STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2008
v	No. 272073 Macomb Circuit Court
ALLEN DAVID DANIEL, Defendant-Appellant.	LC No. 2005-001614-FH

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree home invasion, MCL 750.110a(3), larceny in a building, MCL 750.360, malicious destruction of a building, MCL 750.380(3)(a), malicious destruction of personal property, MCL 750.377a(1)(b)(i), aggravated stalking, MCL 750.411i, and malicious use of service provided by a telecommunications service provider, MCL 750.540e. He was sentenced to concurrent prison terms of 8 years and 3 months to 15 years for the second-degree home invasion conviction, two to four years for the larceny conviction, 180 days for the malicious use of telephone service conviction, and two to five years for each of the remaining convictions. He appeals as of right. We affirm.

Defendant first argues that his jury panel was not representative of the community and that African-Americans were underrepresented in his jury venire. Because defendant objected to the composition of only his petit jury in the trial court, and his objection was untimely, neither issue is preserved for appellate review. See *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). We review unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite a defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (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). This requirement does not, however, entitle a defendant to a jury consisting of members of a certain race. In *Hubbard*, *supra* at 472, this Court stated:

> This fair-cross-section requirement does not entitle the defendant to a petit jury that mirrors the community and reflects the various distinctive groups in the population. [*Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975).] Instead, the 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.

As stated in *Taylor, supra* at 538, "[d]efendants are not entitled to a jury of any particular composition . . . ."

Defendant asserted below that his jury "did not make up the neighborhoods that [he] grew up in." He reasserts this argument in this Court and contends that the jury panel drawn was constitutionally defective. Because defendant was not entitled to a jury reflecting the various distinctive groups in the community, however, his argument was properly rejected by the trial court. *Taylor, supra* at 538; *Hubbard, supra* at 472.

Defendant also argues that African-Americans were underrepresented in his jury venire. "To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving 'that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process.'" *McKinney, supra* at 161, citing *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000), citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Because defendant did not raise this issue in the trial court, the record does not indicate the composition of his jury pool or support his argument that African-Americans were underrepresented in the venire. Defendant's assertion that the trial court and the prosecutor conspired to exclude African-Americans from the jury pool is similarly unfounded and has no record support. Thus, this Court has no means of conducting a meaningful review of defendant's claims. See *McKinney, supra* at 161-162. Further, defendant has made no attempt to show that the alleged underrepresentation of African-Americans was the result of systematic exclusion of the group from the jury selection process as required under *Duren, supra* at 364. Accordingly, he has not established a plain error affecting his substantial rights. *Carines, supra* at 763.

To the extent that defendant also argues that the composition of the jury venire denied him his right to equal protection of the law under the Fourteenth Amendment, his argument similarly fails. To establish systematic discrimination regarding a state grand jury,

> a claimant must (1) show that the group excluded is a recognizable, distinct class capable of being singled out for different treatment under the laws, (2) prove the degree of underrepresentation by comparing the proportion of the excluded group in the total population to the proportion actually called to serve on the venire over a significant period, and (3) show that the selection procedure is either susceptible of abuse or not racially neutral. [*People v Williams*, 241 Mich App 519, 527-528; 616 NW2d 710 (2000).]

Assuming without deciding that this test applies with respect to a petit jury,[1] defendant's claim fails because, as discussed previously, the record does support his contention that any minority group was excluded from the jury venire.

Further, to the extent that defendant relies on *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), his reliance is misplaced. A *Batson* challenge is "a three-step process for determining the constitutional propriety of a peremptory challenge." *People v Knight*, 473 Mich 324, 336; 701 NW2d 715 (2005). Neither party asserted a *Batson* challenge in the trial court. Accordingly, defendant's reliance on *Batson* is misplaced.

Defendant next argues that his convictions were a result of fraudulent conduct. Specifically, he contends that the prosecution relied on known perjury and fabricated evidence, that the complainant, Sheba Lazarus, filed a false insurance claim, that police officers participated in the alleged fraudulent conduct, and that the trial court judge was corrupt and a party to the alleged fraud and deception. These arguments do not entitle defendant to appellate relief. With the exception of his claims pertaining to the trial court itself, defendant asserted these theories as a defense during trial, and the jury chose to disbelieve his claims. Further, defendant's arguments pertaining to the trial court judge are more appropriately addressed by means other than a direct appeal of his convictions to this Court.

Defendant next contends that the prosecution engaged in misconduct by relying on perjured testimony and fabricating evidence. This Court reviews de novo claims of prosecutorial misconduct to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005).

Defendant argues that Lazarus committed perjury in both the district and circuit courts and that the prosecution knowingly relied on such perjury. He fails to identify, however, the particular testimony that he argues constituted perjury. A defendant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citation and quotations omitted).

In further support of his claim of prosecutorial misconduct, defendant argues that Mary Sanders, Lazarus's neighbor, never identified him as the perpetrator at his preliminary examination and provided perjured testimony on which the prosecution knowingly relied. Again, defendant does not indicate the particular testimony of Sanders that he alleges was perjurious. It appears that he is arguing that Sanders committed perjury because she described the perpetrator as being six-feet tall and defendant is apparently only five-feet seven-inches tall. Even if Sanders was incorrect regarding the height of the perpetrator, however, this does not mean her testimony was perjurious. Rather, the height discrepancy created a credibility issue for the jury to determine. Sanders testified that she was unable to positively identify defendant at his

[1] See *Williams*, *supra* at 527 n 5, in which this Court "assume[d] without deciding" that the three-prong test for challenging the composition of state grand juries applies to petit juries as well.

preliminary examination because she had never seen him "up close" and knew him only by the way he walked, his physique, and his demeanor. She nevertheless testified at trial that defendant was the perpetrator. To the extent that Sanders's testimony was inconsistent, this did not render her testimony perjurious and it was for the jury to determine if she correctly identified defendant as the perpetrator.

Also in support of his claim of prosecutorial misconduct, defendant asserts that prosecution witness Arthur Bailey, defendant's stepfather, committed perjury because his true name is Charles Edward Hubbard. Bailey admitted during trial, however, that his true name is Bailey, but that he has also been known as "Charles Edward Hubbard." Defendant's claim of perjury is thus erroneous.

Defendant further argues that Lori Paionk, a State Farm Insurance Company representative, and Thomas Mulhern, the officer in charge of the case, committed perjury. Defendant does not indicate, however, the particular testimony of these individuals that he alleges was perjurious. As previously stated, a defendant may not announce his position and leave it to this Court to ascertain and rationalize the basis for his claims. *Matuszak, supra* at 59.

Defendant also contends that the prosecutor falsified police reports and insurance records, intimidated witnesses, entrapped defendant, took over four boxes of defendant's legal mail, withheld information required to be turned over in discovery, and failed to disclose material exculpatory evidence.[2] The record does not support these assertions. Defendant further argues that he has presented newly discovered evidence that was withheld by officers of the court. But he does not indicate the substance of the newly discovered evidence, and his contention that he presented such evidence lacks record support. Finally, defendant erroneously argues that his first trial ended because of jury tampering by Lazarus and the prosecution. Rather, the record shows that the trial court granted defendant's motion for a mistrial because Lazarus referred to events pertaining to a separate Wayne County case[3] against defendant, which the trial court had excluded from the instant case. Thus, defendant's assertion that the prosecution and Lazarus engaged in jury tampering is unsupported by the record.

Defendant next argues that he was denied his right to a speedy trial under the 180-day rule. We review de novo legal issues pertaining to the 180-day rule. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

Defendant offers no substantive argument in support of his assertion that the 180-day rule was violated in his case. As we have previously stated, a defendant may not announce his position and leave it to this Court to ascertain and rationalize the basis for his claims. *Matuszak, supra* at 59. In any event, "the purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently." *People v Bell*, 209 Mich App

[2] Defendant does not indicate the substance of the allegedly material exculpatory evidence.

[3] This Court upheld defendant's convictions in the Wayne County case in *People v Daniel*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006 (Docket No. 263622).

273, 279; 530 NW2d 167 (1995). The 180-day time period is triggered when the Department of Corrections sends "notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges." *People v Williams*, 475 Mich 245, 259; 716 NW2d 208 (2006); see also MCL 780.131 and MCR 6.004(D).

It appears from the record that defendant was not an inmate of the Department of Corrections until he was sentenced in the Wayne County case on June 2, 2005. Therefore, that date was the earliest that the Department of Corrections could have sent notice to the prosecution pursuant to MCL 780.131 and MCR 6.004(D). Defendant's first trial in this matter began on December 14, 2005, approximately 192 days after June 2, 2005. Defendant fails to indicate, however, the date on which the Department of Corrections sent notice to the prosecution in accordance with the court rule and statute. Thus, he has failed to show that his right to a speedy trial under the 180-day rule was violated.

Moreover, the record reflects that the trial court was prepared to start trial on July 1, 2005, but that defendant requested an adjournment, which the trial court granted. Thereafter, the trial court granted two additional defense requests for an adjournment. Defendant again requested an adjournment on the first day of his first trial, which the trial court denied. Therefore, although defendant argued in the trial court that the 180-day rule was violated, he was responsible for much of the delay.

Defendant next argues that neither the district court nor the circuit court had subject-matter jurisdiction over his case. Whether a court had subject-matter jurisdiction is a question of law that this Court reviews de novo. *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004).

Although defendant asserts that the lower courts did not have subject-matter jurisdiction, he fails to explain the basis for his argument. Again, a defendant may not announce his position and leave it to this Court to ascertain and rationalize the basis for his claims. *Matuszak, supra* at 59. To the extent that defendant contends that the courts lacked subject-matter jurisdiction because he never signed the bindover waiver form, he fails to cite any authority for the proposition that this failure deprived either the district or circuit court of subject-matter jurisdiction. As such, his argument fails.

Defendant also asserts in his statement of questions presented that the trial court deprived him of his constitutional protection against double jeopardy. Despite his contention, he offers no supporting argument on this issue in the body of his brief. Again, defendant may not announce his position and rely on this Court to ascertain and rationalize the basis for his claim. *Matuszak, supra* at 59. Moreover, issues that are insufficiently briefed are considered abandoned on appeal. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002). Accordingly, defendant has abandoned this issue.

Defendant next argues that the trial court improperly admitted evidence under MRE 404(b). Because defendant did not raise this issue in the trial court, our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763; *Knapp, supra* at 375.

Defendant contends that the essence of the evidence was to show that he was a bad man who swears, threatens to beat children, causes property damage, and was more likely to have

committed the charged acts. He maintains that these acts were not similar enough to be admissible against him under MRE 404(b). Defendant's argument is misplaced. The evidence regarding defendant swearing at Lazarus, threatening to beat her and her children, and causing property damage was not admitted during trial pursuant to MRE 404(b). In fact, whether defendant caused property damage was the ultimate issue regarding two of the charges against him.

In any event, evidence that defendant swore at Lazarus and threatened her and her children would have been admissible under MRE 404(b) to prove his motive, intent, and identity. Defendant threatened Lazarus and her children with physical harm and threatened to give her a reason to contact the police. During trial, defendant denied committing the offenses and claimed that he was charged as a result of fraudulent conduct by Lazarus, the prosecution, and the police. Thus, defendant's conduct and threats were relevant to show his motive, intent, and identity, which are permissible purposes for admitting evidence under MRE 404(b)(1). Defendant's argument that the evidence was not similar enough to the charged acts is more appropriately asserted regarding other acts evidence admitted to show a common plan, scheme, or system rather than motive, intent, and identity. Therefore, he has failed to establish plain error.

Defendant next argues that he was denied his constitutional rights to confront witnesses against him and to present a defense when the prosecution failed to present two "John Doe" witnesses listed on its witness list. In the trial court, defendant argued that the prosecution's failure to produce the witnesses denied him his right to confront witnesses against him. Thus, this issue is preserved and presents a constitutional question that we review de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Because defendant's argument pertaining to his right to present a defense was not preserved for appellate review, our review of that issue is limited to plain error affecting his substantial rights. *Carines, supra* at 763; *Knapp, supra* at 375.

A criminal defendant has a federal and state constitutional right to confront witnesses against him as well as a federal and state constitutional right to present a defense. US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20. Defendant fails to explain how the prosecution's failure to present its own witnesses could have deprived him of his right to present a defense. As previously recognized, a defendant may not announce his position and leave it to this Court to ascertain and rationalize the basis for his claims. *Matuszak, supra* at 59.

Moreover, the prosecution's failure to present the "John Doe" witnesses did not deny defendant his right to confront witnesses against him. The prosecutor explained that one of the "John Does" listed on the witness list was Lori Paionk from State Farm Insurance Company, who the prosecution called to testify and who defendant cross-examined during trial. The record does not disclose the identity of the remaining "John Doe" witnesses. Even if their identities were known, however, a defendant's "right to confrontation is not violated by the prosecution failing to call witnesses that defendant could have called to testify." *People v Cooper*, 236 Mich App 643, 659; 601 NW2d 409 (1999). Moreover, defendant cites no authority supporting the notion that the prosecution was required to call the remaining "John Doe" witnesses to testify in order to preserve his right to confront witnesses against him. Therefore, defendant has failed to show that his right of confrontation was violated.

Finally, defendant contends that the cumulative effect of the asserted individual errors denied him his due process rights. In order to reverse a conviction based on the cumulative effect of multiple errors, the effect of the errors must be so prejudicial that the defendant was denied a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Because no individual error exists, there can be no cumulative effect that denied defendant a fair trial.

Affirmed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis