STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

,
FEDRICO GERNALDO SIMON

Defendant-Appellant.

UNPUBLISHED
July 18, 1997

No. 195600
Genesee Circuit Court
LC Nos. 96-053459-FC,
96-534660-FC,
96-534661-FC

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

A jury convicted defendant of three counts of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to twenty to forty years' imprisonment on two of the armed robbery counts and ten to forty years' imprisonment on the third armed robbery count, to be served concurrently. Defendant appeals as of right and we affirm.[1]

On the night of December 12, 1995, three business establishments were robbed in the Flint area. A witness from each of the businesses robbed identified defendant in court as the robber. Another witness, Teresa Smith, testified that she was with defendant that evening and corroborated the testimony given by the other witnesses. Smith, who had been previously convicted of retail fraud and was awaiting sentence, was informed that her probation officer would be notified that she cooperated.

Defendant first argues that the trial court erred in allowing him to proceed pro se because it failed to comply with the requirements set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D) and (E). Specifically, defendant contends that the trial court failed to inform him of the maximum penalty for the crimes he committed, he was not adequately informed of the dangers of self-representation, and the court did not confirm that his waiver was made knowingly, intelligently, and voluntarily. We disagree.

In *Anderson*, the Michigan Supreme Court set forth the following requirements that should be met before a defendant's request to proceed pro se is granted. The request must be unequivocal. *Id*. at 367. Once the defendant has unequivocally declared his desire to proceed pro se, the trial court must determine whether defendant is asserting his right knowingly, intelligently and voluntarily. *Id*. at 368. This requirement means the trial court must make the "defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id*. Finally, the trial court must determine that the court will not be disrupted, unduly inconvenienced and burdened by the defendant proceeding pro se. *Id*.

In *People v Dennany*, 445 Mich 412; 519 NW2d 128 (1994), the Supreme Court held that when a defendant requests to represent himself, the trial court must comply with the requirements set forth in *Anderson*, as well as with MCR 6.005(D) and (E). *Id*. at 438-439. MCR 6.005 (D) and (E) require that:

> (D) Appointment or Waiver of a Lawyer. If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.
>
> (E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
>
> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

In *People v Adkins*, 452 Mich 702, 730-731; 551 NW2d 108 (1996), the Supreme Court held that substantial compliance with the *Anderson* requirements and MCR 6.005 was adequate. In *Adkins*, the trial court made indirect references to the court rule and did not specifically address the

charged offense and the range of possible punishment. *Id*. at 731. Nonetheless, the Court held that the trial court did substantially comply with the requirements because it conveyed the substance of both *Anderson* and the court rule to the defendant. *Id*.

Based upon the lower court record, while the trial court did not strictly comply with the *Anderson* requirements and the court rule, it did substantially comply because it conveyed the substance of both to defendant, as stated in *Adkins*. At his arraignment, the trial court specifically questioned defendant about proceeding pro se. After the prosecutor read the information, the trial court asked defendant specifically if he understood that the maximum prison sentence was life with no possibility of probation. Defendant acknowledged his understanding. Thus, we find that the trial court did inform defendant of the maximum possible penalty.

We also find that the trial court adequately informed defendant of the dangers of self-representation, and that his waiver was made knowingly, intelligently, and voluntarily. The trial court informed defendant that there were dangers associated with self-representation and that the matter before it was major. It encouraged defendant to allow his appointed counsel to represent him. However, defendant expressed to the court that he had been attending college, he had been studying law for eight years, was a "jailhouse lawyer," and had initiated numerous cases in court. He also informed the court that he was more than competent to represent himself adequately. Therefore, we find that the record establishes that defendant knew what he was doing, and made his choice with his eyes open. *Anderson*, *supra* at 368.

Next, defendant argues that the trial court erred by refusing to reread testimony requested by the jury. We note at the outset that defendant failed to object to the trial court's instruction to the jury. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). We find, however, that the trial court did not refuse to have the testimony reread to the jury. Rather, it asked the jury to narrow their request. Therefore, we find no abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

Defendant also argues that the prosecutor improperly used its peremptory challenge to excuse one of two African-American jurors and that the trial court erred because it accepted the prosecution's reason. We disagree.

We review a trial court's ruling regarding a *Batson*[2] challenge for an abuse of discretion. *People v Hart (After Remand)*, 170 Mich App 111, 112; 427 NW2d 557 (1988). In *People v Barker*, 179 Mich App 702, 705-706; 446 NW2d 549 (1989), aff'd 437 Mich 1611 (1991), this Court addressed the rule from *Batson* that a prosecutor may not use peremptory challenges to strike blacks from a jury where the defendant is also black:

> [T]he burden initially falls upon the defendant to make out a prima facie case of purposeful discrimination. Once the defendant makes that showing, the burden shifts to the state to explain adequately the racial exclusion. Moreover, the state cannot meet its burden on the general assertion that its officials did not discriminate, but must show that

permissible racially neutral selection criteria and procedures were used in selecting the jury.

> To establish a prima facie case, a defendant must show that he is a member of a cognizable racial group, that the prosecutor exercised peremptory challenges to remove from the venire members of the defendant's race, and that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. In deciding whether the defendant has made the requisite showing, the trial court must consider all relevant circumstances, including whether there is a pattern of strikes against black jurors and the questions and statements made by the prosecutor during voir dire and in exercising his challenges, all of which may support or refute an inference of discriminatory purpose.
>
> If a defendant makes a prima facie showing of discriminatory purpose, the burden shifts to the state to come forth with a neutral explanation for challenging black jurors, though that burden does not rise to the level of requiring the prosecutor to justify the exercise of a challenge for cause. However, the prosecutor may not rebut the defendant's prima facie case of discrimination by merely stating that the jurors were challenged on the basis of the assumption, or the prosecutor's intuition, that the jurors would be partial to the defendant because of their shared race. Similarly, the prosecutor's mere statements of good faith or denial of a discriminatory motive are insufficient to rebut the defendant's showing of discrimination. Rather, the prosecutor must articulate a neutral explanation related to the particular case to be tried. The trial court must then determine if the defendant has established purposeful discrimination. Finally, the trial court's findings should be given great deference. [Citations omitted.]

Turning to the case at bar, we find that defendant did not make a prima facie showing of a discriminatory purpose. Defendant is an African-American male, and the prosecutor exercised a peremptory challenge to remove an African-American as a juror. However, the reason the prosecutor struck the potential juror was because he had a previous shoplifting conviction which concerned the prosecutor. Furthermore, the prosecutor did not strike the other African-American juror. Moreover, the trial court conducted voir dire, and noted that it questioned the potential juror regarding his involvement with the legal system because his questionnaire reflected that he had a shoplifting conviction. As well, the court noted on the record that the prosecutor did not exercise his peremptory challenge until after the court had questioned the juror about the prior conviction. We find that the trial court did not abuse its discretion in finding the prosecutor's challenge racially neutral.

Finally, defendant argues that the prosecutor and a witness, Teresa Smith, misled the jury regarding a plea bargain agreement made in exchange for her testimony. While defendant did not object to Smith's testimony, we review this issue since defendant contends that his due process rights were violated. *People v Johnson*, 215 Mich App 658, 669; 547 NW2d 65 (1996).

In *People v Atkins*, 397 Mich 163; 243 NW2d 292 (1976), the defendant appealed his conviction after a petition for order of nolle prosequi was granted on the charges that were pending

against the prosecution's informant witness. During the trial, the evidence revealed that the witness had a criminal history and that there were possible motives for lying on the stand. *Id*. at 168. The defense counsel elicited contradictions in the witness' story. *Id*. It was also revealed that the witness had charges pending against him, and that he had offered to become an informant in exchange for a dismissal of the charges. *Id*. However, a sheriff's deputy testified that no agreement had been made. *Id.* On appeal, the defendant argued that, even if there was no plea bargain agreement in existence at the time of trial, the witness and the prosecution knew there would be one shortly thereafter, and that this information had to be disclosed to the jury. *Id*. at 172-173. The Michigan Supreme Court disagreed, observing that there was no evidence that such an agreement existed at trial. *Id*. The Court explained that the prosecution and the trial judge had a duty to disclose such a fact to the jury if the defense counsel requested it and it existed. *Id*. at 173. Furthermore, the same requirement existed if reasonable expectations of leniency had been given in exchange for the testimony. *Id*. Moreover, the prosecution had a duty to correct a witness who testified that he had been promised no consideration in exchange for his testimony but the prosecution knew this statement to be false. *Id*. at 173-174.

Defendant has failed to provide evidence that an agreement existed at trial or that Smith had a reasonable expectation of leniency because of something offered to her. Moreover, based upon the testimony, neither Smith nor the officer in charge of the case misled the jury. Smith never denied that she was to be sentenced on a probation violation based upon her retail fraud conviction, and both Smith and the officer testified that she was told her probation officer would be informed that she had cooperated in the investigation. It was for the jury to weigh Smith's credibility. *People v Goss*, 200 Mich App 9, 18-19; 503 NW2d 682 (1993), aff'd 446 Mich 587 (1994). Furthermore, as the Court in *Atkins* explained, informants do have expectations of consideration for their cooperation and jurors are well aware of these "facts of life." *Id*. at 173. However, Smith's personal expectation of leniency does not equate to a reasonable expectation of leniency being offered to her in exchange for her testimony. As well, defendant extensively cross-examined Smith, and was not prohibited from placing any facts before the jury that were relevant to her credibility. See *People v Mumford*, 183 Mich App 149, 153; 455 NW2d 51 (1990). Finally, while defendant alleges that the prosecution did not have sufficient evidence without Smith's testimony, three other witnesses identified defendant in open court as the armed robber. Thus, we find no error.

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.

[1] We note that the prosecution filed no appellate papers and otherwise did not appear to oppose this appeal.

[2] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).