STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BILL HARRIS LEONARD, a/k/a WILLIAM HARRIS LEONARD,

Defendant-Appellant.

UNPUBLISHED
July 25, 2000

No. 214494
Jackson Circuit Court
LC No. 97-082099-FC

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and sentenced to life imprisonment without parole. Defendant appeals as of right. We affirm.

Defendant's conviction arises from the beating death of Bobby Rydell Miles, who died from brain injuries caused by blunt force impacts to the head. The pattern of the indentations on the head and other bruises on the face and side chest wall were consistent with markings on a baseball bat that was seized from defendant's car.

Testimony at trial indicated that defendant, his nephew Naim Abdur-Rasheed, and Latoya Bell drove from Detroit to Jackson for the purpose of assaulting Miles, who was the fiancée of Latoya's twin sister, Latosha. Latoya was angry at Miles because of a prior incident in which he had fired shots at a house where Latosha resided. When Latoya confronted Miles, he threatened her with a gun. Latoya subsequently told Rasheed and defendant that Miles needed to be beaten up. Rasheed and defendant agreed to do it and they discussed different methods of killing him, including using a baseball bat.

On or about December 17, 1996, at approximately 2:30 a.m., a situation developed in which Miles was at Latosha's house. Latoya and her Uncle Tony arrived at the front door around the same time that defendant and Rasheed approached from defendant's car across the street. Defendant and Latoya both knew that Rasheed had the bat in his hand. Latoya and her uncle went inside the house. Defendant and Rasheed waited on the porch. When Miles came out, Rasheed swung at him and Miles began to run. Rasheed chased after Miles and defendant followed.

Defendant claimed that he intended to prevent an altercation, but heard a smack and then heard Miles screaming, whereupon he saw Rasheed standing over Miles' body at the top of the steps of a back porch and tried to pull Rasheed away. Defendant admitted that, in response to an epithet directed at him by Rasheed, he kicked the victim, but claimed it was merely a "nudge" to see if he was still alive. Defendant denied hitting Miles with the bat. Defendant testified that he pulled Rasheed down the stairs, went back to his car, picked up Latoya, and drove back to Detroit. However, Latoya testified that, during the drive home, both Rasheed and defendant bragged about the incident and both stated that they had cracked Miles in the head with the bat.

On appeal, defendant claims that he was denied a fair trial because of three separate occurrences of prosecutorial misconduct. This Court considers allegations of prosecutorial misconduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

First, defendant claims that the prosecutor improperly concealed explicit or implicit understandings, or reasonable expectations, that Latoya Bell would receive leniency in exchange for her testimony. While a prosecutor has a duty to disclose promises made to obtain an accomplice's testimony, the prosecutor is not required to disclose future possibilities of leniency for the jury's speculation. *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982); *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976); *People v Dowdy*, 211 Mich App 562, 571; 536 NW2d 794 (1995). Here, there is no record support for defendant's claim that some secret promise of leniency existed in exchange for Latoya Bell's testimony. Further, it was not improper for the prosecutor to recommend lenient consideration for Latoya Bell after the fact.

Second, defendant contends that it was improper for the prosecutor to argue that defendant administered the fatal blow with the bat where this theory was inconsistent with the prosecution's position at Rasheed's earlier trial. We disagree. A prosecutor is permitted to argue the evidence and all reasonable inferences therefrom as it relates to the prosecutor's theory of the case. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Here, the prosecutor's argument was supported by the medical examiner's testimony concerning the direction of the blows, which in turn was based on facts in evidence at defendant's trial that were not in evidence at Rasheed's trial. Accordingly, the prosecutor's argument was not improper.

Third, viewed in context, the prosecutor did not violate the trial court's ruling regarding reference to defendant's alias. Further, the prosecutor's questions concerning defendant's use of an alias upon arrest were relevant to his credibility. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997); *People v Griffis*, 218 Mich App 95, 99; 553 NW2d 642 (1996).

Next, defendant argues that the trial court erred when, in connection with Latoya Bell's testimony, it gave the cautionary instruction for a disputed accomplice, CJI2d 5.5, rather than an undisputed accomplice, CJI2d 5.4. Because defendant did not object to the court's jury instructions or request CJI2d 5.4, appellate relief is precluded absent plain error affecting defendant's substantial rights, and the error resulted in the conviction of an actually innocent defendant or "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings" independent of the defendant's

innocence. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), citing to *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

First, we find that the trial court was not required to sua sponte give a cautionary instruction on accomplice testimony because (1) the trial did not involve a credibility contest between defendant and the accomplice and, therefore, the issue was not "closely drawn," see *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974); *People v Buck*, 197 Mich App 404, 415; 496 NW2d 321 (1992), rev'd in part on other grounds 444 Mich 853 (1993); *People v Fredericks*, 125 Mich App 114, 120-121; 335 NW2d 919 (1983), and (2) "potential problems" with Latoya Bell's credibility were plainly presented to the jury, *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996).

We agree, however, that having proceeded to instruct on accomplice testimony, the evidence supported giving CJI2d 5.4 (undisputed accomplice) instead of CJI2d 5.5 (disputed accomplice). Nonetheless, because the instruction given left the jury free to decide that Latoya Bell was an accomplice, and because the evidence pointing to her role as an accomplice was not seriously in dispute, and because the prosecutor argued throughout trial that she was equally as guilty as Rasheed and defendant, we are satisfied that the error had no affect on the outcome of trial. Accordingly, appellate relief is not warranted. *Carines, supra*.

Defendant claims that the trial court abused its discretion and usurped the function of the jury on two separate occasions. The first involves the court's statement when admitting into evidence the bat seized from defendant's vehicle. In the course of overruling defendant's objection to the admission of the bat, the court commented that the proofs "certainly place this bat as the bat that was used in this killing." The trial court may not usurp the right of the jury by ruling as a matter of law on an essential element of the crime charged. *People v Reed*, 393 Mich 342, 349; 224 NW2d 867 (1975); *People v Tice*, 220 Mich App 47, 54-55; 558 NW2d 245 (1996). Identification of the weapon is not an element of first-degree murder. *People v Graves*, 224 Mich App 676, 678; 569 NW2d 911 (1997), rev'd on other grounds 458 Mich 476 (1998). Here, we are satisfied that the trial court did not usurp the function of the jury, inasmuch as the challenged statement was not made in the context of a statement of undisputed fact to the jury, but rather in the context of ruling whether an adequate foundation had been established for admission of the bat into evidence. Further, in view of evidence that defendant directed the police to the bat, the court's decision to admit the bat did not constitute an abuse of discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

We are also satisfied that the trial court did not usurp the fact-finding function of the jury or abuse its discretion when giving a cautionary instruction in response to a defense objection during the prosecutor's closing argument. Viewed in context, the instruction conveyed that it was up to the jury to determine whether it believed that Rasheed had in fact made the statement that Latoya Bell attributed to him.

Defendant next argues that he was denied the effective assistance of counsel due to numerous alleged deficiencies by trial counsel. To warrant a new trial based on a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him that he was denied a fair trial. *People v*

Hoag, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). To demonstrate prejudice, defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Hoag*, *supra* at 6; *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Hoag*, *supra*.

Defendant first argues that counsel was ineffective for failing to call Paul Williams and Stanley Leonard as witnesses at trial. Even if we were to conclude that their purported testimony was admissible under MRE 804(b)(3), see *People v Barrera*, 451 Mich 261, 267-268, 275-276; 547 NW2d 280 (1996); *People v Poole*, 444 Mich 151, 153-154, 161-165; 506 NW2d 505 (1993), defense counsel's failure to call them at trial did not amount to ineffective assistance because their testimony would not have changed the outcome of the trial. *Hoag, supra*. At best, their testimony might have raised a question whether defendant actually struck Miles with the bat, but it would not have exculpated defendant from being equally culpable in the murder as an aider and abettor. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

Nor was defense counsel ineffective for failing to elicit that Latoya Bell was subject to a possible penalty of mandatory life imprisonment for first-degree murder where she had not been charged with first-degree murder and there was no evidence of an agreement not to charge her with first-degree murder in exchange for her testimony. *People v Goad*, 421 Mich 20, 25, 28; 364 NW2d 584 (1984). Further, contrary to what defendant asserts, the record discloses numerous instances in which defense counsel impeached Latoya Bell with evidence of her prior inconsistent statements and testimony.

Next, the record does not factually support defendant's claims that he was not properly and timely advised of his *Miranda*[1] rights before police questioning and inquiry about the bat, or that he did not validly consent to the seizure of the bat. Although defendant made an offer of proof, there is no indication from the record of any evidence that supports defendant's position. At trial, a police officer involved in defendant's arrest testified that defendant received the *Miranda* warning after his arrest. Defense counsel cross-examined the officer, asking "And what you have stated in your report and contributed to a statement, is subsequent to the advice of rights of [defendant]. Is that accurate?," to which the officer responded "Yes." Defendant even testified at trial about the arrest, the questions that the officers asked, and the seizure of the bat from defendant's car. At that time, defendant did not suggest that the police failed to give him the *Miranda* warning. Defendant's trial testimony reveals that defendant willingly spoke with the police and gave them permission to retrieve the bat from his car. Thus, the record reveals police testimony that the *Miranda* warning was properly given, that defense counsel inquired into the police actions during the arrest, and that defendant, in his own testimony, failed to suggest that he did not know his rights before he spoke to the police because they failed to recite the *Miranda* warning. Defendant's offer of proof is insufficient to overcome the factual record already established at trial. On this record, there are no grounds to suggest that a motion to suppress would have been effective. Counsel is not required to make a futile motion. *People v Flowers*, 222 Mich

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

App 732, 737-738; 565 NW2d 12 (1997); *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989). Accordingly, we reject defendant's claim that trial counsel was ineffective for failing to move to suppress the evidence on these grounds.

We also reject defendant's claim that defense counsel was ineffective for failing to move to suppress his first statement to Detective Crawford on the basis that it was involuntary. The existing record does not factually support a finding of involuntariness and defendant's mere assertion that he had not had sufficient sleep when he made the statement, absent other allegations of police misconduct, is insufficient to support a finding of voluntariness. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988); *People v Wells*, 238 Mich App 383, 386-387; 605 NW2d 374 (1999).

Defendant also claims that defense counsel was ineffective for failing to object to the prosecutor's questions inquiring about his reasons for traveling to Jackson. We disagree. The questioning was proper in that it was designed to test the credibility of defendant's testimony denying that the only purpose of coming to Jackson was to assault the victim. Thus, any objection by defense counsel would have been futile. Further, the prosecutor's reference to Rasheed's earlier murder conviction was made in response to defense counsel's remarks, which suggested that the guilty party had already been convicted. The prosecutor was arguing that the evidence demonstrated that *both* defendant and Rasheed were guilty and, therefore, the jury should not hesitate to find defendant guilty merely because Rasheed had already been convicted. Viewed in this context, the prosecutor's remarks were not improper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996); *Lee*, *supra* at 255; *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). Accordingly, defense counsel was not ineffective for failing to object.

While defense counsel may have erred in failing to object to the disputed accomplice jury instruction, and not requesting the undisputed accomplice jury instruction, with respect to Latoya Bell's testimony, defendant was not prejudiced by this error inasmuch as the instruction given allowed the jury to conclude that Latoya was an accomplice and the prosecutor never seriously disputed this fact.

Next, the record reveals no due process violation in connection with any delay in charging defendant with first-degree murder. Defendant's claims of prejudice are too indefinite and speculative to satisfy the "actual and substantial" threshold requirement set forth in *People v Adams*, 232 Mich App 128, 132-134; 591 NW2d 44 (1998), citing to *People v Bisard*, 114 Mich App 784, 788, 791; 319 NW2d 670 (1982). Further, the prosecutor has demonstrated legitimate reasons for any delay. Thus, defendant has not shown that defense counsel was ineffective for failing to move to dismiss or suppress on this basis.

Defendant also claims that defense counsel was ineffective for not objecting to Latoya Bell's testimony concerning certain statements by Rasheed. However, the record indicates that the statements were admissible under MRE 804(b)(3). *Poole, supra*. Therefore, defense counsel was not ineffective for failing to object to the statements.

Next, we find no merit to defendant's claim that Dr. Schultz, who performed the autopsy on the victim, was not authorized by law to do so. MCL 52.201b; MSA 5.953(1b) merely establishes residency requirements for a person who is appointed a county's deputy medical examiner, and MCL 52.202; MSA 5.953(2) sets forth the duties of the county medical examiner. There is nothing in either statute that precludes the county from contracting with other medical doctors who specialize in forensic pathology. Dr. Schultz did not claim to be a deputy county medical examiner for Jackson County and he did not misrepresent his status. Thus, defendant's claim of ineffective assistance of counsel predicated on this issue must fail.

Finally, we are satisfied that any alleged deficiency with regard to counsel's examination of a police officer concerning defendant's tendency to be honest was not so prejudicial that it denied defendant a fair trial or otherwise had an effect on the outcome of trial. *Hoag, supra* at 6.

In light of the foregoing, we conclude that defendant has not demonstrated any entitlement to relief due to ineffective assistance of counsel. *Pickens, supra* at 338; *Ho, supra* at 191.

Next, defendant claims that the prosecutor's opening statement exceeded the bounds of MCR 6.414(B), which requires a "full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove." We disagree. While a prosecutor may not make inflammatory remarks or blatant appeals to the jury's sympathy, she may comment regarding the evidence to be presented. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Moreover, prosecutors are not precluded from using "hard language" and are not required to phrase their remarks in the blandest of all possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Here, the prosecutor's opening remarks were dramatic, but not improper. They set forth the facts that she intended to prove at trial. The remarks did not deny defendant a fair trial.

Defendant, an African-American, was tried before an all-white jury. He contends that he was denied his right to be tried by a jury that represented a fair cross-section of the community. We disagree. In *People v Howard*, 226 Mich App 528, 532-534; 575 NW2d 16 (1997), this Court stated:

> We reject defendant's fair cross-section claim. While a criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community, US Const, Am VI, he is not entitled to a petit jury that exactly mirrors the community. *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975); *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 593 [*sic*] (1996). To establish a prima facie violation of the fair cross-section requirement, a defendant must show
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> > "(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).]
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> Although defendant asserts that African-Americans were underrepresented in his particular array, he presented no evidence concerning the representation of African-Americans on 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. *Timmel v Phillips*, 799 F2d 1083, 1086 (CA 5, 1986). Defendant also failed to show that any alleged underrepresentation was due to systematic exclusions, i.e., an exclusion resulting from some circumstance inherent in the particular jury selection process used. *Duren*, *supra* at 366; *Hubbard (After Remand)*, *supra* at 481 . . . . It is well settled that "[o]ne incidence of a jury venire being disproportionate is not evidence of a 'systematic' exclusion." *Timmell*, *supra* at 1087; see also *Hubbard (After Remand*), *supra* at 481.

Here, as in *Howard*, defendant has failed to present any evidence regarding the representation of African-Americans on jury venires in general in his community and has failed to present any evidence to show that any alleged underrepresentation was due to systematic exclusion resulting from some circumstance inherent in the particular jury selection process used.

Furthermore, *Robson v Grand Truck WR Co*, 5 Mich App 90; 145 NW2d 846 (1966), upon which defendant relies, is not supportive of defendant's position. In *Robson*, this Court stated that the complaining party had "the burden of demonstrating that the township and city ward officials did not comply with the applicable law in selecting at random a jury . . . ." *Id*. at 98. Here, apart from claiming that his jury venire was disproportionate, defendant has failed to shoulder his burden of demonstrating a prima facie violation of the fair cross-section requirement.

In light of the foregoing, defendant has not demonstrated that he is entitled to a new trial on the basis of cumulative error. *Cooper*, *supra* at 659-660; *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Finally, we find no merit to defendant's claim that his mandatory life sentence for first-degree murder is unconstitutional. *People v Snider*, 239 Mich App 393, 426-428; 608 NW2d 502 (2000); *Cooper*, *supra* at 661, 664; *People v Saxton*, 118 Mich App 681, 693; 325 NW2d 795 (1982), citing *People v Hall*, 396 Mich 650; 242 NW2d 377 (1976). See, also, *People v Launsburry*, 217 Mich App 358, 363-365; 551 NW2d 460 (1996).

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey