STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN ALLAN JONES,

Defendant-Appellant.

UNPUBLISHED
October 22, 2020

No. 348981
Ionia County Circuit Court
LC No. 2018-017507-FH

Before: LETICA, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of delivery of methamphetamine, MCL 333.7401(2)(b)(*i*), and one count of possession with the intent to deliver methamphetamine, *id*. The court sentenced defendant to concurrent terms of 13 to 40 years' imprisonment as a second or subsequent drug offense, MCL 333.7413(1). We affirm defendant's convictions, but remand for the ministerial task of correcting the judgment of sentence to reflect the sentences imposed.

I. BACKGROUND

This case arises out of the Central Michigan Enforcement Team (CMET) undercover investigation and purchase of methamphetamine. At trial, Detective Joseph Marshall of the CMET testified that he arranged a controlled buy with a confidential informant (CI) to target Nathan Elferink. The CI was given $4,500 in pre-recorded bills to be given to Elferink in exchange for six ounces of methamphetamine. The controlled buy took place inside defendant's girlfriend's white Nissan SUV, a rental car, while it was stopped in a parking lot shared by a hotel and gasoline station.

The CI testified that the exchange actually occurred between her and defendant. Although the CI had known Elferink for two or three years and they had supplied each other with drugs in the past, the CI did not know defendant. Earlier that day, Elferink had sent the CI a message via Facebook Messenger informing her that his supplier would be with him.

The CI recorded the entire transaction. The CI testified that she entered the SUV, sitting in the front passenger seat. Defendant was driving and Elferink was in the backseat behind the

driver's seat. A few minutes later, a third individual, later identified as Arieus Taylor, returned to the vehicle, sitting in the backseat behind the CI. After some small talk, defendant asked the CI, "You got it on you?" Believing that defendant was Elferink's supplier, the CI handed defendant the pre-recorded funds. Defendant counted them, stating aloud, "There's thirty-eight."[1] Defendant then mentioned that the one-ounce cuts for the CI and Elferink had not been made, and the CI confirmed by noting that it was still "all one," and "so I gotta weigh out." Defendant asked if the CI had a scale. When she responded negatively, defendant demonstrated how to eyeball what "two ounces look like" after saying, "let me show you." When Taylor expressed concern over defendant performing this task in a public place, defendant responded: "No, we cool." The CI testified that defendant then separated out an ounce for her and an ounce for Elferink. Defendant said that the six-ounce bag was "for them" and informed the CI that her bag was a little light, advising that she might want to take more out of the bag destined for her buyer. When the CI asked if the CI's bag had one or two ounces in it, defendant responded that it contained one ounce because he had already given Elferink his ounce. The CI mentioned that her buyer wanted to engage in future transaction and the defendant indicated that they would need to meet closer to Kalamazoo next time. According to the CI, defendant was the only person in the SUV who divided the methamphetamine and received payment.

After the CI left the SUV, the CI went directly to the hotel, where she turned over the two baggies of methamphetamine. The police arranged to pull over defendant's vehicle, arresting defendant, Taylor, and Elferink. The police found a baggie under the back seat on the driver's side. Later laboratory testing confirmed that the large baggie contained 172.01 grams of methamphetamine.

The CI had been arrested in Mecosta County for delivery of two ounces of methamphetamine. The CI was facing ten to twenty years imprisonment, but expected a sentence involving no prison time if she cooperated with law enforcement by arranging for controlled buys.

Elferink testified similarly to the CI. Elferink had pled to delivery of methamphetamine and expected to receive a 51-month minimum sentence. Elferink also had to testify against defendant, whom Elferink had only known for about two- and one-half weeks. Defendant became Elferink's supplier after his prior supplier was "popped." Elferink was facing an additional charge in Kalamazoo County. Elferink admitted that his father suggested that he "set up" defendant. Elferink needed defendant to provide transportation to the deal with the CI because his truck broke down. When Elferink was arrested, he told the police that he was going to set up both defendant and the CI in order to assist him with his Kalamazoo charges. Elferink also told the police that he had heard that the CI "had been popped."

Defendant testified that both Elferink and the CI were lying in order to obtain sentence reductions on their earlier charges. Defendant testified that he was only a marijuana dealer, who had never dealt methamphetamine. Defendant was giving Elferink a ride in exchange for money.

[1] The CI testified that she and Elferink had arranged to retain monies from the $4,500 provided, along with one ounce of methamphetamine for each of them, as payment for their services. Accordingly, the CI was paying $3,800 for eight ounces of methamphetamine.

This is why defendant counted the money. Defendant also testified that his only involvement in the controlled buy was when he handed the bag containing the methamphetamine, without knowledge of its contents, to the CI per Elferink's instruction. Defendant explained how the recorded statements he had made during the transaction were taken out-of-context and misinterpreted. Nevertheless, defendant admitted that he counted out the money and handed it to Elferink. Defendant also told the CI that she might need to take more out of one of the baggies as it appeared that the one-ounce baggie intended for her needed "just a little bit more . . . ." Defendant denied agreeing to a future transaction. Instead, he quietly told the CI "don't put me in the middle of all your[] s***. Don't do that." The CI responded: "Okay."

When defendant was interviewed by the police, defendant denied knowing what "ice," the slang term for methamphetamine was. Defendant accused Elferink of trying to set him up because I had never touched "ice[.]" Defendant urged the police to test inside the baggie for fingerprints, but they never did.

On cross-examination, defendant admitted that he had a prior 2012 conviction for delivery of cocaine. In addition, the police searched defendant's cell phone. Defendant admitted that there was a message on the day of the transaction indicating that he had "zips of ice for 445 apiece." Moreover, before the transaction, Elferink had sent a text message with a picture of money fanned out and the words "[s]he's waiting."

The jury convicted defendant and this appeal followed.

II. FAILURE TO DISCLOSE EVIDENCE

Defendant first argues that the trial court erred by denying him a new trial because the prosecutor committed a *Brady*[2] violation by failing to provide Facebook Messenger messages between Elferink and the CI. We disagree.

We review a trial court's decision to grant or deny a new trial for an abuse of discretion. *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. A mere difference in judicial opinion does not establish an abuse of discretion." *Id.* (quotation marks omitted). We review de novo a defendant's constitutional due-process claim. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 US at 87. In order to establish a *Brady* violation, defendant must show that: "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material." *People v Chenault*, 495 Mich

[2] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

142, 155; 845 NW2d 731 (2014). As our Supreme Court recognized:

> The contours of these three factors are fairly settled. The government is held responsible for evidence within its control, even evidence unknown to the prosecution, without regard to the prosecution's good or bad faith. Evidence is favorable to the defense when it is either exculpatory or impeaching. To establish materiality, a defendant must show that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. This standard does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . . The question is whether, in the absence of the suppressed evidence, the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. In assessing the materiality of the evidence, courts are to consider the suppressed evidence collectively, rather than piecemeal. [*Id*. at 150-151 (quotation marks, citations, and parentheticals omitted; ellipsis in original).]

According to testimony from both CI and Detective Marshall, Detective Marshall informed the CI to save the messages between the CI and Elferink, in the event that they became relevant. The police never retrieved the messages and, therefore, never provided to the prosecutor, who, in turn, never provided them to defense counsel. Even after the prosecutor forwarded defense counsel's request for copies of any text messages between the CI and Elferink to Detective Marshall, he was informed that none existed.

Without specifically evaluating whether a *Brady* violation occurred, the trial court determined that the prosecutor had acted diligently, and, given these circumstances, no error warranting a new trial occurred. We conclude that defendant has failed to meet his burden in establishing a *Brady* violation. "*Brady* imposes on the prosecution a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id*. at 154 (quotation marks and citation omitted). Assuming that the CI was acting as an agent of the police, the prosecution was responsible for the text messages. Nevertheless, defendant cannot complain that the evidence was suppressed when he was aware of it at trial because the essence of a *Brady* violation is the prosecution's failure to disclose favorable evidence unknown to the defense. *Chenault*, 495 Mich at 150, 153; see also *Strickler v Greene*, 527 US 263, 281-282; 119 S Ct 1936; 144 L Ed 2d 286 (1999). At trial, defense counsel learned that such messages existed, but did not request them. Instead, during closing, counsel asked the jury to infer that Elferink asked the CI to help set up defendant. This is not a *Brady* violation.

Moreover, the CI testified that the messages with Elferink, in the hours before the deal was to occur, did not mention defendant by name, but simply indicated that Elferink's supplier would be present. Thus, not only is there no indication that the prosecutor suppressed evidence, but there is also no indication that it was favorable.

Nevertheless, defendant further faults the prosecution because Detective Marshall failed to preserve the messages. But, "when the exculpatory nature of the evidence is speculative, due process is not violated in the absence of bad faith where the state fails to preserve such evidence."

People v Huttenga, 196 Mich App 633, 642; 493 NW2d 486 (1992); see also *People v Savage*, 327 Mich App 604, 633; 935 NW2d 69 (2019) (asserting that missing evidence that "may or may not have supported" a defense theory is not a sufficient basis for a successful claim of a *Brady* violation). Here, defendant merely speculates about the contents of the messages between the CI and Elferink, alleging that they are "clearly potentially exculpatory." This does not demonstrate a *Brady* violation and ignores the CI's trial testimony that defendant was never mentioned by name in the messages.

Defendant also indicates that his inability to access the messages affected his trial counsel's ability to question Elferink and the CI as to why the CI handed the money to defendant when Elferink was the target of the controlled buy. But the trial testimony established that the CI was aware that Elferink's supplier would be present, and, after the CI entered the car, defendant asked her: "You got it on you?" This suggests that the CI gave the money to defendant for the reasons she testified. Accordingly, defendant's claimed *Brady* violation lacks merit.[3]

Defendant also argues that the trial court erred by denying to grant a new trial because the police did not preserve Elferink's knives to introduce into evidence during trial. We again disagree.

Defendant cites *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988), for the proposition that "failure by police to preserve potentially useful evidence can be grounds for dismissal of criminal charges." Yet, defendant merely argues that, although Elferink admitted to having knives in the backseat, this testimony had "less impact at trial than showing the two knives if they were preserved and produced as evidence to cross-examine." He further asserts that the introduction of the knives would have contradicted the CI's and Elferink's testimony that Elferink never touched the bags containing the drugs. However, the record contains no support for these contentions. Outside of defense counsel's argument at the motion for a new trial hearing, there was no evidence in the record that Elferink cut open the drug bag with a knife. Defendant did not describe this incident in his testimony. Elferink denied doing so. And the detective who interviewed Taylor did not recall Taylor telling her that Elferink had cut open the bag. Therefore, we find no merit in defendant's claims that the prosecution withheld exculpatory evidence.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also raises several ineffective assistance of counsel claims, all of which we reject.

Determining whether a defendant received ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). We review findings of facts for clear error and questions of law de novo. *Id.*

[3] To the extent that defendant raises this issue as a discovery violation without reference to *Brady*, he is not entitled to relief because he has not demonstrated outcome-determinative error. *People v Elston*, 462 Mich 751, 766-767; 614 NW2d 595 (2000).

In order to receive a new trial on the basis of ineffective assistance of counsel, defendant "must show both that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010) (quotation marks and citation omitted). Accordingly, a defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*. Secondly, a defendant must show a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that defense counsel was ineffective for failing to call Taylor as a witness. Defendant argues that this was ineffective because Taylor would have undermined the testimony of Elferink and the CI because he had seen Elferink use the knife to open the drug bag. Defendant refers to Taylor's interview with police, in which he made such admission. However, defendant has provided no such interview. Defendant also failed to submit the alleged police report that contained these allegations. Defendant also alleges that Taylor's presence could have undermined the other testimony of Elferink and the CI. However, defendant did not submit an affidavit from Taylor containing these allegations or describing how Taylor would have testified at trial. Instead, defendant relies on defense counsel's statements made during her argument to set aside his conviction, without any support as to how Taylor would have testified. Thus, defendant's ineffective assistance of counsel claim fails because he has not established the factual predicate for his claim. Moreover, defendant has not overcome the presumption that trial counsel's decision not to call Taylor as a witness was a matter of trial strategy. *People v Jackson (On Reconsideration)*, 313 Mich App 409, 432; 884 NW2d 297 (2015) ("[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy[.]") (quotation marks omitted). The record reflects that Taylor was a charged codefendant; therefore, he had a Fifth Amendment privilege.[4] While counsel is willing to subjectively describe her performance as deficient, the standard is an objective one. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Objectively viewed, defendant has not demonstrated that counsel's performance was deficient and that he was prejudiced by the failure to call Taylor in light of the evidence presented against him at trial.

Defendant first asserts that the text messages on his phone were MRE 404(b) evidence because they were sent to an unrelated party about selling "ice." Defendant adds that the

[4] Taylor pled guilty to and was sentenced for possession of methamphetamine before defendant's trial. MRE 201; *People v Arieus Taylor*, Ionia County Circuit Court Docket No. 2018-017468-FH.

prosecution erred when it failed to provide pretrial notice of this evidence under MRE 404(b)(2). The admission of other-acts evidence is controlled by MRE 404(b), which states that evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). "It may, however, be admissible for other purposes, such as . . . knowledge[.]" *Id*. To be admissible under MRE 404(b), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Vander Vliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Even if erroneously admitted, the defendant must demonstrate it was outcome-determinative. *People v Jackson*, 498 Mich 246, 265; 869 NW2d 253 (2015); *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012).

As previously discussed, on direct examination, defendant testified that he had never heard the term "ice" until the detective who interviewed told him what it meant. On cross-examination, the prosecutor questioned defendant about a Facebook message from defendant's cell phone on the date of the offenses, reading: "This is Brian on Facebook. I got zips of ice for 445 apiece. Make something happen." Defendant responded: "What?" The prosecutor again asked if defendant had sent that text to someone. Defendant denied doing so. The prosecutor then put the message in context, mentioning an earlier message sent to defendant that read: "Brian, my boy in BC is looking for a plug. You still at $400 an ounce?" Defendant again denied sending the response. Following a bench conference, the prosecutor moved on to other matters. On redirect examination, defendant explained that he had lost the phone connected to that Facebook and no longer used it.

Regarding the prosecutor's initial inquiry on cross-examination, defendant's argument is misplaced because his statements contained in the messages do not qualify as other-acts evidence subject to MRE 404(b). Instead, it was a question of fact for the jury as to whether defendant made these statements. *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989),[5] aff'd 437 Mich 149; 468 NW2d 487 (1991) ("[A] prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act."), citing *People v Goddard*, 429 Mich 505, 515; 418 NW2d 881 (1988). Therefore, "[a]s a statement of a party opponent, the admissibility analysis involves instead first determining whether the statement was relevant, and second whether its probative value outweighed its possible prejudicial effect." *Goddard*, 429 Mich at 515.[6] Notably, the prosecutor did not seek to introduce this evidence as character evidence; instead, it was used to impeach and rebut defendant's testimony that he did

[5] Court of Appeals cases decided before November 1, 1990, are not binding. See MCR 7.215(J)(1). Although we are not "strictly required to follow uncontradicted opinions from this Court decided prior to November 1, 1990, those opinions are nonetheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *People v Bensch*, 328 Mich App 1, 7 n 6; 935 NW2d 382 (2019) (quotation marks omitted).

[6] The presence of the word "ice" on defendant's phone was very relevant and not unfairly prejudicial, as defendant denied knowing what the word meant.

not know what "ice" was until the detective explained that it was slang for methamphetamine. To the extent that the prosecutor delved further by attempting to place the statement in context, the evidence was offered to show defendant's knowledge and was not outcome-determinative. Defendant also argues that the prosecutor testified and interpreted the audio from the recording device worn by the CI and that defendant waived his preliminary examination on the basis of an illusory promise, namely, that he could participate in the Swift and Sure program when he was not eligible. However, defendant cites no caselaw for either proposition and does not provide any substantive analysis for either argument. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, these issues are abandoned.[7] See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Lastly, because no errors have been established, reversal is not warranted on the basis of cumulative error. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007) ("Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal.").

V. STANDARD 4 BRIEF[8]

In his Standard 4 Brief, defendant challenges "the truthfulness with which the police reported" the seized evidence from his vehicle "and because of the lack of truthfulness there must be suppression of any alleged evidence originating from the seizure." We review unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Notably, defendant does not challenge the search of his vehicle or the seizure of evidence from his vehicle. Rather, he challenges the police cataloging of the evidence and argues that such evidence should be inadmissible.

As defendant concedes, we have held that "any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims." *People v White*, 208 Mich App

[7] Defendant's claims also fail on the merits. As to the claim of prosecutorial error, defense counsel objected to the exchange at issue and the prosecutor rephrased the question. Therefore, the record demonstrates that any error was corrected, see e.g., *People v Miller (After Remand)*, 211 Mich App 30, 42-43; 535 NW2d 518 (1995), and, in any event, harmless. As to defendant's waiver of his statutory right to a preliminary examination, the trial court noted that defendant's attorney never requested a remand for preliminary examination despite learning that defendant was ineligible for Swift and Sure. Moreover, a preliminary examination determines whether there is probable cause to believe that a crime was committed and that the defendant committed it; however, at trial, a jury determined that defendant was guilty beyond a reasonable doubt. See *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003) (explaining the purpose of a preliminary examination). Thus, even if the prosecutor was not able to make such a promise, defendant has not shown prejudice.

[8] A "Standard 4" brief refers to a brief filed on behalf of an indigent criminal defendant pursuant to Michigan Supreme Court Administrative Order 2004-6, Standard 4.

126, 130-131; 527 NW2d 34 (1994). "[A] perfect chain of custody is not required for the admission of cocaine and other relatively indistinguishable items of real evidence." *Id*. at 132-133. Defendant merely challenges the location where the drugs were seized and asserts that the chain of custody was imperfect because the evidence log lists the wrong address regarding where the drug seizure occurred. Thus, the alleged issues with the chain of custody affect the weight of the evidence and not its admissibility. Consequently, defendant's claim fails.[9]

Defendant also argues that he is entitled to a new trial because his Sixth Amendment right to a fair cross section of jurors was violated. We disagree. "Whether defendant was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community is a constitutional question that we review de novo." *People v Bryant*, 491 Mich 575, 595; 822 NW2d 124 (2012). As this claim was also unpreserved, we review for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

"The Sixth Amendment of the United States Constitution guarantees a defendant the right to be tried by an impartial jury drawn from a fair cross section of the community." *Bryant*, 491 Mich at 595. To establish a prima facie case of a 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 597, citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

In this case, "[t]here is no dispute that African-Americans, the group alleged to be excluded, are a distinct group in the community for the purposes of determining whether there is a violation of the Sixth Amendment's fair-cross-section requirement." *Bryant*, 491 Mich at 598. Accordingly, the first prong is satisfied. However, defendant cannot establish the second or third prongs of *Duren*. Defendant has not proffered any evidence to suggest that African-Americans are underrepresented in relation to the number of African-Americans in the Ionia community, and there is no evidence that this alleged underrepresentation is due to systematic exclusion.

Defendant merely asserts, unsupported, that the current method of selecting jurors—of choosing those that are registered to vote and have a Michigan's driver's license—significantly limits the number of African-Americans in the jury pools. He also states that the third prong is

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[9] As our Supreme Court held:

> [This Court] must remember that the jury is the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence, and decide the questions of fact . . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony. [*Hardiman*, 466 Mich at 431 (quotation marks omitted; ellipsis in original).]

clearly established because there were no African-Americans on the jury and that "[w]ithout the act of exclusion, it is unreasonable that no African-American would have been chosen or selected." Yet, our Supreme Court recognized, "[b]ecause underrepresentation in a single venire could result from chance, evaluating whether representation of a distinct group is fair and reasonable requires evaluating venire composition over time." *Id*. at 602. Only with sufficient evidence can we evaluate whether representation was fair and reasonable, *Id*. at 599, and whether underrepresentation was the result of systematic exclusion, *Id*. at 616-618. Without any evidence to support defendant's contention, his arguments are conclusory and we cannot conclude that his Sixth Amendment right was violated.

Affirmed and remanded for the ministerial task of correcting defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Kirsten Frank Kelly
/s/ James Robert Redford