STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS TERRELL HORN,

Defendant-Appellant.

UNPUBLISHED
May 24, 1996

No. 181080
LC No. 94-000743-FC

Before: Sawyer, P.J., and Griffin and M.G. Harrison,* JJ.

PER CURIAM.

Defendant was charged with two counts of open murder, MCL 750.316; MSA 28.548, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2)., MCL 750.227b; MSA 28.424(2), felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and manslaughter for the wilful killing of an unborn quick child, MCL 750.322; MSA 28.554. The jury convicted defendant of first-degree murder, felony-firearm, second-degree murder, MCL 750.319; MSA 28.549, felon in possession of a firearm, and manslaughter for the wilful killing of an unborn quick child. On July 25, 1994, the trial judge sentenced defendant concurrently to life imprisonment on both murder convictions, ten to fifteen years of imprisonment for the manslaughter conviction, and 3-1/3 to five years of imprisonment for the felon in possession of a firearm consecutive to the mandatory two-year sentence for the felony-firearm conviction. Defendant appeals as of right from his convictions. We affirm.

I

Defendant argues that his trial counsel's ineffective assistance infringed his right to a fair trial. We disagree. In the context of this argument, defendant identifies four possible actions of his trial counsel that may support his claim. However, defendant abandoned this issue on appeal by merely stating his position and failing to argue its merits. Thus, this issue is not properly presented for review. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Furthermore, even if this issue was properly presented, defendant failed to properly preserve this issue

* Circuit judge, sitting on the Court of Appeals by assignment.

by moving for either a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436: 212 NW2d 922 (1973). Without a *Ginther* hearing, this Court's review is limited to the record as it stands. *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994). In any event, our review of the record reveals that none of the claimed instances of ineffective assistance of counsel are factually supported. Correspondingly, defendant's claim must fail.

Defendant next argues that the trial court erred when it denied his motion to change venue on the ground of prejudicial pretrial publicity. We disagree. This Court reviews the denial of a motion for a change of venue to determine whether the trial court abused its discretion in denying the motion. *People v Lee*, 212 Mich App 228, 252; 537 NW2d 233 (1995). An abuse of discretion will only be found when an unprejudiced person would say that there was no excuse or justification for the trial court's denial of the motion. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

As a general rule, when potential jurors swear that they will be impartial by putting aside preexisting knowledge and opinions, a presumption arises that the jurors will abide by their oath. *DeLisle*, *supra* at 662-663. In order to rebut this presumption so as to be entitled to a change of venue, the defendant must show that there was "either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it . . . or that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice." *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992) (citations omitted). Thus, the mere existence of pretrial publicity is not enough to warrant a change of venue. *Lee*, *supra* at 253. If a review of the jury's voir dire and the evidence of publicity does not show that the jurors were biased, a denial of a motion for a change of venue is proper. *DeLisle*, *supra* at 669.

Our review of the record below shows that pretrial publicity did exist. Nevertheless, defendant failed to introduce any evidence concerning the nature of this publicity. Furthermore, our review of the jury's voir dire shows that the prospective jurors were not biased by the publicity anyway. Because neither the evidence of publicity nor the voir dire showed the existence of bias, the trial court properly denied defendant's motion for a change of venue. *DeLisle*, *supra* at 669. Correspondingly, the trial court did not abuse its discretion. *Lee*, *supra* at 252.

Defendant contends that his right to a fair trial was likewise infringed by an absence of a representative cross section of African-Americans in the jury array. Defendant failed to preserve this issue by making a timely objection before the jury was impaneled and sworn. *People v McCrea*, 303 Mich 213, 278: 6 NW2d 489 (1942). Nevertheless, appellate review is still appropriate because defendant raised a constitutional challenge to the actions below. *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994). We review de novo questions of systematic exclusions in jury panels. *People v Sanders*, 58 Mich App 512, 514-516; 228 NW2d 439 (1975).

As a general rule, a defendant is entitled to an impartial jury drawn from a fair cross section of the community in question. *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690

(1975). Nevertheless, the fair cross section need not directly mirror the ethnic makeup of the community; the Sixth Amendment merely guarantees the opportunity for a representative jury array through the use of jury wheels, pools of names, or panels which are not drawn to systematically exclude a distinctive group within the community. *Id.*; *United States v Jackman*, 46 F3d 1240, 1244 (CA 2, 1995). Therefore, in order to show that this guarantee has been violated in the given situation, defendant must establish a prima facie violation of the fair cross section requirement with the following factors:

> (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, 586-587 (1979).]

Yet, even if defendant can establish this prima facie case, the government may overcome the right to a proper jury by offering a significant state interest which will manifestly advance those aspects of the process that result in the disproportionate exclusion of a distinct group. *Ford v Seabold*, 841 F2d 677, 681 (CA 6, 1988).

Defendant alleged that the group excluded from the jury array consisted of African-Americans. Black citizens are considered a distinct group within a given community for fair cross section challenges. *Bamseur v Beyer*, 983 F2d 1215, 1230 (CA 3, 1992). Therefore, the first prong of the *Duren* test is met. However, defendant failed to supply any evidence to meet the other prongs of the test. At most, defendant complained that he could not seat the three prospective African-American jurors in his jury. Such evidence does not support a claim of systematic exclusion. *Ford*, *supra* at 685. Correspondingly, the trial court did not err when it rejected defendant's challenge to the jury.

II

On the eve of oral arguments, defendant filed an *in pro per* brief on appeal. We accepted this brief and will review it as if it had been timely filed.

Defendant argues that his trial counsel was ineffective because counsel failed to move for the suppression of defendant's statement to the police. We disagree. Defendant asserts that he never made the statement in question. In such a case, the jury must decide whether the defendant indeed made the statement. *People v Neal*, 182 Mich App 368, 371; 451 NW2d 639 (1990). This fact question rendered a motion to suppress futile. We do not require defense counsel to make such futile motions. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Regarding the other claims of ineffective assistance of counsel put forth in this brief, we find no factual support in the record to substantiate them.

Defendant next argues that he is entitled to a new trial because the police violated his right to an attorney when they interrogated him on the second day of post-arrest detention without one present. We disagree. It is true that a defendant has the right to have an attorney present during custodial interrogation. *Miranda v Arizona*, 384 US 436, 466; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Nevertheless, a defendant may waive this right. *People v Smielewski*, 214 Mich App 55, 61; 542 NW2d 293 (1995). Our review of the record shows that defendant voluntarily initiated this conversation with the police after verbally waiving his right to have counsel present. Consequently, we find defendant's argument to be meritless.

Defendant last argues that his right to a fair trial was infringed by prosecutorial misconduct during closing arguments. We note that this issue is unpreserved because defendant failed to object below, so our review is foreclosed unless the alleged misconduct would result in a miscarriage of justice. *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). After a careful review of the record, we conclude that no miscarriage of justice occurred below.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Griffin
/s/ Michael G. Harrison