STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2007
v	No. 269958 Kent Circuit Court
OTIS DARRELL NELSON, Defendant-Appellant.	LC No. 05-002174-FC

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree home invasion, MCL 750.110a, three counts of armed robbery, MCL 750.529, two counts of kidnapping, MCL 750.349, two counts of assault with intent to murder, MCL 750.83, assault with intent to rob while armed, MCL 750.89, wearing body armor during the commission of a violent crime, MCL 750.227f, and ten counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant, as a habitual offender, third offense, MCL 769.11, to 20 to 40 years' imprisonment for each of the two home invasion convictions, 25 to 60 years' imprisonment for two of the three armed robbery convictions and 30 to 60 years' imprisonment for the third armed robbery conviction, life in prison for each of the two kidnapping convictions, life in prison for each of the two assault with intent to murder convictions, 30 to 60 years' imprisonment for the assault with intent to rob conviction, 45 to 96 months' imprisonment for the body armor conviction, and two years' imprisonment for each of the 10 felony-firearm convictions. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

This case arises from an incident that occurred on the evening of December 22, 2004, when four women, two young men and five children were gathered in a house on Francis Avenue in Grand Rapids, Michigan. Late that night, two African-American males wearing masks, kicked open the front door and entered the house. One of the men ordered the four women to the ground and held them at gunpoint. The men subsequently took several items from the women, including a cellular telephone, money, and jewelry.

After several police officers arrived on the scene, the two men ran out of the rear of the house. One of the men brandished a firearm in his left hand and then shot at Officer Jason Lowrie several times. As the man ran away, Officer Lowrie shot at him four or five times. During the shooting, Officer Lowrie sustained a serious gunshot wound to his shoulder and

chest. He also suffered a wound to his thigh when his own firearm accidentally discharged. After the shooting, Officer Keith Hefner parked in an unmarked vehicle on Jefferson Avenue, one block east of Francis Avenue. Officer Hefner then observed an African-American male, carrying a firearm in his left hand, emerge from between the houses on the west side of the street. Officer Hefner exited his vehicle and ordered the man to drop his weapon. The man subsequently shot at Officer Hefner and then continued to run eastbound. As the man ran, Officer Hefner fired at him twice.

Bassie Cummings and Doris Morgan reside in a house on Collins Avenue, one block east of Jefferson Avenue. On the night in question, an African-American male with a handgun kicked open their back door and entered their house. The man held them inside while he removed a "bullet-proof vest," looked out of their windows, and made several telephone calls. After a few hours, the man ordered Morgan to drive him away from the house in her car. Later, both Cummings and Morgan identified defendant as the man who invaded their house.

During the investigation that followed, examiners determined that two nine-millimeter bullets found near the Francis Avenue house and three nine-millimeter bullets found on Jefferson Avenue could all have been fired from the same firearm and that a bullet found in the Collins Avenue house was fired from Officer Lowrie's handgun. An expert in DNA analysis found defendant's DNA on a fence and garage near the Francis Avenue house and on a telephone from the Collins Avenue house. Defendant was arrested, along with Michael Jackson, in January 2005 in Atlanta, Georgia.

Defendant first argues on appeal that he was denied his Sixth Amendment, US Const, Am VI, right 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). We review questions concerning the systemic exclusion of minorities in jury venires de novo. *Id*. To establish a prima facie violation of the fair cross section requirement, defendant bears the burden of showing: "(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." *Id*. at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Defendant claims that he was denied a jury drawn from a fair cross-section of the community because there was an insufficient number of minorities, particularly African-Americans and Hispanics, included in his jury venire. We find that defendant's claim satisfies the first prong of the *Duren* test. "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes." *Hubbard*, *supra* at 473. Hispanics are also generally considered to be a distinct group for fair-cross-section claims. See *United States v Torres-Hernandez*, 447 F3d 699, 703 (CA 9, 2006); *United States v Ovalle*, 136 F3d 1092, 1095-1098 (CA 6, 1998); *United States v Pion*, 25 F3d 18, 22-23 (CA 1, 1994).

To satisfy the second prong of the *Duren* test, defendant must establish that African-Americans and Hispanics are substantially underrepresented in jury pools in Kent County. *Hubbard*, *supra* at 473-474. On appeal, defendant asserts that African-Americans and Hispanics were underrepresented in his jury venire based solely on statements made by defense counsel and the trial judge that Kent County is comprised of eight to nine percent African-Americans and

seven percent Hispanics, and that, out of 60 potential jurors in the jury venire, only five were African-American or Hispanic. But, "[m]erely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *Id*. at 533. Because defendant presented no evidence that minorities are underrepresented in Kent County jury venires in general, and relies instead entirely on statistics provided at trial concerning his particular jury venire, we find that the second prong of the *Duren* test is not satisfied. See *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000).

Finally, in order to satisfy the third prong of the *Duren* test, defendant must show that African-Americans and Hispanics are systematically excluded from jury selection in Kent County. *Hubbard*, *supra* at 473. Defendant must demonstrate a problem inherent in the selection process that results in systematic exclusion. *Williams*, *supra* at 527. Here, defendant failed to present any evidence regarding the jury selection process in Kent County. "It is well settled that systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate." *Id*., quoting *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Defendant's "bald assertion" that systematic exclusion occurred is insufficient to satisfy the third prong of the *Duren* test. *Id*.

Unlike previous cases before this Court, defendant did not assert any claims that the system employed by the county clerk for the selection of jurors was tainted. Also, because the second and third prongs of the *Duren* test have not been satisfied, defendant has clearly failed to establish a prima facie violation of the Sixth Amendment.

Defendant next argues that the trial court abused its discretion when it admitted a videotape that showed defendant "rapping" with Jackson, wearing a mask, and brandishing a firearm. We review a trial court's decision to admit evidence for a clear abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The abuse of discretion standard acknowledges that there are circumstances in which there is no one correct outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), citing *Babcock*, *supra.*

At trial, the prosecutor moved to admit a videotape clip showing defendant and Jackson rapping to a song entitled, "I'm a Robber." During the song, defendant puts on a mask and then brandishes a firearm with his left hand. The trial court admitted the evidence and allowed the jury to watch the videotape clip without the sound. On appeal, defendant contends that the videotape clip constituted unfairly prejudicial bad-acts evidence. Pursuant to MRE 404(b), evidence of an individual's crimes, wrongs, or bad acts is inadmissible to show a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, we cannot identify a crime, wrong, or bad act inherent in the evidence that would trigger MRE 404(b) analysis. Therefore, the appropriate analysis is whether the evidence is relevant, and if so, whether its probative value outweighs its potential prejudicial effect. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995).

Generally, all relevant evidence is admissible. MRE 402; *Crawford*, *supra* at 388. To be relevant, evidence must be material to a fact of consequence to the action. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003). Here, the challenged evidence was relevant to establishing defendant's identity as the person who invaded the Francis Street house and who

shot at Officers Lowrie and Hefner. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The testimony at trial established that two African-American men wearing masks invaded the Francis Street house. One of the men was relatively short, with a light complexion, and the other was taller, with a much darker complexion. After the incident, Jackson was identified as the first of the two men. The videotape at issue established defendant's connection to Jackson and demonstrated that defendant is noticeably taller and darker-complected than Jackson, suggesting that defendant was the man with Jackson during the invasion of the Francis Street house. Furthermore, the person who shot at Officers Lowrie and Hefner used his left hand to do so. The videotape shows defendant brandishing a firearm with his left hand.

Further, we find no merit to the argument that the probative value of the challenged evidence is substantially outweighed by the danger of unfair prejudice. See *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Although the challenged evidence was damaging to defendant's position, it was highly probative because it was relevant to establishing his identity. Furthermore, there is no evidence that the jury gave preemptive weight to the challenged evidence. See *Id*. Considering the overwhelming evidence of defendant's guilt presented at trial, we cannot conclude that the jury would have reached a different conclusion, but for the admission of this evidence. *Lukity*, *supra* at 495-496.

Defendant finally argues on appeal that his trial counsel rendered ineffective assistance of counsel. Because defendant failed to move for a new trial or an evidentiary hearing, pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Defendant first argues that his trial counsel rendered ineffective assistance of counsel by failing to object when Cummings' identified defendant. Defendant asserts that Cummings' identification "showed that he was possibly coerced into fabricating his testimony, or . . . under duress in which he perjured himself." The record does not support defendant's contention. Cummings' testimony indicates that, although he did not know the man who invaded his house, he was able to identify defendant after-the-fact. Such testimony cannot be construed as inconsistent. Furthermore, there is no evidence that Cummings was coerced by the prosecution or that he was under duress when he identified defendant. Therefore, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Moreover, considering that Morgan also identified defendant as the man who invaded their house, defendant cannot establish that defense counsel's failure to object to Cummings' identification was outcome determinative. *Henry*, *supra* at 146.

Defendant next argues that defense counsel was ineffective for failing to adequately cross-examine several prosecution witnesses. Specifically, defendant argues that his trial

counsel should have cross-examined Officer Lowrie about inconsistencies in his testimony and elicited testimony that the crime scene technician lied about the evidence allegedly found near the Francis Avenue house. Defense counsel's failure to cross-examine witnesses can only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900 (1996). A substantial defense is one which might have made a difference in the outcome of the trial. *Hyland*, *supra* at 710. Moreover, decisions about whether to question a witness and which questions to ask a witness are presumed to be matters of trial strategy, *Dixon*, *supra* at 398, and we will not substitute our judgment for that of counsel regarding matters of trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Here, defendant failed to support his assertion that there were inconsistencies in Officer Lowrie's testimony and that the crime scene technicians fabricated evidence. Defendant did not specify what evidence, if any, defense counsel could have elicited upon further cross-examination of these witnesses. Thus, defendant did not meet his burden of establishing the factual predicate for this claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). And, defendant has failed to overcome the presumption that counsel's decision to limit her cross-examination was anything but sound trial strategy. *Henry*, *supra* at 146. Furthermore, there is no basis on which to find that counsel's failure to conduct additional cross-examination denied defendant a substantial defense. *Dixon*, *supra* at 398; *Hyland*, *supra* at 710.

Further, defendant argues that defense counsel rendered ineffective assistance of counsel by failing to object when the prosecutor stated that defendant was "a bully, a thug, and a coward." We review prosecutorial comments as a whole, and in light of the evidence and defense arguments presented at trial, to determine whether the defendant was denied a fair and impartial trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005); *Ackerman*, *supra* at 448. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Additionally, "prosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Here, the evidence supported the assertion that defendant invaded two homes, robbed a group of women, kidnapped an elderly couple, and while running away from the scene of his initial crimes, shot at two police officers, arguably making him "a bully, a thug, and a coward." The prosecutor's remarks did not constitute an assertion that the jury should convict defendant regardless of the evidence. Because the prosecutor committed no misconduct, any objection by defense counsel would have been futile, and counsel is not ineffective for failing to make a futile objection. *Thomas*, *supra* at 457. Furthermore, the trial court cured any potential for error by instructing the jury that the attorneys' statements and arguments were not evidence. Therefore, defendant cannot establish that the failure to object to the prosecutor's remarks was outcome determinative. *Henry*, *supra* at 146.

Defendant further argues that defense counsel was ineffective for failing to interview potential witnesses and present a reasonable defense. Defense counsel's failure to investigate and call a witness does not amount to ineffective assistance of counsel unless the defendant shows prejudice as a result. *People v Caballero*, 184 Mich App 636, 640-642; 459 NW2d 80 (1990). Thus, the failure to call certain witnesses can only constitute ineffective assistance of

counsel if it deprived defendant of a substantial defense. *Dixon*, *supra* at 398; *Hyland*, *supra* at 710. Moreover, decisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy. *Dixon*, *supra* at 398. Defendant has not identified the witnesses who would testify on his behalf or demonstrated that his trial counsel was even aware of any potential witnesses. "[C]ounsel cannot be found ineffective for failing to pursue information that his client neglected to tell him." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Furthermore, because defendant provided no information regarding the alleged witnesses, there is no basis on which to find that defense counsel's failure to call them denied defendant a substantial defense. *Dixon*, *supra* at 398; *Hyland*, *supra* at 710.

Finally, defendant argues that defense counsel was ineffective for failing to seek an interlocutory appeal when the trial court denied his motion to quash. However, defendant failed to support this claim either factually or legally. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Lastly, we note that defendant has requested from this Court an order for remand for further fact finding. However, because defendant has not presented any evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claims, we decline to order a remand. MCR 7.211(C)(1)(a)(ii).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray