STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2006
v	No. 258072 Kent Circuit Court
JIMMY RAY PHEA, Defendant-Appellant.	LC No. 03-005930-FC

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

PER CURIAM.

Defendant appeals as of right from his jury conviction of armed robbery, MCL 750.529. Defendant was sentenced to 7 to 25 years' imprisonment. We affirm.

Defendant argues that there was insufficient evidence to convict him of armed robbery. He does not contend that there was insufficient evidence to establish the elements of armed robbery; rather, he argues that there was insufficient evidence to establish his identity as the person who robbed Blain. We disagree.

The prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 1967). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of the crime, including the identity of the perpetrator. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999), *Kern, supra* at 409-410. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

We find that there was sufficient evidence from which a jury could reasonably conclude that defendant was the robber. Defendant met the description of the robber. Defendant was stopped by an officer shortly after the robbery, provided inconsistent answers to the officer's questions, and attempted to disguise his voice during the show-up. The amount and denominations of money found on defendant's person were an exact match to the amount and denominations of the money stolen from the victim. The tracking dog brought to the scene of the robbery picked up the robber's scent and followed it to defendant's residence. The jacket, paintball mask, and gun collected at defendant's residence, were consistent with what was worn by the robber.

Defendant notes the presence of conflicting testimony. However, where testimony conflicts, it is the jury's function to determine the inferences to be drawn from the evidence and the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Further, this Court will not hinder the jury's function to determine the weight of the evidence and credibility of the witnesses. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). Viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to enable a rational jury to find beyond a reasonable doubt that defendant was the person who committed the armed robbery.

Defendant next argues that he was denied his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community, because errors in the Kent County jury management system caused a disproportionately low number of jury notices to be sent to the African-American community. Defendant contends that this problem occurred between April 2001 and July 2002, and that although by the time of his January 2004 trial, the general impression was that the problem was fixed, the presence of one African-American in the fifty-six person jury array indicates that the problem still existed.

Defendant raises this issue for the first time on appeal. "[T]o properly preserve a challenge to the jury array, a party must raise this issue before the jury is empanelled and sworn." *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). At the close of jury voir dire, the prosecutor expressed satisfaction with the jury, and defense counsel stated: "[d]efense is satisfied as well, Your Honor." The jury was then empanelled and sworn. An expression of satisfaction with a jury made at the close of voir dire waives a party's ability to challenge the composition of the jury subsequently impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 466-467; 552 NW2d 493 (1996).

Defendant argues that defense counsel was not required to raise this issue before trial to preserve it for appellate consideration, "[s]ince so many challenges had been raised in the trial court—and in the Court of Appeals—subsequent to the widespread public disclosure of this systemic breakdown, the problem was well-known to the court." We know of no rule of law waiving the preservation requirement for well-known allegations of error. Additionally, the heightened awareness of this issue could have increased the likelihood of an objection on these grounds at the trial level. Waiver has been defined as "the 'intentional relinquishment of a known right.'" *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted). Regardless of any controversy surrounding the Kent County jury selection process, defendant's choice during or at the end of voir dire was the same: he could, through his counsel, either object to the jury array or express satisfaction with it. Because defense counsel affirmatively approved the jury, defendant has waived appellate review of this issue.

In *McKinney*, *supra* at 160-162, this Court considered and rejected an almost identical claim that African-Americans were systematically excluded from the Kent County jury array when the defendant's jury trial was conducted. This Court held that it had "no means of conducting a meaningful review of defendant's allegations on appeal" because the defendant failed to object to the composition of her jury array, and because the lower court record contained no evidence supporting the defendant's argument. *Id*. at 161-162. We find the same result proper in the present case. Defendant speculates that a problem that he believes was resolved by July 2002 still existed at the time of his January 2004 trial; however, no support for his allegations exists in the lower court record. We also note that, as in *McKinney*, *supra* at 162,

a panel of this Court previously denied defendant's request to remand to the trial court for an evidentiary hearing. *People v Phea*, unpublished order of the Court of Appeals, entered April 15, 2005 (Docket No. 258072). Furthermore, we find that even if defendant had not waived appellate review of this issue, it fails on its merits because he cannot meet the requirements for such a claim established in *Duren v Missouri*, 439 US 357, 364; 99 S CT 664; 58 L Ed 2d 579 (1979) and adopted by this court in *Hubbard, supra* at 473.

Defendant also argues that he was denied his Fourteenth Amendment right to equal protection of the law because the racial composition of his jury array is indicative of discrimination against African-Americans. In support, defendant cites *Batson v Kentucky*, 476 US 79, 84; 106 S Ct 1712; 90 L Ed 2d 69 (1986), in which the United States Supreme Court held that the use of a peremptory challenge to strike a potential juror solely because of that juror's race violates the Equal Protection Clause of the Fourteenth Amendment. We find this argument to be entirely irrelevant, because defendant did not allege that the prosecutor exercised his peremptory challenges in a racially discriminatory manner.

Defendant next argues that the trial court erred when it admitted the DNA test results into evidence. We disagree. We review an unpreserved objection to the admission of DNA evidence for plain error affecting substantial rights. *People v Herndon*, 246 Mich App 371, 404; 633 NW2d 376 (2001); *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant argues that the prosecution did not establish a sufficient foundation for the admission of the DNA evidence. DNA analyst Joel Schultze of the Michigan State Police Forensic Laboratory in Grand Rapids testified that the DNA profiles used to compare the DNA from defendant's buccal swab to the swabs taken from the paintball mask and BB gun were created using the PCR (polymerase chain reaction) method of DNA testing. In *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995), this Court held that "trial courts in Michigan may take judicial notice of the reliability of DNA testing using the PCR method." However, before a court may admit the results of a particular DNA test, the prosecution must establish that "generally accepted laboratory procedures were followed." *Id.* at 283.

Before he testified to the results of the DNA tests, Schultze testified extensively about his qualifications and the laboratory procedures followed when a swab is submitted to the Michigan State Police Laboratory, and described the procedures that he followed upon receiving the evidence in the present case. The trial court did not commit plain error in allowing Schultze to testify about the results of the DNA tests.

Defendant argues that the trial court had an affirmative duty to rule on the admissibility of the DNA evidence, and that the trial court should have held a pretrial evidentiary hearing to determine whether generally accepted laboratory procedures were followed. A similar argument was presented by the defendant in *Herndon, supra* at 404, and this Court ruled that such hearings were not required. It noted that in a different case, it or the Michigan Supreme Court might, require such a hearing, as other jurisdictions have. *Id*. However, it noted defendant's failure to request a pretrial hearing, testimony from laboratory representatives that the proper procedures were used, the defendant's failure to challenge their testimony, and the defendant's failure to demonstrate that the representatives "actually deviated from the approved procedures or that the DNA analysis was otherwise invalid." *Id.* at 404-405. This Court found no plain error, and refused to use the case "as a vehicle to change trial procedure." *Id*. at 405.

In the present case, defendant did not move for a pretrial hearing, and did not challenge Schultze's qualifications as an expert witness or his testimony concerning the test results. Like the defendant in *Herndon*, defendant has failed to demonstrate that the laboratory actually deviated from the proper procedures or that the test results were invalid. Further, this Court has held that "[w]hether the proper procedures and safeguards are followed in a particular case is a matter for the jury to consider in determining how much weight it should give the results." *Lee, supra* at 281. The trial court's failure to conduct a pretrial hearing concerning the admissibility of the DNA evidence does not constitute plain error.

Defendant also argues that the trial court erred in admitting the DNA evidence because the prosecution failed to establish a sufficient foundation for the testimony about the statistics concerning the likelihood that defendant was the source of the DNA found on the paintball mask and the BB gun. In *Herndon*, the defendant similarly argued that the prosecutor did not provide sufficient testimony about the statistical probability that the blood found on the defendant was the victim's blood. *Herndon, supra* at 405. This Court stated, "[t]hough we are aware that there can be serious problems with making these predictions because of a variety of factors, including insufficient data used for the purpose of comparison, this sort of statistical evidence is generally admissible." *Id*. at 406. It further stated that defendant had not demonstrated "that there was any particular flaw in the statistics generated in this case," and therefore, failed to establish "the plain error and prejudice necessary to merit a new trial." *Id*.

Likewise, defendant fails to state with specificity any problems with the statistical analysis in the present case. Rather, defendant notes that the 1992 National Research Council Report makes several "recommendations for improvements in the methods of estimating population frequencies of specific DNA typing patterns," and lists a few of those recommendations. Furthermore, challenges to the statistical analysis of DNA evidence are relevant to its weight, not its admissibility." *People v Coy (After Remand)*, 258 Mich App 1, 11; 669 NW2d 831 (2003). Defendant cannot demonstrate plain error affecting his substantial rights.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff