STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v RANDALL MAHAN, Defendant-Appellant.	No. 215182 Wayne Circuit Court LC No. 97-008851

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v WINSTON WELLS, Defendant-Appellant.	No. 215206 Wayne Circuit Court LC No. 97-008851

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a joint jury trial, defendant Mahan was convicted as charged of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and defendant Wells, although charged identically, was convicted of the lesser offense of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant Mahan was sentenced to three to twenty years in prison, and defendant Wells was sentenced to six months to five years in prison. Defendants appeal as of right. We affirm.

I

Docket No. 215182

A

Defendant Mahan first argues that the trial court erred by refusing to allow him to change clothing at the courthouse. We disagree. Defendant arrived from the jail wearing a T-shirt and blue jeans. Although defendant was entitled to be brought to trial in proper attire, no due-process violation resulted from his casual attire. *People v Lewis*, 160 Mich App 20, 30-31; 408 NW2d 94 (1987). "Only if a defendant's clothing can be said to impair the presumption of innocence will there be a denial of due process." *Id*. at 31. Here, defendant was not compelled to wear "jail garb," but was in fact wearing civilian clothing.

Defendant argues that his T-shirt allowed the jury to see his jail wristband; however, defendant has not established a factual record to indicate whether the wristband clearly identified him as a prisoner. The trial court specifically concluded that defendant was not wearing "jail garb." Defendant's reliance on *People v Turner*, 144 Mich App 107, 112; 373 NW2d 255 (1985), is misplaced. In *Turner*, the defendant not only wore a jail wristband, but was wearing jail clothing as well. *Id*.

B

Defendant next argues that he was denied his Sixth Amendment right 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). However, defendant has not established a prima facie violation. "To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000). Defendant has not established that African Americans were substantially underrepresented in the jury pool, but has only challenged his particular jury array. This is insufficient. *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). "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). Moreover, defendant has not established that any underrepresentation was due to systematic exclusion. "[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).

Defendant argues that the trial court promised to hold an evidentiary hearing on this claim but did not do so. We disagree. The court indicated that it would provide defendant an opportunity to establish a record on this issue. The record apparently was not made. However, defense counsel made no subsequent effort in this regard, but instead stood by while no hearing was held. "Counsel may not harbor error as an appellate parachute." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

C

Defendant next argues that the trial court erred by encouraging and allowing counsel to exercise multiple peremptory challenges before excused jurors were replaced. This procedure did violate MCR 2.511(F), which is applicable to criminal trials through MCR 6.412(A). However, reversal is not required because defendant failed to object to the procedure used. *Lewis*, *supra* at 32; *People v Lawless*, 136 Mich App 628, 636; 357 NW2d 724 (1984). Moreover, defendant waived this issue by willingly participating in the procedure and expressing satisfaction with the jury. *Carter*, *supra* at 216; *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998).

D

Next, defendant argues that the trial court erred in allowing evidence that he was unemployed, but had $215 when he was arrested. Because defendant did not object to the evidence, this issue is not preserved for appellate review. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Defendant has forfeited this unpreserved issue because he has not demonstrated outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Although evidence of poverty or unemployment is inadmissible to show a motive or predisposition to commit the charged crime, *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980); *People v Johnson*, 393 Mich 488, 496-497, 498-499; 227 NW2d 523 (1975), the prosecutor did not introduce the evidence for such purposes. Rather, the prosecutor argued that the money found on defendant when he was arrested was likely the result of drug trafficking, because defendant was unemployed. Moreover, evidence of defendant's unemployment was first elicited during defense counsel's direct examination of defendant's sister. The prosecutor was allowed to elicit testimony to follow through on this subject. *People v Smith*, 80 Mich App 106, 114-117; 263 NW2d 306 (1977); *People v Kincaide*, 61 Mich App 498, 507; 233 NW2d 54 (1975).

E

Defendant next argues that the trial court erred by failing to take judicial notice that a previous evidentiary hearing was conducted for a codefendant only, and not defendant, after a police officer suggested in testimony that he had seen defendant at the hearing. However, the officer later stated that he could not recall whether defendant was present, and the officer acquiesced to defense counsel's assertion that defendant was not present. Although the trial court could have taken judicial notice of its own records, MRE 201(c); *People v Birmingham*, 62 Mich App 383, 385-386; 233 NW2d 551 (1975), the court was not required to do so. Moreover, the parties stipulated that the evidentiary hearing was for a codefendant only, which was exactly what defendant sought to establish by judicial notice; thus, defendant was not prejudiced.

F

Next, defendant argues that the trial court's jury instruction on reasonable doubt was constitutionally deficient. However, the trial court gave the instruction contained in CJI2d 3.2, which this Court has consistently held adequately conveys the concept of reasonable doubt.

People v Snider, 239 Mich App 393, 420-421; 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); *Hubbard*, *supra* at 487-488.

G

Defendant next argues that the trial court erred by failing to instruct the jury that each defendant was entitled to a separate determination of guilt or innocence. Because defendant did not object to the instructions given, this issue is not preserved for appellate review. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Defendant has not demonstrated outcome-determinative plain error and, accordingly, has forfeited review of this issue. *Carines*, *supra* at 763. The trial court instructed the jury that it must return a separate verdict for each defendant. This sufficiently protected defendant's rights. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998).

H

Next, defendant argues that his trial counsel was ineffective by failing to object to testimony that the police were in the area in response to neighborhood complaints of drug trafficking. Because defendant did not preserve this issue by moving in the trial court for an evidentiary hearing or a new trial, our review is limited to mistakes apparent from the record on appeal. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; ___ NW2d ___ (2000). We conclude that defendant was not denied the effective assistance of counsel. Defendant has not shown that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Although hearsay statements of informants regarding allegations against a defendant are inadmissible, *People v Wilkins*, 408 Mich 69, 71-74; 288 NW2d 583 (1980); *People v McAllister*, 241 Mich App 466, 469-470; 616 NW2d 203 (2000), the testimony regarding neighborhood complaints was general in nature and did not implicate defendant directly.

Even had defense counsel successfully objected, the result of the proceeding would not have been different, given that the evidence of defendant's guilt was overwhelming. Defendant was observed selling drugs and was arrested at the scene. The challenged testimony could not reasonably have contributed to defendant's conviction. See *id.* at 470-471.

I

Next, defendant argues that the trial court's sentence of three to twenty years' imprisonment raises a presumption of vindictiveness because the trial court had previously given defendant a *Cobbs*[1] sentence evaluation of one to five years' imprisonment. At a defendant's

[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

request, the trial court may indicate what the sentence would be if the defendant pleads guilty or nolo contendere, based on the facts then available to the court. *People v Cobbs*, 443 Mich 276, 283-285; 505 NW2d 208 (1993). However, a judge must not state alternative sentencing possibilities with respect to future procedural choices, such as exercising a right to trial. *Id*. at 283. Defendant did not plead guilty or nolo contendere and instead proceeded to trial; thus, the *Cobbs* evaluation is inapplicable.

Further, defendant's claim that the trial court's sentence was vindictive is not borne out by the record. Defendant's sentence is near the low end of the applicable sentencing guidelines and is proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Although it is improper for a trial court to impose a harsher sentence because a defendant exercises the right to a jury trial, *People v Atkinson*, 125 Mich App 516, 518; 336 NW2d 41 (1983), there is no indication of such "retaliatory sentencing" in this case.

J

Finally, defendant argues that the cumulative effect of the alleged errors mandates reversal of his conviction. Because no actual errors occurred, or any arguable errors were of little consequence, reversal is not warranted. *Cooper*, *supra* at 660; *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

II

Docket No. 215206

Defendant Wells' sole issue on appeal is that his conviction was against the great weight of the evidence. This issue is not preserved because defendant failed to move for a new trial on that ground. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Further, defendant has not demonstrated outcome-determinative plain error to avoid forfeiture of this issue. *Carines*, *supra* at 763.

Police officers testified that defendant was observed completing a drug transaction, in which he removed a substance from his waistband area, and that upon arrest, packages of crack cocaine were found in his underwear. Nonetheless, defendant claims that his testimony, denying the possession of any controlled substances, renders his conviction against the great weight of the evidence, because the testimony against him came from the police officers, who were biased against him and beat him. Defendant's argument is simply an attempt to retry matters of credibility. Absent exceptional circumstances, the credibility of witnesses is a matter for the jury to decide. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald