STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2003
v	No. 236169 Monroe Circuit Court
DERRICK LAMOND MITCHELL-EL, Defendant-Appellant.	LC No. 99-030238-FH

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted possession of 225 or more, but less than 650, grams of cocaine, MCL 333.7407a(1), and conspiracy to possess with intent to deliver 225 or more, but less than 650, grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(ii). He was sentenced to consecutive terms of twenty to thirty years' imprisonment. He appeals as of right, and we affirm.

This case arises out of two separate sets of arrests. Police officers stopped and impounded a white Cadillac driven by Kenneth Lyons and occupied by three passengers. On a subsequent search of the trunk, the police found boots with hollowed-out soles containing approximately 590 grams of cocaine. At this point, defendant was not linked to any offenses, although the car had been registered in his name until about a month before.

After the white Cadillac was impounded, a gray Cadillac, driven by defendant, was identified as appearing to be "casing" the impound lot, and, later, defendant's two passengers were apprehended after the impound-lot office had been broken into. All three were arrested. The gray Cadillac once was registered to Kenneth Lyons, the driver of the white Cadillac. In the trunk of the gray Cadillac, the police found a scale typically used for measuring drugs, and a towing receipt with the gray Cadillac's vehicle identification number and Lyons' name.

Several addresses in Toledo were relevant to the investigation. Lyons and defendant had used the same address on Norwood in Toledo when they registered the two Cadillacs in the past. Defendant used the Norwood address when posting bond in the case involving the attempted break-in at the impound garage, and acknowledged that it had been his home address since the

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

early 1980s. He also acknowledged that Lyons had lived there briefly while dating defendant's sister.

When Lyons was arrested, the car he was driving was registered to a woman who lived on Mettler in Toledo. When defendant was arrested at the impound garage break-in, he gave as identification a driver's license issued to a man who lived at the same address on Mettler.

Ohio police investigating drug offenses in their jurisdiction searched a house on Woodland in Toledo. Defendant had been observed entering the house in the past, and the raid occurred while he was parked outside the house. Police found the same brand of hollowed-out boots (some packed with cocaine) in the house. Also located during the search were three court notices and correspondence in defendant's name, although the Woodland address was not shown on those papers. Defendant testified that the papers were not found in the house, but, rather, were taken from his car when he was stopped outside the house. Others were present in the home when it was raided, and a utility bill for the house had a name other than defendant's. When booked by Toledo police, the booking paperwork showed the Woodland address as defendant's home address. While the normal booking practice is to write down the address given by the arrestee, it is possible that the address was derived from the location of the search.

Defendant's primary defense was that he did not know anything about the cocaine in the trunk of the white Cadillac, and he merely served as a driver and lookout for his passengers who wanted help in stealing that vehicle. Defendant also denied residing at the Woodland address in Toledo. He further denied being involved with drugs, and maintained that a police detective set him up for failing to pay a bribe.

I. Motion to Disqualify Judge

Defendant first argues that the trial judge should have been disqualified because (1) the judge was biased against criminal defendants in general and him in particular; (2) the judge was a witness to a separate charge of absconding from bond; (3) the judge conspired with the prosecutor to punish him for refusing to testify against another member of the drug delivery network; and (4) the judge was a necessary witness to plea negotiations related to defendant's claim that the police had failed to perform their end of a bargain. Defendant's motion to disqualify was denied by the trial judge. On appeal to the chief judge pursuant to MCR 2.003(C)(3)(a), the chief judge disqualified the trial judge from hearing the absconding charge, but denied defendant's motion to disqualify the trial judge from this drug case.

A trial judge is presumed to be impartial, and a party seeking disqualification bears a heavy burden of overcoming the presumption. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001). The moving party generally must show that the judge is actually biased or prejudiced for or against a party or attorney. *Id.*

Defendant has failed to sustain his burden of demonstrating bias. Read in context, the judge's comment about not wanting to provide a "benefit" to defendant merely reflects the judge's reluctance to grant a tactical advantage to defendant from his apparent attempts to delay the proceedings. It does not demonstrate actual bias.

Although the absconding offense was committed in relation to this drug case, it did not automatically disqualify the trial judge from hearing this case, and defendant has not shown that the judge could not be impartial. See *People v Coones*, 216 Mich App 721, 726-727; 550 NW2d 600 (1996) (trial judge who presided over show-cause hearing in divorce case for violation of restraining order was not disqualified from presiding over criminal prosecution arising out of the same conduct).

There is no factual support for defendant's claim that the prosecutor and the judge conspired to punish defendant for refusing to testify against a codefendant, Eric Crisp.

Defendant also argues that the trial judge should have been disqualified because he was a "necessary" witness to plea negotiations regarding defendant's pledge to assist the police. Even if the trial judge had participated in plea negotiations, he would not be automatically disqualified from presiding over defendant's jury trial.

II. Production of Toledo Police Officer

Defendant argues that the trial court denied him an opportunity to present a defense when the court failed to compel the attendance of a Toledo police officer who searched the house in Toledo where the hollowed-out boots were found.

The officer, Detective Lt. Awls, appeared for trial. On the day he appeared, however, trial was adjourned due to defense counsel's illness. When trial resumed the next day, Lt. Awls was unavailable because he was giving testimony in an Ohio court. The prosecution sought leave to endorse Lt. Awls' partner, Officer Greenwood, who assisted in the search. In the alternative, the prosecutor suggested that the court permit defendant to read into evidence Lt. Awls' testimony at the preliminary examination. Although the court instructed the prosecutor that "if you can get him, you should," the court ultimately denied defendant's motion to compel Lt. Awls' attendance, and ruled that Officer Greenwood could be produced (allowing defendant to interview him in advance), or defendant could introduce Awls' prior testimony. Defendant declined to use the preliminary examination testimony, and Greenwood testified at trial.

Defendant argues that the court violated his constitutional right to present a defense by failing to compel Awls' attendance. See *People v Hayes*, 421 Mich 271; 364 NW2d 635 (1984) (defendant has a constitutional right to present a defense). Defendant argues that he needed to cross-examine Awls because Awls had given "very incriminating" testimony at the preliminary examination. Awls' preliminary examination testimony was not introduced at trial. Defendant has not shown that Awls' testimony was material, or that he was prejudiced by his inability to cross-examine Awls at trial. Further, defendant testified that the court documents alleged to have been seized from the Woodland address were, in fact, taken from his car. Had Awls been present at trial, he might have contradicted this testimony. Greenwood was unable to testify to first-hand knowledge that would contradict defendant's assertion.

We also reject defendant's effort to elevate this issue to a constitutional level. He has failed to show that he was denied a substantial defense by the ruling. Another officer was able to confirm that defendant was not in the house when the warrant was executed. Defendant has not shown that Awls would have given testimony that would have benefited any defense.

III. Remarks Regarding Jury Composition

Defendant next argues that he was denied a fair and impartial jury because his own lawyer remarked that the jurors were "farmers," and that they would side with a police officer because they, and the officer, were white while defendant was black. One juror expressed that the jury was disturbed by counsel's comments.

The initial reference to the jurors as farmers was attributed by defense counsel to Lt. Davis, the officer whose credibility was challenged at trial. The subsequent comment was made in closing argument in the context of counsel's observation that the jury would be inclined to believe the police officer, rather than defendant.[1] Counsel's argument was obviously a matter of trial strategy. When counsel realized that he had offended the jurors, he apologized and asked that they not hold his comments against defendant. Defendant did not ask the court to inquire into the nature of the jurors' discussions regarding counsel's statement or to explore whether the jurors could be fair to defendant. We will not surmise that jurors who were offended by the suggestion that they would determine credibility based on race would then do so.

IV. LEIN Printout

Defendant argues that the trial court erred by allowing the prosecutor to introduce into evidence a LEIN printout to link defendant to the Woodland Street address where the hollowed-out boots were found. Defendant objected that the printout constituted hearsay. The court overruled the objection, finding that the report could be admitted under the business record exception to the hearsay rule, MRE 803(6), if a proper foundation was laid.

We conclude any error in the admission of the printout was harmless because the lien printout did not affect the outcome of the trial.[2] The printout only listed the Woodland address

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[1] Defense counsel said:

> [Davis] could have gotten - - he could have gotten a statement from Derrick before this whole thing started, but he chose not to do that because he chose-because he knew eventually it was going to come down to his credibility to Derrick's credibility. After all, if you don't mind me saying, so what's a group of nice white folks from Monroe going to believe, Luke [Davis] or Derrick?

The prosecutor began to interrupt, and counsel continued:

> It's not nice but it's real.

The prosecutor objected, and the court sustained the objection, but did not strike the statement. A juror then interjected:

> Yes, we-we take offense to that because it was brought up in the jury room at different times. It-it-it is offensive to us to be that –that statement in general.

[2] Defendant's argument that the printout showed a record of prior arrests is without merit. On its face, the exhibit, a compilation of codes and abbreviations, does not refer to any crimes, only bookings. There was other testimony at trial that defendant had outstanding warrants in Ohio, and there was some testimony that these were traffic offenses.

as plaintiff's address on one date, the date associated with the execution of the search warrant. There were other addresses listed in association with other dates. Defendant testified that he was at the Woodland address the day of the search at Davis' direction, and it was unclear whether the address was attributable to defendant or an officer using the address of the search. Ultimately, the jury was required to assess the credibility of defendant's version of what occurred; the lien printout had little bearing on that determination.

V. Evidence of Pending Toledo Drug Charges

Finally, defendant argues that the trial court erred in allowing evidence of a pending cocaine charge in Toledo. Defendant testified that he met with Federal Drug Enforcement Administration (DEA) officials because he was concerned about his family's safety in light of his cooperation with authorities in setting up additional arrests. An Ohio DEA agent testified in rebuttal that defendant had not approached him about safety issues, but, rather, defendant asked whether his cooperation could lead to dismissal of a pending drug charge in Toledo.

Defendant did not object to the testimony. Because defendant failed to preserve this claim, our review is limited to plain error affecting his substantial rights. *Carines*, *supra*. We find no plain error. The evidence was introduced to rebut defendant's claim that he was concerned about his safety after cooperating with police. Defendant injected this issue into the trial believing it to be pertinent to his challenge to Davis' credibility and asserted bias towards defendant.

Further, there was no prejudice. The issue of illegal drug sales was prevalent throughout this trial. The jury heard evidence regarding defendant's setting up a drug deal for Davis involving the two men who were in the white Cadillac with Lyons when the car was impounded.

Defendant contends that his attorney's failure to object to this evidence deprived him of the effective assistance of counsel. We are satisfied that the evidence was not outcome determinative. Defendant's failure to show prejudice defeats his ineffective assistance of counsel claim.

Affirmed.

/s/ William B. Murphy
/s/ Jessica R. Cooper
/s/ Charles L. Levin