STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2009
v	No. 286409 Kent Circuit Court
FREDRICKS BERNARD SMITH, Defendant-Appellant.	LC No. 08-000739-FC

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and two counts of assault with intent to commit murder, MCL 750.83. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to life imprisonment for first-degree murder and 50 to 90 years' imprisonment for each count of assault with intent to commit murder. These three sentences are to run consecutively to two years' imprisonment for the felony-firearm conviction, and all four sentences are to run consecutively to a sentence he was serving because of his parole status. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecutor presented insufficient evidence to support the jury's verdict, or alternatively, that the verdict was against the great weight of the evidence. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We "'view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.'" *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citation omitted). A new trial can be granted on the basis that the verdict was against the great weight of the evidence only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would result if the verdict were allowed to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). This latter issue is unpreserved for failure to raise it in a motion for new trial; therefore, we review it for plain error affecting substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

Regarding the sufficiency of the evidence, defendant contends that, while he was the driver of the vehicle used in the shooting, the evidence established that the person in the passenger seat exited the vehicle and committed the shooting. Defendant contends that there was insufficient evidence showing that he was the shooter or principal, nor was there sufficient

evidence showing that defendant, as the driver, did anything to aid and abet the shooter. Identity is always an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Defendant was identified by Derrelle Mosley, Kevin Terrell, and Aaron Broyles as being at the crime scene and being the shooter. In addition, defendant's associate, Damoine Davis, was involved in a long standing dispute with the victim over a previous fight and was seen driving defendant in the vehicle before the shooting occurred. Eyewitness testimony and proof of motive constitute sufficient evidence to justify a conviction. See *People v Malone*, 193 Mich App 366, 372; 483 NW2d 470 (1992). Moreover, "'[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted). Before the shooting, defendant asked Barbara McGhee to drive him to pick up a gun. After the shooting, defendant washed his hands with bleach, changed the appearance of his hair, told his girlfriend to lie to the police, and appeared nervous. The thrust of defendant's appellate arguments pertains to weight and credibility, e.g., McGhee "lacked any credibility since she never made . . . allegations until she got arrested." However, this Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). On the record, there was sufficient evidence to enable a rational jury to determine beyond a reasonable doubt that defendant was present and was the shooter. We therefore need not address defendant's aiding and abetting arguments.

With respect to defendant's claim challenging the great weight of the evidence, defendant has failed to show that the evidence preponderates heavily against the verdict or that the prosecution witnesses' testimony was impeached to the extent that it was deprived of all probative value such that the jury could not believe it. *Lemmon, supra* at 643. On review of the record and the strong evidence of guilt, it would not be a miscarriage of justice to allow the verdict to stand. *Id.* at 642. Thus, there exists no plain error requiring reversal.

Defendant also argues that the statements he made to police in the presence of his parole officer should have been suppressed where they were made in violation of *Miranda*,[1] were involuntary, and were in violation of his Fifth and Sixth Amendment rights to counsel. Although we review this issue de novo on examination of the entire record, we will not disturb the trial court's underlying factual findings absent clear error. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000).

Considering the totality of the circumstances surrounding defendant's statements, including the myriad factors enunciated in the caselaw on the subject of voluntariness, and considering the deference that must be given to the trial court's assessment of the weight of the evidence and witness credibility, we find that defendant's statements were voluntary and not coerced. *People v Shipley*, 256 Mich App 367, 372-374; 662 NW2d 856 (2003). Furthermore, defendant's *Miranda* arguments are rejected, where the record supports the trial court's finding, to which we give the required deference, that the challenged statements were not the result of a *custodial* interrogation. *People v Coomer*, 245 Mich App 206, 219-220; 627 NW2d 612 (2001). Finally, on the associated right to counsel arguments, there was no Sixth Amendment violation,

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

where the initiation of adversarial judicial criminal proceedings had yet to take place, *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004), and there was no Fifth Amendment violation, where defendant was not in custody when the initial statements were made, *Michigan v Jackson*, 475 US 625, 629; 106 S Ct 1404; 89 L Ed 2d 631 (1986), overruled on other grounds *Montejo v Louisiana*, __ US __; 129 S Ct 2079; 173 L Ed 2d 955 (2009). Moreover, even were the statements excludable, the presumed error was harmless given the wealth of untainted evidence showing guilt. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Defendant next argues that he was deprived of the right to an impartial jury drawn from a fair cross-section of the community. We disagree. We review unpreserved constitutional errors for plain error that affects the substantial rights of the defendant. *Carines*, *supra* at 763-764.[2] To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979); *People v Hubbard (After Remand)*, 217 Mich App 459, 473; 552 NW2d 493 (1996). Defendant has failed to prove the second prong of the test. Defendant's only evidence of underrepresentation was his own observation of the jury array, which he claims contained only three minorities; he did not present evidence of underrepresentation for jury venires in Kent County in general. Simply showing one case of alleged underrepresentation does not rise to the general underrepresentation that must be shown in order to establish a prima facie case. *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). In addition, defendant has failed to meet the third prong. Although systematic errors may have plagued the Kent County jury selection process in the past, defendant produced no evidence that systematic exclusion existed at the time his jury was chosen. Further, "systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate." *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Therefore, defendant has failed to establish a prima facie case of racial discrimination, and his claim is without merit.[3]

Affirmed.

/s/ Patrick M. Meter
/s/ William B. Murphy
/s/ Brian K. Zahra

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[2] Regardless of defendant's claims to the contrary, we do not accept that the claim was somehow preserved. Defendant did not challenge the jury array until after the jury was empanelled and sworn. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996); *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 493 (1996).

[3] Defendant's reliance on *Smith v Berghuis*, 543 F3d 326 (CA 6, 2008), cert gtd __ US __; __ S Ct __; __ L Ed 2d __, issued September 30, 2009 (Docket No. 08-1402), is misplaced because that case involved the Kent County jury selection process as it existed in the early 1990s and not when defendant was tried, which was in 2008.