STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2010
v	No. 292548 Cass Circuit Court
WILLIE EARL BROWN, Defendant-Appellant.	LC No. 07-010123-FC

Before: M.J. KELLY, P.J., and K.F. KELLY and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a controlled substance, cocaine, less than 25 grams, MCL 333.7403(2)(a)(*v*); maintaining a drug house, MCL 333.7405(1)(d); and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as a habitual offender, fourth offense, MCL 769.12, to two terms of 30 months to 15 years' imprisonment for his possession of a controlled substance, cocaine, less than 25 grams and maintaining a drug house convictions, and 180 days in jail for his possession of marijuana conviction. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm the convictions of defendant but vacate defendant's sentence and remand for resentencing.

This case arises from a narcotics investigation conducted by the Cass County Drug Enforcement Team. Based on evidence obtained by team members as well as from the Michigan State Police, the team began surveillance on Forler's Motel in Cass County, in May of 2007. As a result of their surveillance, team members suspected that defendant, who had an outstanding arrest warrant, was involved in the sale and distribution of illegal narcotics at Forler's Motel. On May 3, 2007, defendant was arrested by team members who found cocaine and marijuana in the motel room where he was staying. Defendant was subsequently convicted of the afore-mentioned charges, leading to this appeal.

In his first issue on appeal, defendant asserts that there was insufficient evidence in the record to prove that he knowingly possessed cocaine or marijuana. A person who "knowingly or intentionally possess. . .less than 25 grams of any mixture of [cocaine]" or marijuana is guilty of possession of a controlled substance under MCL 333.7403(a)(*v*) and (d); MCL 333.7214(a)(*iv*). This Court summarized the element of possession in *People v Meshell*, 265 Mich App 616, 621-622; 696 NW2d 754 (2005):

> Proof of possession of a controlled substance requires a showing of " ' "dominion or right of control over the drug with knowledge of its presence and character." ' " *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003), quoting *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000), quoting *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977). Possession may be either actual or constructive, and may be joint or exclusive. [*People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201.] However, the defendant's mere presence where the controlled substance was found is not sufficient to establish possession; rather, an additional connection between the defendant and the controlled substance must be established. *Id.* at 520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the controlled substance. *Id.* at 521. " '[P]ossession may be proved by circumstantial evidence and reasonable inferences drawn from this evidence.' " *Nunez*, [242 Mich App at 615-616], quoting *Maliskey*, [777 Mich App at 453].

Our review of the record leads us to conclude that the arresting officers received several tips about narcotics distribution from room number nine at the Forler's Motel in the days and weeks prior to May 3, 2007. As a result, Deputy Paul McGowan and Deputy Beth Davis, and members of the Cass County Drug Enforcement Team, surveiled the room on various occasions, and observed on at least two occasions, people drive to the motel room, exit their vehicles, enter room number nine for a short period of time, reemerge, and drive away. They also saw defendant come outside the room on multiple occasions. Detective Sergeant David Toxopeus, a member of the Cass County Drug Enforcement Team, also received tips of narcotics distribution about the motel, which he corroborated with the Michigan State Police and Berrien County Narcotics Team. On the morning of May 3, 2007, Toxopeus and McGowan surveiled room number nine from an adjacent room. Defendant soon emerged and was arrested. The officers then entered room number nine and "cleared" it, at which point they observed narcotics and narcotics paraphernalia. Defendant consented to a search of the room, and stated something to the effect of: "You saw it" and/or "You're not going to find anything else." During the ensuing search, the officers found a plate inside an open drawer to a table or dresser. On the plate, they found loose marijuana leaves. Near the plate they found a small rock of crack cocaine and smaller chunks/rocks of cocaine which appeared to have been broken off the larger rock. Also inside the drawer, the officers discovered a bag of marijuana beneath a rag. The officers also found two pieces of paperwork inside the room, both of which contained defendant's name. They also found men's clothing and toiletry items, including cologne and deodorant. At trial, defendant admitted that he had a few hats, winter coats, and other articles of clothing inside the room.

Our review of the record reveals that defendant clearly had "dominion or right of control" over the belongings in the room, as evidenced by storing his personal items. *McKinney*, 258 Mich App at 165 (citations omitted). Further, we note that defendant made statements to the officers after his arrest which clearly indicated that he was aware of the marijuana and cocaine inside the room. Thus, a rational trier of fact could have concluded that defendant had "dominion or right of control over the [marijuana and cocaine] with knowledge of its presence and character." *Id.* (citations omitted). Based on these facts, we conclude that the prosecutor established "a sufficient nexus between defendant" and room number nine. *Wolfe*, 440 Mich at

521. Accordingly, after reviewing all the evidence in a light most favorable to the prosecutor, and resolving all conflicts in the evidence in favor of the prosecutor, *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008), we find that a rational trier of fact could have concluded that the prosecutor proved beyond a reasonable doubt that defendant constructively possessed the marijuana and cocaine inside room number nine.

Defendant next argues that there was insufficient evidence in the record to prove that he maintained a drug house. MCL 333.7405(1) provides, in pertinent part that a person:

> (d) Shall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.

The issue presented at trial and on appeal is whether room number nine was "frequented by persons using controlled substances[,]" and whether defendant, based on the totality of the evidence, kept or maintained the room for purposes of using controlled substances, i.e., whether such use was a substantial purpose of defendant's use of the property, and whether it was continuous to some degree. *People v Thompson*, 477 Mich 146, 156-157; 730 NW2d 708 (2007), citing *Dawson v State*, 894 P2d 672, 678-679 (Alas App, 1995).

The facts presented at trial revealed that defendant's girlfriend, Bridgette Hoover, occupied the room for two months preceding defendant's arrest. There was also testimony that defendant occupied the room during that same period, with the exception of eight to ten days in early April when he was temporarily jailed for a parole violation. In addition to the marijuana and cocaine found in the motel room near the plate that contained the marijuana leaves, the officers also found a plastic baggie, a razor blade, and a straw or crack pipe. When they lifted the plate from the drawer, they found rolling papers, another razor blade and a spoon containing white residue. Toxopeus testified that plastic baggies are commonly used to package marijuana or cocaine, and that a razor blade and cards are used to break off smaller chunks of cocaine from a larger rock. He also indicated that, based on his training and experience, the objects indicated that someone was using crack cocaine and turning cocaine into crack. They also found a box of baking soda, which, according to testimony, is used to "cut" cocaine, i.e., turn cocaine powder into freebase. Beneath a chair next to a nightstand, the officers found a jar containing off-white residue which, testimony indicated, was also used to help turn powder cocaine into freebase. Officers found a "choy boy" on the kitchen stove, which, according to testimony, is often used as a filter in a homemade crack pipe. Additionally, they found white residue inside a large safe, which was indicative of crack cocaine. Hoover testified that she and defendant both smoked crack cocaine and marijuana. She said that she was a "user" for "too many years." Defendant also admitted to using crack and marijuana, but he testified that he was "clean" when he was arrested. The officers also surveiled multiple persons come to the room, stay for less than a minute, and drive away. They also saw defendant come out of the room on various occasions.

Viewing all these facts in a light most favorable to the prosecution, we conclude that a rational trier of fact could have concluded that defendant kept or maintained room number nine to use and sell controlled substances, and that it was frequented by persons who purchased controlled substances. Furthermore, as the facts indicate, because a rational trier of fact could

conclude that defendant resided in the room at that time, a rational trier of fact could also conclude that using and selling marijuana and cocaine was a substantial purpose of defendant's use of the property. Similarly, the evidence in the room, including the jars, razor blades, baggie, white residue in the jar and safe, all indicate that the use was continuous to some degree. *Thompson*, 477 Mich at 156-157, citing *Dawson*, 894 P2d at 678-679. Accordingly, viewing the evidence in a light most favorable to the prosecutor, we conclude that a rational trier of fact could have concluded that the prosecutor proved beyond a reasonable doubt that defendant maintained a drug house. *Wolfe*, 440 Mich at 515-516.

Next, we address defendant's numerous claims of prosecutorial misconduct. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights to determine if defendant was denied a fair trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and a prosecutor's comments must be viewed in context of the pertinent portions of the record, *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003).

First, defendant argues that the prosecutor elicited irrelevant and prejudicial testimony from several witnesses. In particular, he challenges as improper: (1) testimony by Toxopeus that the officers received tips about narcotics distribution at the motel; (2) Toxopeus's testimony that he saw drugs and drug paraphernalia when he cleared room number nine, and that they found the same during the subsequent search; (3) a statement by Davis where she indicated that during their surveillance of room number nine, they saw people arrive for a short period of time and then leave, which was indicative of drug dealing; and (4) testimony by McGowan that the officers received tips about the motel before conducting the surveillance. Regarding the first and fourth statements, the testimony was relevant and admissible as part of the res gestae, *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979); *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996), and in order to provide the jury with the "complete story" of the events surrounding the crime, *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Although the testimony was prejudicial to some extent, as is all evidence for that matter, *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994); *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995), the testimony was not so prejudicial as to inject extraneous considerations into the lawsuit, such as jury bias, sympathy, anger, or shock. *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). Rather, the testimony was relevant and admissible despite the fact that it referenced the possibility of other criminal acts. *Delgado*, 404 Mich at 83. Consequently, there was no evidence of prosecutorial misconduct requiring reversal. *Noble*, 238 Mich App at 660; see also *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002) ("Case law is clear that a prosecutor has the discretion to prove his case by whatever admissible evidence he chooses.")

Regarding the second instance, the evidence of narcotics and paraphernalia found inside room number nine was directly relevant to prove defendant guilty of the crimes charged. MRE 401; MRE 402. While the evidence was prejudicial, *Pickens*, 446 Mich at 336, evidence is not unfairly prejudicial simply because it proves a defendant guilty of a crime. Again, there was no evidence of prosecutorial misconduct.

Regarding the third instance, the record shows that defense counsel objected to the challenged testimony, albeit on different grounds than the error alleged on appeal, and the trial

court sustained the objection. The allegedly improper remark was not before the jury. Thus, defendant was not denied a fair trial. *Thomas*, 260 Mich App at 453-454.

Defendant also challenges a portion of the prosecutor's opening statement as irrelevant and highly prejudicial. Specifically, the prosecutor stated that undercover officers went to the motel on May 3, 2007, and staked out room number nine because they previously received information that defendant and Hoover occupied the room, and that the room was involved in narcotics. The officers actually testified that they received tips regarding drugs coming out of room number nine, and tips that defendant resided therein. As previously indicated, their testimony was relevant and admissible. The prosecutor's comment during opening statement merely forecasted the anticipated testimony, and was not improper. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991) ("Opening argument is the appropriate time to state the facts to be proven at trial.")

Defendant also challenges several remarks during the prosecutor's closing argument. First, he argues that it was irrelevant and highly prejudicial for the prosecutor to argue that the officers watched room number nine based on tips concerning drugs, and that they watched the room for multiple weeks. As previously indicated, the officers testified to these facts, and their testimony was relevant and admissible. Thus, the prosecutor could properly argue these facts to the jury. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003) ("A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence.") Second, defendant argues that the record did not support the prosecutor's argument that the officers testified that they saw defendant at room number nine every time they surveiled the motel in the weeks before his arrest. Defendant is correct. The officers testified that they saw defendant on multiple occasions; but, no one testified they saw defendant every time. The remark was thus unsupported by the record and was improper. *Id.* However, the trial court instructed the jury multiple times that the lawyers' statements and arguments were not in evidence and should not weigh in its decision, thus, curing any prejudice that might have occurred. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). Third, defendant argues that the record did not support the prosecutor's remark that several people testified that defendant came from room number nine. Contrary to defendant's argument, the record clearly indicates that Toxopeus, Davis and McGowan all testified to this fact. Thus, the argument was supported by the record, and prosecutorial misconduct did not occur. *Ackerman*, 257 Mich App at 450. Fourth, defendant argues that the prosecutor improperly speculated that the white powder found in one of the bottles was cocaine. However, our review of the record indicates that the prosecutor never made such an argument. Thus, no error occurred.

Defendant also argues that the prosecutor improperly asked defendant and Hoover to comment on the credibility of the officers. The record indeed indicates that the prosecutor twice asked defendant if the officers "were lying," and once asked a similar question of Hoover. Such questioning was improper, as assessing witness credibility is left to the province of the jury. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007); *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985). However, a timely objection by defense counsel could have cured any prejudice. *Buckey*, 424 Mich at 18. Because "a well-tried, vigorously argued case ought not be overturned because of isolated improper remarks that could have been cured had an objection been lodged[,]" *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996), we

conclude that the isolated improper questions did not deny defendant a fair trial. *Thomas*, 260 Mich App at 453-454.

Defendant also alleges that the cumulative effect of the combined prosecutorial errors denied him a fair trial. However, the few errors were harmless individually, and we find that their combined effect was not any more prejudicial to defendant than they were in isolation. Our review of the record as a whole leads us to conclude that defendant was not denied a fair trial. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

Next, defendant asserts that several errors by the trial court denied him a fair trial. We generally review de novo these claims involving the due process right to a fair trial. See *People v Blackmon*, 280 Mich App 253, 259-261; 761 NW2d 172 (2008). However, because this issue is unpreserved on appeal, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

First, defendant argues that the trial court improperly allowed Toxopeus to testify that certain items found inside room number nine showed use of illegal substances. The challenged testimony includes the following statements: that a razor blade could be used to chip off cocaine from a larger rock of cocaine; that a baggie is usually used to package marijuana or cocaine; that baking soda is used to "cut" cocaine by turning powder cocaine into freebase; that there is a difference between freebase and powder cocaine, namely, that freebase provides a more immediate and long lasting high; and that the white residue found in the safe was indicative of crack cocaine. Specifically, defendant argues that the trial court erred because the testimony was irrelevant and because Toxopeus was not qualified to testify as an expert witness, and thus, should not have been allowed to provide such specialized information. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Abuse of discretion exists if the trial court's decision falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Regarding the relevancy of the challenged testimony, contrary to defendant's argument, the challenged testimony was relevant to help prove that defendant maintained a drug house. Specifically, this evidence helped the prosecutor establish that using controlled substances was a substantial use of the room. *Thompson*, 477 Mich at 156-157, citing *Dawson*, 894 P2d at 678-679. Again, defendant cannot claim that the evidence was unfairly prejudicial simply because it helped prove his guilt for that crime. Furthermore, contrary to defendant's arguments, whether the controlled substances found in room number nine and whether the items recounted by Toxopeus constituted drug paraphernalia were not topics dependent on scientific, technical or specialized knowledge. *People v Oliver*, 170 Mich App 38, 40-42, 50-51; 427 NW2d 898 (1988) (citations omitted). Rather, his testimony was based on his perceptions inside the room, and it assisted the jurors in determining whether defendant possessed the controlled substances and maintained a drug house, i.e., facts in issue. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). Thus, it was admissible lay testimony under MRE 701,[1] and Toxopeus did not need

[1] MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a)

(continued…)

to be qualified as an expert to provide the challenged testimony. Nevertheless, Toxopeus testified to his extensive training and experience, which helped establish the basis of his testimony, and help give the jury a clearer understanding of the facts in issue. *Oliver*, 170 Mich App at 50-51. The trial court did not abuse its discretion in allowing his testimony without qualifying him as an expert. *Id.*

Next, defendant argues that he should have been sentenced as a habitual offender, third offense, MCL 769.11. MCL 769.12 governs fourth-time habitual offenders. MCL 769.12 provides:

> (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for life or for a lesser term.
>
> (b) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is less than 5 years, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for a maximum term of not more than 15 years.

At the time defendant was sentenced, December 14, 2007, the rule for counting prior felonies under this statute was as follows: "The statute require[d] only that the fourth offense be preceded by three convictions of felony offenses, and that each of those three predicate felonies arise from separate criminal incidents." *People v Preuss*, 436 Mich 714, 717; 461 NW2d 703 (1990), overruled 482 Mich 41, 68; 753 NW2d 78 (2008). In other words, multiple felony convictions that arose from a single criminal transaction were only considered as a single prior felony under MCL 769.12. *Id.* Here, two of defendant's three prior felony convictions arose from the same criminal incident and resulted in a sentence on the same date. As such, the trial court should have sentenced defendant as a habitual offender, third offense. Because properly counting the prior felonies would have resulted in a shorter minimum sentence, see MCL 777.13m; MCL 777.21(3)(b) and (c); MCL 777.68, we conclude that plain error affecting defendant's substantial rights occurred. See *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006) (footnote omitted).

(…continued)

> rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

We recognize that the Supreme Court in *People v Gardner*, 482 Mich 41, 68; 753 NW2d 78 (2008), expressly overturned *Preuss*, 436 Mich 714, and its predecessor, *People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987), and held that multiple felony convictions can be used to enhance a defendant's sentence under the habitual offender statutes, MCL 769.10, *et seq.*, even if they arise from the same criminal incident. Thus, under *Gardner*, 482 Mich at 68, defendant's sentencing as a habitual offender, fourth offense, would have been correct. However, we decline to apply *Gardner* retroactively to correct the trial court's error because doing so would constitute an ex post facto increase in defendant's sentence.

> The test for determining whether a criminal law violates the Ex Post Facto Clause of our Constitution, Const 1963, art 1, § 10, involves two elements: (1) whether the law is retrospective, i.e. whether it applies to events that occurred before its enactment, and (2) whether it disadvantages the offender, *People v Davis*, 181 Mich App 354, 357; 448 NW2d 842 (1989). A statute disadvantages an offender if (1) it makes punishable that which was not, (2) it makes an act a more serious offense, (3) it increases a punishment, or (4) it allows the prosecutor to convict on less evidence. *People v Harvey*, 174 Mich App 58, 60; 435 NW2d 456 (1989), quoting *People v Moon*, 125 Mich App 773, 776; 337 NW2d 293 (1983). [*People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995).]

The Ex Post Facto Clause likewise applies to the "judiciary by analogy through the Due Process Clauses of the Fifth and Fourteenth Amendments." *People v Doyle*, 451 Mich 93, 101; 545 NW2d 627 (1996); citing *Bouie v City of Columbia*, 378 US 347; 84 S Ct 1697; 12 L Ed 2d 894 (1964). Retroactive application of a judicial decision violates due process when it acts as an ex post facto law. *Doyle*, 451 Mich at 100. Here, *Gardner* clearly changed the law by overruling the interpretation and application of the habitual offender statutes. We conclude retroactive application of *Gardner* would violate the Ex Post Facto Clause because it would apply to events that occurred before the release of the opinion and it would disadvantage defendant by making his punishment greater.

Next, defendant argues that the trial court erred by not giving him credit for the 226 days he was incarcerated after his arrest and before sentencing. However, defendant was paroled for a previous conviction at the time of his arrest, and therefore, the time he spent in jail before sentencing was attributed to the sentence for his paroled conviction, and not the instant one. MCL 791.238; *People v Idziak*, 484 Mich 549, 566, 568; 773 NW2d 616 (2009).[2] Because his time in jail was attributed to his prior conviction, we further reject his claim that such time constituted "dead time." See *People v Johnson*, 283 Mich App 303, 309-310; 769 NW2d 905 (2009).

Defendant also argues that the trial court erred by not taking any independent action to correct the multiple instances of alleged prosecutorial misconduct previously discussed.

[2] We also reject defendant's argument that we should ignore *Idziak* because the holding violates due process, equal protection, and double jeopardy. The Court, *Idziak*, 484 Mich at 469-574, expressly addressed these arguments, and concluded they were without merit.

Although we conclude that the prosecutor committed minor errors, we also conclude that these errors did not deny defendant a fair trial because any prejudice that might have resulted could have been remedied by a contemporaneous objection or were cured by jury instructions. *Buckey*, 424 Mich at 18; *Ullah*, 216 Mich App at 679; *Seals*, 285 Mich App at 22. Thus, we further conclude that these errors, even when combined, were not so significant as to deny defendant a fair trial. *McLaughlin*, 258 Mich App at 649. Accordingly, even if the trial court erred by not *sua sponte* correcting the alleged errors, we find that the errors did not result in the conviction of an actually innocent person, or seriously affect the "fairness, integrity, or public reputation of the judicial proceedings, regardless of his innocence." *Thomas*, 260 Mich App at 454 (quotations omitted). Plain error did not occur.

Next, defendant argues that defense counsel was ineffective for failing to object to the numerous instances of alleged prosecutorial misconduct previously discussed. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To prove the latter, defendant must show that the result of the proceeding would have been different but for defense counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Here, the few errors committed by the prosecutor were clearly harmless, and we find that defendant has not shown that, but for defense counsel's failure to object, the outcome of trial would have been different. Thus, defendant has not met his burden of proving ineffective assistance of counsel.

Finally, defendant, an African-American, contends that he was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community because there was only one non-Caucasian on his jury panel. "Questions concerning the systemic exclusion of minorities in jury venires are generally reviewed de novo." *McKinney*, 258 Mich App at 165. However, because defendant failed to properly preserve this issue, we review for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

The Sixth Amendment of the United States Constitution guarantees that a "criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *McKinney*, 258 Mich App at 161.

> [T]o establish a prima facie violation of the Sixth Amendment fair cross-section requirement [a defendant must prove]:
>
> > (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 a systematic exclusion of the group in the jury-selection process. [*People v Bryant*, __ Mich App __; __NW2d __ (2010), citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Nothing in the record before us supports that only one non-Caucasian was on defendant's jury panel. Moreover, even assuming that fact is true, alleging the exclusion of non-Caucasians is not the same as proving an underrepresentation of a distinctive group of people as a result of a systematic exclusion. *Bryant*, __ Mich App at __; see also *McKinney*, 258 Mich App at 161-162 (Where "there is no evidence in the lower court record to support [the] defendant's argument" there are "no means of conducting a meaningful review of [the] defendant's allegations on appeal."). Thus, we conclude that defendant has not met his burden of proof.[3] Plain error did not occur.

We affirm defendant's convictions but remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Stephen L. Borrello

[3] We note that our analysis does not take into account the numerous demographic statistics cited in defendant's appeal brief because they were not made a part of the lower court record. See, e.g., *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990) ("Enlargement of the record on appeal is generally not permitted.").