STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL EARL PHELPS,

Defendant-Appellant.

UNPUBLISHED
December 13, 1996

No. 186112
LC No. 94-067690-FH
94-067758-FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and E.R. Post,* JJ.

PER CURIAM.

In lower court number 67758, defendant was convicted by a jury of two counts of uttering and publishing, MCL 750.249; MSA 28.446. He subsequently pleaded guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. In lower court number 67690, defendant pleaded nolo contendere to two counts of unauthorized use of a financial device, MCL 750.157n(1); MSA 28.354(14), and to a related charge of habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced to seven to twenty-eight years' imprisonment for the uttering and publishing conviction and to a concurrent term of four to eight years on the unauthorized use of a financial transaction device conviction.[1] We affirm.

Defendant first argues that the prosecutor improperly used peremptory challenges to remove the only two potential black jurors from the jury venire. The Equal Protection Clause of the Fourteenth Amendment bars a prosecutor from peremptorily challenging potential jurors solely on account of their race. *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986); see *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989), aff'd on other grounds 437 Mich 161; 468 NW2d 492 (1991). We review a trial court's finding on the issue of discriminatory intent in excluding a potential juror for clear error. MCR 2.613(C); cf. *Hernandez v New York*, 500 US 352, 369; 111 S Ct 1859; 114 L Ed 2d 395 (1991) (Opinion of Kennedy, J., joined by Rehnquist, C.J. and White and Souter, JJ.), 500 US 372 (O'Connor, J., joined by Scalia, J.). The prosecutor explained that she challenged one potential black juror because of her failure or refusal to complete the juror questionnaire

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

and that the decision was made before the prosecutor was aware of the individual's race. The prosecutor explained that she challenged the other potential juror, consistent with her general practice, of doing so when a potential juror has been convicted of a crime. A prosecutor's concern that a person previously convicted of a crime might be biased against the prosecution is reasonable. Accordingly, the trial court did not clearly err by accepting the prosecutor's race-neutral explanations for challenging the jurors in question.

Defendant also argues that the prosecutor's references to one potential black juror being a single parent and working for a temporary employment service support a conclusion that she was excluded for reasons related to her race. However, defendant's basis for correlating single parenthood and working for a temporary service with a particular race is unclear. Regardless, the Equal Protection Clause does not forbid dismissing a juror due to a factor that is merely "related" to or correlated with race, so long as the challenge was not actually motivated by race. *Hernandez, supra,* 500 US 360 (Opinion of Kennedy, J., joined by Rehnquist, C.J. and White and Souter, JJ.), 500 US 375 (O'Connor, J., joined by Scalia, J.).

Defendant next asserts that reversal is required because of an incident at trial when the judge admonished defense counsel during a side bar conference. We disagree and conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial on this basis. *People v Cunningham,* 215 Mich App 652, 654; 546 NW2d 715 (1996). This single incident cannot reasonably be considered to have held defense counsel up to contempt in the eyes of the jury so as to destroy the necessary appearance of impartiality, particularly as defense counsel and the trial court agreed that the prosecutor was also admonished during this incident. *People v Ross,* 181 Mich App 89, 91; 449 NW2d 107 (1989). Further, the court indicated that it immediately instructed the jurors that it should not have made comments in a rather loud voice during the side bar conference and to disregard anything they heard him say. We conclude that this incident did not deny defendant a fair and impartial trial by unduly influencing the jury. *People v Wigfall,* 160 Mich App 765, 774; 408 NW2d 551 (1987).

Defendant has waived appellate review of his claim that his no contest plea to habitual third lacked an adequate factual basis by failing to move to withdraw that plea before the trial court. MCR 6.311(C); *People v Beasley,* 198 Mich App 40, 42-43; 497 NW2d 200 (1993).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Edward R. Post

[1] The uttering and publishing convictions were based on defendant having intentionally cashed bogus checks. The unauthorized use of a financial transaction device pleas were based on defendant's use of a credit card account number and a credit card without permission of the cardholders.