

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE D. MOORE,

Defendant-Appellant.

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UNPUBLISHED

November 20, 2001

No. 214248

Genesee Circuit Court

LC No. 98-002465-FC

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant Clarence Moore of first-degree premeditated murder,<sup>1</sup> assault with intent to murder,<sup>2</sup> and possession of a firearm during the commission of a felony<sup>3</sup> for the shooting death of Jacky Hamilton. The trial court sentenced Moore to life imprisonment for the first degree murder conviction, fifteen to thirty years in prison for the assault with intent to murder conviction, and a consecutive two-year prison term for the felony-firearm conviction. Moore appeals as of right. We affirm.

I. Basic Facts And Procedural History

According to Johnny Hamilton, he and his brother Jacky Hamilton were at their mother's house in Flint in August 1997 when they decided to go fishing. They left the house around 10:00 p.m. and, as they turned left on to Collingwood Street, Johnny Hamilton observed two trucks parked on the grass and sidewalk. Approximately five people were gathered around the trucks playing rap music. As the brothers walked by, one of the people called out to them, "Who that be?" and Hamilton said, "Who that be" in return. Though the small crowd of people then started saying angry things to the brothers, such as threats and challenges, Jacky Hamilton instructed Johnny Hamilton not to pay any attention. They continued walking, looking back at the men, until they reached their fishing spot at the dock on Thread Lake.

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<sup>1</sup> MCL 750.316.

<sup>2</sup> MCL 750.83.

<sup>3</sup> MCL 750.227b.

About five minutes later, Johnny Hamilton said, the two trucks that he had seen on Collingwood Street arrived at the top of the hill near where he and his brother were fishing. Hamilton saw somebody by a tree at the top of the hill and then he saw a rifle. Two people, one considerably shorter than the other, then came down the hill toward the brothers. As they approached the brothers, the taller person said, “what’s up now bitch ass n\*\*\*\*\*.” Johnny Hamilton told the two men that he and his brother lived nearby and offered them a drink. The taller person refused, replying, “no, bitch ass n\*\*\*\*\* jump in the water and swim your ass to the island.” Next, Johnny Hamilton said, the shorter person, who was holding the rifle, walked up to him. Johnny Hamilton and this shorter person, DeJuan Boylston, recognized each other. Boylston then looked at Johnny Hamilton and reportedly said that he was not going to do “nothin’ to ‘em, they ain’t bother nobody” and that he was going home.

At this point, however, the taller person, interjected, saying to Boylston, “You better kill them n\*\*\*\*\*,” and started arguing with Boylston. The taller person said, “Give me the gun, I’ll do it, I’ll do it” and tried to take the gun away from Boylston. Though the taller person actually touched the gun, Boylston was able to keep it away from him. The taller person began yelling at Boylston before walking up the hill, with Boylston walking slowly behind him. Johnny Hamilton said that the taller person “kept looking at me and my brother like, I wanna do it but I don’t wanna do it” and continued “running his mouth” all the way to the top of the hill, calling Boylston names, cussing, and saying odd things, like calling him a “whore” and questioning his manhood. Johnny Hamilton thought Boylston seemed confused at what was going on, but when he got to the “heart of the hill,” he turned around and aimed the gun at the brothers and fired several shots at them. The brothers jumped in the water. Because Boylston fired the shots two to three seconds apart, Johnny Hamilton concluded “[t]hat’s why I feel he was . . . aiming to hit one of us.” Though Johnny Hamilton was not physically harmed, his brother said had been hit in the chest by a bullet. When Jacky Hamilton got out of the water, he collapsed. He later died.

The police were unable to identify any fingerprints on the bullet casings found at the scene, nor could the police link the bullets or the murder weapon to a specific person. Though Johnny Hamilton never got close enough to the taller person involved in the shooting to identify him, the Flint police officers ultimately arrested Moore. According to Sergeant Eddy, who interviewed Moore at the police station, he told Moore that he was a possible suspect in the homicide and Moore waived his *Miranda*<sup>4</sup> rights. Initially, Moore told Sergeant Eddy that he did not know anything about the shooting and that he was at a residence on Belvidere when he heard gunshots. When Sergeant Eddy told Moore that he did not believe him, Moore stated that he had been at the house on Belvidere, sleeping, when Fredrico McWilliams and another person he did not know awakened him. Moore said that he, McWilliams, and “the other guy” went outside to have a beer. Two men then walked by the house and they exchanged words. One of the men lifted his shirt and displayed what Moore believed was a gun. Moore and “the other guy” decided to go down to the park to fight the two men. When Moore and “the other guy” later approached the two men they had seen on the street, one of the two men moved as if he was reaching for his gun, at which time Moore decided to leave and walked up the hill. At the top of the hill, according to Moore, he heard shots, and drove away.

<sup>4</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; L Ed 2d 694 (1966).

Sergeant Eddy told Moore that he still did not believe him and asked Moore if he had struggled with “the other person.” Moore responded that he and the person who had gone with him to look for the two men had struggled and that he grabbed the gun in an attempt to stop “the other person” from shooting the two men on the dock. Finally, Moore reportedly told Sergeant Eddy that “the other person” was “Juan,” presumably referring to DeJuan Boylston. Sergeant Eddy took notes of this interview and told Moore that he would “pass on everything he told me to the prosecutor’s office,” but he did not tape Moore’s statement, use a stenographer, or get a formal sworn statement from Moore.

The police kept Moore in jail overnight and placed him in a lineup the next day. The police released Moore after no one identified him in the lineup. After the police arrested Boylston, Johnny Hamilton identified him. The prosecutor’s office charged Boylston, but did not request a warrant for Moore. Moore, however, was asked to identify Boylston in a lineup, which he did. Because neither Johnny Hamilton nor any other witnesses could identify Moore in a lineup, Moore’s statements to Sergeant Eddy were the only evidence linking him to the murder. Nevertheless, the prosecutor decided that there was sufficient evidence to charge Moore.

At the preliminary examination, the district court dismissed the charges against Moore. However, the circuit court reversed and reinstated the charges. The case then proceeded to trial and the jury convicted Moore. We address the specific details of the trial and additional procedural history of this case in the context of the arguments Moore raises, below, because each issue relies on discrete sets of facts.

## II. Fair Trial

### A. Facts

In his closing argument, assistant prosecuting attorney Daniel Stamos emphasized Moore’s role in provoking the shooting and also attempted to explain why Sergeant Eddy’s notes were sufficient evidence of Moore’s statement, noting:

Now, I want to wind up, let’s talk about Sergeant Eddy. It was in his notes, in his notes, and — and he does these notes and then he has them typed, all right. You take notes and then you have them typed afterwards, all right. The typed version wasn’t missing anything.

Defense counsel Michael Manley objected to this argument on the grounds that the notes were not admitted in evidence and that it was improper for Stamos to suggest that the notes were in evidence.

MR. STAMOS: Well, hold it.

MR. MANLEY: No, that’s not even true —

MR. STAMOS: No, I don’t want you to make a misstatement —

MR. MANLEY: — what he just said it's not in — well, he just made a statement to the jury —

THE COURT: All right, I want you — I want to let the arguments happen and you may rebut when it's your turn.

MR. MANLEY: No —

THE COURT: Don't, I'm — that's my ruling, counsel, please.

MR. MANLEY: Your Honor, that —

THE COURT: That's the Court's ruling —

MR. MANLEY: — his statement is not —

THE COURT: All right —

MR. MANLEY: — in the evidence.

THE COURT: Excuse me, counsel, you're out of order, I have ruled and I ask you to sit down and wait to make your record after the jury leaves the room. Thank you.

MR. STAMOS: Okay, that's true it's — the — the statement is, we didn't introduce anything, I already talked about that, about rules of evidence, all right, the notes or the statement, that's true, are not in evidence and I explained that, all right.

Later, outside the jury's presence, Manley renewed his objection to the prosecutor's argument and the trial court's admonishment. The trial court responded that it believed the curative instruction it intended to give informing the jury that the attorney's arguments did not constitute evidence, in conjunction with Manley's opportunity to make his own argument, was sufficient to cure any prejudice. Further, the trial court commented, though it was appropriate for Manley to object to the prosecutor's argument, it was not proper for him to argue his "version of what the facts may be in front of the jury, that's for you to do either out of the presence of the jury or at a side-bar conference and not get into it at the time . . . ."

#### B. Standard Of Review

Moore now argues that he was denied a fair trial because Stamos made this argument and because the trial court admonished him in front of the jury. Whether a defendant was denied his constitutional right to a fair trial is a question of constitutional law subject to de novo review.<sup>5</sup>

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<sup>5</sup> *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

### C. The Remarks

Appellate courts must review a prosecutor's remarks in context to determine if they denied a defendant a fair and impartial trial.<sup>6</sup> Though the law makes clear that a prosecutor has wide discretion to argue that the facts of a case support convicting a defendant, the law is equally clear that a prosecutor may not make an argument on the basis of facts that the evidence does not support.<sup>7</sup> Here, the prosecutor referred to a matter the evidence did not support.

Nevertheless, even errors of a constitutional nature are ordinarily subject to a harmless error analysis.<sup>8</sup> In this case, both the prosecutor and the trial court acted to prevent Moore from suffering prejudice because of this error. The prosecutor immediately acknowledged the error to the jury. The trial court also instructed the jury that the attorneys' statements and arguments did not constitute evidence and that the jury had to decide the case solely on the basis of the evidence introduced at trial. We presume that the jury followed these instructions.<sup>9</sup> Further, because the prosecutor conceded that his assertion regarding Sergeant Eddy's notes was not accurate, we are confident that this error was harmless beyond a reasonable doubt.<sup>10</sup>

A trial court's statements in front of a jury that tend to denigrate the defense can deny a defendant a fair trial if the comments hold defense counsel "up to contempt in the eyes of the jury, destroy[ing] the balance of impartiality necessary for a fair hearing."<sup>11</sup> However, the facts of this case make it impossible to conclude that the trial court's decision to cut off Manley's ongoing argument denied Moore a fair trial. The trial court's comments did not actually criticize Manley, his arguments, or the defense. The trial court heard and responded to Manley's objections, properly ending what appears to have been an escalating interaction between Manley and Stamos that was disruptive to the orderly conduct of the trial. We see nothing unfair or overly prejudicial to Moore's right to a fair trial in the trial court's efforts to return the jury's attention to the closing arguments rather than Manley's objections. If Moore suffered any prejudice in this instance, and we see none because of the brevity of the exchange, it was because his own counsel provoked the trial court. A defendant may not benefit on appeal from his trial counsel's misconduct on his behalf.<sup>12</sup>

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<sup>6</sup> *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

<sup>7</sup> *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995).

<sup>8</sup> See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

<sup>9</sup> *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

<sup>10</sup> See *Carines*, *supra* at 774.

<sup>11</sup> See *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989).

<sup>12</sup> See, generally, *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

### III. Evidence Concerning Moore's Arrest

#### A. Facts

One of theories the defense formulated before trial was that Moore, who had been released from police custody while cooperative, had been charged because he had refused to testify against Boylston. Before trial, the prosecutor moved to preclude the defense from referring to the date the warrant was issued against Moore as well as other events surrounding Moore's arrest. The prosecutor anticipated that the defense would emphasize that Sergeant Eddy had released Moore before arresting him not only to challenge the strength of the prosecution's case, but also to suggest this police or prosecutorial bias. Consequently, the prosecutor argued that it was not up to Sergeant Eddy to decide whether to charge a suspect or issue a warrant. Though the trial court denied the prosecutor's motion to suppress this testimony, the prosecutor raised this issue again on the first day of trial, at which time the trial court ruled:

Well, I have always thought it was totally irrelevant to the charges myself and the evidence I agree was in the history. It's my impression from everything I've heard, a history was presented and that history is then made available to everybody and whatever it was it was and it still is the same, and all this fooling around whatever anybody did or didn't do for whatever reason I have no opinion on today, but I think I am gonna preclude any discussions regarding why a sergeant released somebody and then later went out and arrested him. I don't think it is relevant and even if it were, I agree with you, Mr. Stamos, it would be under the Rule 403, in my view . . . we need to focus on the facts of the case, and the defendant's involvement based on the evidence.

Defense counsel then called Randall Petrides, the assistant prosecutor who supervised the attorneys from the prosecutor's office working in the district court at the time Moore and Boylston were charged, to make a record explaining how Moore was charged. According to Petrides:

[T]he Boylston case was up for a committee review. He had been charged, a police report or police reports had been generated and this case got scheduled in the matter of course for a pre-trial conference which would bring it up for a committee review. I read the police reports that were prepared and became familiar enough with that to take that case along with the other cases of the day to the committee meeting. And in reading those police reports I noticed that Clarence Moore had not been charged . . . . I called . . . Scott Eddy [and asked why] Clarence Moore was not charged, and he indicated there was . . . no reason, that's still an open investigation . . . . [I]n reading the police report it became evident to me based upon my evaluation that Clarence Moore should be charged with the murder . . . . The committee reviewed it . . . and accepted my recommendation and I was directed then to authorize a warrant for Murder against Clarence Moore.

At trial, in accordance with its ruling, the trial court limited defense counsel in his attempt to admit all the evidence surrounding Moore's arrest. However, the trial court allowed defense counsel to attack Sergeant Eddy's credibility by questioning him concerning his interview with Moore and his investigation. The trial court permitted defense counsel to question Sergeant Eddy concerning the fact that he did not record Moore's statement, use a stenographer, or obtain a formal sworn statement from Moore, and was merely testifying from his incomplete handwritten notes. Defense counsel questioned Sergeant Eddy about each of his entries on his notes and about what Sergeant Eddy had said to Moore during the interview. Sergeant Eddy admitted that some of the statements that he attributed to Moore were not in his notes and that he was relying on his memory. Sergeant Eddy also admitted that his notes did not reflect that Moore said he had his hands on the gun. Defense counsel also questioned Sergeant Eddy about his investigation concerning things that Sergeant Eddy did not do.

### B. Standard Of Review

Moore argues that the trial court's ruling prohibiting him from presenting testimony concerning the events leading up to his arrest denied him a fair trial, constituting error requiring reversal. We review an evidentiary decision to determine whether the trial court abused its discretion.<sup>13</sup> However, we review de novo his claim that this evidentiary ruling impinged on his constitutional right to present a defense.<sup>14</sup>

### C. Analysis

Criminal defendants have the fundamental right to present a defense.<sup>15</sup> As this Court explained in *People v Layher*:<sup>16</sup>

[T]he bias or interest of a witness is almost always relevant to the substantive issue of witness credibility. In *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984), the United States Supreme Court stated:

“Bias is a term used in the ‘common law of evidence’ to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness’ like, dislike, or fear of a party, or by the witness’ self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.”

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<sup>13</sup> See *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

<sup>14</sup> See *Eaton*, *supra*.

<sup>15</sup> See *People v Toma*, 462 Mich 281, 321, n 14; 613 NW2d 694 (2000).

<sup>16</sup> *People v Layher*, 238 Mich App 573, 578-579; 607 NW2d 91 (1999), *aff'd* 464 Mich 756 (2001).

Similarly, in addressing the constitutional right to confrontation, the Court explained:

“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to . . . discredit [ ] the witness . . . . A more particular attack on the witness’ credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial and is ‘always relevant as discrediting the witness and affecting the weight of his testimony.’ [*Davis v Alaska*, 415 US 308, 316; 94 S Ct 1105; 39 L Ed 2d 347 (1974), quoting 3A Wigmore, Evidence (Chadbourn rev), § 940, p 775.]”

Even assuming that it was error to exclude this evidence, the error was not sufficiently prejudicial to defense counsel to conclude that it affected the outcome of this case.<sup>17</sup> The trial court did not construct an impenetrable wall around Sergeant Eddy’s reputation. In fact, the trial court permitted Moore to attack the Sergeant Eddy’s credibility extensively. Thus, while the trial court would not have erred by admitting this evidence at trial, we concluded that Moore is not entitled to a new trial because it was excluded.

#### IV. Directed Verdict

##### A. Standard Of Review And Legal Standard

Moore asserts that the trial court erred when it denied his motion for directed verdict on the felony-firearm charge because there was no evidence that he handled the firearm used to kill the victim. He also contends that the trial court erred when it denied his motion for a directed verdict of acquittal on the murder charge because the evidence was also insufficient.<sup>18</sup> We review de novo the grounds for a motion for directed verdict.<sup>19</sup>

In conducting this de novo review, the legal standard we apply requires us to consider the evidence in the light most favorable to the prosecutor to determine whether a reasonable jury

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<sup>17</sup> See *Carines, supra* at 774, citing *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994).

<sup>18</sup> Moore also contends that the trial court erred when it denied the motion for a new trial that he combined with the portion of the motion for directed verdict concerning his murder conviction. However, his argument is directed solely at the directed verdict issue. Thus, he has abandoned this issue and we do not consider it. See *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

<sup>19</sup> *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).



could conclude that the essential elements of the crime had been proven beyond a reasonable doubt.<sup>20</sup> However, we must assure that we do not interfere with the jury's exclusive role of determining witness credibility.<sup>21</sup>

## B. Analysis

To prove the form of first-degree murder involved in this case, the prosecutor had an obligation to prove that Moore intentionally killed the victim and that the act of killing was premeditated and deliberate.<sup>22</sup> Premeditation and deliberation, which necessitate "sufficient time to permit the defendant to take a second look, may be inferred from the circumstances surrounding the killing."<sup>23</sup> As we explained in *People v Abraham*:<sup>24</sup>

Premeditation and deliberation may be established by evidence of "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id.* "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Proof of motive is not essential. *People v Wells*, 102 Mich App 122, 128; 302 NW2d 196 (1980).

Here, the prosecutor presented evidence that Moore was part of a group of young men who started a verbal altercation with the two Hamilton brothers, following which Moore and Boylston went to Thread Lake to engage the brothers again. The evidence indicated that Boylston was armed with a gun and that Moore urged Boylston to kill the two men. When Boylston initially refused, Moore attempted to take the weapon away from Boylston, stating that he would shoot them. When Boylston refused to surrender the gun, Moore began to berate Boylston, calling him names and impugning his manhood. Boylston continued to hold the weapon and proceeded up a hill, away from the two brothers. However, Moore continued to berate and verbally attacked Boylston until, finally, Boylston turned around, aimed, and fired the weapon at the brothers, killing Jacky Hamilton. Viewed most favorably to the prosecutor, this evidence was sufficient for the jury to find beyond a reasonable doubt that Moore, with premeditation and deliberation, aided and abetted in the first-degree murder of the victim, as well as assault with intent to murder Johnny Hamilton.

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<sup>20</sup> *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

<sup>21</sup> See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

<sup>22</sup> MCL 750.316(1)(a).

<sup>23</sup> *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888 (2000).

<sup>24</sup> *People v Abraham*, 234 Mich App 640, 656-657; 599 NW2d 736 (1999).

Similarly, there was sufficient evidence that Moore aided and abetted Boylston's possession of the firearm to convict him of felony-firearm.<sup>25</sup> Accordingly, we conclude that the trial court did not err in denying Moore's motion for a directed verdict.

## V. Reinstating The Charges

Moore argues that the circuit court erred when it reversed the district court's decision refusing to bind him over for trial, instead reinstating the charges. However, because sufficient evidence was presented at trial to support Moore's convictions, any error in the bindover decision was harmless.<sup>26</sup>

## VI. Jury Array

### A. Standard Of Review

Moore claims that the trial court erred in determining that he failed to establish a prima facie case of a violation of the fair cross-section requirement for his allegation that minorities were excluded from the jury. We review questions of systematic exclusion of minorities from jury venires de novo.<sup>27</sup>

### B. Legal Standards

In this case, because this alleged error is constitutional in nature and preserved, we first determine whether the error is structural and therefore subject to a rule of automatic reversal. If the error, if it exists at all, was not structural, then we must determine whether it was harmless beyond a reasonable doubt.<sup>28</sup> Only a narrow class of errors are structural.<sup>29</sup> However the alleged error in this case appears to fit within that small class.<sup>30</sup> Thus, if we find error, reversal is required.

In *People v Howard*,<sup>31</sup> this Court rejected the defendant's fair cross-section claim, but explained in detail the legal principles that led to that conclusion:

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<sup>25</sup> See *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981); *People v Eloby (After Remand)*, 215 Mich App 472, 478; 547 NW2d 48 (1996); *People v Morneweck*, 115 Mich App 156, 158-159; 320 NW2d 327 (1982).

<sup>26</sup> *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

<sup>27</sup> See *People v Smith*, 463 Mich 199, 215; 615 NW2d 1 (2000).

<sup>28</sup> See *Carines*, *supra* at 774.

<sup>29</sup> See *Neder v Unites States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999); *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000).

<sup>30</sup> See, generally, *Vasquez v Hillery*, 474 US 254, 261; 106 S Ct 617; 88 L Ed 2d 598 (1986) (discrimination in grand jury selection is structural error).

<sup>31</sup> *People v Howard*, 226 Mich App 528, 532-534; 575 NW2d 16 (1997).

While a criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community, US Const, Am VI, he is not entitled to a petit jury that exactly mirrors the community. *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975); *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 593 (1996). To establish a prima facie violation of the 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.” [*Id.* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Although defendant asserts that African-Americans were underrepresented in his particular array, he presented no evidence concerning the representation of African-Americans on 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. *Timmel v Phillips*, 799 F2d 1083, 1086 (CA 5, 1986). Defendant also failed to show that any alleged underrepresentation was due to systematic exclusions, i.e., an exclusion resulting from some circumstance inherent in the particular jury selection process used. *Duren*, *supra* at 366; *Hubbard (After Remand)*, *supra* at 481 . . . . It is well settled that “[o]ne incidence of a jury venire being disproportionate is not evidence of a ‘systematic’ exclusions” *Timmell*, *supra* at 1087; see also *Hubbard (After Remand)*, *supra* at 481.

This case is factually very similar to *Howard*, and we find the reasoning in that case equally applicable in this case. Moore presented one case of alleged underrepresentation. He presented no evidence concerning the representation of African-Americans on jury venires in general. He failed to show that any alleged underrepresentation was due to systematic exclusion inherent in the jury selection process. Accordingly, we conclude that failed to establish a prima facie case of a violation of the fair cross-section requirement.

Further, Moore essentially admits that he did not present the necessary prima facie case. However, citing *Hubbard (After Remand)*,<sup>32</sup> he asks us to remand his case because the jury coordinator did not possess the information that was necessary for him to make a more particularized challenge. Yet, in *Howard*,<sup>33</sup> this Court did not remand the case for an evidentiary hearing to develop a more complete factual record even though it was aware of, and even cited, the *Hubbard (After Remand)* opinion.<sup>34</sup> Instead, the *Howard* Court took the record as it existed

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<sup>32</sup> *Hubbard (After Remand)*, *supra*.

<sup>33</sup> *Howard*, *supra*.

<sup>34</sup> See *Howard*, *supra* at 533-534.

and flatly rejected the defendant's fair cross-section claim for insufficient evidence.<sup>35</sup> In other words, none of the suspect circumstances surrounding the jury array that may have prompted this Court to remand in *Hubbard (After Remand)* existed in *Howard*, making remand unnecessary.<sup>36</sup> Moore has not presented us with any evidence on the record that would lead us to suspect a fair cross-section violation in this case, thereby requiring a remand.

Additionally, the trial court in this case specifically found that there was insufficient data upon which to prove a Sixth Amendment violation. With that ruling, Moore knew that, in order to present a prima facie case, he would have to have more pertinent data. However, Moore did not file a motion in this Court to remand for development of a factual record.<sup>37</sup> He merely inserted an "informal" request for remand in the body of his appellate brief. This was inadequate and, as a result, we decide this issue on the basis of the available evidence.<sup>38</sup> Our de novo review of the record does not reveal a structural error because Moore has failed to establish a prima facie violation of the fair cross-section requirement. Therefore, Moore is not entitled to any relief on this basis.

## VII. Jury Instructions

### A. Preservation And Standard Of Review

Moore asserts that he was charged with "open murder" but that the trial court erroneously instructed the jury four times that he was charged with first degree premeditated murder. He failed to preserve this issue for appeal by objecting.<sup>39</sup> Consequently, he must demonstrate plain error affecting his substantial rights before we will reverse his conviction and grant him a new trial.<sup>40</sup>

### B. The Instruction

We review jury instructions as a whole to determine whether the instructions adequately informed the jury of the applicable law.<sup>41</sup> "Instructions may not be extracted piecemeal to establish error."<sup>42</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> See *Hubbard (After Remand)*, *supra* at 470-471 (the Kalamazoo Circuit Court had documented problems with the jury array).

<sup>37</sup> MCR 7.211(C)(1)(a)(ii).

<sup>38</sup> *People v Williams*, 241 Mich App 519, 527; 616 NW2d 710 (2000); see *id.* at 527, n 4.

<sup>39</sup> See *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996).

<sup>40</sup> See *Carines*, *supra* at 763-764.

<sup>41</sup> *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

<sup>42</sup> *Id.*

Here, the trial court instructed the jury that Moore was “charged with the crime of First Degree Premeditated Murder” and then stated the elements of first-degree murder. The trial court also instructed the jury that, as to Count One, “it could consider the lesser charge of second-degree murder,” and gave the elements of second-degree murder. The trial court told the jury that “another possible verdict” was voluntary manslaughter and gave the elements of that crime. The trial court also instructed the jury on aiding and abetting the “offense.” The trial court told the jury that Moore was charged with aiding and abetting “each and every one of the crimes.” The court instructed on assault with intent to murder, and informed the jury that it could consider the lesser offenses of assault with intent to do great bodily harm less than murder and assault with a dangerous weapon. The trial court also instructed the jury that Moore was charged with aiding and abetting this assault charge and, again, set forth the elements of aiding and abetting. The trial court instructed the jury on felony-firearm and aiding and abetting felony-firearm. The lesser included crimes were enumerated on the verdict form. Finally, the trial court stated:

[T]he defendant is charged with three counts, that is, in Count One, First Murder; Count Two, Assault With Intent to Murder; and Count Three, Felony Firearm. These are separate crimes and the prosecutor is charging the defendant committed all of them. You must consider each crime separately in light of the evidence in the case and the law that I have given to you. You may find the defendant guilty of all, or one, or some combination of these crimes, or guilty of lesser crimes in Counts One and Two, or not guilty of one or more or all.

Following a discussion at the bench, the trial court gave the instruction for voluntary manslaughter. The trial court then asked defense counsel if he had anything to bring up and defense counsel declined. As we noted, Moore made no objections to the jury instructions. Viewing the trial court’s instructions as whole, we are satisfied that the jury was adequately apprised of the applicable law. There was no plain error.

Affirmed.

/s/ Jeffrey G. Collins  
/s/ Kathleen Jansen  
/s/ William C. Whitbeck