

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE WILBERT, a/k/a ANDRE CARR,

Defendant-Appellant.

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UNPUBLISHED

May 30, 1997

No. 188702

Calhoun Circuit Court

LC No. 95-000446-FC

Before: Hoekstra, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b; MSA 28.788(2), three counts of kidnapping, MCL 750.349; MSA 28.581, one count each of armed robbery, MCL 750.529; MSA 28.797, second-degree CSC, MCL 750.520c; MSA 28.788(3); first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and felonious assault, MCL 750.82; MSA 28.277, and ten counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent prison terms of fifty to ninety years' imprisonment for the first-degree CSC conviction, the armed robbery conviction, and the kidnapping convictions, ten to fifteen years' imprisonment for the second-degree CSC conviction, thirteen to twenty years' imprisonment for the first-degree home invasion conviction, thirty-two to forty-eight months' imprisonment for the felonious assault conviction, and concurrent terms of two years' imprisonment for each felony-firearm conviction, to be served consecutive to and preceding defendant's other sentences. We affirm.

The charges against defendant arose following an evening wherein defendant entered the adult victim's home, held her at gunpoint while demanding that she first physically restrain her two-year-old daughter and eight-year-old nephew with athletic socks and packaging tape, robbed her of three gold necklaces and a watch, and then sexually assaulted her numerous times. Throughout the evening, defendant maintained possession of a gun, at one point tied the victim's hands with a telephone cord, and fired the gun twice, sending one bullet through a pillowcase and into a window sill just beyond the victim's head.

## I

On appeal, defendant first argues that he was denied a fair trial because the trial court used outdated questionnaires and its method for selecting the jury venire resulted in the impaneling of a jury that did not represent a fair cross-section of the community. More specifically, defendant contended that blacks were unreasonably underrepresented in the jury array made available to him. We find that although blacks may have been underrepresented, defendant failed to establish that the underrepresentation was the result of a systematic exclusion of that group in the jury selection process.

A defendant is entitled to a jury that contains a representative cross section of the community. *People v Guy*, 121 Mich App 592, 599; 329 NW2d 435 (1982). However, a defendant is not entitled to a jury that mirrors the community and reflects the various distinctive groups in the population. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 593 (1996). To establish a prima facie violation of the fair cross section requirement, a defendant must prove:

“(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 under-representation is due to systematic exclusion of the group in the jury-selection process.” [*Id.*, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Here, although the lower court took judicial notice of the fact that there were few blacks summoned (three out of a total of fifty-three), that only one black female currently sat on defendant’s jury panel, and that blacks were underrepresented as compared to their numbers in the surrounding community, defendant failed to present any evidence to show that the underrepresentation was the result of the questionnaires used by the court, or the fact that jury veniremen had been randomly selected from lists generated by the Michigan Secretary of State Office containing the names of driver’s license and identification card holders. Because defendant failed to establish a prima facie case of purposeful and systematic underrepresentation, the trial court did not err in refusing to strike the jury that was impaneled in this case.

## II

Defendant next argues that because there was insufficient evidence presented to sustain the convictions of assault with intent to murder, armed robbery, kidnapping, and their accompanying felony-firearm convictions, the trial court abused its discretion in denying defendant’s motion for a directed verdict on those charges. We disagree.

When reviewing both a sufficiency of the evidence question and a trial court’s ruling on a motion for a directed verdict, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). “Inherent

in the task of considering the proofs in the light most favorable to the prosecution is the necessity to avoid a weighing of the proofs or a determination whether testimony favorable to the prosecution is to be believed. All such concerns are to be resolved in favor of the prosecution.” *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993).

Defendant first challenges the trial court’s ruling with respect to his motion for a directed verdict on the assault with the intent to murder charge, alleging that his lack of intent was evidenced by the fact that he never pointed the gun directly at the adult victim. However, minimal circumstantial evidence and the reasonable inferences which arise from that evidence are sufficient to satisfy the elements of the crime charged. *People v Baker*, 216 Mich App 687, 689; 551 NW2d 195 (1996). Here, we find that the trial court did not err in determining that there was sufficient evidence presented from which reasonable jurors could conclude that defendant intended to kill. Although the evidence established that defendant first shot into the corner of the bedroom wall, there was also evidence that he never took the gun from his hand, that he kept asking the adult victim whether she wanted to live or die, that he threatened her, and that he shot a second time, sending a bullet just over the victim’s head and into the window sill near the head of the bed where she was lying. Therefore, the issue of intent was a question left for the jury to consider, and although the jury ultimately found defendant guilty of the lesser crime of felonious assault, there was sufficient evidence presented at trial to sustain a conviction of the higher charged offense of assault with the intent to murder.

Defendant next challenges the sufficiency of the evidence to sustain the kidnapping convictions, arguing that the prosecution failed to show that the element of asportation had been met with regard to the adult victim and also failed to show that the two young children had been secretly confined. With regard to the adult victim, we are satisfied that the element of asportation was shown. Here, there was movement of the victim having significance independent of any accompanying offense where the victim was moved throughout the house and later confined to a bedroom, which placed her in greater danger. *People v Barker*, 411 Mich 291, 300; 307 NW2d 61 (1981). With regard to the child victims who were bound and gagged in another bedroom, we find the evidence was sufficient to establish that they were secretly confined. *People v Jaffray*, 445 Mich 287; 519 NW2d 108 (1994).

Defendant also challenges the sufficiency of the evidence supporting his armed robbery conviction, claiming that there was no evidence presented to suggest that he intended to permanently deprive the adult victim of her necklaces and watch. We find that a review of the evidence shows otherwise. At trial, evidence was presented that defendant demanded that the victim relinquish her necklaces and watch while brandishing his gun, that he put them into his pocket, and that although he later took them out of his pocket and put them on the kitchen table, they were ultimately retrieved by the police from defendant’s pants pocket. Therefore, aside from the fact that his criminal plan was interrupted by the police, we find no evidence to suggest that defendant abandoned his intent to permanently take the jewelry and watch.

### III

Finally, defendant argues that he is entitled to resentencing because the lower court abused its discretion in exceeding the recommended sentencing guidelines with respect to his CSC convictions. We disagree.

At sentencing, rather than sentencing defendant to the recommended twenty to forty years' imprisonment for the three CSC convictions, the court instead sentenced him to fifty to ninety years' imprisonment, explaining that the circumstances of the case were not adequately contemplated by the sentencing guidelines. We agree.

In support of the court's departure, aside from the egregious acts that defendant committed here, a review of the record further reveals that defendant was on active parole when he committed the present offenses, he had a total of thirty-four prior felony convictions, including other incidents of armed robbery, CSC, and kidnapping (some committed within the preceding two months, and others just days before the present crimes), and defendant's points for the prior and offense variables were double that required to reach the highest maximum score. Based upon the foregoing, we conclude that the trial court did not abuse its discretion in sentencing defendant in excess of the recommended guidelines, and that defendant's sentences were proportionate to the offender and offenses. *People v Milbourn*, 435 Mich 630, 635-636, 654, 657; 461 NW2d 1 (1990).

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Jane E. Markey  
/s/ James C. Kingsley