STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2011
v	No. 295091 Calhoun Circuit Court
MAURICE CHARLES FREDERICK, Defendant-Appellant.	LC No. 2009-001887-FC

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, for assault with intent to murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 35 to 60 years' imprisonment for assault with intent to murder, 42 to 120 months' imprisonment for felon in possession of a firearm, and two years' imprisonment for each felony-firearm offense. The assault with intent to murder and felon in possession sentences were to run concurrent to each other and consecutive to the felony-firearm sentences. We affirm.

I. BASIC FACTS

At trial Joshua Woodward, the victim of defendant's attack, testified that he purchased drugs from defendant for approximately a year before the incident relevant to this case. Woodward engaged in 40 to 50 drug transactions with defendant during this time period. To conduct their drug transactions, Woodward would call defendant and they would meet at random locations, such as alleys and gas stations. Woodward also purchased drugs from defendant's brother, Jermaine Frederick. Woodward was apprehended by police for a drug related offense, after which he cooperated with the police as an informant in exchange for a reduced sentence. As an informant, Woodward gave information to the police about the Fredericks' drug sales and

engaged in one transaction with Jermaine at the direction of police.[1] While working with the police, Woodward did not purchase drugs from defendant as often as he had previously. Defendant questioned Woodward about this and Woodward believed that defendant had become suspicious of him.

On November 29, 2007, Woodward called defendant to arrange a purchase. The two agreed to meet later that night. Woodward drove to Battle Creek and called defendant when he arrived in town. Defendant asked Woodward if he was alone; Woodward confirmed that he was. Defendant instructed Woodward to meet him in an alley in which they had not previously met. Woodward arrived at the alley at approximately 11:00 p.m. He turned off his headlights, but kept his vehicle running. The alley was adequately lit by nearby lights. Woodward saw defendant approach on foot from 30 to 40 yards away. Defendant wore a dark blue or black puffy jacket and big blue jeans. Woodward was certain it was defendant who approached him.

As defendant approached Woodward's vehicle, Woodward opened the driver's side window half-way or more. Defendant told Woodward they might have to go somewhere else to get the drugs. Woodward got out of his vehicle and defendant asked to use Woodward's cellular telephone. Woodward found this unusual, because he had called defendant's cellular telephone while driving to the meeting place. Nevertheless, Woodward gave defendant his phone and got back into his vehicle. Woodward turned away from defendant, to look in the center console of his vehicle. As Woodward turned back toward defendant, defendant said, "I've got something for you." Woodward saw a bright light, felt an impact and heard ringing in his ears. He thought he had been punched. Woodward got out of his car, preparing to defend himself, and saw defendant walking away. Woodward's vision was blurry and blood was running down his face. He placed his hand to his face and realized he had been shot. Woodward identified defendant as his assailant, and defendant was later charged with and convicted of the above listed offenses.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues on appeal that he was denied the effective assistance of counsel. In general, a claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to mistakes apparent on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). To prevail on a claim of ineffective assistance of counsel, "a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *People v Jordan*, 275 Mich App 659,

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[1] Battle Creek Police detective Scott Eager testified that police had used information provided by Woodward and other informants to execute search warrants on residences shown to be connected with the Frederick brothers prior to the incident in question.

667; 739 NW2d 706 (2007). "[D]efendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Riley*, 468 Mich at 140.

Defendant first contends that his defense counsel failed to provide him with the discovery materials related to his case, which prevented him from materially participating in his own defense. The constitutional right to effective assistance of counsel includes the right of a defendant to assist in his own defense. *People v Sterling*, 154 Mich App 223, 232; 397 NW2d 182 (1986). Assuming defense counsel failed to provide the materials, defendant has not demonstrated that the failure constitutes ineffective assistance of counsel requiring reversal. Even if the failure to provide the discovery materials was objectively deficient conduct, the record does not support a finding that the outcome of the trial would have been different if defendant had received the discovery materials. Significant evidence was presented against defendant and defense counsel cross-examined the prosecution's witnesses and mounted a defense. The record does not indicate that defendant could have assisted in formulating a defense based on any information in the discovery materials, nor does the record support a finding that had defendant participated in his defense in some manner relative to the discovery materials, the outcome of trial would have been different.

Defendant next asserts that he was denied effective assistance of counsel because defense counsel failed to consult with him and investigate possible defenses. Defendant "has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). There is nothing on the record, other than defendant's allegations, to establish that defense counsel did not consult with defendant or failed to investigate defenses. Further, defendant has failed to provide evidence establishing other viable defenses. Thus, defendant has not established the factual predicate for this claim of ineffective assistance of counsel.

Defendant also argues that defense counsel was ineffective because he failed to object to the absence of African Americans on the jury. "[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). Defendant failed to make a timely objection and, therefore, his claim is not preserved. "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 Diapolis Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000), citing *Duren v Missouri*, 439 US 357; 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). Our Supreme Court has adopted a case-by-case approach, based on the facts and circumstances of the case and the proffered evidence, to determining whether a distinctive group's representation was "fair and reasonable." *Diapolis Smith*, 463 Mich at 204.

In *Diapolis Smith*, 463 Mich at 204, the defendant presented some evidence of the disparity between jury-eligible African-Americans and the actual number of African-Americans selected to the jury pool list. Although the defendant's statistical evidence failed to establish a legally significant disparity so as to constitute underrepresentation, the Court still considered whether African-Americans were systematically excluded. *Id*. at 204-205. The Court held the defendant failed to carry his burden of demonstrating that the exclusion of African-Americans was systematic because there was no record evidence to support such a finding. *Id*. at 205

In *McKinney*, 258 Mich App at 160-161, the defendant argued that her constitutional rights to an impartial jury drawn from a cross-section of the community were violated. This Court said:

> A review of the record in this case indicates that defendant failed to make any objections regarding the composition of her jury array. Further, there is no evidence in the lower court record to support defendant's argument. Consequently, we have no means of conducting a meaningful review of defendant' [sic] allegations on appeal. [*Id*. at 161-162.]

We find that defendant failed to establish a prima facie case that his due process rights were violated. Although "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes," *People v Hubbard*, 217 Mich App 459, 473; 552 NW2d 493 (1996), defendant did not object to the lack of African-Americans in the jury or jury pool until the jury was about to be dismissed for deliberations. Thus, defendant's claim is unpreserved. *McKinney*, 258 Mich App at 161. More importantly, defendant has failed to offer any evidence that there were no African-Americans in the jury panel or that African-Americans were underrepresented. He relies only on his unsupported assertions. Even if defendant's claim were given consideration, there is no evidence to support a finding that any exclusion of African-Americans from the jury selection process was systematic. Accordingly, this Court has "no means of conducting a meaningful review." *McKinney*, 258 Mich App at 161-162. Therefore, on review limited to the record, defense counsel was not ineffective for failing to raise an issue regarding the composition of the jury.

III. MOTION FOR A MISTRIAL

Defendant argues that the trial court erred by denying his motion for a mistrial. "We review for an abuse of discretion a trial court's decision on a motion for a mistrial." *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). A motion for a mistrial should only be granted "'for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.'" *Id*. at 195, quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

Defendant based his motion for a mistrial on two grounds. First, during voir dire, one of the potential jurors fainted. The court recessed for 20 minutes to allow the juror to be treated by medical personnel, before reconvening to continue the jury selection process. After the jury was sworn in, defendant moved for a mistrial. The trial court found that the situation had been handled appropriately and was not a basis for a mistrial. Defendant offers no evidence or support for a finding that he was prejudiced by the fainting juror, nor does the record support

such a finding. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial on this basis.

Defendant also claimed a mistrial was required because another juror communicated with a child standing next to the victim's mother during the recess after the first juror fainted. After the matter was brought to the trial court's attention, the trial court brought the juror into the courtroom outside the presence of the other jurors and inquired into the circumstances of the communication. The juror indicated that she made a single comment to the child, that she did not know who the child or the victim's mother were, and that neither the child nor the victim's mother responded to her comments.

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. [*Smith v Phillips*, 455 US 209, 217; 102 S Ct 940; 71 L Ed 2d 78 (1982).]

In this case, the trial court specifically questioned the juror about the conversation she had in the hallway. The trial court's attention to the juror's conversation was "watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id*. Moreover, the juror's brief comment to the child was not related to the trial, and there is no evidence on the record to support a finding that the juror's verdict was affected by her exceedingly brief interaction with him. Thus, the record does not support a finding that the juror's communication with the child "affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment." *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

IV. FAILURE TO APPOINT NEW COUNSEL

Defendant finally argues that the trial court erred by failing to appoint new counsel for him. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Although defendant moved to have defense counsel removed, he never specifically moved to have new counsel appointed. On a review of the record for plain error,

defendant has failed to show good cause to justify appointment of substitute counsel.[2] See *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

[2] In support of his contention that he should have received substitute counsel, defendant claims that he was unaware trial was to begin and blames his counsel for not objecting to defendant having to wear a jail T-shirt during voir dire. Nothing in the record, however, describes the shirt or supports a finding that the presumption of innocence was impaired. See, *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 is there a denial of due process).