

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE MATHIS, JR,

Defendant-Appellant.

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UNPUBLISHED  
October 22, 1996

No. 178635  
LC No. 93-036346

Before: M.J. Kelly, P.J., and Hood and H. D. Soet,\* JJ.

PER CURIAM.

Defendant was convicted, following a jury trial<sup>1</sup>, of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was also convicted, following a jury trial, of being a habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to twenty to forty years' imprisonment for his habitual offender conviction, to be served consecutively to his two year felony-firearm sentence. He appeals as of right. We affirm.

This case arose from a December 19, 1991, incident in which defendant shot complainant, Everette Willis, Jr., during a party at 2620 Ninth Street, in the city of Muskegon Heights. According to complainant, he and defendant worked together. While at the party, complainant and defendant became engaged in an argument that escalated into a shoving match. Defendant then left the party and returned approximately thirty minutes later. Defendant approached complainant and grabbed him by the arm. When complainant shoved defendant away, defendant pulled out a gun and shot at complainant, grazing his head and knocking him to the ground. As complainant attempted to get up, he saw defendant standing over him pointing a handgun at his head. Defendant then shot complainant in the head a second time, rendering him unconscious.

Defendant first claims that several instances of prosecutorial misconduct denied him a fair trial. Defendant specifically claims that the prosecutor improperly shifted the burden of proof, vouched for the credibility of the prosecutor's office, denigrated defense counsel, and indicated his personal disbelief of defense witnesses. This Court evaluates the prosecutor's remarks in context to determine whether the

defendant was denied a fair and impartial trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Questions of misconduct by the prosecutor are decided case by case. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). We have reviewed the record and conclude that defendant was not denied a fair trial due to the prosecutor's conduct. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

Moreover, these allegations of prosecutorial misconduct are not preserved, either because defendant failed to object, *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), or because defendant objected on one ground at trial and based his argument on appeal on a different ground, *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Appellate review is therefore precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *Stanaway, supra*. We conclude that a curative instruction would have eliminated any possible prejudicial effect that may have resulted from the prosecutor's conduct.

Next, defendant argues that he was denied his right to a trial by a jury which adequately represented a cross-section of the community. We disagree. Whether the juror selection process utilized by Muskegon County violated defendant's constitutional rights is a question of law. We review questions of law de novo. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Specifically, defendant asserts that Muskegon County systematically excludes African-Americans from its juror selection process.

A defendant is entitled to a jury which contains a representative cross-section of the community. *People v Guy*, 121 Mich App 592, 599; 329 NW2d 435 (1982) (quoting *Taylor v Louisiana*, 419 US 522; 95 S Ct 692; 42 L Ed 2d 690 (1975)). To establish a prima facie case of a violation of the right to a jury drawn from a representative cross-section of the community, a defendant must show that (1) the allegedly excluded group is a "distinctive" group, (2) the group was unfairly and unreasonably underrepresented in jury venires, and (3) the underrepresentation reflects a systematic exclusion of the group from the jury selection process. *Guy, supra* (quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979)).

Because it can be presumed that African-Americans would qualify as a distinctive group in Muskegon County, the first requirement is met. Defendant, however, has failed to provide any evidence that African-Americans are underrepresented in Muskegon County jury venires, or that there is any systematic exclusion of that group from the process. The mere fact that no African-Americans were on defendant's jury does not establish underrepresentation or systematic exclusion. *People v Sanders*, 58 Mich App 512, 514-516; 228 NW2d 439 (1975). We therefore conclude that defendant has failed to make out a prima facie case of a violation of the right to a jury trial drawn from a representative cross-section of the community. For the same reasons, we reject defendant's claim that he was denied equal protection due to the alleged underrepresentation.

Defendant also claims that he was denied ineffective assistance of counsel because his counsel did not pursue the challenge to the jury venire. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because defendant has failed to present any evidence that his constitutional rights were violated, defendant has failed to show that he was prejudiced by defense counsel's inaction. We therefore conclude that defendant's claim of ineffective assistance of counsel in this regard is without merit.

Defendant next argues that the prosecution presented insufficient evidence to support his conviction for assault with intent to commit murder. We disagree. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether the evidence was sufficient to support a conclusion by the trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *People v Vaughn*, 186 Mich App 376, 379; 465 NW2d 365 (1990).

Assault with intent to commit murder requires proof of (1) an assault, (2) with the intent to kill, (3) which, if the defendant had been successful, would have made the killing murder. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). The element of intent to kill may be proven by inference from the facts in evidence. *Id.* Circumstantial evidence and all reasonable inferences drawn therefrom may constitute proof of the elements of an offense. *Id.*

Defendant challenges only the sufficiency of the evidence with respect to the intent to kill. Viewing the evidence in a light most favorable to the prosecution, we find that the prosecution established that defendant intentionally fired the gun twice from point-blank range at the victim's head, the second time while the victim lay prone on the ground. This evidence clearly establishes a reasonable inference that defendant intended to kill the victim. See *People v Drayton*, 168 Mich App 174, 177-178; 423 NW2d 606 (1988) (holding that the defendant's act of pointing gun at victim's head and firing was sufficient to establish an intent to kill to support the conviction of assault with intent to murder). We therefore conclude that there was sufficient evidence of an intent to kill to support defendant's conviction of assault with intent to commit murder.

Finally, defendant argues that the trial court erred in scoring fifty points, rather than twenty-five points, for offense variable (OV) 2. Appellate review of guidelines calculations is very limited. *People v Garner*, 215 Mich App 218, 219; 544 NW2d 478 (1996). A sentencing judge has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score. *Id.* A trial court's scoring of the sentencing guidelines will be upheld if there is evidence to support the score. *Id.*

A trial court may assess fifty points under OV 2 when the victim was treated with excessive brutality. Twenty-five points may be assessed under OV 2 when the victim is subjected to terrorism. Michigan Sentencing Guidelines (2d ed, 1988), p 44. The evidence at trial showed that defendant stood over complainant while complainant was on the floor suffering from the first gunshot and fired a

second bullet at complainant's head. From this evidence, it is reasonable to conclude, as the trial court did, that defendant acted in an excessively brutal manner.

In any event, as defendant concedes, any error in the scoring would not change the guidelines range for defendant's conviction for assault with intent to commit murder. Therefore, the alleged error is harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993). Moreover, defendant's sentence of twenty to forty years' imprisonment was imposed for his conviction as a habitual offender, second offense. Because the sentencing guidelines do not apply to habitual offenders, *People v Warner*, 190 Mich App 26, 29; 475 NW2d 397 (1991), any error in calculating the guidelines is further rendered harmless.

Affirmed.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ H. David Soet

<sup>1</sup> Defendant's first trial ended in a mistrial when the court granted retained defense counsel's motion to withdraw.