

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

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

August 2, 1996

Plaintiff-Appellee,

v

No. 171763

LC No. 93 047 588

AUGUSTUS JONES ,

Defendant-Appellant.

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Before: Michael J. Kelly, P.J., and Bandstra and S.B. Miller,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.316; MSA 28.548, and felony-firearm, MCL 750.227b; MSA 28.7424(b). Defendant was sentenced in the Genesee Circuit Court to 200 to 300 months' imprisonment for the second-degree murder conviction, and a consecutive 24 months' imprisonment for his felony-firearm conviction. Defendant appeals of right raising six issues. We affirm.

I

IMPERFECT SELF DEFENSE

This issue is not preserved since defendant failed to object to the instructions as given. MCR 2.516(C); *People v Cross*, 202 Mich App 138; 508 NW2d 144 (1993). Defendant's theory was that he had shot the victim in self-defense. The jury was properly instructed on self-defense, and no manifest injustice occurred.

II

PROSECUTORIAL MISUSE OF PEREMPTORY CHALLENGES PLUS INEFFECTIVE  
ASSISTANCE OF DEFENSE COUNSEL IN FAILING TO OBJECT

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

Appellant raises issues not preserved by objection at trial and fails to recognize the need for preserving ineffective assistance of counsel claims by appropriate motion. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Because it is not clear from the record that the prosecution used its peremptory challenges in a discriminatory fashion the failure to develop an adequate record forfeits appellate review. *People v Vaughn*, 200 Mich App 32; 504 NW2d 2 (1993). Defendant's failure to make a record concerning his claim for ineffective assistance of counsel confines that claim to the record presented. *People v Barclay*, 208 Mich App 670; 528 NW2d 842 (1995).

The prosecutor used 20 peremptory challenges, about half against women, three remained on the panel, and one was excused by lot at the end of the trial. Defense counsel likewise utilized peremptory challenges against women and, under the circumstances, the defendant has not overcome the presumption that the challenged action could be sound trial strategy. *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995). It is defendant's burden to persuade this Court that the prosecutor used his challenges in a discriminatory fashion. We are persuaded that the trial prosecutor's use of nine out of twenty challenges against women is not per se discriminatory. Defendant's argument that "women would be sympathetic towards defendant defending his girlfriend" is not convincing in the absence of some record support that the prosecutor's purpose was to remove jurors by their sex. Equally haphazard is appellate counsel's request for a remand at this time after failure to raise the issue in timely fashion in the appellate court. We find no error. Remand is rejected.

### III

#### INEFFECTIVE ASSISTANCE OF COUNSEL

Appellate counsel raises a separate claim of ineffective assistance of counsel. We hold that defendant's appellate counsel should have raised the issue of ineffective assistance of counsel by moving for a new trial or an evidentiary hearing. on the issue. Failure to do so precludes appellate review. *People v Crall*, 444 Mich 463; 510 NW2d 182 (1993). Our review of the trial court record indicates that trial counsel's performance did not prejudice defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298 521 NW2d 797 (1994).; *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

### IV

#### ERROR IN GIVING AN INSTRUCTION ON FLIGHT

Appellant raises a claim of error not properly preserved for appellate review. Because there was evidence to support an instruction on flight the trial court did not err in giving the instruction; and there is no manifest injustice shown.

V

PROSECUTORIAL MISCONDUCT

Appellant argues that the prosecutor improperly adverted to the irrelevant fact that defendant was from Detroit and claims that this reference so prejudiced the jury that manifest injustice occurred. We hold this claim of error meritless..

VI

CLOSING OF THE COURTROOM

Appellate counsel's final shot argument is that defendant was denied due process because the seating capacity in the courtroom in which he was tried would not accommodate the public. The record shows most seating was reserved for the large jury venire during voir dire. The court expressed its willingness that during all procedures there be somebody from each family present. There was no objection. The issue is without merit..

Affirmed.

/s/ Michael J. Kelly  
/s/ Richard A. Bandstra  
/s/ Stephen B. Miller