

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE DOBSON,

Defendant-Appellant.

UNPUBLISHED

May 31, 1996

No. 176102

LC No. 93-008192-FH

Before: Sawyer, P.J., and Griffin and M. G. Harrison,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of over fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to fifteen months to twenty years' imprisonment. Defendant appeals as of right. We affirm.

On appeal, defendant first contends that he was denied the effective assistance of counsel. However, there was no evidentiary hearing on this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). After a thorough review of the record, we conclude that defendant has neither sustained his burden of proving that counsel made a serious error that affected the result of trial nor overcome the presumption that counsel's actions were strategic. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994).

Defendant's second argument claims that his state and federal rights to due process and equal protection of the law were violated because the prosecution systematically excluded African-Americans from the jury. We disagree. Defendant is entitled to a jury which contains a representative cross section of the community. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579, 586-587 (1979); *People v Guy*, 121 Mich App 592, 599; 329 NW2d 435 (1982). To establish a prima facie violation of this right, a defendant must show: (1) that the allegedly excluded group is a "distinctive" group in the community, (2) that the representation of the group in jury venires is unfair and

* Circuit judge, sitting on the Court of Appeals by assignment.

unreasonable in relation to the number of such persons in the community, and (3) that the underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duran, supra* at 364; *Castaneda v Partida*, 430 US 482, 494-495; 97 S Ct 1272; 51 L Ed 2d 498 (1977); *Guy, supra* at 599.

Here, defendant has failed to provide any factual support for his argument that African-Americans were unfairly or unreasonably underrepresented in the jury venire. Defendant has also failed to present a cogent argument that African-Americans were systematically excluded from the jury venire. Moreover, defendant failed to develop a record that could assist this Court in concluding that an impropriety occurred in the jury selection process. Therefore, we conclude that defendant has failed to establish either of the latter two requirements needed to establish a prima facie violation of his right to a representative jury. Furthermore, even if defendant had established a prima facie case of systematic exclusion, it is clear that the prosecutor's motivation for peremptorily challenging an African-American juror was not discriminatory. See *Purkett v Elem*, 514 US ___, ___; 115 S Ct 1769; 131 L Ed 2d 834, 839 (1995); *People v Barker*, 179 Mich App 702, 705-706; 446 NW2d 549 (1989). The prosecutor said that he challenged the juror because that juror listed on the juror questionnaire that he had a prior misdemeanor conviction. Under *Purkett, supra*, this nondiscriminatory explanation for the challenge is sufficient to satisfy the prosecutor's burden of offering a nondiscriminatory explanation for the peremptory challenge. See also *Hernandez v New York*, 500 US 352, 560; 111 S Ct 1859; 114 L Ed 2d 395 (1991).

Finally, defendant contends that his sentence is disproportionate. However, defendant's sentence is within the sentencing guidelines' range and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Cutchall*, 200 Mich App 396, 410; 504 NW2d 666 (1993). Defendant has failed to rebut the presumption of proportionality. Based on our conclusion that defendant's sentence is proportionate to the offense and the offender, we find that defendant's sentence does not constitute cruel and unusual punishment. See *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael G. Harrison