STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DYSON EUGENE SLATER,

Defendant-Appellant.

UNPUBLISHED
March 24, 1998

No. 187452
Washtenaw Circuit Court
LC No. 94-002505 FC

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

I

Defendant challenges the absence of African-Americans in the jury array. He first claims that African-Americans were systematically excluded from the jury array in violation of the fair cross-section requirement of the Sixth Amendment. See *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996). However, defendant failed to establish a prima facie case of systematic exclusion because he offered no evidence that any underrepresentation was anything but a benign random selection, and no evidence of other incidents of a venire being disproportionate. *Id*. at 473, 477-481. Defendant further claims that the lack of African-Americans constituted discrimination which violated the equal protection clause. In support of this claim, defendant cites the test set forth in *Jefferson v Morgan*, 962 F2d 1185, 1188-1189 (CA 6, 1992). However, because that test is substantially similar to the systematic exclusion test, defendant's second claim fails for essentially the same reasons as his first claim; i.e., he offered no evidence that the procedure used inherently discriminates against African-Americans, and no evidence of underrepresentation over a significant period of time. Although defendant asks for a remand to garner support for his claim, he neither cites authority nor has presented any affidavit or offer of proof in support of his request. See MCR

7.211(C)(1)(a)(ii). Defendant's bald assertions are not sufficient to support his challenge. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Accordingly, a remand is not warranted.

II

Next, defendant claims that the trial court erred in admitting certain statements that he made to the police. Defendant argues that he was too intoxicated to voluntarily waive his rights and give the statements. We disagree.

We must review the entire record and make an independent determination whether, based on the totality of the circumstances, defendant's statements were freely given. *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995). Nevertheless, the trial court's factual findings will not be reversed unless they are clearly erroneous. *Id*. at 226. While intoxication can preclude a finding of voluntariness, the mere fact that defendant was under the influence of alcohol is not dispositive. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). The key consideration is whether the statements were the product of free unconstrained choice or whether the accused's will has been overborne and his self-determination critically impaired. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

In this case, it is clear that defendant had been drinking prior to giving his statements to police. However, the evidence reflects that, at the time he gave the statements, he was cooperative, coherent, and acting pursuant to his own free will. The trial court did not err in failing to suppress defendant's statements.

III

Next, defendant claims that the trial court erred in failing to excuse jurors who had previously sat on a solicitation for murder trial. Defendant argues that the issues in the prior trial and the instant trial are close enough that the two trials should be considered a "trial of the same issue" under MCR 2.511(D)(7), thereby requiring dismissal of those jurors for cause. Assuming, without deciding, that defendant is correct, we conclude that reversal is not required. The record reveals that defendant failed to satisfy the test for determining whether an error in refusing a challenge for cause merits reversal. See *People v Legrone*, 205 Mich App 77, 81-82; 517 NW2d 270 (1994). Therefore, this issue is waived. *Id.*

IV

Next, defendant takes issue with the information filed. We will not reverse for errors of pleading or procedure unless it shall affirmatively appear that the error resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096.

First, defendant makes several claims regarding the information as it relates to the charged felony-murder count. However, although defendant was found guilty of felony-murder, that conviction was vacated by the trial court. See *People v Passeno*, 195 Mich App 91, 95-96; 489 NW2d 152 (1992) (holding that when a defendant is convicted of first-degree premeditated murder and felony-

murder for the killing of a single victim, the constitutional guarantees against double jeopardy require vacating the felony-murder conviction).[1] Therefore, we fail to see how any alleged error relating to the charging of the felony-murder count resulted in prejudice to defendant or a miscarriage of justice. We also find it unlikely that any alleged error regarding the charging of the felony-murder count affected the jury's conclusion that defendant was guilty of premeditated murder with a firearm.

Second, we reject defendant's claim that it was error to charge him with alternate counts of first-degree felony murder and premeditated murder, or to send both theories to the jury. See *People v Ramsey*, 89 Mich App 260, 264; 280 NW2d 840 (1979); *People v Hall*, 83 Mich App 632, 637; 269 NW2d 476 (1978).

V

Next, defendant claims that there was insufficient evidence of premeditation and deliberation to support his conviction. We disagree.

We review claims of sufficiency of the evidence by considering the evidence in a light most favorable to the prosecution and determining whether the evidence, and the reasonable inferences arising therefrom, is sufficient to allow a rational trier of fact to find each element of the crime beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991). The testimony revealed that the victim was involved in an intimate relationship with Dineya Bell, defendant's ex-girlfriend and the mother of his child. Defendant was aware of the relationship and admittedly upset about it. Defendant went to Bell's home, knowing that the victim was there, entered the home with a loaded handgun, went upstairs to look for the victim, found him, and fired two shots at him. Defendant then stomped on the victim, and yelled at him to "die." Viewed in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant went to Bell's home intending to kill the victim and had time to reconsider his contemplated action. The evidence presented was sufficient to support defendant's first-degree murder conviction.

VI

Next, defendant claims that the prosecutor made several improper remarks to the jury during closing and rebuttal argument. Generally, because defendant did not object, review is precluded. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception to the general rule exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id*. We conclude that the allegedly improper remarks were not so prejudicial that they resulted in a miscarriage of justice or could not have been cured by an appropriate instruction.

VII

Next, defendant takes issue with the jury instructions. Defendant did object to the felony-murder instruction. However, because defendant's felony-murder conviction was vacated, we conclude

that any alleged error in instructing the jury on that count did not result in prejudice to defendant and, therefore, was harmless.

Regarding defendant's other claims involving the jury instructions, we find no error warranting reversal. Defendant did not object at trial to the alleged errors in the jury instructions.

As a result, we will reverse only upon a showing of manifest injustice. *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995). We have reviewed defendant's claims and find no manifest injustice.

VIII

Last, defendant claims that the cumulative effect of the errors at trial warrants reversal for a new trial. After a review of the entire record, we conclude that any imperfections during the course of the proceedings did not deprive defendant of a fair trial. Therefore, reversal is not warranted. *People v Kvam*, 160 Mich App 189, 200-201; 408 NW2d 71 (1987).

Affirmed.

/s/ Jane E. Markey
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] We note that a special panel of this Court has been convened to reconsider this issue. See *People v Bigelow*, 225 Mich App 806; 571 NW2d 520 (1997).