

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMY LARTHIDGE,

Defendant-Appellant.

UNPUBLISHED

October 8, 1999

No. 201582

Ingham Circuit Court

LC No. 96-070739 FC

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of bank robbery, MCL 750.531; MSA 28.799, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Additionally, he was convicted of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), following a bench trial. The trial court sentenced defendant to thirty to fifty years' imprisonment for the bank robbery conviction, three to five years' imprisonment for the felon in possession conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that he was denied his constitutional rights of equal protection and a fair jury trial as a result of African-Americans being excluded from the Ingham Circuit Court jury pool. We review questions of systematic exclusion of minorities from venires de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). While a criminal defendant is entitled to an impartial jury drawn from a fair cross-section of the community, US Const, Am VI, he is not entitled to a petit jury that exactly mirrors the community. *Hubbard, supra*. To establish a prima facie violation of the fair cross-section requirement, a defendant must show: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997), quoting *Hubbard, supra* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

In this case, defendant asserted that, out of the fifty-two potential jurors brought in for jury selection, there were no African-Americans on the array. However, defendant presented no evidence

with respect to the method used by the Ingham Circuit Court for selecting potential jurors nor with respect to the percentages of minorities selected for jury arrays. Defendant merely cited the 1990 United States Census figures demonstrating that “Ingham County had 27,837 African-Americans in 1990 with 21,905 residing in Lansing.” “Merely showing one case of alleged underrepresentation does not rise to a ‘general’ underrepresentation that is required for establishing a prima facie case” of systematic exclusion. *Howard, supra*. Moreover, defendant failed to provide any evidence that his claim of the exclusion of African-Americans from the jury array resulted from some circumstance inherent in the particular jury selection process used by the Ingham Circuit Court. See *Hubbard, supra* at 481.

Defendant next argues that the trial court abused its discretion in allowing into evidence his prior conviction for unauthorized driving away of an automobile (UDAA), introduced through the impeachment of his testimony during cross-examination. However, we conclude that it is unnecessary to determine whether the trial court improperly admitted defendant’s prior UDAA conviction because we conclude that any possible error in admitting the evidence does not warrant reversal under the test for preserved, nonconstitutional error of *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999).¹ Even assuming that the admission of the prior conviction was improperly admitted, it does not affirmatively appear, after an examination of the entire record, that “it is more probable than not that the error was outcome determinative.” *Id.* at 496.

Here, even in the absence of the prior conviction evidence, the evidence against defendant was substantial. Within minutes of the robbery, defendant was seen inside a vehicle located within a very short distance from the bank, making movements suggesting that he was changing clothes and stuffing things in a bag. When confronted by Officer McManus, defendant got out of the vehicle, reached back inside to retrieve money that was later found to be stolen from the bank, and fled. A subsequent search of the vehicle from which defendant ran revealed a bag containing clothing, a pistol, a mask, gloves, and additional money that had been stolen from the bank. Further, defendant’s version of the events appears incredible and highly improbable in light of the testimony of those involved in the robbery and the subsequent chase and arrest of defendant. Defendant’s account essentially consisted of the bank robbers asking him if he had jumper cables and then defendant proceeding to help them try to start their car, before attempting to run off with some of the money that he saw in the car. Defendant’s version is contrary to the testimony of Officer McManus. It is highly improbable that there would have been sufficient time, from when the robbery was reported to when Officer McManus saw the vehicle with the robbers, for the robbers to ask a pedestrian if he had jumper cables and for the pedestrian to have tried to help. It is also unlikely that a pedestrian with no car in the area would be viewed by the robbers as being much help in trying to start a car. Moreover, it is unlikely that an “innocent bystander” to the robbery would attempt to run off with cash essentially in known view of a police officer.

Defendant next argues that the prosecution improperly put defendant’s post-*Miranda*² silence before the jury, thus depriving him of his right to due process. We disagree. Defendant raised this issue in a motion for mistrial before the trial court. A trial court’s ruling on a motion for a mistrial will not be reversed on appeal absent an abuse of discretion. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). On this record, we find no abuse of discretion.

Defendant, during his direct examination, described the circumstances surrounding his involvement with money taken from a bank, a vehicle in which some of the money was found, and his flight from police officers. The prosecutor then cross-examined him regarding whether he had provided this information to a police detective after his arrest. We conclude that the prosecution made a proper inquiry. Generally, the prosecutor cannot comment on a defendant's silence or place the matter before the jury. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). The record fails to demonstrate that the challenged questioning by the prosecution and defendant's commentary focused on the exercise of defendant's right to remain silent. There is no indication that the prosecution attempted to elicit, even by inference, an invocation by defendant of his right to remain silent. *Id.* In responding to the prosecutor's inquiry regarding the conversation between defendant and the police detective, defendant could have responded without reference to speaking to an attorney. *Id.* Further, it appears that defendant's testimony regarding "talk[ing] to my lawyer" may have been a misstatement and that he actually may have been referring to a police officer, Officer Brian McManus.

Defendant next argues that the prosecution, during closing argument, improperly introduced defendant's flight from the police when confronted on the day of the bank robbery, and that defendant was prejudiced because the jury was allowed to consider an implication of guilt by flight. Unpreserved claims of error in a prosecutor's closing argument are not subject to review unless a curative instruction could not have eliminated the prejudicial effects of the remarks or where failure to review the issue would result in a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997). In the present case, the trial court's instruction to the jury regarding consideration of evidence of flight was a proper and sufficient curative instruction that alleviated any prejudicial effect that may have been caused by the prosecution's statements regarding defendant's flight from the police. Moreover, the prosecution's statements during closing argument were neither misstatements of law or fact nor otherwise improper. See, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

Defendant's final argument is that the prosecution improperly stated to the jury during closing argument that the perpetrators of the bank robbery wore gloves and that when criminals wear gloves, no fingerprints will be found. Defendant reasons that this statement improperly implied that the absence of defendant's fingerprints was because he was wearing gloves, not because he was not present at the crime. Again, unpreserved claims of error in a prosecutor's closing arguments are not subject to review unless a curative instruction could not have eliminated the prejudicial effects of the remarks or where failure to review the issue would result in a miscarriage of justice. *Messenger, supra*. Again, the trial court provided an appropriate curative instruction to the jury regarding statements made by counsel during the trial. Because manifest injustice would not result from our failure to further review this unpreserved issue, we decline to do so. *Id.*

We affirm.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck

¹ Although defendant frames the issue as involving a deprivation of constitutionally protected due process, he makes no meaningful argument that the alleged error was anything other than a nonconstitutional error in the admission of evidence under MRE 609.

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).