STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 8, 2005
v	No. 250585 Oakland Circuit Court
ERWIN ARNET SMITH, Defendant-Appellant.	LC No. 03-189890-FH

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant, Erwin Smith, was charged with the following offenses: possession with intent to deliver between 5 and 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii); possession of a firearm by a felon, MCL 750.224f; two counts of felony firearm, MCL 750.227b; possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); and habitual offender, third offense, MCL 769.13. On July 29, 2003, after a jury trial, defendant was convicted of the following: the lesser offense of possession of marijuana less than 5 kilograms, MCL 333.7403(2)(d); possession of a firearm by a felon, MCL 750.224f; and one count of felony firearm, MCL 750.227b. On August 12, 2003, defendant was sentenced to one and a half to ten years in prison.

I. FACTS

On April 13, 2003, Officers Robinson and Bryant of the Southfield Police Department were dispatched to Riverstone Apartments concerning a complaint that someone had been knocking on windows. The officers spotted Melissa Tait in the parking lot of the complex. The officers approached Tait to see if they could assist in any manner. Tait asked for a ride to her mother's residence; they said they could get her a taxi but could not drive her. Tait appeared intoxicated. The officers offered to accompany her to her apartment so that she could get more clothing. With Tait's permission, the officers entered the apartment.

When the officers entered the apartment, they saw defendant sitting naked on the couch with a tether around his ankle. Defendant casually, and in a non-threatening manner, walked towards the officers. Officer Robinson also observed three semiautomatic weapons underneath a glass table in the living room. Next to the guns was a large bag of marijuana. The officers handcuffed defendant to maintain control of him because of the presence of the guns. The officers then consulted with their superiors and secured the apartment while Sergeant Fitzgerald sought a search warrant. Upon doing a complete search, the officers found a shotgun, an

electronic scale, baggies with marijuana residue, men and women's clothing in the bedroom, as well as mail addressed to defendant at a different address. In addition, officers found a large bag containing a substantial quantity of marijuana packaged in individual baggies.

Prior to jury selection, defendant made several motions in limine. First, a motion was made to keep out any testimony regarding a gun that had been stolen in 1993; second, a motion was made to suppress testimony regarding a sifter (used for cocaine) that was found in the apartment. The trial court granted the motions and the prosecutor was instructed to advise the police officer witnesses that they were not to bring up either item. However, during direct examination, Sergeant Fitzgerald mentioned both items. Defense counsel, however, allowed the trial court to decide on a proper resolution of the matter. No motions for a mistrial were made.

At the conclusion of jury selection, defense counsel expressed satisfaction with the jury. However, several minutes later, defense counsel challenged the jury pool, objecting specifically to the prosecutor's peremptory challenge of the only African American juror. The trial court found the objection to be late; however, the prosecutor still provided a race neutral explanation, which the trial court found to be rational. The motion was denied and the court moved to opening statements.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective because counsel highlighted young black males during jury selection, failed to timely object to one of the prosecution's preemptive challenges, and failed to move for a mistrial when testimony that was excluded by motions in limine came into the trial. We disagree.

A. Standard of Review

A defendant must request a new trial or an evidentiary hearing before the trial court to preserve the issue of ineffective assistance of counsel. *People v Marji,* 180 Mich App 525, 533; 447 NW2d 835 (1989). Here, defendant did not request a hearing pursuant to *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973), and this Court's review is limited to errors apparent on the record. *People v Knapp,* 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

B. Analysis

Our Supreme Court has held that to find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994), *see also Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To demonstrate prejudice, the defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *Strickland, supra* at 694. In addition, decisions attributable to trial strategy will not support a finding of ineffective assistance of counsel. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

During *voir dire*, defense counsel attempted to determine whether any racial prejudices existed amongst the perspective jurors. In her attempt to do so, counsel referred to television shows, and how she believed that typically, 90-95% of the drug dealers depicted on those shows tend to be African American males. Immediately after getting confirmation from one juror who believed television shows do make such depictions, defense counsel then asked, "And would you agree that that is not a fair representation of reality, is that correct?" The juror answered "yes." Clearly, counsel's intent was to use an indirect route to determine whether any prejudices existed on the jury. The comparison of what jurors may be exposed to on television followed by a subsequent question distinguishing television from reality demonstrates that counsel was being strategic, knowing no one is likely to admit to being racist, but that she may be able to make that determination by asking discreet questions. As defendant acknowledges in his brief, "[t]here are many ways that an attorney can try to determine whether racial prejudice may be evident in a juror or an entire jury pool." Defense counsel attempted to make that determination by seeking to see if any of the jurors had any preconceived opinions about African American males. As stated previously, decisions attributable to trial strategy will not support a finding of ineffective assistance of counsel. *Dixon*, *supra* at 398.

In addition to using television shows, counsel attempted to discover prejudices by asking the perspective jurors about the armed guards in the courtroom. Once again, the questions were intended to elicit from the jurors any preconceived notions regarding the fact that the defendant was on trial. Counsel asked questions such as "[i]s there anyone here that assumes that they need protection from the defendant and that's why the armed guards are here?" A juror answered that she believed the guards are their to protect them (the jury) "from anyone." Again, as a matter of strategy, counsel asked questions to determine underlying prejudices jury members may have. None of the questions asked "fell below an objective standard of reasonableness" and much less "so prejudiced the defendant as to deprive him of a fair trial." *Pickens, supra* at 302-303.

Defendant argues that counsel's delayed objection to the prosecution's peremptory challenge removing the only African American juror in the pool amounts to ineffective assistance. After the juror had been dismissed, the defense counsel raised no objections. In fact, she even stated that "[the defense is] satisfied, your honor." After the case was called, defense counsel raised her objection to the peremptory challenge of Rosiar, the African American juror. Certainly, the delayed objection could have had severe consequences as the trial court could have simply overruled the objection for being delayed. However, in this case, the trial court noted that the objection was delayed when the judge stated "I wish you would have brought the motion at the time, because I wondered maybe if you were going to. I didn't know. . . . But, I do believe there's a rational reason other than race." Before the judge made this comment, the assistant prosecutor provided a lengthy, race-neutral explanation as to the use of his peremptory challenge. Arguably, had the objection been merely overruled, this delayed error could be viewed as a "serious mistake which could have altered the outcome of the case." However, the fact that the trial court, despite acknowledging that the objection was delayed, still listened to the rational, race-neutral explanation, then found the explanation to be sufficient as to overcome the objection, demonstrates that the delayed objection caused defendant no harm. Logically, had the objection been timely made, the result would have been no different. Therefore, defendant has failed to demonstrate that counsel was ineffective for failing to object in a more timely manner because counsel's objection was addressed.

Prior to jury selection, defense counsel brought several motions in limine. Counsel was successful on two of these motions, which included the exclusion of any testimony regarding a sifter used for cocaine which was found in the apartment and that one of the guns found had been stolen. During his testimony, Sergeant Fitzgerald mentioned both these items. With regard to the sifter, Fitzgerald was listing items he found in the apartment, and stated that "[t]here was on top of the entertainment center was a brown paper bag that had a little plastic sifter in it like." At that point, defense counsel made an immediate objection, the assistant prosecutor apologized, and then asked the officer a question leading him away from the entertainment center. As his testimony continued, Fitzgerald was identifying some items in a photograph, and stated that "I recognize it as the one I picked up with the serial number that's been scratched, attempted or . . . ." Once again, defense counsel made an immediate objection and then asked to approach.

During discussions outside the hearing of the jury, defense counsel voiced her concern about the testimony as to the pieces of evidence that should have been excluded by the motions in limine. The assistant prosecutor admitted he forgot to mention to the officers that they may not mention those items, that the mistake was inadvertent, and believed that the errors were harmless, at least with regard to the gun, because an objection came immediately after, and he coughed as to cut off the officer before he could state that the gun was stolen. The judge offered to provide an instruction and asked defense counsel if she had any suggestions. Counsel, clearly using trial strategy, stated "I agree that should you bring a motion or should I ask for a limine instruction that would do nothing but highlight that testimony. So I would leave it to your discretion as to how to handle that." As this court has repeatedly stated, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey,* 237 Mich App 74,76-77; 601 NW2d 887 (1999) (*citing People v Barnett,* 163 Mich App 331, 338; 414 NW2d 378 (1987)). There was no testimony that the gun had been stolen nor was any explanation provided as to what a sifter is used for. Using her skill and making a quick decision as trial lawyers often do, defense counsel found that to highlight the evidence would not be in the best interest of her client. In addition, the fact that objections were timely and there was no mention of a stolen gun, defendant was not prejudiced by the testimony. Therefore, counsel's actions were neither unreasonable nor did they prejudice the defendant to the point of depriving him of a fair trial.

Therefore, none of defense counsel's errors rise to the level of ineffective assistance of counsel as required by our Supreme Court in *Pickens*, *supra*.

III. PEREMPTORY CHALLENGE

Defendant's second contention on appeal is that the prosecution improperly exercised a peremptory challenge to exclude the only African American juror in the pool of perspective jurors. We disagree.

A. Standard of Review

This Court reviews for abuse of discretion a trial court's ruling regarding discriminatory use of peremptory challenges. *People v Ho,* 231 Mich App 178, 184; 585 NW2d 357 (1998). In doing so, we must give great deference to the trial court's findings because they turn in large part on a determination of credibility. *Harville v State Plumbing & Heating, Inc,* 218 Mich App 302,

319-320; 553 NW2d 377 (1996). This issue was properly preserved because even though defense counsel's objection was not timely, the trial court chose to address the issue.

B. Analysis

In order to make a showing of discrimination in jury selection, courts are guided by the United States Supreme Court decision of *Batson v Kentucky,* 476 U S 79, 84-88; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The Court said that first, the defendant must show that he is a member of a cognizable racial group; that the prosecutor used purposeful discrimination; and the defendant, using the facts and circumstances, must show the prosecutor was engaged in this practice to exclude members of the same race as defendant. *Id.* at 96-97. Once the defendant makes a prima facie showing, the burden shifts to the State to provide a neutral explanation for challenging the jurors in question. *Id.* at 97. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. *Id.* at 98. Merely denying a discriminatory motive or saying it was done in good faith is not enough. *Id.*

The trial court listened to the prosecutor's neutral reason which indicates the trial court found a prima facie case was made. As the Supreme Court stated, "trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination." *Id.* at 97. Therefore, the only question left is whether the proffered reason by the prosecutor is sufficient.

Despite the late objection, the prosecutor still provided a race-neutral reason for the peremptory challenge of juror Rosiar. During *voir dire*, the prosecutor asked the jurors if any of them had ever had any issues with police officers, specifically asking "[a]nybody have a bad experience with the police officers?" Rosiar responded:

> Yes. I have got pulled over before as to where, you know they checked my you know glove box and everything. But – I wasn't speeding. They said they pulled me over because it was around 11:00 o'clock at night, see if I was drinking and they had me back in the police car and handcuffed me. And I didn't do anything. They said oh you're drinking, you're - - they were asking me all these questions and I didn't do nothing but driving home.

In response to the objection to the peremptory challenge, the prosecutor stated that his reason for dismissing Rosiar was that "I discussed it with my officer in charge. He did make indications when he was being questioned with regards to improper conduct by police officers is what he felt by the Oak Park Police Department. He was pulled over and placed in the rear of the car for what he felt was nothing wrong, not doing anything wrong. . . . I don't want to say there may have or there could be some sort of problem with Rosiar and the witnesses, since all my witnesses are police officers."

Defendant contends that "the Prosecutor provided no single factor, or set of factors, which would justify excluding the only African American from the jury." In addition, defendant asserts the reasons given by the prosecutor were "specious at best." We disagree. The Supreme Court has stated that the prosecutor must articulate a neutral explanation related to the particular case to be tried. *Barton, supra* at 98. In this case, the prosecutor was worried that an individual

who has had trouble with the police would likely have some issues with witnesses who are all police officers. This reason is no more attenuated than that presented in *People v Howard*, 226 Mich App 528; 575 NW2d 16 (1997). In *Howard*, the prosecutor dismissed one of the African-American jurors because she was a renter, explaining that he preferred not to have any renters on the jury, regardless of race. *Id.* at 534. Defendant argued that this is a "patently ridiculous" reason for dismissal; however, this court found that it is a reason related to the circumstances of this case, because the victims were shot while inquiring about overdue house payments, a situation more commonly associated with renters. *Id.* at 534-35. Under the circumstances of the case, it was "reasonable for the prosecutor to believe that a renter might be more sympathetic to defendant's situation." *Id.* at 535. Certainly, if this court found an attenuated reason like renters being more sympathetic towards people who were also renters, the reason provided by the prosecutor in the case at bar is much more specific to the circumstances of the case. Therefore, the prosecutor provided a race-neutral explanation for the peremptory challenge that was related to the circumstances of the case at bar. Accordingly, defendant's claim that his equal protection rights were violated by the prosecution's exercise of a peremptory challenge to dismiss the only African American juror is without merit.

IV. SUBJECT MATTER JURISDICTION

In his standard 11 brief, defendant argues that the district court, and subsequently the circuit court, lacked jurisdiction to hear the case because the case was not properly bound over to the circuit court by the district court. Specifically, defendant argues that the lower court's record is void of a complaint, or other documents that are equivalent to a complaint. We disagree.

A. Standard of Review

Defendant did not raise the issue of the circuit court's jurisdiction at trial, thus he has failed to properly preserve this issue. This court reviews an unpreserved issue for plain error affecting a defendant's substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Green,* 260 Mich App 392, 396; 677 NW2d 363 (2004).

B. Analysis

Defendant asserts that no complaint was filed with the court. MCR 6.101 provides:

> A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense.

In many jurisdictions, the complaint is made up of two or more separate documents. Often the criminal's arrest warrant will satisfy the substance aspect of the compliant, while a separate document will contain the rest of the required information. However, other jurisdictions employ a more simple method, by allowing the warrant and complaint to be included in the same document. Such documents not only serve as a warrant, but also list the information that is required in the complaint.

In the present case, the record reflects a three page document pertaining to the district court. The document serves as both the arrest warrant and complaint, by authorizing police to make an arrest, and by also listing the defendant's name, substance of the accusation, and the specific citations of the crimes being charged. Defendant's claim of improper jurisdiction is therefore without merit.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell