

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD ALLEN JACK,

Defendant-Appellant.

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UNPUBLISHED

April 21, 2005

No. 252982

Wayne Circuit Court

LC No. 03-009006-01

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, of assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to four years' probation on the felonious assault conviction, and a two-year term of imprisonment on the felony firearm conviction. We affirm.

The charges against defendant stem from an incident in the City of Detroit at 5:00 a.m. on June 11, 2003. Detroit police officer Eric Smith and his partner had received a report of a missing twelve-year-old boy. The police were given information that the boy might be in the vicinity of a vacant house on Shields Street, known to the officers by previous experience to be the scene of drug activity. Officer Smith approached the house and went onto the front porch. When he peered through a front window, Officer Smith saw a shoebox containing small Ziploc bags of suspected marijuana. Hearing voices inside, he knocked on the door, identified himself as a police officer, and knocked again. A towel covering the window on the front door started to move, and a grinning face appeared at the window. An object then appeared in the window and was tapped against the pane twice; Officer Smith, who had his flashlight pointed at the window, realized the object was a gun that was aimed directly at him. He ducked, ran off the porch and across the street, and yelled "gun" as a warning to his partner. Backup assistance was called and other police officers arrived at the scene. A total of six people, two females and four males, complied with the officers' orders to exit the house. At the scene, and again at trial, Officer Smith positively identified defendant as the person who looked out the window and pointed the gun at him.<sup>1</sup> Based on information received by the police, a search of the premises revealed

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<sup>1</sup> The other suspects were cited for entering a vacant dwelling without the owner's permission.

marijuana and an unloaded blue steel automatic handgun in the attic area of the house. No identifiable fingerprints were taken from the gun after testing, and no ammunition was found on the premises.

## I

Defendant initially contends on appeal that he was deprived of a fair trial by several instances of prosecutorial misconduct. First, defendant protests the prosecutor's characterization of the site of the assault as a "vacant drug house." Defendant further argues that during closing argument, the prosecutor inaccurately described Officer Smith's rendition of the sound he heard when the gun touched the window pane as a "click, click, click," rather than a tapping sound. Defendant argues that "[t]here is certainly a world of difference between click, click and a tap when a gun is concerned. To suggest that Officer Smith heard clicking is to suggest that [defendant] was loading or ratcheting a handgun." Defendant notes that when the weapon was recovered, it was not loaded, and no ammunition was found in the house. Finally, defendant maintains that the prosecutor again argued facts not in evidence and appealed to the jury's sympathy by using scare tactics when she stated during closing argument that "if I point a loaded gun at you it's at the very least going to scare you." Defendant contends that the cumulative effect of the prosecutor's comments was error requiring reversal. We disagree.

A review of the record indicates that defense counsel objected only to the prosecutor's reference to a "vacant drug house," and that no objections were raised at trial concerning the other allegedly improper comments by the prosecutor. We review de novo preserved claims of prosecutorial misconduct to determine whether the challenged remarks denied defendant a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error [that affected his substantial rights]." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

Prosecutorial misconduct issues are decided on a case-by-case basis. *Schutte, supra* at 721; *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be examined as a whole, read in context, and evaluated in light of defense arguments and the relationship they bear to the evidence. *Id.* Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are given great latitude to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *Id.*; *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Here, defendant's sole preserved claim of prosecutorial misconduct is without discernible merit. In light of the testimony of police witnesses that they were looking for a missing boy and had information that the boy might be at or near the vacant house, which was known to police and in the neighborhood as a "dope house" or a "bad spot," the trial court properly overruled defendant's objection to the "drug house" reference, which was derived from the facts in evidence. *Schutte, supra.*

With regard to defendant's forfeited claims of error, we conclude that the prosecutor's remarks do not constitute plain error affecting defendant's substantial rights. *Schutte, supra*; *Carines, supra*. The record indicates that the prosecutor referred to both "clicks" and "taps" in her argument, concluding with a "tapping" reference, consistent with the testimony of Officer Smith. In any event, under the circumstances, the distinction between a "tapping" sound and a "clicking" sound is innocuous and did not result in manifest injustice to defendant, particularly where, as here, even "an unloaded gun is a dangerous weapon for purposes of the felonious assault statute, and the prosecutor need not present proof of operability as an element of a prima facie case in a felonious assault prosecution." *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998). For the same reason, the prosecutor's remark about the fright experienced when confronted by a loaded gun did not constitute plain error affecting defendant's substantial rights. As the prosecutor further noted during the course of her argument, one of the elements of felonious assault is placing the victim in reasonable apprehension of an immediate battery, and "[s]taring down the barrel of a gun is going to . . . scare anybody." Had defendant raised the issue at trial, any prejudice caused by the challenged remark could have been cured by a timely instruction. *Schutte, supra*. See also *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Because we conclude that no actual errors occurred in this regard, defendant's claim that the cumulative effect of the numerous instances of prosecutorial misconduct constitutes error requiring reversal is without merit. See *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999).

## II

Defendant next contends that he was denied his constitutional right to an impartial jury drawn from a fair cross-section of the community because African-Americans were systematically excluded from his jury pool.

A challenge concerning the systemic exclusion of minorities in jury venires presents a question of law, which this Court reviews de novo. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003); *People v Williams*, 241 Mich App 519, 525; 616 NW2d 710 (2000). "A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996), citing *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975).

To determine whether a prima facie violation . . . of US Const, Am VI has occurred, the court must find the following: (1) the group alleged to be excluded must be a distinctive group in the community; (2) 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) the underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Williams, supra* at 525-526.]

See also *Hubbard, supra* at 473.

Defendant has satisfied the first prong of the test, because “African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes.” *Hubbard, supra* at 473. However, “[m]erely showing one case of alleged underrepresentation does not rise to a ‘general’ underrepresentation that is required for establishing a prima facie case.” *Williams, supra* at 526, quoting *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997). Defendant has failed to show that the representation of African-Americans in Wayne County jury venires is not fair and reasonable in relation to the number of such persons in the community. Defendant simply alleges that three of the twenty-four jurors brought into court for his trial appeared to be of African-American ancestry; he presents no evidence on jury venires in general. Moreover, defendant has failed to show that any alleged underrepresentation is attributable to systemic exclusion, but suggests that “this prong will be met if a hearing is held on remand.” “[A] ‘bald assertion’ that systematic exclusion must have occurred is insufficient to make out a claim of systematic exclusion.” *Id.* at 527, quoting *People v Flowers*, 222 Mich App 732, 736-737; 565 NW2d 12 (1997). Under the circumstances, defendant has failed to establish the second and third prongs of the requisite test, *Williams, supra*, and, therefore, he is not entitled to a new trial on this ground.

### III

Defendant next claims that the trial court “erred in allowing the prosecutor to refer to the house where the police were looking for a missing child as a drug house . . . .” In actuality, defendant challenges the trial court’s decision allowing such evidence to be admitted over defense counsel’s objection. He claims that the prosecutor’s reference to the vacant house as a “drug house” was more prejudicial than probative and was not relevant to the issues at trial, i.e., whether an assault occurred.

This Court reviews a trial court’s decision to admit or exclude evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). “‘Relevant evidence’” means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *People v Hawkins*, 245 Mich App 439, 449; 628 NW2d 105 (2001), quoting MRE 401 (emphasis in original). As a general rule, all relevant evidence is admissible, unless otherwise provided by law. *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004). However, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403; *Fletcher, supra* at 553.

In this case, the challenged evidence concerning the unsavory nature of the premises in question and its history as a “drug house” was relevant to show why the police went to look for a missing child at that address,<sup>2</sup> and to explain why someone inside the house would be armed and willing to point a gun at anyone who ventured too near the premises. Accordingly, such

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<sup>2</sup> Testimony indicated that the missing twelve-year-old boy had been “hanging out with the wrong crowd lately,” and was last seen headed in the direction of the house in question.

evidence was properly admissible under MRE 402, and defendant's claim in this regard is without merit.

#### IV

Defendant lastly claims that there was insufficient evidence to sustain his convictions or, alternatively, that the trial court erred in denying his motion for a directed verdict based on his argument that the verdict was against the great weight of the evidence. Defendant contends that the evidence was insufficient because "there was only one person who actually saw [defendant] with a weapon," there were no fingerprints on the gun, and "there was no testimony regarding the operability of the firearm." Defendant further argues that there were other suspects at the scene who could have committed the crime; in particular, one individual, who was found outside hiding in the bushes, had braids in his hair similar to defendant's hair. Defendant maintains that there are too many variables that point to his innocence, rather than guilt.

A challenge to the sufficiency of the evidence in a criminal trial is reviewed de novo to determine whether, in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002); *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack, supra* at 400. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id.*

The trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). A new trial based on the weight of the evidence should be granted "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). "This Court gives substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence." *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). Absent exceptional circumstances, issues of witness credibility are for the jury. *Id.* at 642. This Court will not interfere with the role of the trier of fact in determining the weight of the evidence or the credibility of witnesses. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), quoting *Lemmon, supra* at 647.

"The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). A complainant's testimony that the defendant pointed a gun at the complainant is sufficient evidence to support a conviction of felonious assault. *Id.* at 506. As the gist of the crime of assault, the prosecution need not establish that the firearm was loaded, or even operable. *Smith, supra*.

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *Avant, supra* at 505. See also MCL 750.227b; *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Possession of a

weapon may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989).

In this case, Officer Smith testified that, as he approached the vacant house looking for a missing child, he knocked on the door and announced his presence, illuminated the window with his flashlight, and saw defendant smile at him and then point a revolver directly at his face. Frightened and startled by defendant's action, Officer Smith jumped off the porch and yelled "gun" to his partner as a warning. Officer Smith positively identified defendant at the scene and again at trial as the individual who pointed the gun directly at him through the door window. Taken in the light most favorable to the prosecution, this evidence is sufficient to sustain defendant's convictions for felonious assault and felony firearm. *Avant, supra*. Defendant also has failed to establish any basis for finding that the verdict was against the great weight of the evidence. *Lemmon, supra*.

Affirmed.

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra