STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2012
v	No. 297058 Ingham Circuit Court
JONATHAN HICKS, Defendant-Appellant.	LC No. 09-000961-FC

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of second-degree murder, MCL 750.317, possession of a firearm by a felon, MCL 750.224f, and felony-firearm, MCL 750.227b. We affirm.

I. FACTS

This case arises from the double homicide of cousins, Brandy Lowe and Betsy Lowe. Levon Pate shot and killed both at Walsh Park in Lansing. Defendant was prosecuted as an aider and abettor. The prosecutor's theory was that Pate and defendant, while under the influence of drugs, took the victims to a remote location, planning to shoot them simultaneously. When defendant's gun malfunctioned, Pate shot the cousins in succession.

On appeal, appellate counsel argues that the trial court erred in denying a motion for a mistrial based on juror misconduct, in removing defendant's relatives from the courtroom for part of jury selection, in denying a motion for a directed verdict based on the sufficiency of the evidence, and in denying a motion for a new trial based on the great weight of the evidence. Appellate counsel additionally claims that defendant's trial counsel was ineffective and, alternatively, that the trial court erred in denying a motion for an evidentiary hearing to develop that issue. Defendant, in his Standard 4 brief, also argues that his trial counsel was ineffective, and additionally argues that he was denied a fair trial by prosecutorial misconduct or the cumulative effect of trial errors, and that African-Americans and other minorities were underrepresented on his jury.

II. JUROR MISCONDUCT

This issue stems from two irregularities. The first concerned juror number one who admitted reading an article about the case on the Internet which reported that another suspect was already imprisoned, a gun jammed, and the murders were execution style. The juror advised that he felt he had acquired a bias in the matter and admitted that he had told the other jurors about the conviction. The prosecuting attorney argued that mentioning the other suspect's conviction was not problematic because that fact would be brought to the jury's attention. But the trial court excused juror number one. Thereafter, each individual juror was asked if what they heard regarding the article went beyond the fact that a codefendant was convicted and each responded in the negative. The court also invited the attorneys to question the jurors on the matter and defense counsel stated, "I just want to make sure . . . there's nobody . . . answering the questions in the way that they are because they have any type of fear about getting in trouble," and when that inquiry aroused no response, counsel stated, "That's all, Your Honor. I'm satisfied."

The second juror irregularity concerned juror number four. After the first several prosecution witnesses had testified, that juror informed the trial court that she personally knew one of the witnesses, Ashley Tarrow. They were casual high school friends several years earlier, but had a few spotty contacts since, including about five or six months earlier. The juror elaborated that she recognized Pate's name as that of Tarrow's boyfriend, but she knew Pate by name only. When she realized she knew one of the witnesses, she mentioned it to a fellow juror who told her to disclose the situation. She did not tell the other juror anything else. Juror number 4 assured the court that she knew nothing about the case before becoming a juror, and that her past familiarity with Tarrow would not interfere with her ability to objectively assess Tarrow's credibility, but the trial court excused her from deliberations.

On appeal, appellant counsel argues that the trial court abused its discretion when it denied his motion for a mistrial premised on these two irregularities. See *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). We disagree.

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted). Appellate counsel has failed to show how either irregularity was prejudicial to defendant's rights or impaired his ability to get a fair trial. First, juror number four was excused from deliberations. And appellate counsel does not suggest that the juror spoke out of turn, or otherwise tainted the remaining jurors before being excused. Further, the remaining jurors were instructed to decide the case solely on the basis of the evidence, and not to use any personal knowledge about a person involved in the process. "Jurors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). Second, juror number one was excused and defense counsel expressed satisfaction with how the trial court handled the matter. Accordingly, the trial court did not abuse its discretion when in concluded that these two juror irregularities did not warrant a mistrial.

III. REMOVAL OF DEFENDANT'S RELATIVES

At the start of jury selection, the trial court was concerned about having enough seats for the unusually large number of prospective jurors. With defense counsel's acquiescence, the trial court asked defendant's parents, and possibly other relatives, to leave the courtroom to make room for the jurors. After about an hour, they were allowed back in, and jury selection continued for about four more hours. In a post-trial motion for a new trial, appellate counsel argued that this partial and temporary closure of the courtroom constituted a structural error warranting a new trial. The trial court denied the motion, holding that only a few spectators were removed for only a short time and its policy was to prefer relatives of the victims over relatives of the defendant in such situations.

Appellate objections relating to a criminal defendant's right to a public trial are subject to forfeiture and, thus, review for plain error affecting substantial rights. *People v Vaughn*, 491 Mich 642, 646; 821 NW2d 288 (2012), citing *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Vaughn*, 491 Mich at 646, quoting *Carines*, 460 Mich at 774.

Our state and federal constitutions both guarantee the right to a public trial. *Vaughn*, 491 Mich at 650, citing US Const, Am VI; Const 1963, art 1, § 20. That right encompasses voir dire proceedings. *Vaughn*, 491 Mich at 651-652. Complementing a defendant's Sixth Amendment right to a public trial is the general public's First Amendment right to attend trials. *Id*. at 652. In light of the fundamental importance of keeping judicial proceedings open to the public, such a proceeding may be closed to the public only if some overriding interest compels doing so, and when such an interest does arise the closure should be no broader than necessary to address that interest. *Id*. at 653.

Here, the trial court was within its rights in limiting public access to voir dire proceedings in deference to the numerous jurors, for as long as the supply of seats fell below demand. But the court plainly erred in arbitrarily selecting persons aligned with defendant for exclusion, in open preference for those aligned with the prosecution. See US Const, Am XIV, § 1; Const 1963, art 1, §§ 2, 17. However, appellate counsel has failed to show how defendant's substantial rights were affected by this brief exclusion. Excluding defendant's relatives from one out of five hours of jury selection, in connection with a nine-day jury trial, was not serious enough an irregularity to throw the fairness or integrity of the proceedings into doubt, or to bring them into public disrepute. Accordingly, no appellate relief is warranted.

IV. SUFFICIENCY OR GREAT WEIGHT OF THE EVIDENCE

Appellate counsel next argues that the evidence was insufficient to sustain a conviction and that the verdict was against the great weight of the evidence. We disagree.

When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecution, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v*

Mayhew, 236 Mich App 112, 124; 600 NW2d 370 (1999). A trial court's decision on a motion for a new trial premised on the ground that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes." *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007).

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39.

> A conviction of aiding and abetting requires proof of the following elements: (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. [*People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).]

"Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). However, any advice, aid, or encouragement, however slight, if effective, is sufficient to establish guilt on an aiding and abetting theory. *Id*. The intent element may be satisfied by proof that the defendant had a specific intent to commit the crime, that the defendant had knowledge of the principal's intent, or that the criminal act committed by the principal was an incidental consequence that might reasonably have been expected to result as a natural and probable consequence of the intended wrong. *People v Robinson*, 475 Mich 1, 6-7, 9; 715 NW2d 44 (2006). Intent may be inferred from all of the facts and circumstances, and minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

Here, defendant argues that witness Douglas Teed's testimony was not credible and did not tend to prove that defendant aided and abetted in the murders. Teed had been incarcerated with defendant and testified about purported conversations he had with defendant regarding the murders. Defendant argues that Teed's timing of the events can readily be rebutted by police testimony and that Teed could have learned about defendant's presence at the murders, including the tendency of his gun to jam, from a newspaper article. We agree that Teed's testimony was impeached, at least in part. But a trial judge does not sit as the thirteenth juror in ruling on motions for a new trial. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). And "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id*. at 647. Further, Teed's testimony that defendant intended to participate in the murders was not the only evidence of defendant's active involvement. Pate also testified that defendant attempted to shoot one of the victims but his gun jammed. And after defendant fled from police, a gun was recovered that was malfunctioning in a way that would cause it to jam. That gun was identified by a witness as defendant's gun. Thus, there was evidence, in addition to Teed's testimony, that could persuade a rational trier of fact that

defendant aided and abetted in the murders and was not merely present at the crime scene. Accordingly, the trial court did not err in denying the motion for directed verdict which challenged the sufficiency of the evidence, or the motion for a mistrial that challenged the verdict as against the great weight of the evidence.

V. ASSISTANCE OF COUNSEL

Appellate counsel argues that defendant's trial counsel was ineffective because he failed to object to the removal of defendant's relatives for part of jury selection and because he failed to secure the testimony of certain witnesses. We disagree.

"To prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable." *People v Brown*, 294 Mich App 377, 387-388; 811 NW2d 531 (2011).

Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). To overcome that presumption, a defendant must show that counsel's failure to prepare for trial resulted in counsel's remaining ignorant of substantially beneficial evidence that accordingly did not get presented. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). "[T]he failure to interview witnesses does not itself establish inadequate preparation." *Id*. at 642.

Appellate counsel first makes issue of defense counsel's acquiescence in the trial court's insistence that defendant's relatives leave the courtroom for part of jury selection in order to make room for the unusually large number of prospective jurors. As discussed above, the trial court was within its rights in asking spectators to make space for prospective jurors, but erred in asking only defendant's relatives to make that accommodation. But, as discussed above, we conclude this was not serious enough an irregularity to have affected the outcome, or rendered the proceedings fundamentally unfair or unreliable. See *Brown*, 294 Mich App at 387-388.

Appellate counsel otherwise supports the claim of ineffective assistance of counsel by arguing that defense counsel failed to call two "exculpatory witnesses" who were incarcerated with defendant and were prepared to testify that defendant never spoke of the murders or of his gun jamming. Trial counsel, however, did call two different witnesses who testified that they were incarcerated with defendant, associating with him on a nearly daily basis, and that defendant never spoke of being involved in a murder, having "two under his belt," or having had a gun-jamming incident.

Nevertheless, appellate counsel argues that trial counsel should have called Julius Rolland and Robert Lee Curry to testify. Appellate counsel offers a statement from an investigator who reported that he was denied access to Rolland, but did meet with Curry and Curry was very cooperative, opining that defendant would never confide anything to Teed. Appellate counsel also offers an informal statement from Rolland, as transcribed by appellate counsel, asserting that Rolland had been "bunkmates" with defendant and Teed, was with

defendant most of the day, and that Rolland never heard defendant speak of a murder or a gun jamming. Rolland also claimed that Teed was known to be a liar. Appellate counsel acknowledges that "the investigator says he never actually spoke with Rolland," but asserts even so that "Julius Rolland says indeed he did talk to the investigator and told him he would be willing to testify." Appellate counsel thus admits that, at best, calling Rolland would have introduced a credibility contest between Rolland and the investigator. Appellate counsel does not explain why the jury would have likely resolved that conflict by crediting the prisoner over the investigator. Further, defense counsel presented testimony from two inmates who gave substantially similar testimony to the testimony that appellate counsel claims Rolland and Curry would have provided. Thus, the presumption that defense counsel's decision was a matter of trial strategy has not been overcome. See *Julian*, 171 Mich App at 158-159.

Moreover, we note that trial counsel did effectively cross-examine Teed regarding his self-interested motives for helping the police and about his review of a newspaper article for information related to the gun jamming. And, in closing argument, defense counsel effectively disparaged Teed's credibility, including pointing out that Teed "told you about a conversation that occurred in May of 2006" but he was "paroled in April of 2006," stressing that Teed could have learned of defendant's jamming gun from information available in the newspaper. Accordingly, we conclude that appellate counsel has failed to show that trial counsel's performance fell below the objectively reasonable, let alone that the outcome would have been different if counsel had acted differently.

Appellate counsel additionally argues that the trial court abused its discretion in denying a post-trial motion for an evidentiary hearing to develop the issue of trial counsel's effectiveness. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Appellate counsel included with her motion for a new trial an alternative prayer for an evidentiary hearing "in order to determine whether Defendant received ineffective assistance of counsel." However, the hearing on the motion included no mention of any request for an evidentiary hearing, and the order denying the motion for a new trial likewise said nothing about a request for a *Ginther* hearing. This issue was thus raised, but then abandoned.

VI. PROSECUTORIAL MISCONDUCT

In his Standard 4 brief, defendant argues that the prosecuting attorney's remarks included several assertions not supported by the evidence, along with improper appeals to the juror's fears and sense of civic duty. However, defendant admits that none of the challenged remarks were objected to at trial, leaving appellate objections unpreserved. An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Relief for unpreserved issues of prosecutorial misconduct is appropriate only "when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *Unger*, 278 Mich App at 234-235 (citation omitted).

Typically prosecutors are afforded great latitude regarding their arguments and conduct at trial. *Id*. at 236. They are free to argue the evidence and all reasonable inferences arising from the evidence. *Id*. And a prosecutor need not confine argument to the "'blandest of all possible terms.'" *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v*

Cowell, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). "The test for determining whether prosecutorial misconduct requires reversal is whether the defendant was denied a fair and impartial trial." *Marji*, 180 Mich App at 536. Claims of prosecutorial misconduct are decided on a case-by-case basis, evaluating each challenge in context. *Id*. at 537.

A. FACTS NOT IN EVIDENCE

"Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Thomas*, 260 Mich App at 453-454.

In arguing that the prosecuting attorney violated this rule, defendant first asserts that the prosecuting attorney stated that "defendant 'himself admitted' to having the .22 revolver the night of the killings," but that "[a]t no time during his testimony did the defendant make any such statements." Defendant cites three pages of transcript in support of this argument. On the first, we find the prosecuting attorney saying, "We know that the defendant himself also corroborates Ashley's testimony about this gun in People's [exhibit] 72. Defendant admits, *practically*, that he had it." (Emphasis added.) The italicized qualifying word indicates that the prosecuting attorney was in fact arguing an inference from the evidence, not actually attributing to defendant a confession of his having had the gun on the night in question. Defendant denied having it on the night of the murders, but admitted that he was caught in possession of it several days later when he and Pate ran from the police, and had carried the gun for the few days ahead of that time. The prosecuting attorney did not commit misconduct by suggesting that defendant testified truthfully about having the gun when he was arrested, while acting on his obvious incentive to disclaim any such thing on the night of the killings. Where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). Defendant also cites the next page of trial transcript, upon which nothing even implies that defendant admitted having had the gun. Defendant's final record citation for this assertion presents the prosecuting attorney saying, "We know, ladies and gentlemen, that [defendant] comes back with that 22 caliber gun that jams." Viewed in context, the prosecuting attorney was not attributing a confession to defendant, but rather was arguing inferences from Tarrow's testimony.

Defendant next objects that the prosecuting attorney "stated that Ashley Tarrow testified that she 'seen' the defendant 'return' to her apartment that night with the .22." Checking the three transcript pages cited, we first find the prosecuting attorney saying, "Ashley told you that that was the gun she saw him with and that was the gun that he came back with in the early morning hours of October 10, 2004." On the following page, the prosecuting attorney continues, "why . . . discount what [Tarrow] tells you about the little things that the defendant didn't tell you? Like, defendant had a gun when he came back." On the last page cited, the prosecuting attorney reiterates, "he comes back with that 22 caliber gun that jams," but there is no mention of Tarrow. Tarrow in fact testified that defendant customarily carried the gun in question, and that Pate and defendant lay down in the living room with their familiar handguns on the night in question. Characterizing Tarrow's account as indicating that defendant came back to her house in possession of the gun in question was reasonable inference from the testimony.

Defendant's next objection: "The prosecutor stated that the defendant and Pate had a 'dispute' with Brown and we took 'lethal force' to settle this dispute one way or another. He stated, 'the evidence and testimony' shows this." Here defendant accurately represents what the prosecuting attorney said, and that Brown and Pate became embroiled in conflict is much in evidence. Although there was no testimony indicating that defendant shared in the antagonism, the evidence of defendant's and Pate's close association generally, and acting much in tandem on the night in question, gave rise to a reasonable inference that he did so.

Defendant next makes issue of the following: "The prosecution's statement about corroboration in terms of Douglas Teed, that defendant and Teed had a conversation about a 'gun that jams' and lo and behold, this man, from the evidence and testimony, has a 'gun that jams.'" Defendant argues that Teed described a conversation about a handgun that was a "semi-auto," and protests that the .22 caliber handgun at issue was a revolver, thus not the same gun. But the prosecuting attorney's comments included no attempt to conflate the properties to two dissimilar weapons; instead, the commentary emphasized that Teed spoke of defendant's boasting of having a gun that sometimes malfunctioned, and that defendant did indeed go about in possession of a gun that jammed. This commentary did not deviate from matters in evidence.

Next, defendant asserts that the prosecuting attorney stated that "defendant's 'words and actions' before the park shows he participated in premeditated murder," and argues that there was no testimony to the effect that defendant was angry, or otherwise of a mind to harm someone, on the night in question, and that his only "action" on the way to the park was sitting in the back seat of a car. In fact, the prosecuting attorney described defendant's actions in being with Pate on the night in question, having a gun at the time, and having the gun malfunction, which implies that defendant was trying to fire it. The prosecuting attorney did not attribute words to defendant while specifically on the way to the park that night, but instead spoke of defendant's actions and words after the murders. In evidence was that defendant was carrying a gun that tended to malfunction that night, he complained to Pate of just that malfunction at the time, and mentioned it also to some fellow inmates while incarcerated. Again, the prosecuting attorney was arguing from the evidence.

Defendant bases his last allegation of arguing facts not in evidence on "[t]he prosecutor's statement that there was an argument in the car and the park over where [Undra] Brown is and defendant has his gun aimed at Brandy because the 'plan' is to shoot at the same time," complaining that there was no testimony of an argument in the car, or in the park, or about where Brown was. But the prosecuting attorney made clear that he was using inferences to fill in some evidentiary blanks, saying that what "*probably* happens in that car is they are arguing over where Undra is" (emphasis added), and that defendant "most likely" aimed his gun at one of the victims in furtherance of a decision of which he was a part. The prosecuting attorney elaborated, "I say probably, but . . . the plan most likely is that they would fire at the same time so that there would be no screams, but we know from Levon Pate's second plea that he says [defendant's] gun jammed." The prosecuting attorney thus did not misrepresent the facts in evidence, but instead offered a theory based on what was in evidence.

Defendant asserts that trial counsel was ineffective for failing to object to any of these prosecutorial comments, but because defendant has failed to show that the prosecuting attorney argued beyond the evidence and reasonable inferences from it, trial counsel's disinclination to

raise objections in the matter cannot support a claim of ineffective assistance. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

B. CIVIC DUTY, FEAR OR PASSION

"Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Nor should a prosecuting attorney resort to argument intended to inflame the passions or prejudices of the jury. *People v Pennington*, 113 Mich App 688, 690-692; 318 NW2d 542 (1982). Defendant argues that the prosecuting attorney ran afoul of both principles with the following statements:

> [Defense counsel] asked you essentially in his argument to be afraid. That's what his argument was. He pedaled [sic] fear to you, ladies and gentlemen, fear of the big decision that you have to make and tells you that there is not credible evidence. He tells you that this man right here was afraid of his friend, Levon Pate, and he tells you that the [victims], well, if this actually happened, then they wouldn't be afraid, they would have fought back. His whole argument, ladies and gentlemen, is permeated with the idea of fear and it's designed to play on your fear. Because, as you know, you have . . . a big decision before you. You must decide the fate of this man right here based on the evidence and testimony before you.
>
> . . . But to be just, each and every one of you knows, to be just and fair you must also be brave. And so I ask you to set aside your fear for a second and think about the evidence and testimony you've heard and think about this supposed fear of this man right here, [defendant]; drug dealer, living in the streets, always carrying a gun, as Ashley said. Think about his fear in relation to Levon Pate, . . . who, conveniently enough for [defendant and his attorney], has been convicted of this. He offers you, ladies and gentlemen, a way out. A way out of your difficult decision by saying, that man up there, that cold hearted killer, Levon Pate, he's already taken responsibility, let this man go. Don't make the hard decision, don't consider what he did. Justice has been served.
>
> Fear and a way out. Don't take that way out.

Defendant argues that this commentary "in an unsubtle fashion was appealing to the unstated apprehension that by acquitting this Defendant, the jury would be letting a cold, depraved killer out on the street," and that "this is exactly the kind of argument that is prohibited, because it improperly appeals to emotion rather than factual innocence or guilt." We reject defendant's characterization. The prosecuting attorney was not trying to put the jury into fear of having defendant at large in society, but was trying to show concern for the weighty decision the jurors had to make, and to urge them to resist any hesitation to avoid making a decision that would have severe consequences for defendant through the expedient of satisfying themselves that the admitted killer was already behind bars.

For these reasons, defendant has failed to bring any prosecutorial misconduct to light and no appellate relief is warranted.

VII. COMPOSITION OF THE JURY ARRAY

Defendant in his Standard 4 brief asserts that he "was denied his Sixth Amendment right to an impartial jury drawn from a cross-section of the community." Defendant further states that defense counsel preserved this issue with a timely objection. We disagree with both assertions.

At the end of jury selection, defense counsel estimated that, out of one hundred prospective jurors, only between four and six were African-American.[1] Counsel protested the dearth of African-Americans, but conceded that one of the criteria for identifying a constitutional infirmity in this regard could not be shown from the record. Counsel spoke of investigating further, but this was counsel's last mention of the issue. Defense counsel thus raised concerns about the makeup of the jury array, but conceded that he was not immediately able to show error in the process used in this instance, then did not follow through with the further industry he thought might bring error to light. Accordingly, defense counsel raised, and then abandoned, objections to the jury selection process.

Moreover, to establish a prima facie case of a violation of the Sixth Amendment's fair-cross-section requirement, a defendant must show:

> (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 Bryant*, 491 Mich 575, 597; 822 NW2d 124 (2012), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

On appeal, however, defendant does not show that the fair-cross-section requirement was violated; instead, he requests this Court to assist in investigating that possibility. But defendant is asking for a form of appellate relief that is beyond the scope of what this Court can provide; thus, no appellate relief is warranted.

VIII. CUMULATIVE ERROR

Defendant argues that, even if no single error in the proceedings below was serious enough to warrant reversal on its own, the cumulative effect of all such error denied him a fair trial and so reversal is warranted.

However, of the several issues argued by defendant and appellate counsel, the only allegation of error that had any merit was the trial court's decision to select defendant's parents

[1] Apparently one of whom was seated on defendant's petit jury.

and other partisans, in preference for spectators aligned with the victims, for removal from the courtroom for part of jury selection in an effort to make room for the unusually large number of prospective jurors. But, as discussed above, that error was not of structural significance and did not affect the outcome. And because that is the only error the defense has brought to light, there was no other error to consider with it for purposes of cumulative-error analysis.

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio