STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DORRIAN LEON LASSITER,

Defendant-Appellant.

UNPUBLISHED
December 30, 1996

No. 187024

Jackson County
LC No. 94-070961 FH

Before: McDonald, P.J., and Murphy and J. D. Payant*, JJ.

PER CURIAM.

Defendant, Dorrian Leon Lassiter, appeals by right from his conviction and sentence for possession with intent to deliver less than 50 grams of cocaine, MCL 333.740a(2)(A)(iv); MSA 14.15(7401)(2)(a)(iv); and conspiracy to possess with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii); and MCL 750.157a; MSA 28.354(1). We affirm in part and remand for further proceedings consistent with this opinion.

Defendant raises several arguments on appeal. First, defendant argues that the prosecutor failed to establish that defendant possessed the intent necessary to support his conviction of conspiracy to possess with intent to deliver between 50 and 224 grams of cocaine. We disagree. Viewing the evidence presented at trial, both direct and circumstantial, in a light most favorable to the prosecutor, we find that there was sufficient evidence from which a reasonable trier of fact could find beyond a reasonable doubt that defendant agreed to possess with the intent to deliver between 50 and 225 grams of cocaine. In the case at bar, a police informant purchased 1.47 grams of cocaine from Wilson at 104 W. Biddle street at approximately 3:10 p.m. on November 8, 1994. When the police executed a search warrant for 104 W. Biddle that same day at approximately 7:30 p.m., the occupants of the house including defendant attempted to flee. The police confiscated 53.84 grams of rock cocaine divided and stored in plastic bags with defendant's finger prints on them. Additionally, various bills totaling $713.00 were found in the area in which defendant was apprehended, and Wilson and Borden,

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

who were also apprehended, had $44.00 and $133.00 respectively in their possession. Although, defendant's testimony did provide an innocent reason for his presence in the house and for his fingerprints being found on the plastic bags in which some of the cocaine was found, given the jury's verdict, it is clear that it did not find defendant's testimony credible. Credibility determinations are left to the trier of fact and will not be resolved anew on appeal. *People v Velasquez,* 189 Mich App 14; 472 NW2d 289 (1991).

Next, defendant argues that two key defense witnesses asserted their Fifth Amendment privilege against self-incrimination as a result of threats made by the prosecutor. As a result, defendant alleges that he was denied his constitutional right to due process and compulsory process. Defendant basis his entire argument on Wilson's statement to the trial court that "[t]he way they put it to me is like either you don't testify or you go back to the 10 to 20, that's the way I took it." Because, Wilson's statement does not identify who the "they" were who made that representation to him and was essentially only Wilson's understanding of comments made, it does not clearly establish that there was a threat made by the prosecutor which prevented Wilson and Borden from testifying on defendant's behalf.

However, in light of the facts of this case, Wilson's statement explaining his decision to assert his privilege in conjunction with the prosecutor's statement regarding the possibility of bringing additional charges does create a question as to whether the prosecutor threatened or intimidated the witnesses. At the time of defendant's trial, both Wilson and Borden were awaiting sentencing. Wilson's statement suggests that he was told that if he testified he would receive a tougher sentence. The prosecutor's comment regarding bringing additional charges, although accurate, could be viewed as intimidating because it suggests that additional charges might be brought against these witnesses if they testified. *People v Callington*, 123 Mich App 301; 333 NW2d 260 (1983). Therefore, because Wilson and Borden were the only witnesses defendant intended to call at trial to corroborate his testimony and were critical to defendant's case, *Id.*, we remand this case pursuant to MCR 7.216(A)(5) for further factual development to determine whether Wilson and Borden were intimidated into asserting their privilege by the prosecutor. If the court finds the prosecutor's conduct improper and caused defendant's witnesses not to testify then a new trial shall be granted.

Defendant also argues that the trial court abused its discretion in admitting Officer Bachman's expert testimony regarding the drug trade in Jackson. We disagree. Drug enforcement is a recognized discipline outside the knowledge of a layman. *People v Ray*, 191 Mich App 706; 479 NW2d 1 (1991). Evidence presented at trial established that Officer Bachman was an expert by virtue of his training and experience, and his testimony setting forth the means of distinguishing a person who possesses drugs for use from one who possesses them for sale was relevant to the case at bar where defendant was charged with possession with intent to distribute. CJI2d 12.3(3); CJI2d 10.1(4); MRE 401. Thus, Officer Bachman's testimony was admissible as expert testimony pursuant to MRE 702. *People v Williams (Aft Remand),* 198 Mich App 537; 499 NW2d 404 (1993).

Defendant, also argues that Officer Bachman's testimony should have been excluded because it was profile evidence used as substantive evidence of defendant's guilt. We disagree. Although drug profile testimony is inadmissible as substantive evidence of a defendant's guilt, *People v Hubbard*, 209

Mich App 234; 530 NW2d 130 (1995), in the case at bar Officer Bachman's testimony was being offered to explain, with respect to the issue of the intent to deliver, the significance of the separately packaged bags of cocaine and money seized. Thus, Officer Bachman's testimony was admissible. *Ray, supra*.

Defendant further argues that because the jury array from which his jury was selected did not contain any black members[1], he was denied an impartial jury drawn from a fair cross-section of the Jackson community. We disagree. In order "[t]o establish a prima facie violation of the right to a jury drawn from a representative cross-section of the community, a defendant must show (1) that the allegedly excluded group is a 'distinctive' group in the community, (2) that the group is unfairly and unreasonably underrepresented in venires from which juries are drawn, and (3) the underrepresentation is due to systematic exclusion of the group in the jury selection process." *People v Kelly*, 147 Mich App 806, 815; 384 NW2d 49, vacated on other grounds 428 Mich 867; 400 NW2d 605 (1985) (citing *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979)). Although blacks qualify as a distinctive group in the Jackson community, *Kelly, supra*, there was no evidence in the trial record which could establish that the absence of potential black jurors was unfairly and unreasonably unrepresentative of the composition of the community[2] or that their absence was the result of a systematic exclusion of blacks from the jury selection process. Thus, because there is no record support for the latter two requirements of a prima facie case, defendant's claim amounts to only a conclusory allegation for which we can grant no relief.

Alternatively, defendant argues that the jury selection process violated his equal protection rights under the Fourteenth Amendment. However, there is again no record evidence to support defendant's claim. As previously indicated while black citizens are members of a distinctive class, *Jefferson v Morgan*, 962 F2d 1185, 1189, cert den 506 US 905; 113 S Ct 297; 121 L Ed 2d 221 (1992), there was no evidence presented at trial to establish either that the selection process was susceptible to abuse or that the underrepresentation occurred over a significant period of time as required. *Id*. Thus, because defendant's argument lacks factual support, reversal is not warranted.

Next defendant argues that his trial counsel's failure to file a written challenge to the jury array before the jury was sworn constituted deficient representation which deprived him of his right to effective assistance of counsel. We disagree. Although this Court has recently declined to adopt a rule that "Sixth Amendment fair-cross section challenges must be submitted to the trial court in writing." *People v Hubbard*, 217 Mich App 459; 552 NW2d 593 (1996), this Court does require that the challenge be made before the jury is sworn. *Id*. Thus, defense counsel's failure to follow established procedural rule by challenging the jury array in a timely manner does constitute deficient conduct. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). However, because the trial court did consider defendant's challenge to the jury array, there is nothing to suggest that defendant was prejudiced as a result of defense counsel's failure to challenge the jury array in a timely manner. Therefore, we find that defendant was not denied effective assistance of counsel.

Defendant also asserts that he was denied a fair trial because he was allegedly seen in shackles by one of the jurors. We disagree. Where a jury inadvertently sees a shackled defendant, it is

incumbent on defendant to make a showing of prejudice before reversal is required. *People v Robinson*, 172 Mich App 650; 432 NW2d 390(1989). Defendant failed to present any evidence to establish that any of the jurors actually saw defendant in the handcuffs or that they were thereby prejudiced. Reversal is therefore, not warranted. *Robinson, supra*.

Lastly, defendant argues that he is entitled to be resentenced because the trial court was improperly assessed points under OV 8 where there was no evidence that defendant's conduct was part of a pattern of criminal activity from which he earned a substantial portion of his income. We disagree. There are two alternative prongs of OV 8: (1) the criminal activities prong and (2) the organized criminal group prong. Michigan Sentencing Guidelines OV 8. The trial court's statement that the evidence at trial was sufficient to suggest "some type of organized criminal activity," indicates that the trial court assessed defendant points under OV 8 pursuant to the organized criminal group prong. Because the trial court did not assess points pursuant to the criminal activities prong, the trial court was not obligated to evaluate whether the offense in question was part of a pattern of criminal activity over a period of time from which defendant derived a substantial portion of his income. *People v Ayers*, 213 Mich App 708; 540 NW2d 791 (1995). Furthermore, in light of the substantial amount of drugs and money recovered from the scene and defendant's connection to Geraldine Maxwell, a known operator of various crack houses, there was sufficient evidence to support the trial court's assessment of points pursuant to the organized criminal activities prong of OV 8.

Affirmed in part and remanded. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ John D. Payant

[1] Although defendant states that there was one black person in the jury venire, the trial court stated:

> You're making a challenge of the whole--this isn't really a Batson challenge as a peremptory, this is just a challenge that we brought in a panel that I guess I can state for the record it did not appear to me that we had any African-Americans. We had one gentleman that appeared to me that to me [sic] to be Hispanic.

[2] On appeal, defendant attempts to rectify this lack of evidence by asserting that of the 149,756 residents of Jackson County, 11,822 or 7.89% are black. However, because we are limited on appeal to reviewing only the lower court record, MCR 7.210(A)(1), we can not consider this newly presented information.