STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

STANLEY PARKER,

Defendant-Appellant.

UNPUBLISHED
October 23, 1998

No. 195820
Kalamazoo Circuit Court
LC No. 95-001195 FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of first-degree premeditated murder, MCL 750.316; MSA 28.548, assault with intent to do great bodily harm less than murder (hereinafter "assault with intent"), MCL 750.84; MSA 28.279, two counts of possession of a firearm during the commission of a felony (hereinafter "felony-firearm"), MCL 750.227b; MSA 28.424(2), and one count of being a felon in possession of a firearm (hereinafter "felon in possession"), MCL 750.224f; MSA 28.421(6). Defendant was sentenced to serve life imprisonment for his first-degree premeditated murder conviction, ten to fifteen years in prison for the assault with intent conviction, two years' imprisonment for each felony-firearm conviction, and five to seven and one-half years for the felon in possession conviction. Defendant's felony-firearm sentences are concurrent with his felon in possession conviction, and are to be preceded by his other two prison terms. We affirm.

Defendant first argues that the trial court violated his right to due process by empanelling an "anonymous jury." We disagree. Defendant first raised this issue on appeal to this Court. "Issues raised for the first time on appeal, even those relating to constitutional claims, are not ordinarily subject to appellate review." *Michigan Up & Out of Poverty Now Coalition v Michigan*, 210 Mich App 162, 167; 533 NW2d 339 (1995). "This Court may nevertheless address constitutional questions that were not addressed below where no question of fact exists and the interests of justice and judicial economy so dictate." *Great Lakes Div of National Steel Corp v Ecorse*, 227 Mich App 379, 426; 576 NW2d 667 (198). Accord *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993).

After reviewing the record, we conclude that no there are no exigent circumstances which would justify reversal of defendant's convictions. In support of his argument, defendant cites to a practice used in federal district courts whereby "certain biographical information about potential jurors [is withheld] for the parties involved." *United States v Branch*, 91 F3d 699, 723 (CA 5, 1996). The empanelment of such an anonymous jury is considered to be a extreme measure, that "is constitutional when necessary . . . so long as the defendants are not stripped of their rights to conduct an effective voir dire and to maintain the presumption of innocence." *United States v Salvatore*, 110 F3d 1131, 1143 (CA 5, 1997). Accord *Branch, supra* at 724-725.

Although the jurors in the instant case were referred to by an assigned number throughout the record, this does not amount to the type of concealment that constitutes the designation "anonymous jury," as that label has come to be understood in the federal district courts.[1] The concealment of the jurors names was done to assure their anonymity from the public (particularly the media), not the parties to the trial. There is no indication that the names of the jurors were withheld from defendant. Further, there is no evidence that defendant was denied access to any information contained on the standard jury personal history questionnaire. MCR 2.510. The fact that the trial judge called the system he used an "anonymous system" is of no import. Moreover, defendant has failed to establish that his right to an effective voir dire was prejudiced by this procedure, or that it somehow undermined his presumption of innocence. *Salvatore, supra* at 1144; *Branch, supra* at 724-725.

Defendant next argues that his right to a fair trial was undermined by certain comments made by Detective Kevin Vaughn at trial. We disagree. First, defendant agues that he was prejudiced when the officer testified that he knew of defendant "from dealing with him on a prior case." Defendant's failure to raise a specific and timely objection to the allegedly improper testimony precludes "appellate review in the absence of manifest injustice." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). At the heart of defendant's argument is the speculative inference that the testimony at issue would prejudice the jury because it would likely conclude that defendant had been involved in past criminal activity. When viewed in context, we do not agree that the testimony leads to such a conclusion. Accordingly, we find no manifest injustice.

Second, defendant argues that he was prejudiced by Vaughn's comment that a second officer had told Vaughn that the second officer "did not think [defendant] . . . was being truthful and up-front" about the murder. Defendant properly objected to this testimony on the grounds that it was inadmissible hearsay. The trial court then struck the testimony and informed the jury to disregard it. Later, during its final instructions to the jury, the trial court reinforced this directive when it told the jury, "At times during the trial I have . . . stricken testimony that was heard, do not consider those things in deciding this case. Make your decision only on the . . . evidence that I let in and nothing else." "[A] jury is generally presumed to follow the instructions of the trial court unless the contrary is clearly shown." *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). Defendant has failed to show that the jury failed to follow the trial court's instructions. Finding no evidence of prejudice, we conclude that the comment did not deny defendant a fair and impartial trial.

Third, defendant argues that he was unfairly prejudiced by the officer's testimony that defendant had invoked his Fifth Amendment privilege against compelled self-incrimination.[2] *People v Bobo*, 390

Mich 355; 212 NW2d 190 (1973). After the statement was made and defendant raised an objection, the court immediately recessed the trial and met with the parties in chambers. In that meeting, the court indicated it would sustain defendant's objection and tell the jury to disregard the answer.[3] Defense counsel then indicated he would discuss with defendant whether or not defendant would pursue any further remedial action. Significantly, as the following trial excerpt shows, defendant decided not to pursue the issue and seek a mistrial:

> *The Court*: All right. In the intervening break Mr. Sykes[4] has communicated with the Court that he is, after consulting with his client, has elected to not request a – mistrial, at this point in time.
>
> Mr. Sykes, is that correct?
>
> *Mr. Sykes*: That is, Your Honor. I've discussed the options, at this point, with my client. We've decided it would not be in . . . his best interest, or the case, as far as defensively, to request a mistrial, at this point.
>
> And we also appreciate the fact that the Court, in instructing the jury not to consider it, didn't mention what it was that they we're supposed to consider.
>
> And, I think that it's be dealt with sufficiently, at this point. We would ask to continue with this jury trial.
>
> *The Court*: All right. Let me just, for the record, Mr. Parker, have you heard what Mr. Sykes just said?
>
> *Mr. Parker*: Yes.
>
> *The Court:* And, you've had an opportunity to consult with him on this?
>
> *Mr. Parker*: Yes.
>
> *The Court*: And, you agree with his statement?
>
> *Mr. Parker*: Yes, sir.

Defendant's approval of the trial court's curative instruction and his documented decision not to seek a mistrial means that he has intentionally waived his right to pursue the matter on appeal. To hold otherwise would be to allow defendant "to harbor error to be used as an appellate parachute in the event of jury failure." *People v Bart (On Remand)*, 220 Mich App 1, 15; 558 NW2d 449 (1996).

Defendant also argues that the trial court erred when it instructed the jury that if it found that he "gave false statements to the police regarding this crime [it] . . . may consider this as circumstantial evidence of" his guilt. "We review de novo a claim of instructional error." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). "We read instructions in their entirety to

determine if error occurred requiring reversal." *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

Reading the instruction in context, we do not agree that the challenged instruction was erroneous. The statements at issue related to defendant's claim that he had been home on the day that the victim was shot and killed. Because those statements, "if believed, [would tend] . . . to lead suspicion in another direction," *People v Wolford*, 189 Mich App 478, 482; 473 NW2d 767 (1991), and because the other evidence against defendant was not weak, *People v Dandron*, 70 Mich App 439, 442-443; 245 NW2d 782 (1976), we conclude that the instruction given was proper.

Next, defendant argues that he was denied a fair and impartial trial when the prosecutor in his closing argument vouched for the credibility of two prosecution witnesses, and appealed for sympathy for the victim. Because defendant did not object to the alleged instances of prosecutorial misconduct, appellate review "is foreclosed . . . unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant or if manifest injustice would result from our failure to review the alleged misconduct." *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). This Court decides issues of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating a prosecutor's comments in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

After reviewing the challenged remarks, we find no miscarriage of justice. We do not believe that the prosecutor's remarks about the two witnesses improperly invaded "the jury's exclusive province of testing the credibility of the witnesses." *People v Jones*, 60 Mich App 681, 686; 233 NW2d 22 (1975). The prosecutor did not vouch for the credibility of the two witness; the prosecutor did not imply that he had some "special knowledge' concerning the two witnesses' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Rather, the prosecutor simply argued that given the circumstances, the two witnesses should be believed. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). As for the prosecutor's comments regarding the victim, while they do appear to be an improper attempt to play upon the jury's sympathy for the victim, we find that they do not pose grounds for a new trial. The "prejudicial effect could have been cured with a timely requested cautionary instruction." *People v Swartz*, 171 Mich App 364, 373; 429 NW2d 905 (1988). Accordingly, manifest injustice will not result from our decision to not further consider the matter. *People v Shaneberger*, ___ Mich App ___; ___ NW2d ___ (Docket No. 200499, rel'd 9/18/98) slip op at 9.

Finally, defendant raises a two prong attack to the effectiveness of his trial counsel. To prevail on a claim of ineffective assistance of counsel, defendant "must show that counsel's performance was below an objective standard of reasonableness under prevailing norms . . . [and] that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Accord *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993), aff'd 449 Mich 375; 535 NW2d 496 (1995). Because defendant failed to move for either a new trial or a *Ginther*[5] hearing, review is limited to the existing record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

First, defendant argues that defense counsel was ineffective because he failed to take appropriate action to deal with the errors surrounding the testimony of officer Vaughn. We disagree. Defendant has failed to establish that he was prejudiced by either Vaughn's testimony concerning a prior contact with defendant, or Vaughn's testimony that was stricken as inadmissible hearsay. Further, given defendant's acquiescence in the decision not to pursue a mistrial based upon the testimony concerning defendant's invocation of his right to remain silent, we hold that defendant cannot now predicate a claim of ineffective assistance on that action. *Id.* at 672-673. Again, "'[t]o hold otherwise would allow defendant to harbor error as an appellate parachute.'" *Id.* at 673, quoting *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

Second, defendant argues that his counsel erred by not examining officer Luedecking regarding a report filed by the officer, and the officer's previous testimony in the trial of defendant's accomplice. Again, we disagree. After reviewing the existing record, we conclude that defendant cannot establish either that his counsel's performance was deficient, or that he was in any way prejudiced.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

[1] See, e.g., *Branch, supra* at 723 (observing that the recognized procedure involved in empanelling an anonymous jury involves "withholding names, addresses, places of employment, and spouses' names and places of employment"), citing *United States v Ross*, 33 F3d 1507, 1519 (CA 11, 1994).

[2] US Const, Am V reads in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."

[3] After court was reconvened, the trial court told the jury: "Members of the jury, . . . in Chambers I sustained the last objection, and have stricken from the record the last statement, or comment by Detective Vaughn." Further, as previously discussed, the trial court told the jury in its closing instructions that any matter stricken from the record was to be completely disregarded.

[4] Sykes was defendant's trial counsel.

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).