STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNATHAN THOMAS,

Defendant-Appellant.

UNPUBLISHED
August 6, 1996

No. 182678
LC No. 94-000707-FC

Before: Doctoroff, P.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of felony murder, MCL 750.316; MSA 28.548, one count of first-degree (premeditated) murder, MCL 750.316; MSA 28.548, and two counts of armed robbery, MCL 750.529; MSA 28.797, arising from the stabbing of, and the theft of a safe from, the grandparents of defendant's girlfriend. The trial court vacated one of the felony murder convictions and then sentenced defendant to two terms of mandatory life imprisonment without possibility of parole on the remaining murder convictions and to two terms of fifty to seventy-five years' imprisonment on the armed robbery convictions. Defendant appeals as of right. We affirm.

Defendant argues that he was deprived of a fair trial by numerous instances of prosecutorial misconduct. Because defendant failed to timely and specifically object below to the alleged improper conduct of the prosecutor, our review is precluded absent a miscarriage of justice. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989).

Defendant was not deprived of a fair and impartial trial by prosecutorial misconduct. *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989). Defendant's claims of prosecutorial misconduct are unsupported by fact or law, with the exception of the claim that the prosecutor appealed to the jury's sense of civic duty during closing argument. A prosecutor may not argue to the jury that it has a civic duty to convict. *People v Weatherspoon*, 171 Mich App 549, 558; 431 NW2d 75 (1988). Here, the prosecutor's call for the jury to "do the right thing" constituted an impermissible appeal to the jury's sense of civic duty. This civic duty argument was cured, however, by a cautionary

instruction that "[t]he lawyers' statements and arguments are not evidence . . . ." *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Defendant also argues that defense counsel rendered ineffective assistance of counsel by failing to timely and specifically object to the alleged instances of prosecutorial misconduct. Defendant failed to raise his claim of ineffective assistance below in conjunction with an evidentiary hearing. This failure forecloses appellate review unless the record contains sufficient detail to support defendant's claims. If the record contains sufficient detail, then our review is limited to the facts contained in the record. *People v Ginther*, 390 Mich App 436, 443; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Here, the record establishes that defendant has failed to demonstrate that defense counsel's performance fell below an objective standard of reasonableness or that counsel's performance so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 314; 521 NW2d 797 (1994).

Defendant next argues that the trial court abused its discretion when it denied defendant's motion to change venue premised on pretrial publicity. The existence of pretrial publicity, standing alone, does not necessitate a change of venue. *People v Lee*, 212 Mich App 228, 253; 537 NW2d 233 (1995); *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992). Instead, to be entitled to a change in venue, a defendant must show that there is a pattern of strong community feeling against him and that the publicity is so extreme and inflammatory that jurors could not remain impartial when exposed to it, or that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice. *Lee*, *supra*; *Passeno*, *supra*.

Thirty-two of the sixty prospective jurors in defendant's jury array indicated that they had some knowledge of facts of the case. These thirty-two prospective jurors were taken one at a time into the trial court's chambers where each prospective juror was subjected to voir dire by the court, the prosecutor and defense counsel on the nature and extent of the individual's knowledge of the circumstances of the murders and defendant, the source of each individual's knowledge and the effect, or lack thereof, of the knowledge on each individual's ability to be objective. Twelve of these thirty-two prospective jurors were excused during this voir dire. Of the remaining twenty prospective jurors, seven made it onto the panel that convicted defendant. These seven jurors acquired a "general," "basic," or "minimal" knowledge of the case from the radio, the newspaper, television news or a combination of these media. Despite this knowledge, each of the seven jurors swore that he or she could decide the case based on the evidence presented, that he or she could honor the presumption of innocence accorded to defendant and that he or she had not formed opinions concerning guilt or innocence based on the information each gleaned from the media.

On this record, defendant has not shown the existence of a strong community feeling against him or publicity so extensive and inflammatory that jurors generally could not remain impartial. *Lee, supra*; *Passeno, supra*. Defendant also has failed to show that the impaneled jury was actually prejudiced or that there was an atmosphere that created a probability of prejudice. *Lee, supra*; *Passeno, supra*.

Accordingly, the trial court did not abuse its discretion when it denied defendant's motion for a change of venue.

Defendant argues that the prosecutor exercised a peremptory challenge in a racially discriminatory manner, thereby depriving him of a fair and impartial trial. A prosecutor may not exercise peremptory challenges to strike African-Americans from a jury because the venire members are African-American where a defendant is also an African-American. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *People v Barker*, 179 Mich App 702, 705, 707; 446 NW2d 549 (1989), aff'd 437 Mich 161; 468 NW2d 492 (1991). In examining the merits of a claim that a peremptory challenge was exercised in a discriminatory manner, the burden initially falls upon the defendant to make out a prima facie case of purposeful discrimination. *Barker, supra*, 705. To establish a prima facie case, the defendant must show that he is a member of a cognizable racial group, that the prosecutor exercised peremptory challenges to remove from the venire members of the defendant's race, and that these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire members from the petit jury on the account of their race. *Barker, supra*. Once the defendant makes the showing, the burden shifts to the state to adequately explain the racial exclusion. *Barker, supra*.

Defendant failed to carry his initial burden of establishing a prima facie case of discriminatory use of peremptory challenges. Although defendant established that he is a member of a cognizable racial group, i.e. African-American, and that the prosecutor's exercise of a peremptory challenge removed a prospective juror, who was also African-American, defendant failed to show that the record created an inference that the prosecutor used the peremptory challenge to exclude the prospective juror based on her race. On the contrary, the record indicates that the removed juror expressed, during voir dire, resentment towards the prosecutor and distrust of law enforcement authorities because of her sons' prior involvement in the criminal justice system.

Defendant next argues that the trial court abused its discretion when it admitted a videotape and photographs of the crime scene. Photographic evidence is admissible if relevant, pertinent, competent and material to any issue in the case. *People v Mills*, 450 Mich 61, 66-74; 537 NW2d 909 (1995); *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). It is not rendered inadmissible solely because the evidence may be gruesome or shocking. *Mills, supra*, 76-77; *Coddington, supra*. Instead, the proper inquiry is whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Mills, supra*; *Coddington, supra*. The trial court should exclude the photographic evidence where the admission could lead the jury to abdicate its truth-finding function and convict on passion or sympathy. *Mills, supra*, p 77; *Coddington, supra*.

The admission of videotape evidence is closely analogous to the admission of photographic evidence and the same rules of admissibility apply to the admission of both forms of evidence, although the trial court must take into account the differences between the two media when determining admissibility. *Barker, supra*, 179 Mich App 710; *People v Sharbnow*, 174 Mich App 94, 102-103; 435 NW2d 772 (1989).

The trial court did not abuse its discretion when it admitted the videotaped evidence. Defendant was charged with open murder. A substantial portion of the videotape is devoted to a room-by-room survey of the victims' home. The information gathered by this video survey indicated that the victims were killed where they were found and that their killers went directly to the victims' safe and removed it from the house. The videotape shows that no other items of value were disturbed or missing and that no random ransacking of the home took place. This information is relevant to premeditation and deliberation in that it tends to show that the killings and robbery were planned and that the killings and robbery were executed pursuant to the plan.

Nor are we persuaded that the probative value of the contents of the videotape was substantially outweighed by its prejudicial effect. While the victims' bodies are seen on the video, we do not find the images presented so gruesome or shocking as to lead the jury to abdicate its truth-finding function and convict on passion or sympathy. Accordingly, we conclude that the trial court did not abuse its discretion when it admitted the videotape.

We also conclude that the trial court did not abuse its discretion when it admitted photographs of the crime scene. The photographs were likewise relevant to premeditation and deliberation. Moreover, the probative value of the photographs was not so minimal that we can conclude that this value was substantially outweighed by unfair prejudice. The photographs are less graphic than the images presented on the videotape and, as such, we do not consider the photographs to be so gruesome or shocking as to lead the jury to abdicate their truth-finding function and convict based on passion or sympathy.

Defendant argues that his statement to a Kalamazoo County sheriff's detective was not voluntarily made and, therefore, was erroneously admitted into evidence. We decline appellate consideration of this claim. Defendant has forfeited his ability to raise this issue on appeal by failing to challenge the voluntariness of the statement in the trial court. *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988).

Defendant also argues that his statement to two Portage police detectives was not voluntarily made and, therefore, was erroneously admitted. Defendant correctly points outs that the burden lies with the prosecutor to prove the voluntariness of the statement by a preponderance of the evidence. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). Defendant is mistaken, however, in his belief that the trial court shifted the burden of proof onto him to prove the voluntary nature of his statement. Viewed in context, the trial court's comments regarding defendant's failure to make a record of the alleged coercion are part of the court's lengthy critique of defendant's credibility and meant to convey nothing more than that defendant's claims of coercion were so facially incredible that his credibility could only have been restored had there been some record support for his claims.

Moreover, having examined the entire record, we conclude that defendant's statement to the two detectives was voluntarily made. *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995). The question of whether defendant's statement was voluntarily given is dispositively

resolved once witness credibility is assessed. Here, the trial court found the detectives to be credible witnesses and defendant not to be a credible witness. Because this Court is not in a position to reassess credibility, we accord great deference to the trial court's credibility assessments. *Haywood, supra*, p 226; *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). Being credible, the testimony of the two detectives establishes that defendant was advised of his rights pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), that he understood those rights, and that he knowingly and voluntarily waived those rights. Their testimony also establishes that defendant's statement was made during an interrogation that was free of coercion, threats or unfulfilled promises. Accordingly, the record establishes that defendant voluntarily made his statement to the detectives.

Defendant next argues that he was deprived of his equal protection rights because only two African-Americans appeared in the jury array. Defendant failed to raise this issue below and, therefore, has waived appellate consideration of the claim. Although this Court may waive preservation requirements for constitutional claims, *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994), we decline to waive the preservation requirement in this case. Defendant has failed to persuade us that his claim is outcome determinative where the record is facially insufficient to give rise to an inference or to demonstrate that African-Americans were substantially underrepresented in the jury venires of the Kalamazoo Circuit Court or that the selection procedure was not racially neutral. *Alston v Manson*, 791 F2d 255, 257 (CA 2, 1986).

Defendant also argues that he was deprived of his Sixth Amendment right to a jury drawn from a fair cross-section of the community where only two African-Americans appeared in the jury array. A criminal defendant is entitled to an impartial jury drawn from a fair cross-section of the community. *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975). This fair cross-section requirement does not entitled the defendant to a petit jury that mirrors the community and reflects the various distinctive groups in the population. *Id.*, 419 US 538. Instead, the Sixth Amendment guarantees an opportunity for a representative jury venire by requiring that jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. *Id.*, 419 US 538; *United States v Jackman*, 46 F3d 1240, 1244 (CA 2, 1995). In order to establish a prima facie violation of the fair cross-section requirement, the 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." *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Defendant has failed to satisfy the second and third prongs of the *Duren* test. The record indicates only that two of sixty prospective jurors in the array were African-Americans. Defendant failed to supply any information from which it could be concluded that African-Americans were substantially underrepresented in the jury pool. *People v Osorio*, 801 F Supp 966, 977 (D Conn, 1992). Defendant also failed to provide any evidence from which it could be concluded that any

underrepresentation was due to a systematic exclusion, i.e., an exclusion resulting from some circumstance inherent in the particular jury selection process employed, *Duren*, 439 US 366; *United States v Ashley*, 54 F3d 311, 314 (CA 7, 1995), or that the systematic exclusion existed for a sustained period, *Duren*, 439 US 366. In fact, at trial, defendant only focused on the number of African-Americans in his jury array. Even assuming that African-Americans were substantially underrepresented in defendant's array, a systematic exclusion is not shown by one or two instances of a jury venire being disproportionate. *Ford v Seabold*, 841 F2d 677, 685 (CA 6, 1988); *Timmel v Phillips*, 799 F2d 1083, 1087 (CA 5, 1986).

Finally, defendant argues that defense counsel rendered ineffective assistance of counsel because counsel failed to preserve defendant's Sixth Amendment fair cross-section challenge by filing a written fair cross-section challenge before the jury was sworn as required by *People v Kelly*, 147 Mich App 806, 814; 384 NW2d 49 (1985). We conclude that defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness where the case relied upon by defendant has been vacated by our Supreme Court, *People v Kelly*, 428 Mich 867; 400 NW2d 603 (1987), and where defense counsel did preserve the challenge for appellate review by orally raising the challenge before the jury had been impaneled and sworn, *People v McCrea*, 303 Mich 213, 278; 6 NW2d 489 (1942). *Pickens, supra*, 446 Mich 302-303.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski