STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 20, 2007
v	No. 265843 Genesee Circuit Court
ROBERT THOMAS PARKS, Defendant-Appellant.	LC No. 05-016127-FC

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of premeditated first-degree murder, MCL 750.316. The trial court sentenced him to life in prison without parole. We affirm.

Defendant was convicted of killing his wife by manual strangulation. During their marriage, defendant frequented strip clubs and brothels, asked co-workers for sex, and claimed to keep "his pimp hand strong," meaning that he "kept his women in line." Before her death, the victim expressed increasing concern and frustration about their marriage and defendant's infidelity.

On August 28, 2004, five days before her death, the victim was involved in a car accident. There were no injuries to her chest, neck, or head, and she had no difficulty breathing as a result of the accident. The victim worked on September 3, 2004, and did not complain of any ailments other than a sprained ankle. She arrived home from work at approximately 6:45 p.m. that evening. At approximately 11:20 p.m., defendant reported that the victim was in cardiac arrest as a result of a drug overdose. Police officers and paramedics subsequently discovered the victim lying nude on her bed, with her feet at the head of the bed. She had vomit on her face and in her airway. They then transported the victim to the hospital, where she was pronounced dead upon arrival.

Dr. Valery Alexandrov performed the victim's autopsy the following day. He discovered hemorrhaging in the victim's left eye, indicating that she suffered asphyxiation. There was also hemorrhaging on both sides of her neck and a fracture of the tip of her hyoid bone, indicating that force was applied to her neck. Dr. Ljubisa Dragovic testified that he, Dr. Alexandrov, and at least three additional forensic pathologists reviewed the autopsy report. They unanimously agreed that the victim's cause of death was manual strangulation.

On appeal, defendant first argues that defense counsel's failure to investigate and call an expert witness to testify about the victim's cause of death amounted to ineffective assistance of counsel. Whether defendant was denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The trial court's factual findings are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id*. at 484-485. Because there was no evidentiary hearing concerning claims of ineffective assistance of counsel, our review is limited to mistakes that are apparent on 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 that defendant was prejudiced to the extent that he was denied a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Defendant must show that, but for defense counsel's error, there is a reasonable probability that the results of the trial would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy. *Id*.

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). In other words, defense counsel's failure to call an expert witness in the instant case 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 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Hyland*, *supra* at 710-711. Moreover, the decision whether to call a witness is presumed to be a matter of trial strategy, *Dixon*, *supra* at 398, and we will not, in hindsight, substitute our judgment for that of counsel regarding matters of trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Before trial, defense counsel indicated that he intended to call an expert in forensic pathology to testify. But, the record does not disclose defense counsel's reasons for ultimately deciding not to call an expert witness. Defendant has simply failed to overcome the presumption that defense counsel's decision was anything but sound trial strategy. Defendant has not shown that he was denied a substantial defense by defense counsel's failure to call an expert witness. Defendant's trial theory was that the victim died as a result of injuries suffered in a car accident. Defense counsel advanced this theory by way of opening and closing statements and thorough cross-examination of the prosecutor's expert witnesses. The record does not indicate that there was any expert witness who would have refuted the prosecutor's theory regarding manual strangulation. Thus, this case is distinguishable from cases where trial counsel failed to present witnesses who could actually have directly contradicted the prosecution's case. See, e.g., *Grant*, *supra* at 493-495; *People v Johnson*, 451 Mich 115, 118; 545 NW2d 637 (1996). Because there is no evidence that an expert witness would have testified on defendant's behalf in a manner consistent with his theory of defense and contrary to the prosecution's theory of manual strangulation, we cannot conclude that the failure to call an expert witness was outcome determinative. Defendant has failed to overcome the presumption of effective assistance of counsel.

In reaching our conclusion, we note that defendant requests a remand for additional fact-finding. Because defendant failed to present any evidence, in the form of an affidavit or other offer of proof, to support his claims and the need for an evidentiary hearing, a remand is not warranted. See MCR 7.211(C)(1)(a)(ii); *Johnson, supra* at 118 (claim that the defendant never shot a gun at the crime scene supported by the affidavits of six eyewitnesses who counsel failed to call to the stand).

Defendant next argues on appeal that the trial court erred when it admitted expert opinion testimony regarding the victim's cause of death. Defendant specifically contends that, in determining the admissibility of the testimony of Dr. Dragovic and Dr. Alexandrov, the trial court failed to consider all of the factors required under MCL 600.2955(1). We first find that the issue was waived, considering that defense counsel stipulated to the doctors' qualifications to testify as experts. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000); *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). However, defendant also frames this issue in the context of ineffective assistance of counsel for failure to object to the expert testimony. This argument also fails.

MCL 600.2955(1)(a)-(g) require a trial court to consider seven factors regarding the reliability of expert scientific opinions. While it is true that Dr. Dragovic and Dr. Alexandrov were not specifically questioned regarding all seven of these factors, MCL 600.2955 pertains to tort actions and not criminal prosecutions. The statute limits its application to "action[s] for the death of a person or for injury to a person or property[.]" MCL 600.2955(1). MCL 600.2955 is part of Chapter 29 of the Revised Judicature Act, MCL 600.101 *et seq.*, which encompasses "provisions concerning specific actions" and relates to civil claims. MCL 600.2901 *et seq.* Accordingly, because any argument by defense counsel at trial that MCL 600.2955 was not satisfied would have been futile, counsel was not ineffective. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

The admission of expert testimony in the instant case is governed by MRE 702. MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court has an obligation under MRE 702 "to ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004).

Here, Dr. Dragovic and Dr. Alexandrov provided extensive testimony regarding their education, training, and experience in the field of forensic pathology. Dr. Alexandrov performed a thorough autopsy on the victim. Later, Dr. Dragovic, and at least three additional forensic pathologists, confirmed Dr. Alexandrov's conclusion that the victim died as a result of manual strangulation. We find that the expert opinion testimony regarding the victim's cause of death

was properly admitted pursuant to the requirements of MRE 702. Accordingly, no claim of ineffective assistance of counsel relative to admission of the evidence is sustainable.

Finally, defendant argues that he "was denied the right to a fair trial and impartial jury when the race of the jury venire did not sufficiently reflect the African American community." We review unpreserved claims of systemic exclusion of minorities in jury venires for plain error affecting substantial rights. *People v Eccles*, 260 Mich App 379, 381-382; 677 NW2d 76 (2004).

"A criminal defendant is entitled 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). "[T]he Sixth Amendment guarantees an opportunity for a representative jury by requiring that jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to constitute a fair cross section of the community." *Id*. at 472-473. However, a particular jury array need not mirror the community exactly. *People v Howard*, 226 Mich App 528, 532-533; 575 NW2d 16 (1997); *Hubbard*, *supra* at 472. 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.'" *Hubbard*, *supra* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Defendant's claim satisfies the first prong of the *Duren* test because "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes." *Hubbard*, *supra* at 473. We find, however, that defendant has not satisfied the second prong of the test. Defendant asserts that a distinctive group in the community was substantially underrepresented in his jury venire based solely on statements that his jury venire was "mostly white." But, even if there was some disparity between the number of African-Americans included in his jury venire and the number residing in the community, "[m]erely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *Howard*, *supra* at 533. Because defendant presented no evidence regarding the actual racial make-up of his jury venire, or regarding jury venires in Genesee County in general, the second prong of the *Duren* test is not satisfied. See *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000).

Further, even if we assumed that African-Americans are underrepresented in jury venires in Genesee County, in order to satisfy the third prong of the *Duren* test, defendant had to show that this underrepresentation was due to a systematic exclusion of African-Americans from jury selection in Genesee County. *Hubbard*, *supra* at 473. "It is well settled that systematic 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). Rather, there must be a demonstrated problem inherent in the selection process that results in systematic exclusion. *Hubbard*, *supra* at 481. Defendant failed to present any evidence regarding the jury selection process in Genesee County. Therefore, we cannot conclude that African-Americans are systematically excluded from jury service. Defendant's "bald assertion" that systematic exclusion occurred is insufficient to satisfy the third prong of the *Duren* test. *Flowers*, *supra* at 737.

Further, with respect to defendant's request for a remand in order to conduct an evidentiary hearing on this matter, no affidavit or offer of proof regarding the Genesee County jury selection process or regarding the composition and selection of the jury array in this particular case has been submitted; therefore, defendant has failed to establish a need for an evidentiary hearing. See MCR 7.211(C)(1)(a)(ii).[1]

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter

[1] Defendant does not even present an argument or suggestion, pointing to any possible constitutional flaw in the jury-selection process. Additionally, there is no merit to defendant's argument that, without a remand for an evidentiary hearing, he will be deprived of effective appellate counsel.