STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2009
v	No. 281526 Berrien Circuit Court
JEREMY LARRONN BURRELL, Defendant-Appellant.	LC No. 2007-402268-FC

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 30 to 80 years' imprisonment for the assault conviction and 6 to 20 years' imprisonment for the felon-in-possession conviction, both sentences to run consecutively to his sentence of two years' imprisonment for the felony-firearm conviction. All three sentences are to run consecutive to a parole violation sentence. We affirm.

Defendant 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. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). With respect to the preserved issue that the verdict was against the great weight of the evidence, this 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).

Identity is always an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). And, defendant argues that his identity as the perpetrator of the crimes was not established at trial. To secure a conviction of assault with intent to murder, the prosecutor must prove three elements: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Defendant further argues that the intent element was not established. The intent to kill may be proven by inference from any facts in evidence and a person may have that

state of mind without directing it at any particular victim. *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999). Intent to kill may be inferred from any facts in evidence. *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008).

Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence that defendant was at the crime scene and shot Alfonzo Rice. Witness testimony and proof of motive can provide sufficient evidence to justify a conviction. See *People v Malone*, 193 Mich App 366, 372; 483 NW2d 470 (1992). Here, Alonzo Rice and Kyle Corzine testified that their vehicle was shot at after an altercation with defendant. Rice testified that he saw defendant doing the shooting. Defendant was identified by his nickname as the shooter at the scene. And, Lasona Stewart saw defendant sitting in the passenger seat of the vehicle from where the shots came; she saw a hand extend from the passenger window and shoot. After the shooting, defendant thereafter made several attempts to persuade Rice not to testify at trial. Defendant's identity was established by sufficient evidence.

There was also sufficient evidence that defendant shot Rice with the requisite intent to kill. The usual purpose of intentionally discharging a firearm at someone within close range is to cause a death. *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). Here, defendant shot a handgun into Rice's vehicle from approximately six feet away after looking directly at Rice. Rice suffered two gunshot wounds. In addition, Lageral Rimpson testified that after the shooting stopped, he could hear the handgun click three or four additional times. Even if defendant's assertion, that Rice was not the intended target, was true, there is sufficient evidence that defendant had the requisite intent to kill when shooting at Rice's vehicle. *Abraham, supra* at 658. Defendant's arguments that there was no confession by defendant, that there was no inculpatory forensic or scientific evidence, that the victim was not credible, that the phone calls by defendant did not establish guilt, and that there was conflicting evidence are all unavailing. Neither a confession nor forensic evidence is necessary to show that sufficient evidence existed to support a verdict, credibility and weight issues were for the jury to decide, *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), all conflicts in the evidence must be viewed in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and the phone calls reflected a consciousness of guilt, *People v Cutchall*, 200 Mich App 396, 400-401; 504 NW2d 666 (1993). Defendant's argument that the evidence was insufficient to show an intent to kill because no one was killed or seriously injured defies logic. Reversal is unwarranted on the sufficiency claim.

We also reject defendant's claim that the verdict with respect to identity and intent was against the great weight of the evidence. Defendant has failed to show that the evidence preponderates heavily against the verdict or that the testimony of the prosecution's witnesses was impeached to the extent that it was deprived of all probative value such that the jury could not believe it. *Lemmon, supra* at 642-643. Here, the jury, through its deliberations, found the prosecution's version credible, and the prosecution's witnesses gave similar accounts of the incident, which diminishes defendant's argument that they were incredible.

Defendant next contends that he was denied a fair trial when the trial court admitted as an excited utterance a statement that defendant, identified by his nickname only, was the shooter. We review this preserved evidentiary decision for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). To the extent that the issue involves a preliminary

question of law, e.g., whether a rule of evidence precludes admissibility, we review the issue de novo. *Id.*

MRE 803(2) provides an exception to the hearsay rule for statements "relat[ed] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." See also *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Defendant's claim that the trial court abused its discretion in admitting the excited utterance is without merit because the prosecution laid a proper foundation. A startling event occurred when defendant drove up next to Rice's minivan and started shooting, leaving Rice with gunshot wounds to his upper leg. See *Smith*, *supra* at 550. Second, the declarant's statement, identifying defendant as the shooter to the police officer, was made while under the excitement of the event. *Id.* Sergeant Daniel McInnis responded to the scene shortly after the shooting occurred and described a chaotic scene. The crowd was frantically milling around, demanding that the police get help for Rice. This testimony supported that the crowd was still under the influence of the event and that the declarant lacked the reflective capacity essential for fabrication. *Id.*; *People v McLaughlin*, 258 Mich App 635, 659-660; 672 NW2d 860 (2003) (it is not whether the declarant had time to fabricate but whether the declarant was sufficiently overwhelmed such that he did not have the capacity to fabricate). Defendant also makes a claim that his rights under the Confrontation Clause, US Const, Am VI, were denied in allowing admission of the excited utterance; however, the evidence was clearly not testimonial in nature and thus there was no violation. *Crawford v Washington*, 541 US 36, 51-52; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant also argues that the trial court improperly allowed the prosecutor to read Stewart's preliminary examination testimony into the record at trial without requiring the prosecution to show due diligence before declaring Stewart unavailable. This unpreserved issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Former testimony of a witness is admissible in a later proceeding if the witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination at the earlier time. MRE 804(b)(1); *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A witness is unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure his attendance. MRE 804(a)(5); *Briseno*, *supra* at 14. The party proffering the former testimony must demonstrate that he made a reasonable, good-faith effort to secure the declarant's presence for trial; however, the "test does not require a determination that more stringent efforts would not have procured the testimony." *Id.*

Before the trial court granted the prosecution's motion to admit Stewart's prior testimony into evidence, the prosecution established that Stewart was subpoenaed to appear for both days of the trial, and that she was not, after a search of the courthouse, present. The prosecution further established that the police made repeated unsuccessful attempts to determine Stewart's location. Even though the prosecution could have made other efforts to locate and obtain Stewart, the prosecution made a reasonable, good-faith effort to secure Stewart's presence by serving her with a subpoena and trying to find her when she did not appear. The prosecutor exercised the required due diligence to satisfy MRE 804(a)(5). *Briseno*, *supra* at 14. We additionally conclude that defendant had an opportunity and similar motive to cross-examine Stewart at the preliminary examination; therefore, the trial court did not commit plain error when

it granted the prosecution's motion to admit Stewart's prior testimony into evidence. Defendant does not appear to present an accompanying Confrontation Clause argument, but even it the issue were considered, it would fail given that the witness was unavailable and that there was a full opportunity to question the witness at the preliminary examination. *Crawford*, *supra.*

Defendant next argues that the trial court questioned two defense witnesses in a biased manner, thereby "piercing the veil of judicial impartiality." Defendant failed to object, and we review for plain error. *Carines*, *supra* at 763. A trial court's actions pierce the veil of judicial impartiality where its conduct or comments unduly influence the jury and in so doing deprives the defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). The trial court, however, is permitted to question witnesses in order to clarify testimony or elicit additional relevant information; but, it should exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992).

Defendant has failed to show that the trial court pierced the veil of judicial impartiality by asking the witnesses whether their testimony was influenced by anyone. The trial court's questions were appropriate because of evidence that defendant made telephone calls from jail discussing what alibi to present, how to present it, and who should be paid to go along with it. The trial court's questioning of two defense witnesses was proper to clarify testimony or to elicit additional relevant information. *Conyers*, *supra* at 404-405. The trial court's questions simply clarified whether these witnesses were offered anything to testify, and it was not intimidating, argumentative, prejudicial, unfair, or partial. *Id*. The trial court did not argue with the substance of the witnesses' testimony, and the witnesses denied being influenced to testify. There was no plain error.

Defendant next argues several unpreserved claims of prosecutorial misconduct, which we review for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Generally, "[t]he test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). 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). Prosecutors are afforded great latitude regarding their arguments and conduct at trial, and they are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).[1]

[1] Defendant contends that we should not employ a harmless error or comparable analysis with respect to the prosecutorial misconduct claims because application of such principles typically result in allowing a verdict to stand despite misconduct, thereby turning this Court into an enabler for future misconduct and leaving no deterrent to continued prosecutorial misconduct. While there is a hint of validity to defendant's concerns, we are ultimately bound by controlling precedent in regard to the proper analysis and are not at liberty to engage in constructing a public policy position on the matter under the guise of an opinion.

First, defendant argues that the prosecutor introduced irrelevant and prejudicial testimony and made arguments to the jury based on that evidence. The prosecution questioned several witnesses concerning Rice's demeanor after he was shot, and he explored possible influences on his testimony. The prosecutor questioned a police officer about Rice's interview days after the shooting wherein Rice identified someone other than defendant as the shooter. During April Franks' testimony, the prosecutor again elicited testimony concerning Rice's demeanor following the shooting and asked questions about contact that Rice had with defendant's acquaintances wherein Rice's testimony was influenced. In addition, the prosecutor asked another police officer generally why a gunshot victim may choose not to cooperate with the police, and the officer responded that when the perpetrator has "street clout," the victim may be less willing to cooperate. Defendant's attempts to conceal his crime are probative of defendant's consciousness of guilt and therefore relevant. *Cutchall, supra* at 400-401. The challenged testimony was relevant to demonstrate defendant's efforts to influence Rice's testimony and the effect the efforts had on it. Furthermore, a prosecutor is permitted, within limits, to respond to issues raised by defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). Defendant's primary theory was to discredit Rice's testimony because of its inconsistencies, and therefore, the prosecutor was allowed to respond by introducing evidence explaining the inconsistencies. The witnesses were asked for an opinion based on their own perception, and each witness's opinion was helpful to the jury's understanding of the issue. MRE 701.

Defendant also asserts that police testimony concerning the search for defendant immediately following the shooting was irrelevant and prejudicial. However, this evidence was relevant to rebut defendant's alibi defense. *People v Lyles*, 148 Mich App 583, 593; 385 NW2d 676 (1986). Defendant claimed that he did not go to the DnR Bar on the night of the shooting and was at home when the shooting occurred. However, defendant also claimed that he did not hear his telephone ring when the police telephoned his home. This evidence was relevant to rebut the alibi, and the prosecutor's good-faith effort to admit relevant evidence to rebut defendant's alibi defense is not misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

Defendant next contends that testimony concerning the extent of Rice's injuries was irrelevant and prejudicial. We disagree. Evidence of injury, including the nature and extent of the injuries, is relevant to show an intent to commit murder. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The prosecutor was free to argue that defendant intended to kill Rice because defendant shot at Rice hitting him twice in an area containing vital organs. Again, prosecutors are generally free to argue the evidence and all reasonable inferences arising from the evidence as it relates to their theory of the case. *Bahoda, supra* at 282.

Defendant further argues that the prosecutor impermissibly appealed to the jury's sympathy and civic duty in order to convince the jury to convict defendant. "A prosecutor may not appeal to the jury to sympathize with the victim." *Unger, supra* at 237. In addition, a prosecutor may not make a civic duty argument that appeals to the fears and prejudices of the jurors because this injects issues broader than the guilt or innocence of the accused into the trial. *Bahoda*, *supra* at 282-284.

The prosecutor, during voir dire, questioned potential jurors about whether they would treat this case any differently than a case occurring in their own community. In addition, during

opening statement, the prosecutor told the jury that, after he presented his evidence, it would be "crystal clear why they were there [at trial]." Defendant argues that the above conduct constitutes veiled references to the jury's civic duty. Read as a whole, the prosecutor's comments do not appeal to the fears and prejudices of the jurors. *Bahoda*, *supra* at 282-284. The challenged questions and statements did not inject issues broader than the guilt or innocence of defendant into the trial. There was no misconduct. *Id.* at 283-285. Moreover, the trial court instructed the jury that it must decide the case based on the evidence and that the attorneys' statements are not evidence. The instructions were sufficient to cure any presumed prejudice. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Defendant next asserts that the prosecutor impermissibly appealed to the jury's sympathy when Franks testified concerning the effect that the shooting had on Rice and his family. The questioning was not an attempt to elicit evidence that would appeal to the jurors' sympathy. Rather, the prosecutor's question was properly responsive to defendant's assertion that Rice was lying at trial. Throughout the trial, defendant attacked Rice's credibility because he initially did not identify defendant as the shooter; he was inconsistent with his identification. The prosecutor was permitted to respond to this issue raised by defense counsel. *Jones*, *supra* at 353. Franks' explanation as to Rice's behavior after the shooting also did not inject issues broader than the guilt or innocence of the accused into the trial. *Bahoda*, *supra* at 282-284.

Defendant additionally argues that the prosecutor argued facts that were not in evidence when he argued that, after the vehicle in which defendant was riding pulled away from the scene of the shooting, witnesses saw the vehicle's reverse lights come on as if it was going to come back to enable the shooter to finish the job. A prosecutor may not make a factual statement to the jury that is not supported by the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). However, the prosecution may make arguments regarding the evidence admitted and all the reasonable inferences that relate to its case. *Bahoda*, *supra* at 282. At trial, two witnesses testified that, after defendant finished shooting, the vehicle pulled away, but then his reverse lights came on. The prosecutor was free to argue the evidence that defendant's reverse lights came on after initially pulling away and to argue the reasonable inference that defendant intended to return when his vehicle was put into reverse. Moreover, the trial court instructed the jury that it must decide the case based on the evidence and that the attorneys' statements are not evidence.

Lastly, with respect to prosecutorial misconduct, defendant argues that the sum total of the prosecution's instances of misconduct denied him a fair trial. Although the cumulative effect of minor instances of prosecutorial misconduct may result in reversal, there were no errors in this case to accumulate. *McLaughlin*, *supra* at 649.

Defendant next argues that his sentence is invalid because the trial court enhanced it based on facts not proven by the jury. Because defendant's minimum sentence was within the guidelines range, this Court must affirm defendant's sentence unless the trial court erred in scoring the sentencing guidelines or the sentence was based on inaccurate information. *McLaughlin*, *supra* at 670; MCL 769.34(10). Contrary to defendant's assertion, *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), are inapplicable to Michigan's indeterminate sentencing scheme in which a trial court sets a minimum sentence but can never exceed the statutory maximum sentence. *People v Harper*, 479 Mich 599, 644-645; 739 NW2d 523 (2007);

People v McCuller, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Accordingly, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.*

Defendant next argues that the trial court improperly scored several offense variables when calculating the minimum sentence range under the legislative guidelines. A sentencing court has discretion in determining the number of points to be scored for each offense if record evidence adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). "'Scoring decisions for which there is any evidence in support will be upheld.'" *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citation omitted); see also *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Defendant argues that a preponderance of the evidence test must instead be applied, assuming that we reject his *Blakely* argument; however, even if we applied the standard argued by defendant, there was sufficient evidence to support the scoring determinations.

Regarding offense variable (OV) 1, MCL 777.31, the trial court scored it at 25 points. Twenty-five points should be scored if "[a] firearm was discharged at or toward a human being . . . ." MCL 777.31(1)(a). Evidence established that defendant fired a gun at least four times toward the minivan occupied by Rice. Therefore, we uphold the score. Regarding OV 2, MCL 777.32, the trial court scored it at five points, which is proper if the "offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon[.]" MCL 777.32(1)(d). Because defendant used a gun in the commission of the assault with intent to murder, we uphold the score. Regarding OV 3, MCL 777.33, the trial court scored it at ten points. OV 3 addresses "physical injury to a victim," and ten points is scored if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). It was undisputed that Rice suffered two gunshot wounds that required him to be transported to the hospital for medical treatment. Accordingly, the trial court correctly scored OV 3 at ten points. Regarding OV 9, MCL 777.39, the trial court scored it at ten points, which is proper if two to nine victims were placed at risk of physical injury or loss of life. MCL 777.39(1)(c). There were three individuals in Rice's minivan when defendant started shooting. Each individual was in close proximity to the gunshots. Therefore, sufficient evidence existed to support the trial court's scoring of this variable.

Regarding OV 12, MCL 777.42, defendant argues that the trial court erred in scoring this variable at five points. Five points is scored if one contemporaneous felonious criminal act is committed against a person or two contemporaneous felonious acts involving other crimes were committed. MCL 777.42(1)(d) and (e). It appears undisputed on the record that defendant committed other contemporaneous felonious acts for which he was not charged. Defendant does not argue to the contrary. Rather, he argues that the trial court may not make a specific finding that defendant is guilty of other crimes then sentence defendant on the basis of that finding. *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997). "However, a trial court may consider the evidence admitted at trial as an aggravating factor in determining the appropriate sentence." *Id*; see also *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). In this case, the trial court did not sentence defendant for the alleged uncharged crimes, but rather, it used the evidence admitted at trial to score OV 12 at five points for two other crimes that could have been charged but were not. The trial court properly scored OV 12 at five points.

Defendant next claims that he received ineffective assistance of counsel. Given the lack of a *Ginther*[2] hearing below, our review of defendant's claim is limited to mistakes apparent on the record. *Rodriguez, supra* at 38. To prevail on his claim, defendant must show that defense counsel's performance fell below an objective standard of reasonableness, i.e., the performance was deficient, and that defendant was prejudiced, i.e., there is a reasonable probability that, but for counsel's error, a different result would have occurred. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He must overcome the strong presumption that counsel's actions constituted sound trial strategy. *Carbin, supra* at 600.

Defendant specifically contends that defense counsel failed to object to the excited utterance introduced at trial and to object to the prosecutor's failure to establish due diligence before Stewart's preliminary examination testimony was read into the record. For the reasons stated above, defense counsel was not ineffective for failing to object to these matters at trial because no error existed, and it would have been futile to object. Trial counsel is not ineffective for failing to advocate a meritless position. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). In addition, defendant argues that defense counsel should have impeached Stewart's testimony because she made a statement contrary to her preliminary examination testimony, which indicated that she lied at the preliminary examination. Defendant is required to establish the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant does not offer any evidence that Stewart made a contrary statement or lied at the preliminary examination. Defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness. *Toma, supra* at 302.

Defendant also contends that defense counsel was ineffective for failing to investigate or call rebuttal witnesses that were identified in the police report. In addition, defendant argues that defense counsel failed to call Jason Hamilton or other witnesses to support his alibi. Defense counsel's failure to investigate and call witnesses 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). The failure to adequately investigate constitutes ineffective assistance if it undermines confidence in the outcome of the trial. *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). The failure to call witnesses 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). Decisions regarding what evidence to present and whether to call or question witnesses are generally presumed to be matters of trial strategy. *Id.*

Defendant has failed to demonstrate that defense counsel failed to adequately investigate or call witnesses at trial who would have been valuable to his case. Defendant is essentially arguing that there were witnesses who could substantiate his alibi and offer another person as the possible offender. However, defendant produced this defense at trial. Defense counsel called two employees of the DnR Bar who testified that defendant was not in the bar the night of the shooting and that Rice's companion was involved in a fight with someone named "Jason," not defendant. Furthermore, defense counsel called several other witnesses including defendant to

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

support an alibi defense. Defense counsel was not ineffective where his failure to call other witnesses on the same subject, including Hamilton, did not result in the omission of evidence that would have benefited defendant's case.

Additionally, defendant argues that defense counsel was ineffective in failing to call Hamilton to testify because the jury was informed by defense counsel in his opening statement that Hamilton would be called. Defense counsel's failure to call a witness may constitute ineffective assistance of counsel if defense counsel should have been aware that the witness would not be able to testify when he made the comment. See *Hill, supra* at 139-140. However, defendant is required to establish the factual predicate for his claim. *Hoag, supra* at 6. Here, the record contains no information as to why Hamilton was not called as a witness. Defendant does not establish that Hamilton was not called because of defense counsel's error or oversight. Therefore, defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness. *Toma, supra* at 302.

Defendant next argues that he was deprived of the right to an impartial jury drawn from a fair cross section of the community. 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." *Duren v Missouri,* 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979); see also *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003).

Defendant has failed to establish the second or third prongs of the test. Defendant's only evidence of underrepresentation was his own observation of the jury array in this case, which he claims contained very few minorities. Defendant did not present evidence of underrepresentation for 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.'" *People v Williams,* 241 Mich App 519, 526; 616 NW2d 710 (2000) (citation omitted). Further, even if defendant's observations were correct and his jury pool contained a disparity in minority members, he has failed to establish systematic exclusion of minority jurors. "[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, defendant has failed to establish a prima facie case of discrimination, and his constitutional claim is without merit.[3]

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[3] Given our rulings in this opinion, there is no merit to a summation argument made by defendant that the trial court erred in denying his motion for a new trial.