

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUFUS JOHNSON,

Defendant-Appellant.

UNPUBLISHED
December 18, 2003

No. 243125
Saginaw Circuit Court
LC No. 01-020487-FC

Before: Talbot, P.J., and Owens and Hood, JJ.

PER CURIAM.

Defendant was charged with manufacturing or possession with intent to manufacture or deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i), maintaining a drug house, MCL 333.7405(1)(d), and conspiracy to manufacture or possess with intent to manufacture or deliver 650 grams or more of cocaine, MCL 750.157a. Following a jury trial, defendant was convicted of the lesser offense of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), and maintaining a drug house, MCL 333.7405(1)(d). He was sentenced as a third habitual offender, MCL 769.11, to a term of twenty to sixty years' imprisonment for the possession conviction, to be served concurrently with a term of two to four years' imprisonment for the drug house conviction. Defendant appeals as of right. We affirm.

I. Defendant's Right to a Speedy Trial

Defendant first asserts that his conviction must be reversed because of a violation of his right to a speedy trial. The record establishes that defendant's counsel orally raised the issue at a hearing that was convened for a different matter. The trial court directed defendant's counsel to file a formal motion to provide notice to the prosecutor and the co-defendant.¹ However, defendant did not file any formal motion and the case subsequently proceeded to trial. Because no formal motion for a speedy trial was made and no record was established, *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999), we review this issue for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

¹ The co-defendant in this case was defendant's niece. She failed to appear on the day of trial and defendant was tried separately.

The right to a speedy trial is guaranteed to criminal defendants by the United States and Michigan constitutions, as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; *Cain, supra*. A delay of six months is necessary to trigger further investigation when a defendant raises a speedy trial issue. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). The defendant must prove prejudice, or that he was actually harmed, when the delay is less than eighteen months. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972). In determining whether a defendant has been denied a speedy trial, this Court must balance the following four factors: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his speedy trial right, and (4) prejudice against the defendant resulting from the delay. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000).

There was a thirteen-month delay between defendant's arrest and the commencement of his trial. This delay was more than the six-month period of delay that is generally required to trigger judicial review of a speedy trial claim, *Daniel, supra*, and was less than eighteen months, thus requiring defendant to show prejudice. *Collins, supra*. Much of the delay was due to defendant's unsuccessful efforts to have his trial bifurcated from that of a co-defendant, and to be represented by counsel who the court determined had a clear conflict of interest. A delay of one day was attributable to the loss of defendant's clothes in the jail. Although delays inherent in the court system, e.g., docket congestion, are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial. *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997). Defendant's failure to pursue his claim after he was directed by the trial court to file a formal motion weighs against his subsequent claim that he was denied the right. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). Further, defendant has failed to make a particularized showing of any prejudice he suffered from the delay. In light of the above, we find no violation of defendant's right to a speedy trial.

II. Defendant's *Batson* Challenge

Defendant next argues that he was denied his Equal Protection rights to a fair and impartial trial when the prosecutor improperly used a peremptory challenge to remove one African-American juror from the prospective jury panel.

The use of a peremptory challenge to strike a potential juror solely because of that juror's race violates the Equal Protection Clause of the Fourteenth Amendment, US Const, Am XIV. *Batson v Kentucky*, 476 US 79, 84; 106 S Ct 1712; 90 L Ed 2d 69 (1986). In *Batson*, the United States Supreme Court established a three-part test for considering claims that the prosecution improperly exercised peremptory challenges to exclude minorities from a jury panel. Under this test, the defendant must first make a prima facie showing that the prosecution exercised the challenge on the basis of race. *Id.* at 476 US 96-97. If the defendant meets that burden, the prosecution must offer a racially neutral reason for the challenge to the juror. *Id.* at 97-98. Finally, the trial court must determine whether, in light of what the parties have submitted, the defendant has shown purposeful discrimination. *Id.* at 98. See also *People v Bell*, ___ Mich App ___; ___ NW2d ___ (Docket No. 233234, decided 12/9/2003), slip op p 3.

After the appeal in this case was filed, the United States Supreme Court decided *Miller-El v Cockrell*, 537 US 322; 123 S Ct 1029; 154 L Ed 2d 931 (2003), which emphasized that a *Batson* violation can be established by extrinsic evidence "demonstrating that, despite the neutral

explanation of the prosecution, the peremptory strikes in the final analysis were race based.” *Id.* at 537 US 340. The Court noted that this showing can be made with evidence used to make a prima facie showing of discrimination. *Id.* The Court in *Miller-El* heightened the requirements for a trial court’s acceptance, in the third prong of the test, of a prosecutor’s assertion of a racially neutral reason for the challenge. The Court gave the following directions to trial courts on how to evaluate the prosecutor’s proffered justifications for challenges:

In that instance the issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. [*Miller-El, supra* at 537 US 339.]

This Court reviews a trial court’s *Batson* ruling for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). An appellate court is to give great deference to the trial court’s findings on this issue because they turn in large part on credibility. *Harville v State Plumbing and Heating Inc*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996).

In this case, each of the parties had several peremptory challenges remaining at the time they expressed satisfaction with the selection of the prospective jurors. The trial court dismissed the prospective jurors who had not been selected to serve on the jury. However, before the selected jurors were sworn in, defendant’s counsel requested a side bench conference with the judge. The judge gave the selected jurors a recess, and defendant raised a *Batson* challenge. Defendant stated that the entire pool of prospective jurors called to serve included only four African-Americans. Of these four, only two were called to the jury box. One was excused for cause and the prosecutor used a peremptory challenge against the other. Defendant’s counsel claimed that the prosecutor’s use of a peremptory challenge against the only remaining African-American prospective juror who was called to the jury box raised the question of racial discrimination in the absence of an explanation by the prosecutor, as follows:

THE COURT: Is there something for the record?

DEFENDANT’S COUNSEL: Your Honor, yes. I wanted to place something on the record on behalf of [defendant], your Honor, . . . there were only, I believe, four identifiable African-Americans in the entire group. One was [prospective juror #74], who was excused for cause because of his felony conviction and responses in regard to questioning, and then [prospective juror #85], who was . . . excused for a peremptory challenge by the prosecution and I would raise an objection on behalf of [defendant], Your Honor, under *Batson*

In the circumstances, Your Honor, I believe that the use of the peremptory [challenge] *in the absence of an explanation by [the prosecutor]* raises the issue of racial discrimination in violation of the 14th Amendment, so it’s a *Batson* motion.

The prosecutor responded by stating the following:

THE PROSECUTOR: And in response, Judge . . . [defendant's counsel] used 10 of 12 challenges. I used nine of 12 challenges, so he didn't exhaust his challenges. If he felt that there were other people more qualified than the 14 that we have --

Looking around the courtroom, although there's no way of identifying it now, there were other African-Americans that were in the courtroom. There could have been an impaneling of the rest of those folks.

The specific reason for my letting [prospective juror #85] go, there's two. During questioning by myself, [prospective juror #85] would not look at me, which to me is important. If a juror isn't willing to make eye contact I have a feeling as a prosecutor who's been doing this for 26 years that there's something wrong.

I would also note for the record that [prospective juror #85] has a brother or a husband by the name of . . . Who was convicted in 1995 of armed robbery and carrying a concealed weapon in the 10th Judicial Circuit Court for the County of Saginaw. I am very concerned when a family member has a husband or brother in prison. His residence address is identical to her residence address that I got from her driver's license records, so those are my reasons, Judge, for causing her to be removed peremptorily, even though I disagree that there is even a basis under *Batson* to bring that kind of a motion before the Court. [Emphasis added.]

The record indicates that the trial court did not perform the third prong of the *Batson* test. While the court's determination on a *Batson* challenge was required, we conclude that a remand for the court's determination is unnecessary for several reasons. First, the fact that defendant's counsel conferred with the court in a bench conference, the language of defendant's counsel's subsequent argument on the record, and the court's immediate request for the jury to be brought back to the court room after the record was made indicate an understanding by the court and the parties that defendant was merely requesting the prosecutor to articulate on the record the reasons for his use of a peremptory challenge against the prospective juror. Second, defendant's counsel appeared to be satisfied with the reasons proffered by the prosecutor. Third, defendant's counsel did not object to the prosecutor's assertion that there were other African-American prospective jurors in the pool who could have been impaneled.² Fourth, and contrary to defendant's assertion on appeal, prospective juror #85 had not been challenged immediately upon being impaneled. The record established that she was among the first group of prospective jurors to be called to the jury box and she sat through the entire questioning by the trial court and the parties until she became part of the first group of prospective jurors to be excused under the prosecutor's peremptory challenges. Fifth, the *Batson* challenge was raised before the selected

² On appeal, defendant expands the record by raising a cursory claim that the Saginaw courts followed a pattern of systematic exclusion of African-American from the jury by failing to include as venire persons a proportionate percentage of the African-American population of Saginaw. See, generally, *Miller-El, supra*. Defendant provides no statistical or any other evidence whatsoever to support this claim. Therefore, we do not address it.

jurors were sworn in and after the court dismissed the prospective jurors who remained in the pool. Defendant's counsel did not insist that the court correct the matter before the selected jurors were sworn in. Finally, the fact that the prosecutor used one peremptory challenge to excuse an African-American from the jury and the mere fact that no member of the defendant's race ended up sitting on the jury are insufficient to make a prima facie showing of discrimination. *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). It is well settled that the party opposing the strike must make a prima facie showing of discrimination before the burden shifts to the other party to provide a race-neutral rationale for striking the juror. *Bell, supra* at slip op p 4. For the above reasons, we conclude that defendant did not establish that a prima facie case existed to satisfy the first prong of the *Batson* test. Accordingly, defendant's claim fails.

III. Directed Verdict

Defendant finally asserts the trial court erred in denying his motion for a directed verdict of acquittal regarding the charges of conspiracy and possession with intent to deliver 650 grams or more of cocaine.

This Court reviews the evidence presented by the prosecutor in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Defendant first argues that the prosecutor failed to establish that defendant possessed 650 grams or more of cocaine. Specifically, defendant relies on this Court's decision in *People v Hunter*, 201 Mich App 671; 506 NW2d 611 (1993), and asserts that the 340 grams of water and cocaine that was in a jar seized from his residence could not be used against him because it was not a "homogenous mixture." We agree.

In *Hunter*, a jar found during a search of the defendant's home was filled with 61.5 grams of water containing insoluble particles in a non-homogenous mixture. The water was evaporated, leaving 10.05 grams of cocaine. *Hunter, supra* at 674. *Hunter* concluded that the jar in that case contained "two separate items, water and particles of cocaine . . . rather than a mixture containing cocaine." *Id.* at 613. In reaching its conclusion, *Hunter* relied on the decision in *People v Barajas*, 198 Mich App 551, 556; 499 NW2d 396 (1993), which construed the word "mixture" for purposes of MCL 333.7403. *Barajas* held that a "mixture" can be established when a sample from anywhere in the mixture reasonably approximates in purity a sample taken elsewhere in the mixture and it should be reasonably difficult to separate the cocaine from the filler material. In *Barajas*, the mixture did not consist of a homogenous mass. Accordingly, *Barajas* held that the weight of the cocaine and the filler material could not be aggregated to punish a defendant more severely unless both are mixed together to form a homogenous or reasonably uniform mass. *Barajas, supra* at 556.

Similarly, in this case, the prosecutor failed to prove that the 340 grams of liquid contained in the jar was "a mixture containing cocaine" for purposes of MCL 333.7403. Instead, the prosecution's evidence indicated that the water was waste product of the cooking process and the estimated amount of cocaine in the form of a chunky material was about 15.5 grams. Therefore, we conclude that the trial court erred when it found that the record contained evidence sufficient to prove the elements of possession with intent to deliver 650 grams or more of cocaine and the court erred in submitting the charge to the jury.

However, “a defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury.” *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998). In this case, defendant was convicted of the lesser included offense of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine. The evidence established that about 670 grams of cocaine was seized from defendant’s residence. This included the 340 grams of liquid found in the jar at dispute. Of the 340 grams of liquid in the jar, only 15.5 grams consisted of cocaine, while 324.5 grams consisted of water. Subtracting the 324.5 grams of water from the total amount of 670 grams of cocaine, the amount of cocaine found in defendant’s home was 345.5 grams. This amount is sufficient for purposes of defendant’s conviction of the lesser included offense of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine that was properly submitted to the jury.

With respect to the conspiracy charge, defendant argues that the prosecutor failed to present evidence of an agreement with a co-conspirator. We disagree. MCL 750.157a provides that “[a]ny person who conspires together with one or more persons to commit an act prohibited by law . . . is guilty of the crime of conspiracy” Circumstantial evidence is sufficient to sustain a conviction. *Carines, supra* at 757. Contrary to defendant’s assertion on appeal, there was considerable circumstantial evidence of a conspiracy. Given that defendant and his adult niece occupied the same house, and cocaine, drug paraphernalia and sums of money were discovered throughout the house, a reasonable inference may be made that defendant and his niece agreed to deliver cocaine. Thus, the charge was properly submitted to the jury.

Defendant argues that the jury verdict was a product of compromise. We disagree. The conspiracy charge was properly submitted to the jury. With respect to the possession charge, our Supreme Court has held that reversal of a conviction *may* be permissible under certain conditions if a charge is improperly submitted to the jury and the defendant is acquitted on it or convicted of a lesser-included offense. *Graves, supra* at 488-489. Here, there is nothing to show any persuasive indicia of jury compromise. *Id.* We find no error mandating reversal.

Affirmed

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood