61; 120 S Ct l119; 146 L Ed 2d 47 (2000), reversing the federal second circuit decision on which defendant relies, 117 F3d 696 (CA 2, 1997).

Defendant's second argument likewise fails where defendant argues here, for the first time, that the trial court should not have allowed the prosecutor to use a taped and transcribed statement of defendant as either impeachment or substantive evidence against him because the prosecutor allegedly violated discovery by failing to give these items to defense counsel prior to trial. Because the admission of defendant's taped and transcribed statement was challenged below on a different ground than that argued on appeal, this claim is subject to review for plain error. See *People v Carines,* 460 Mich 750; 597 NW2d 130 (1999); *People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2000). The record reflects that defense counsel was apprised before trial of the substance of defendant's statement, and that he received the actual recording of the statement one week before defendant testified at trial. Defendant has not demonstrated he was denied a fair trial or explained how he was prejudiced due to the *timing* of defense counsel's receipt of the taped or transcribed statement. Therefore, defendant has not demonstrated that he is entitled to relief under the plain error rule. *Carines, supra*.

Third, the prosecutor did not engage in misconduct by interjecting facts not in evidence that nontestifying codefendant Vaughn Davis had confessed to the crime and named defendant as the person who shot the victim. Prosecutors may not make statements of fact to the jury that are unsupported by the evidence, *People v Stanaway,* 446 Mich 643, 686; 521 NW2d 557 (1994), but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case, *Bahoda, supra* at 282; *Schutte, supra* at 721. Prosecutorial comments are read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra.* Because of defendant's repeated denials that he was the shooter or even at the scene of the crime, it was entirely appropriate for the prosecutor to ask defendant on cross-examination if he knew that Vaughn Davis had confessed and placed defendant at the scene of the crime as the shooter. *Bahoda, supra; Schutte, supra.*

Finally, the prosecutor's argument in rebuttal—that Cedric King and Vaughn Davis retained their right not to testify in this case even though they had been tried and convicted for their part in the shooting incident—did not shift the burden of proof, undermine defendant's presumption of innocence, or deny him a fair trial. In light of remarks by defense counsel in closing argument that the defense was unable to confront or cross-examine Cedric King and Vaughn Davis because they were not at trial to testify, the prosecutor was entitled to explain why

they were not present. *Bahoda, supra; Schutte, supra.* Further, the prosecutor's statement in rebuttal that Cedric King admitted to conspiracy to commit first-degree murder, does not refer to a "conviction" of King. The statement is based on the evidence at trial of Cedric's self-inculpatory admissions to Sergeant Payne, in which he admitted participating in the plan to kill the victim, which would form the basis for the referenced crime. See *People v Buck,* 197 Mich App 404, 412; 496 NW2d 321 (1992).

III

With regard to his third claim, defendant contends he was denied a fair trial when Detective Betz was permitted to testify as a fact witness to his role in the search and seizure of material from defendant's home and was also permitted to give his "expert" opinion that the facts of this case indicated defendant was engaged in drug trafficking or the sale of narcotics.

The admission of evidence is reviewed for an abuse of discretion. *People v Williams,* 240 Mich App 316, 320; 614 NW2d 647 (2000). However, because defendant did not preserve this issue below, he has forfeited this Court's review unless he shows that a plain error occurred by admission of the testimony that prejudicially affected his substantial rights, i.e., affected the outcome of his trial. *Carines, supra.* Defendant has not made the requisite showing.

Detective Betz' testimony was offered as background evidence, not as substantive evidence of defendant's guilt of the crimes for which he was charged. MRE 702; see also *People v Griffin,* 235 Mich App 27, 44-45; 597 NW2d 176 (1999); *People v Murray,* 234 Mich App 46, 53-54; 593 NW2d 690 (1999); *People v Ray,* 191 Mich App 706, 708; 479 NW2d 1 (1991). Moreover, contrary to defendant's assertions on appeal, there was other, competent, evidence that defendant was engaged in the on-going sale of drugs. Therefore, Betz' opinion testimony was merely cumulative and any error in its admission would have been harmless. See *Williams, supra* at 321-322. Notably, the court instructed the jury on the limited use of the evidence regarding possible involvement with drugs, and specifically instructed the jury that it could not use that as evidence to find defendant guilty in this case. Moreover, although Detective Betz opined that drug trafficking was taking place at defendant's residence, Betz did not testify that *defendant* was engaged in the drug trafficking. See *Murray, supra* at 56-57. There was no error in the admission of Betz' testimony.

IV

Fourth, defendant asserts the trial court should not have admitted testimony by Sergeant Payne regarding statements made to him by Cedric King that inculpated defendant. Defendant argues that the statements were inadmissible under MRE 804(b)(3), because those inculpatory statements were collateral to Cedric King's statements against his own interest. We disagree.

The trial court did not abuse its discretion in admitting those portions of Cedric King's statements to Sergeant Payne that inculpated defendant. Cedric King's statements as a whole were against Cedric's penal interest and were admissible against defendant. *People v Barrera,* 451 Mich 261; 547 NW2d 280 (1996); *People v Poole,* 444 Mich 151; 506 NW2d 505 (1993).

Defendant urges this Court to adopt a narrow construction of MRE 804(b)(3) that allows only those portions of a statement that directly inculpate the declarant to be admitted as substantive evidence. See, e.g., *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999); *Williamson v United States*, 512 US 594, 600-601; 114 S Ct 2431; 129 L Ed 2d 476 (1994). However, we agree with and follow this Court's decision in *People v Beasley*, 239 Mich App 548, 555-556; 609 NW2d 581 (2000), which rejected similar arguments.

V

Fifth, defendant presents numerous grounds on which he claims that he was deprived of the effective assistance of counsel at trial. In claiming the ineffective assistance of trial counsel, defendant has the burden to show that his counsel's performance fell below an objective standard of reasonableness and the representation so prejudiced him that it deprived him of a fair trial, i.e., that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). The facts on the record do not support defendant's claim, and he has failed to overcome the strong presumption that he received the effective assistance of his trial counsel. *Hoag*, *supra* at 8; *Stanaway*, *supra* at 687.

VI

Sixth, defendant, who is African American, claims that he was denied his right to a fair and impartial jury drawn from a representative cross-section of the community due to underrepresentation of African Americans in the pool from which his jury was drawn and in the specific panel that tried and convicted him. Defendant maintains that African Americans have been systematically excluded from jury pools in Kent County, depriving him of his constitutional right to a jury drawn from a venire which represents a fair cross-section of the community.

We note that defense counsel timely challenged the jury array before the jury was impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 493 (1996). We review de novo the trial court's legal determination that defendant was not denied the right to an impartial jury drawn from a fair cross-section of the community. *People v Smith*, 463 Mich 199, 215; 615 NW2d 1 (2000) (Cavanaugh, J., concurring); *People v Williams*, 241 Mich App 519, 525; 616 NW2d 710 (2000).

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; *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975); *Smith*, *supra* at 213; *Hubbard supra* at 472. Our state Supreme Court in *Smith* followed the United State Supreme Court's determination in *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979), that to establish a prima facie violation of the fair cross-section requirement, a defendant must satisfy the following elements:

> "(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." [*Smith, supra* at 215, quoting *Duren, supra* at 364.]

Considering the facts present here and the various tests to be employed in our review, *Smith, supra* at 203-204, we conclude defendant has not established that he was denied the right to a fair and impartial jury drawn from a cross-section of the community.

Defendant has satisfied the first prong of the *Duren* test because he is African American and African Americans are considered a constitutionally cognizable group for Sixth Amendment fair cross-section purposes. *Smith, supra* at 215. However, defendant has failed to satisfy the second and third prongs of the *Duren* test.

Regarding the second prong, defendant asserts that African Americans were underrepresented in his particular jury array but he has presented no record evidence that minorities were underrepresented on jury venires *generally* in Kent County at the time of his trial. Specifically, defendant has not rebutted the statements of the circuit court that minorities had achieved proportional representation in jury pools in the year or two prior to defendant's trial, even though defendant's particular jury panel did not have proportional representation. "Merely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997). Defendant has therefore not carried his burden on the second element of the *Duren* analysis.

Defendant has also presented no evidence that any such underrepresentation was due to systematic exclusion. See *Smith, supra* at 203, 205-207, 226-228. "[S]ystematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate." *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). To the contrary, the trial court's comments on the record reveal that the system in effect during the selection process for defendant's jury was designed to *include*, not exclude, minority jurors, and that Kent County had increased the proportional representation of minorities in jury pools over that of the former jury selection system in Kent County, which was held in *Smith* not to systematically exclude prospective African American jurors. *Smith, supra.* Where the jury-selection process has apparently systematically *increased* the proportional representation of African Americans in Kent County jury pools, and the former system which had less proportional minority representation was held in *Smith* not to systematically exclude African Americans, we conclude that defendant has not carried his burden of showing systematic exclusion of minorities in Kent County jury pools.

VII

Seventh, defendant claims that evidence of other bad acts, i.e., drug trafficking by defendant, denied him his right to due process and so prejudiced him as to deny him a fair trial. We disagree.

Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person to show that he acted in conformity with an alleged bad act. MRE 404(b)(1). However, such evidence is expressly admissible for the purpose of showing a defendant's motive, intent,

plan, or scheme in doing an act, MRE 404(b)(1); *People v Hoffman*, 225 Mich App 103, 105-106; 570 NW2d 146 (1997). Defendant has not shown that the evidence was not relevant and admissible as evidence of his motive to kill the victim, and defendant has not carried his burden of showing that admission of the evidence constituted a plain error that affected his substantial rights. *Carines*, *supra.*

VIII

Finally, defendant claims the trial court's instruction to the jury, that the jury could consider statements made to the police notwithstanding a *Miranda*[1] violation, was erroneous and denied him due process because, defendant contends, it permitted the jury to consider incompetent evidence that violated his right to counsel. Defendant's claim of instructional error is without merit.

It is uncontested that, prior to questioning by the police, defendant received his *Miranda* warnings. The prosecutor conceded below that defendant requested counsel several times during his custodial interrogation, and the trial court correctly ruled that the interrogation should have, but did not, cease. *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880, 1884-1885; 68 L Ed 2d 378 (1981). During the hearing on the suppression motion, the trial court implicitly found that defendant's statements were voluntarily made, and defendant does not assert otherwise on appeal.

Although the prosecutor could not have used defendant's statements in his case-in-chief, defendant's statements, where voluntary but taken in violation of his right to counsel, could be used for impeachment purposes by the prosecution. *People v Stacy*, 193 Mich App 19, 24-25; 484 NW2d 675 (1992); *People v Paintman*, 139 Mich App 161, 169-170; 361 NW2d 755 (1984). The prosecution's use of defendant's statements for this purpose was appropriate, and the trial court instructed the jury in accord with the applicable law. *Id.*

Accordingly, no error, plain or otherwise, was committed by the trial court through its issuance of the jury instruction challenged here by defendant.

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Richard Allen Griffin

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