STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 2006
v	No. 263507 Wayne Circuit Court
ARTHUR JACKSON III, Defendant-Appellant.	LC No. 04-012306-01

Before: Wilder, P.J. and Kelly and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, and carrying a concealed weapon, MCL 750.227. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 30 to 45 years' imprisonment for assault with intent to murder and one to five years' imprisonment, to be served concurrently, for carrying a concealed weapon. We affirm.

I. Res Gestae Witness

Defendant first contends that the prosecutor failed to exercise due diligence in locating a res gestae witness and, therefore, the trial court should have read the "missing witness" instruction. We disagree.

As this Court stated in *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004),

> A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. We review a trial court's determination of due diligence and the appropriateness of the "missing witness" instruction for an abuse of discretion. [Citations omitted.]

"The test for due diligence is whether good-faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it." *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995).

The prosecutor endorsed Kieran Baxter as a res gestae witness, but was unable to produce him for trial. During the due diligence hearing, the prosecutor and Officer Derryck Thomas recounted, in detail, their efforts to produce Baxter. The prosecutor called five hospitals and a telephone number Baxter had provided when he was previously jailed. However, the hospitals had no record of Baxter, and the number Baxter had provided was no longer in service. On the night before trial, the prosecutor also sent an officer to the address Baxter had previously provided to police, which was also in the law enforcement information system (LEIN). However, no one answered the door. Officer Thomas indicated that when he attempted to serve Baxter at his mother's house on four different occasions, no one answered the door. Officer Thomas also spoke to Baxter's mother and checked the three county jails and morgues in Dickerson where Baxter's mother indicated Baxter might be. Officer Thomas even sent surveillance crews to Baxter's mother's house, but they were unable to find Baxter. Further, the record reflects that the prosecutor's efforts were ongoing as of a month before trial. After reviewing the record, we conclude that the trial court did not abuse its discretion in finding due diligence and not giving the "missing witness" instruction.

II. Prosecutor's Conduct

Defendant next argues that the prosecutor improperly appealed to the jurors' sense of civic duty and defense counsel failed to object. We disagree. This Court reviews unpreserved issues of prosecutorial misconduct for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). To avoid forfeiture, defendant must show that there was plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *Aldrich, supra* at 110. It is improper for the prosecutor to appeal to the jury's civic duty, but the prosecutor "is given great latitude to argue the evidence and all inferences relating to his theory of the case." *People v Thomas*, 260 Mich App 450, 455-456; 678 NW2d 631 (2004). "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Read in context, the prosecutor's remarks were responsive to defense counsel's theory that the police were called to investigate Baxter and acted improperly towards defendant during the course of their investigation. Specifically, during opening statement, defense counsel claimed that defendant was merely in the "wrong place at the wrong time" when the police arrived and began their investigation. Defense counsel noted that unlike defendant, Baxter, who "was the subject of the 911 call," knew why the police were there and "fit the description that Alexander had called in [to police]." Defense counsel continued this theme when he asked Officer Jose Dorsey, who shot defendant, whether defendant had done anything wrong or was under arrest before he began resisting Officer Dorsey. The prosecutor asked Officer Dorsey to describe his duties to investigate and to take control at a crime scene.

The prosecutor's closing remarks were based on the evidence and in response to defendant's theory that the police officers acted improperly at the scene. His comments were not an improper attempt to appeal to the jurors' sense of civic duty. Given that "defense counsel is not required to make a meritless motion or a futile objection," *People v Goodin*, 257 Mich App

425, 433; 668 NW2d 392 (2003), the failure to object did not result in defendant being denied the effective assistance of counsel, *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

III. Substitution of Counsel

Defendant next argues that the trial court erred in denying his request for substitution of counsel and consequently deprived him of the effective assistance of counsel. We disagree. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). "An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *Id.* "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id.* A defendant's assertions that he lacks confidence in his trial counsel are not good cause to substitute counsel. *Traylor*, *supra* at 463.

Defendant asserts the trial court failed to investigate his conflicts with defense counsel and appoint substitute counsel. But defendant has failed to provide support in the record for his claim and "may not leave it to this Court to search for a factual basis to sustain or reject his position." *Id.* at 464. Nonetheless, it appears that the trial court addressed defendant's claims during the February 18, 2005, pretrial conference when defendant asserted his complaints and the trial court explained to defendant that defense counsel appropriately requested a criminal responsibility report and could not proceed until after the criminal responsibility report had been completed. Defendant also asserted that defense counsel failed to secure videotape recordings of the incident. However, the record indicates that defense counsel was not only aware of their existence, but also stipulated at trial that the incident was not discernable on the videotapes. Regarding defense counsel's statement about defendant's likelihood of success at trial, this was merely an expression of defense counsel's opinion and had no bearing on trial strategy. On this record, we conclude that defendant did not show good cause for appointment of substitute counsel. Therefore, the trial court did not err in denying defendant's request for substitute counsel nor did the trial court deprive defendant of his right to the effective assistance of counsel.

IV. Jury

Defendant next argues that he was denied his right to a fair trial because the jury was not drawn from a cross-section of the community. However, as in *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003), defendant did not properly preserve a challenge to the jury array and, because there is no evidence in the lower court record to support defendant's argument, we have "no means of conducting a meaningful review of defendant's allegations on appeal." *Id.* at 161-162.

Defendant also contends that he was denied his constitutional right to an impartial jury when the prosecutor used two peremptory challenges to strike African-American jurors. The Equal Protection Clause guarantees to a defendant a jury whose members are selected by

nondiscriminatory methods. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The burden initially is on the defendant to make out a prima facie case of purposeful discrimination. *Id.* at 93-94. In deciding whether the defendant has made a requisite showing of purposeful discrimination, a court must consider all relevant circumstances, including whether there is a pattern of strikes against African-American jurors, and the questions and statements made by the prosecutor during voir dire and in exercising his challenges. *Id.* at 97. If a defendant makes such a prima facie showing of a discriminatory purpose, the burden shifts to the prosecutor to articulate a racially neutral explanation for challenging African-American jurors.

Here, defendant, who did not object to the jury selection process at trial, has failed to establish purposeful discrimination. Even assuming that the prosecutor did remove two African-American jurors, which is not reflected by the record, the mere fact that a party uses one or more peremptory challenges to excuse minority members from a jury venire is insufficient to establish a prima facie showing of discrimination. *Clarke v K Mart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996); *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). "That the prosecutor did not try to remove all blacks from the jury is strong evidence against a showing of discrimination." *Williams, supra* at 137. Further, neither the prosecutor's statements nor questions demonstrate purposeful discrimination. Because this record does not establish a prima facie showing of purposeful discrimination, we cannot conclude that defendant was denied his constitutional right to an impartial jury by the prosecutor's peremptory challenges.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello