

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RENDAE DIATEZ WEST,

Defendant-Appellant.

UNPUBLISHED

September 15, 2009

No. 284743

Kalamazoo Circuit Court

LC No. 2007-001088-FC

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; assault with intent to do great bodily harm less than murder, MCL 750.84; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 35 to 75 years for second-degree murder, 67 months to 10 years' for assault with intent to do great bodily harm less than murder, and to two consecutive two-year terms for each felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it denied defendant's request to discharge defense counsel. A trial court's decision regarding substitution of counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id.* However, disagreements arising from matters of professional judgment or trial strategy do not constitute good cause for substitution of counsel. *Traylor, supra* at 463. Nothing in the record suggests that a legitimate difference of opinion existed between defendant and defense counsel over a "fundamental trial tactic." Defendant's primary concern relates to the pretrial motions filed by defense counsel. However, "counsel's decision not to file [pretrial] motions clearly falls within the categories of professional judgment and trial strategy that are matters entrusted to the attorney." *Traylor, supra* at 463. The record indicates that defendant requested that several motions be filed before trial and that defense counsel timely filed the pretrial motions she believed were appropriate. Counsel did not ignore defendant's requests but, rather, utilized her professional judgment. In addition, the record establishes that defense counsel met with defendant on four occasions to discuss the defense. Defendant's general

dissatisfaction and lack of confidence were not enough to establish good cause for substitute counsel. *Traylor, supra* at 463. Moreover, defendant failed to establish that a substitution of counsel would not have unreasonably disrupted the judicial process. The request was made two business days before the start of trial. A substitution of counsel would have required an adjournment, thereby disrupting the judicial process. The trial court did not abuse its discretion by denying defendant's request for substitute counsel.

Defendant next argues that the prosecutor presented insufficient evidence to support the jury's verdict. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The evidence is viewed "in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Defendant does not dispute that all of the elements of second-degree murder and assault with intent to do great bodily harm were present; rather, he maintains that he was not at the crime scene and was not the one who shot the gun. Identity is always an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976).

Considering the evidence in a light most favorable to the prosecution, there was sufficient evidence beyond a reasonable doubt that defendant was at the crime scene and shot the victim. Defendant had a motive, and shortly before the shooting defendant, Tyres Sykes, and Elijah Roberson got into an argument with the occupants of the Grand Am in which the victim was riding. During the argument, defendant produced a black handgun and threatened to shoot the Grand Am's occupants. Roberson testified that as the Grand Am was driving away, some of the occupants of the car fired shots toward defendant's house. Defendant, Sykes, and Roberson then drove in Syke's station wagon in search for the Grand Am. Defendant was in the back seat. Roberson testified that when they found the Grand Am, he heard two or three gunshots coming from the back of Sykes's station wagon, where he observed defendant holding a black handgun. The surviving occupants of the Grand Am confirmed that the gunshots came from the backseat of Sykes' station wagon. Furthermore, while in jail awaiting trial, defendant told two of his cellmates that he shot the victim. This evidence was sufficient to support a finding beyond a reasonable doubt that defendant shot the victim.

Defendant next argues that he was deprived of the right to an impartial jury drawn from a fair cross-section of the community. We review unpreserved issues for plain error that affects the substantial rights of the defendant. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving "(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 under-representation is due to systematic exclusion of the group in the jury-selection process." *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979). Defendant has failed to establish the second or third prongs of the test. Defendant's only evidence of underrepresentation was his own observation of his own jury array, which he claims contained only two African-Americans. Defendant did not present evidence of underrepresentation for jury venires in general. "Merely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *People v*

Williams, 241 Mich App 519, 526; 616 NW2d 710 (2000). Further, even if defendant's jury pool contained a disparity in minority members, he has failed to establish systematic exclusion of minority jurors. "[S]ystematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate." *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

Defendant next claims that he received ineffective assistance of counsel. Our review of defendant's claim is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To prevail on his claim, defendant must show that defense counsel's performance fell below an objective standard of reasonableness and was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He must overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

First, defendant argues that defense counsel was ineffective for failing to request a jury instruction advising the jury that Roberson was an accomplice, as well as an instruction on voluntary manslaughter. A defendant is entitled to have instructions given if they are supported by the evidence. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Counsel's decision to request or refrain from requesting a lesser offense instruction is typically a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986). Here, defense counsel's decision to forgo additional instructions was objectively reasonable because an instruction of voluntary manslaughter and an accomplice instruction were contrary to defendant's theory at trial. Defendant claimed that he was at his aunt's house at the time of the shooting and that Roberson was likely the shooter. An instruction for voluntary manslaughter would have contradicted the defense theory because defendant would then be arguing that he killed the victim after adequate provocation. Similarly, the accomplice instructions would have undermined defendant's statements that he was not involved in the shooting. Defendant has therefore both failed to overcome the presumption that defense counsel's performance constituted sound trial strategy, *Unger, supra* at 242, and failed to establish that counsel was ineffective. *Toma, supra*.

Second, defendant contends that defense counsel was unprepared to argue that there was an underrepresentation of African-Americans in his jury panel. Defense counsel may be ineffective when unprepared for trial. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). However, to succeed on this claim, defendant must demonstrate "that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited" his case. *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). Defendant cannot meet his burden of establishing the factual predicate for this claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant provided no evidence that African-Americans are underrepresented in jury venires or are systematically excluded from jury pools in Kalamazoo County. Thus, defendant has failed to demonstrate that defense counsel's failure in obtaining information about jury venires resulted in a failure to introduce evidence that would have been valuable to his case. The claim of ineffective assistance of counsel is without merit. *Bass, supra* at 253.

Third, defendant argues that defense counsel was ineffective for failing to perform background investigations on several of the prosecution's witnesses. "The failure to make an

adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). "However, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). To constitute ineffective assistance of counsel, defense counsel's failure must deprive the defendant of a substantial defense. *Id.* Defendant has not demonstrated that his counsel failed to conduct an adequate investigation or that the failure to adequately question witnesses at trial resulted in a failure to introduce evidence that would have been valuable to his case. *Dixon, supra* at 398. While defendant implies that there is evidence proving that the prosecution's witnesses were biased and committed perjury, he has provided no evidence to support this assertion. Nevertheless, we note that defense counsel cross-examined each witness concerning his credibility and bias. Defendant has not shown that his counsel's performance with respect to investigating the prosecution witnesses' backgrounds was objectively unreasonable or prejudiced him such that he was denied a fair trial. *Toma, supra*.

In addition, defendant contends that defense counsel also failed to investigate the police investigation surrounding the shooting and his actual innocence. Defendant asserts that the police contacted an individual after the shooting and that this person confessed to shooting the victim. Specifically, defendant contends that this individual told police that he was paid to shoot the victim by unnamed people and that he shot several rounds toward the victim. On the record, there is no evidence that defense counsel's failure to call this person as a witness deprived defendant of a substantial defense. A substantial defense is defined as one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant has failed to establish by record evidence that the alleged confessor existed, was a viable and credible witness who would have been available to testify at trial, or that defense counsel failed to consider this individual. Defendant has failed to establish the factual predicate for his claim of ineffective assistance of counsel. *Hoag, supra*.

Defendant further asserts that defense counsel failed to object when the prosecutor improperly vouched for the credibility of a prosecution witness. A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). After our review of the record, we have not found an instance where the prosecution improperly vouched for a witness or implied that a witness was credible based on special government knowledge. The prosecutor permissibly argued her witnesses were credible and that the defendant was not worthy of belief based on facts before the jury. *Id.* at 361. It would have been futile for defense counsel to object to the prosecutor's comments on these grounds. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant additionally argues that defense counsel was ineffective in failing to request an evidentiary hearing before defendant was ordered to pay \$17,046.50 in restitution. Defendant argues that the amount was not supported by evidence, and that payment will be impossible or cause undue hardship. MCL 780.767(4) "affords defendant an evidentiary hearing when the amount of restitution is contested and further provides that the prosecution bears the burden of establishing the proper amount." *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997).

A defendant waives his opportunity for an evidentiary hearing when he fails to dispute the amount imposed at sentencing. *Id.* Here, the presentence report contained a letter from First Recovery Group indicating that they were seeking “subrogation and/or recovery regarding medical claims paid on behalf of [the victim].” The letter indicated that total claims paid to date were \$17,046.50. The amount was therefore supported by evidence, and defense counsel's failure to request an evidentiary hearing regarding the amount in this case did not fall below an objective standard of reasonableness. Additionally, while defendant claims that it would be impossible or at least an undue hardship to pay the restitution, he has not established a factual predicate for this argument. *Hoag, supra.* Specifically, the trial court noted defendant's ability to pay immediately before ordering costs, fees and restitution and defendant has offered no evidence that he cannot pay. Thus, defendant cannot demonstrate that counsel's failure to move for a hearing on defendant's ability to pay fell below an objective standard of reasonableness.

Defendant finally argues on appeal that the prosecutor permitted the victim's mother to testify concerning the victim's college plans, which constituted an impermissible appeal to sympathy in order to convince the jury to convict defendant. We review unpreserved claims of prosecutorial misconduct for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). “The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial.” *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis, and the actions of the prosecutor are to be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *Rodriguez, supra* at 30. The prosecution may not appeal to the jury's sense of sympathy for the victim. *Watson, supra* at 591. At trial, part of the defense theory was that earlier in the evening someone from inside the vehicle, in which the victim was an occupant, fired a gun at defendant's residence. The defense attempted to establish that the occupants in the victim's vehicle were traveling from place to place looking for trouble. The fact that the victim had recently graduated from high school and was preparing to enter college on a wrestling scholarship rebutted that assertion. The trial court determined that a brief background was relevant, and defendant does not challenge that ruling on appeal. The challenged testimony was derived from the first witness before a lengthy discussion of other evidence, it comprised only a brief part of the argument, and it was not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999).

Defendant also claims that defense counsel was ineffective in failing to request that the testimony be stricken from the record. However, “[d]efense counsel is not required to make a meritless motion or a futile objection.” *Goodin, supra* at 433. Here, the prosecution's questions did not evoke undue sympathy for the victim, and it would have been futile for defense counsel to object on prosecutorial misconduct grounds.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra