STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2008
v	No. 279914 Kent Circuit Court
DAVID JAMAR BLAIR, Defendant-Appellant.	LC No. 06-011905-FC

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b); possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; felon in possession of a firearm, MCL 750.224f; and assault with intent to rob while armed, MCL 750.89. Because sufficient evidence supported defendant's conviction for first-degree felony murder, defendant failed to show that the verdict was against the great weight of the evidence or that there was a plain error affecting his substantial rights, and defendant failed to establish prosecutorial misconduct or a prima facie violation of the fair cross-section requirement in the jury selection process, we affirm.

Defendant first argues that the prosecutor presented insufficient evidence to support the jury's verdict, or alternatively, that the verdict was against the great weight of the evidence. We review challenges to the sufficiency of the evidence de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). In order to satisfy due process in a criminal case, a defendant's conviction must be based on evidence sufficient to justify the conclusion by the trier of fact that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). We review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Patterson*, 428 Mich 502, 524-525; 410 NW2d 733 (1987). On review, all reasonable inferences and credibility choices are made in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To determine whether a verdict is against the great weight of the evidence, the Court must determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Because defendant did not preserve this issue in the trial court, our examination is limited to review for plain error affecting substantial rights. *People v Carines*,

460 Mich 750, 763-764; 597 NW2d 130 (1999). Even where such error is found, we will reverse the trial court judgment only if a plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*.

To sustain a conviction for first-degree felony murder the prosecutor must prove: "(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result i.e., malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b)]." *Carines*, *supra* at 758-759. Assault with intent to rob while armed is a predicate felony under the felony-murder statute. *People v Akins*, 259 Mich App 545, 553; 675 NW2d 863 (2003). "The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal." *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991) (internal citations omitted). Reasonable inferences drawn from circumstantial evidence can be sufficient evidence to sustain a criminal conviction. *Carines*, *supra* at 757.

On appeal, defendant does not dispute that the crime occurred or that the necessary elements were proven beyond a reasonable doubt, with one exception. Defendant asserts that he was not at the crime scene and was not the one who shot the gun. Identity is always an essential element in every criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Here, considering the evidence in a light most favorable to the prosecution, there was sufficient evidence to support beyond a reasonable doubt that defendant was at the crime scene and shot the victim. Defendant was clearly identified as being at the crime scene and being the shooter. And, the police later discovered that defendant jointly owned and had access to the gun that killed the victim, Torry Hopson. Several witnesses, Brittany Dow, Ashley Hunter, and Bobby Miller, all identified defendant, their friend, as the person who shot the victim. Contrary to defendant's argument on appeal, the prosecution witnesses' credibility cannot be considered in evaluating the sufficiency of the evidence. *Lemmon, supra* at 643-644.

With respect to defendant's claim challenging the great weight of the evidence, defendant has failed to show that the evidence preponderates heavily against the verdict, or that the prosecution witnesses' testimony was impeached to the extent that it was deprived of all probative value that the jury could not believe it. *Lemmon, supra* at 642-643. We conclude, after reviewing the record, there is no indication that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Thus, no plain error exists requiring reversal.

Defendant next argues that the prosecution's witnesses were coerced into testifying against defendant through police and prosecutorial misconduct. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). 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. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). It is axiomatic that a prosecutor may not knowingly use false testimony and has a constitutional obligation to correct false evidence if he knows or "can be deemed to have known" that his witness lied. See *People v Lester*, 232 Mich App 262, 275-276,

279; 591 NW2d 267 (1998). Furthermore, police or prosecutor intimidation used to coerce a witness to testify or change his testimony amounts to a denial of defendant's due process rights. *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003).

After reviewing the record, we conclude that defendant has failed to establish a factual predicate showing that the police and prosecution coerced witnesses into offering false testimony. The record here does not support defendant's claim that his conviction was based on false testimony. Defendant's argument is based on minor inconsistencies and perceived bias. At best, the record establishes credibility issues that were resolved by the jury in favor of finding that defendant shot the victim during a robbery. The mere fact that a witness's testimony conflicts with other evidence does not establish that a prosecutor knowingly presented perjured testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Defendant has failed to show that the prosecutor coerced witnesses or knowingly presented false testimony. Therefore, defendant's claim of prosecutorial misconduct is without merit.

Defendant next argues that defects in the Kent County jury selection system deprived him of the right to an impartial jury drawn from a fair cross section of the community. We review unpreserved constitutional errors for plain error that affects the substantial rights of the defendant. *Carines*, *supra* at 763.[1] 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." *People v Smith*, 463 Mich 199, 215; 615 NW2d 1 (2000), quoting *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Defendant has failed to prove the second prong of the test. Defendant's only evidence of underrepresentation was his own observation of his jury array that he claims contained only three minorities. But defendant did not present evidence of underrepresentation for jury venires in Kent County 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). Defendant has also failed to meet the third prong of the test. His counsel mentioned past systematic errors, and the trial court acknowledged an error that existed years previous but had since been resolved.[2] However, defendant produced no evidence that systematic exclusion existed at the time he chose his jury. "[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). Therefore,

[1] Regardless of defendant's claims to the contrary, we do not accept that the claim is somehow preserved. Defendant did not challenge the jury array until the third day of trial, after the jury was impaneled and sworn. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996).

[2] Defendant attached to his brief several exhibits including newspaper articles chronicling the jury pull glitch that occurred in 2002. But, defendant may not expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

defendant has failed to establish a prima facie case of racial discrimination and his claim is without merit.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio