STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 28, 2009
v	No. 281667 Wayne Circuit Court
EUGENE ALEXANDER, JR., Defendant-Appellant.	LC No. 07-006298-FC

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317,[1] assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 18 to 30 years for the murder conviction, 15 to 25 years for the assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts

Defendant's convictions arise from a September 18, 2006, shooting during an argument between neighborhood friends in Detroit, Michigan. Evan Shaw was killed and William Lee was injured. Defendant testified at trial and admitted shooting the victims, but argued that he acted in self-defense. Both Lee and Richard Quattlebaum testified that on the day of the shooting, they had been with Shaw, whose grandfather had died the previous day. At one point, Lee and Quattlebaum were walking in the neighborhood and saw defendant, who was with others. Lee and defendant exchanged some words, and defendant allegedly said something disparaging about the death of Shaw's grandfather. Quattlebaum testified that defendant pulled a gun on Lee, although Lee did not testify that defendant brandished a weapon. Quattlebaum and Lee left and walked up the block, where they saw Shaw and told him about defendant's comment. Shaw was angry, and the three men walked back to where defendant was standing in order for Shaw to confront defendant. Shaw and defendant argued about what defendant supposedly said about

[1] The trial court granted defendant's motion for a directed verdict on an original charge of first-degree premeditated murder, MCL 750.316(1)(a).

Shaw's grandfather, and Shaw invited defendant to fight. Quattlebaum testified that defendant walked behind him to get closer to Shaw. Shaw then told defendant that he knew defendant had a gun, but that defendant would not shoot him because defendant knew "who [Shaw's] peoples are." According to Quattlebaum, defendant pulled out his gun and started shooting at Lee and Shaw. Quattlebaum testified that defendant was the only person with a weapon. Defendant testified, however, that Shaw pushed him, so he pushed Shaw causing him to fall. Shaw then allegedly told Lee to "shoot the nigger," which caused defendant to respond by shooting Shaw and Lee. Defendant claimed that both Shaw and Lee had weapons, although only Shaw actually pulled out his gun and fired. Defendant shot Shaw four times, once in the back, and shot Lee twice. Defendant fled the scene and was arrested in February 2007, in Muskegon, Michigan.

II. Denial of Defendant's Motion to Quash the Information

Defendant argues that the trial court erred in denying his motion to quash the information because the district court had no basis to bind him over for trial on first-degree murder. He contends that the evidence presented at the preliminary examination was insufficient to establish premeditation and deliberation. We disagree.

Generally, this Court reviews a circuit court's decision to deny a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering the bindover. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). But "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004). In this case, defendant's argument fails because he does not argue on appeal that the prosecutor presented insufficient evidence at trial to sustain his conviction of second-degree murder, and there is no indication that he was otherwise prejudiced by the claimed error. *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990). Consequently, defendant has failed to state a cognizable claim on appeal regarding the sufficiency of the evidence at the preliminary examination.

We nonetheless note that sufficient evidence of premeditation and deliberation was presented at the preliminary examination. First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002). "'[P]remeditation and deliberation characterize a thought process undisturbed by hot blood.'" *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (citation omitted). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The following nonexclusive list of factors may be considered to establish premeditation and deliberation: (1) the previous relationship between the decedent and the defendant, (2) the defendant's actions before and after the crime, and "(3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds inflicted." *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

In *People v Harlan*, 258 Mich App 137, 145; 669 NW2d 872 (2003), this Court explained:

> The prosecutor is required to demonstrate at the preliminary examination that a crime has been committed and that there is probable cause to believe the defendant committed the crime. This probable cause standard *is not a very demanding threshold*. As our Supreme Court observed in [*People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997)], a magistrate may bind a defendant over for trial even "while personally entertaining some reservations" regarding his guilt. It is sufficient that the prosecutor presents *some evidence* with respect to each element of the offense charged, "*or evidence from which the elements may be inferred*." [Citations omitted; emphasis added.]

At the preliminary examination, evidence was presented that defendant shot at Shaw as he was running away, defendant shot Shaw four times, and one entrance wound was in Shaw's back. Recognizing that certain issues are for the trier of fact, the district court found that the evidence that defendant shot Shaw four times, including once in back, could establish the premeditation and deliberation elements for first-degree murder. Given the applicable standard of review, the district court did not abuse its discretion in concluding that there was probable cause to believe that defendant committed the crime of first-degree murder.

III. Refusal to Instruct on Voluntary Manslaughter

Defendant also argues that the trial court erred in refusing to instruct the jury on voluntary manslaughter as a lesser offense of second-degree murder. We again disagree. Although this Court reviews questions of law pertaining to jury instructions de novo, a trial court's decision whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

MCL 768.32 permits instruction on necessarily included lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). Voluntary manslaughter is a necessarily included lesser offense of murder, distinguished by the element of malice. *People v Mendoza*, 468 Mich 527, 533-534, 540-541; 664 NW2d 685 (2003). "Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id.* at 541. "[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id.* at 535. In *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991), the Supreme Court explained:

> "[I]f the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed . . . then the law, out of indulgence to the frailty of human nature . . . regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter." [Citation omitted; omissions in *Pouncey*.]

Pouncey emphasized that the provocation must cause the defendant to act out of passion rather than reason. *Id.* at 389. In rejecting a claim that the defendant was entitled to a voluntary manslaughter instruction, the *Pouncey* Court stated that "the defendant's ability to reason was not blurred by passion; his emotional state did not reach such a level that he was unable to act deliberately." *Id.* at 390. The defendant's emotions must be so intense so as to distort the defendant's practical reasoning. *Id.* at 389.

At trial, defense counsel argued that manslaughter was appropriate because defendant and Shaw were having a "heated conversation." The trial court reserved ruling until the defendant testified and, thereafter, denied the request. We agree that defendant's testimony effectively precluded a voluntary manslaughter instruction in this case. During his testimony, defendant maintained that he was not angry during the day's events. He explained that when Quattlebaum and Lee first approached him, they were intoxicated, loud, and disrespectful, but he "wasn't like really worried about it because [he] know[s] these guys," "they wasn't really a threat," and he considered them friends. When Quattlebaum and Lee returned with Shaw, the men were loud and Shaw confronted defendant about disparaging his grandfather. Defendant indicated that Shaw, Lee, and Quattlebaum made a "half circle" around him, and Shaw invited him to fight. Defendant explained that at that point, he was "feeling like it was something about to go on" and used "precaution." Defendant claimed that Shaw pushed him, so he pushed Shaw causing him to fall. According to defendant, Shaw then told Lee to "shoot the nigger," which caused defendant to respond by shooting Shaw and Lee in self-defense. Defendant claimed that both Shaw and Lee had weapons, although only Shaw actually pulled out his gun and fired. On cross-examination, defendant testified as follows:

> *Q*. [Shaw] was loud. Well, being loud to you for no reason is being disrespectful, isn't it?
>
> *A*. Yes.
>
> *Q*. As a result of all this were you angry at them? Will or [Quattlebaum] or Evan, were you angry at them?
>
> *A*. No.
>
> *Q*. Were you really, really mad that you wanted to do something to them?
>
> *A*. Nawl [sic].
>
> *Q*. So at no point while you're out there do you get mad enough so that you kind of snap and just say, well, I'm so mad I could just do about anything, you never felt like that?
>
> *A*. No.
>
> * * *

Q. But you told your attorney that you felt like you had to do - - make [sic] I'm paraphrasing, but you had to do what you had to do. When you took out your gun you felt afraid that you were going to get shot, correct?

A. I was afraid for my life when Evan Shaw told [Lee] to shoot that nigger.

Q. You didn't pull out your gun and shoot because you were mad, then, did you?

A. No.

Q. Anger had nothing to do with it?

A. No.

Q. It was only because you felt afraid that somebody was going to shoot you?

A. Yes.

Q. That's the only reason you pulled out your gun?

A. Yes.

In this case, defendant's testimony supported his claim of self-defense, but it was completely contrary to a finding that he fired his weapon in the heat of passion.[2] Defendant's action of firing his weapon reflected an act deliberately taken, reasoned on self-preservation, as opposed to an act taken in an emotional state blurred by passion. Because no rational juror, under these facts, could conclude that defendant acted in the heat of passion, the trial court did not abuse it discretion by refusing to provide a voluntary manslaughter instruction.

IV. Photographic Lineup

Defendant argues that Quattlebaum's identification testimony was inadmissible because it was tainted by an unduly suggestive identification procedure in which the police showed him a single photograph. Because defendant failed to raise this issue below, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Although identification procedures that are unnecessarily suggestive and conducive to irreparable misidentification deny a defendant due process, *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), the record contains no indication that any impermissible or unduly suggestive identification procedures occurred here. An improper suggestion may arise when a witness is shown only one person because the witness is tempted to presume that the photograph is of the assailant. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). But

[2] Self-defense represents a legal justification for an otherwise intentional homicide and is predicated on an honest and reasonable belief that one is in imminent danger of death or great bodily harm, making it necessary to exercise deadly force. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995); *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

this case did not involve a standard photographic identification where a witness was shown a photograph to determine if he could identify the suspect. Rather, defendant had been identified by name to the police. The police retrieved a photograph of defendant and showed it to the witness to confirm that the person in the photograph was the person the witness had identified. The witness knew defendant from the neighborhood and the two were friends. Defendant testified that he knew Quattlebaum and considered him a friend. Moreover, defendant admitted that he was the person who shot the two victims. Identity was not an issue in this case. Under the circumstances, defendant's claim is without merit.

V. Jury Venire

Defendant, an African-American, argues that he was denied his federal and state constitutional rights to an impartial jury drawn from his community because there were only five African-Americans in the 52-person jury venire. We disagree. We review de novo questions concerning the systematic exclusion of minorities in jury venires. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003).

"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). 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 underrepresentation is due to systematic exclusion of the group in the jury-selection process." *People v Smith*, 463 Mich 199, 215; 615 NW2d 1 (2000), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). Underrepresentation may be measured by measuring the disparity between how many of the distinctive group are in the jury array and how many are in the community. *Hubbard*, *supra* at 474. However, the requirement that a defendant be tried by a fair cross section of his community "does not guarantee that any particular jury 'actually chosen must mirror the community . . . .'" *Smith*, *supra* at 214, quoting *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975).

As an African-American, defendant is a member of a "distinct group" for purposes of the fair cross-section requirement. *Hubbard*, *supra* at 473. Defendant has failed, however, to satisfy the second and third prongs of the test. The second prong requires a showing of several instances of a venire being disproportionate. *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). "'Merely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case.'" *Id*. (citation omitted). In this case, there is no data in the record to show the proportion of African-Americans within the community and on jury venires in general. On appeal, defendant asserts that African-Americans make up over 40 percent of Wayne County's population and submits one newspaper article alleging that African-Americans are routinely underrepresented in the county's jury venires. But this Court may not take judicial notice of newspaper articles because they are inadmissible hearsay. *McKinney*, *supra* at 161 n 4. It is also "'well settled that systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate.'" *Williams*, *supra* at 527 (citation omitted). Rather, there must be a demonstrated problem inherent in the selection process that results in systematic exclusion. *Id*.

There is no evidence in the record regarding the jury selection process in Wayne County. Defendant has failed to establish a prima facie violation of the fair cross-section requirement.

VI. Prosecutorial Misconduct

Defendant further argues that he is entitled to a new trial because the prosecutor impermissibly argued facts not in evidence and denigrated defense counsel. We disagree. This Court reviews preserved claims of prosecutorial misconduct case by case, examining the challenged remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002).

A. Arguing Facts Not in Evidence

Defendant claims that the prosecutor argued facts not in evidence when he made reference to six police officers that did not testify. At the beginning of trial, the prosecutor read the names of seven police officers he intended to call as witnesses, but the parties waived six of the seven officers. During rebuttal argument, the prosecutor made the following remarks to which defense counsel objected:

> Well, you heard, ladies and gentlemen, when we first started selecting a jury in this case, you heard me read off names of seven police officers, and one police officer was called to the witness stand. And the procedure is that if you - - we waived. In other words, we both agreed not to call the other six police officers, because it would have been a waste of your time. If any one of those seven police officers made a report indicating they picked up a gun, you would have heard from that police officer. Either I would have called them - -
>
> *Defense counsel*: Objections - -
>
> - - or I'm sure [defense counsel] would have.
>
> *Defense counsel*: I would like to make an objection about what other officers would had [sic] in the report. They were waived. There was no testimony that other officers made a report there was a weapon in it.
>
> *The court*: Move forward counsel.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Here, however, viewed in context, the prosecutor's remark was focused on refuting the defense claims made during closing argument that the prosecutor failed to present the officer who interrogated a witness who testified inconsistent with his statement to the police, failed to present any officers to testify that they checked the area for weapons, and failed to present an officer to testify about the ballistics information. The prosecutor's comments must be considered in light of defense counsel's comments, *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997), and otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Furthermore,

defendant's right to a fair trial was protected when, in its final instructions, the court instructed the jury that the lawyers' comments are not evidence, it was to decide the case based only on the properly admitted evidence, and it was required to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).[3]

B. Disparaging Defense Counsel

Defendant also argues that the prosecutor denied him a fair trial when he denigrated defense counsel by suggesting that he was trying to mislead the jury with "needless" objections. A prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence, and not be shifted to the attorneys' personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

To support his argument, defendant cites only the prosecutor's use of the phrase "needless objections." However, a complete review of the record shows that defendant's right to a fair trial was protected when the trial court addressed this matter in defendant's favor. The following occurred during the direct examination of Lee:

> *The prosecutor:* And when you were talking to your father telling him you got shot, were you still under the stress of the moment of having been shot?
>
> *Defense counsel:* Objection, your Honor, he said he passed out, so he wasn't under any - - other than he said he got shot - -
>
> *The prosecutor:* Your Honor, *these are needless objections*.
>
> *The court:* *They are not needles [sic]*.
>
> *The prosecutor:* Obviously, he's not passed out and saying something at the same time.
>
> *The court:* The witness testified that he told his father he got shot and he passed out.

* * *

[3] As part of this issue, defendant also asserts that the prosecutor improperly referred to him as a "bully." Defendant does not provide either a record citation for this argument, or any discussion explaining why any such remark would not be proper. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claim. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

The prosecutor: While you were talking were you still under the excitement of the moment of having been shot?

The court: He never established he was ever excited or stressed in the first place. *If you want to do that, you got to lay a foundation. That was counsel's last objection.* [Emphasis added.]

Shortly thereafter, defense counsel again objected and the trial court resolved the matter in defendant's favor:

The prosecutor: Did you ever see him leave in a white van?

Defense counsel: Objection, your honor, he said - - this is not a repetitive objection. It's good basis for an objection is that that, I'm saying that this is asked and answered.

The prosecutor: I didn't ask [Lee] anything about having left in a white van.

The court: [Lee] indicated that he didn't see what [defendant] did after he was shot because he took off running.

The prosecutor: Well, Judge, I'm not forced to accept every single answer I get. I'm entitled to ask different question in different ways to try to get the truth out. If the witness doesn't want to answer a question, one way maybe he'll answer a question another way.

The court: I don't know whether or not - - you know, for you to say to try to get the truth out, you're entitled to ask him the questions, he swore to tell the truth. And if he said that he didn't see anything, he left, *we don't need 15 questions thereafter dragging this matter off for four days.* [Emphasis added.]

Given the trial court's handling of the matter, it is clear that the jury was not left with the perception that defense counsel was trying to mislead it. Indeed, the discussion surrounding the objections dealt with the testimony and, therefore, the jury's focus remained on the evidence. Furthermore, the trial court's final instructions that the lawyers' comments are not evidence and it was to decide the case based only on the properly admitted evidence were sufficient to dispel any prejudice caused by the prosecutor's comment. *Long, supra*. Consequently, defendant is not entitled to a new trial on the basis of prosecutorial misconduct.

VII. Intimidation of Devon Jernigan

In defendant's final claim, he argues that Devon Jernigan was coerced into making a statement against him through police and prosecutorial misconduct. According to defendant, the prosecutor called Jernigan as a witness knowing that he would deny the content of his prior statement to police. Because defendant failed to raise this issue below, we review this unpreserved claim for plain error affecting substantial rights. *Carines, supra*.

In a statement made to the police on October 9, 2006, Jernigan stated that defendant "pulled out" "a revolver" "and fired about 5 shots" at Shaw, Lee, and Quattlebaum. During the

prosecutor's direct examination of Jernigan at trial, the court ordered a person in the audience out of the courtroom for making a threatening gesture toward Jernigan. Jernigan testified that on the day of the shooting, he heard the gunshots, but did not see where they came from. The prosecutor then questioned him about his statement to police. During defense counsel's cross-examination, Jernigan reiterated that he did not see anything and explained why he made and signed the statement:

> *Q*. So the fact that it says in the statement, even though you signed it, the fact that it says that you saw [defendant] shoot four or five times, that wasn't true?
>
> *A*. No. The officer - - I kept telling him for four or five hours I didn't see it. So he was telling me about some - - all right. Well, I'm going to put a case on you for narcotics and all this. I know you sold marijuana, this that and the other. He was like didn't you - - say you seen him?
>
> *Q*. An your response was?
>
> *A*. Well, I did what he asked me. I said yeah, I seen 'en firing a gun.
>
> *Q*. That was because you were worried that he was going to put a case on you?
>
> *A*. Yes.
>
> *Q*. Did you believe him?
>
> *A*. Yes.
>
> *The court:* Why did you believe him?
>
> *A*. I just believed him. Because he was like, you see that door right there, them narcotics people, they waiting on you right there, and there was two guys in the door.

In its final instructions, the trial court instructed the jury as follows:

> If you believe that a witness previously made a statement inconsistent with his testimony at this trial, the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true.

It is axiomatic that a prosecutor may not knowingly use false testimony and has a constitutional obligation to correct false evidence if he knows or "can be deemed to have known" that his witness lied. See *People v Lester*, 232 Mich App 262, 278-280; 591 NW2d 267 (1998). Furthermore, police or prosecutor intimidation used to coerce a witness to testify or change his testimony amounts to a denial of a defendant's due process rights. *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). In this case, there is no proof, other than Jernigan's claim, that the prosecutor or police threatened to bring criminal drug charges against Jernigan if he did not make a statement implicating defendant. Additionally, the problems with Jernigan's testimony, including the circumstances of the purported intimidation, were brought out at trial after

someone in the courtroom made a threatening gesture toward him. There is no evidence, other than defendant's unsupported assertion, that the prosecutor knew or should have known that Jernigan would deny the content of his prior statement until after he had been called as a witness. Under the circumstances, defendant's challenge regarding the conflict between Jernigan's testimony and his prior statement involves a matter of witness credibility, which was for the jury to decide. See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). A witness may be examined concerning a prior inconsistent statement for impeachment purposes. MRE 613; *Rodriguez*, *supra* at 34. Furthermore, the trial court's instructions protected defendant's rights. Because there is no tangible indication that the prosecutor engaged in any misconduct, defendant has failed to demonstrate plain error. Consequently, reversal is not warranted on this basis.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio