

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY ERIC GREEN,

Defendant-Appellant.

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UNPUBLISHED

June 25, 1999

No. 202259

Washtenaw Circuit Court

LC No. 95-003684 FC

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with a dangerous weapon, MCL 750.82; MSA 28.277, and two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). Defendant was sentenced as an habitual offender, fourth offense, MCL 750.769.12; MSA 28.1084, to five to fifteen years' imprisonment for the assault conviction, and life imprisonment for each criminal sexual conduct conviction. Defendant appeals as of right. We reverse and remand for a new trial.

I

In this case, the Washtenaw Circuit Court employed a new computer process for jury selection. The clerk of the court used a computer to randomly select names from the jury pool. The computer then listed the names in numerical order, using the individuals' assigned juror numbers. This list was used as a venire for the instant case. Rather than place the names into a container for a random blind draw, the clerk called the first fourteen names on the list. When a prospective juror was excused for cause or by peremptory challenge, the very next person on the list in numerical order replaced the excused venire person; the replacement venire person was not selected by blind draw. Accordingly, the attorneys could anticipate which prospective juror would be selected to replace any excused venire person. Defendant, who challenged the procedure shortly after voir dire commenced, maintains on appeal that this knowledge nullified the randomization of the selection process and allowed for the potential use of a peremptory challenge to place on the jury a known and desired juror.

The determinative issue in this case is defendant's contention that reversal is required, without a showing of prejudice, because the jury selection procedure in this case did not conform to the requirements set forth in the court rules. We follow the majority opinion in *People v Colon*, 233 Mich App 295; 591 NW2d 692 (1998), in this regard and reverse defendant's conviction because of the non-compliant jury selection procedure.

## II

The additional issues raised by defendant are without merit. First, defendant contends that his retrial following a mistrial constitutes a violation of the constitutional prohibition against twice being placed in jeopardy, US Const, Am V; Const 1963, art 1, § 15; *People v Daniels*, 192 Mich App 658, 662; 482 NW2d 176 (1992). We disagree.

This Court reviews double jeopardy issues de novo as a question of law. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). Jeopardy attaches in a criminal jury trial when the jury is impaneled and sworn. *People v Thompson*, 424 Mich 118, 122; 379 NW2d 49 (1985). Although a criminal defendant has a right to have a trial completed by a particular tribunal, which right generally prohibits retrial where a proceeding ends without the defendant's consent, an exception exists where the termination of the first proceeding was compelled by manifest necessity. *Id.* at 123. Manifest necessity includes the failure of a jury to agree on a verdict. *Id.*; *Daniels, supra* at 663. Accordingly, the prohibition against double jeopardy does not bar retrial when a mistrial is declared because a jury cannot agree on a verdict. *Id.*

In defendant's original trial, a fourteen-member jury was drawn, as permitted by MCL 768.18; MSA 28.1041. All fourteen jurors heard the presentation of proofs at trial. After the close of proofs, but before the final instructions were given, the prosecutor moved to excuse one of the fourteen jurors for discussing the case with an outsider contrary to the instructions of the trial court. The trial court excused the juror over defendant's objection and then instructed and submitted the case to the remaining twelve jurors (another juror having been dismissed by lot pursuant to MCL 768.18; MSA 28.1041). The jury was ultimately unable to reach a verdict and a mistrial was declared.

Defendant's attempt to frame his challenge to the trial court's juror removal ruling as a double jeopardy issue is unmeritorious. Essentially, defendant argues that the trial court's decision to remove the juror resulted in a mistrial without manifest necessity. However, unlike the cases cited by defendant in support of his argument, this is not a case where a mistrial was declared and the jury was discharged pursuant to a juror disqualification ruling. Compare, e.g., *People v Parker*, 145 Mich 488, 498; 108 NW 999 (1906); *People v Anglin*, 6 Mich App 666, 670; 150 NW2d 532 (1967). After the trial court removed the juror, there still remained the requisite twelve jurors to decide the case.<sup>1</sup> Defendant's first trial ended in a mistrial because the remaining twelve jurors were unable to reach a unanimous verdict during their deliberations. Absent a connection between the juror's removal and the mistrial, defendant's double jeopardy right is not implicated. On the instant record, no such connection has been established.

Although defendant argues that the juror's removal altered the composition of the jury, there was neither a guarantee that the juror would have been one of the final twelve jurors chosen to conduct deliberations in this case if he had not been excused nor any indication in the record that the jury would not have deadlocked even if the juror had been one of the final twelve jurors. Accordingly, because the mistrial was caused by the jury's inability to reach a verdict, the prohibition against double jeopardy did not bar defendant's retrial.

### III

Next, defendant contends that the trial court erred in allowing the prosecutor to introduce evidence that he moved to Chicago after the alleged incident and was arrested using the name under which he was on parole in Illinois. Defendant sought to exclude this evidence by a motion in limine. We conclude that the trial court did not abuse its discretion in admitting this evidence. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

It is well established in Michigan law that evidence of flight is admissible because it may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction. *Id.* The term "flight" applies to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *Id.* See also *People v Cutchall*, 200 Mich App 396; 504 NW2d 666 (1993).

The testimony adduced at trial indicates that defendant fled from the jurisdiction within a day of the commission of the assault. Additionally, the evidence supports an inference that defendant's flight was motivated by his consciousness of guilt, particularly where a tenant of the apartment where the assaults took place confronted defendant about the assaults shortly after their commission, thus placing him on notice that one or both of the victims were not remaining silent about the assaults and were naming defendant as the assailant. Under these circumstances, defendant's sudden move to Chicago, his arrest there, and his use of a name other than the one by which he was known in Ypsilanti was admissible as further evidence of consciousness of guilt.

Moreover, defendant was not unfairly prejudiced by the admission of evidence that he was arrested in Chicago under an alias. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). It was not probable that the jury would give preemptive weight to this evidence where the defense countered with evidence of an innocent reason for defendant's move and the use of an alias and where other substantial evidence of defendant's guilt, in the form of the victim's inculpatory testimony and physical evidence, was presented. On such a record, what conclusion, if any, the jury drew about defendant's presence in Chicago was a matter left to the jury's traditional function of assigning weight to the evidence. *People v McWilson*, 104 Mich App 550, 557; 305 NW2d 536 (1981).

In a related argument, defendant argues that the trial court erred in failing to give a modified flight instruction after indicating that it would give the instruction. Defendant failed to object to the judge's unintended omission of the instruction and, in the absence of an objection, this Court reviews a jury instruction challenge de novo to determine whether manifest injustice will result from this Court's

failure to grant the requested relief. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996).

We find no manifest injustice under these circumstances. The prosecutor's arguments, when juxtaposed against defense counsel's arguments, put the jury on notice that it was to determine whether defendant's presence in Chicago and the use of another name constituted evidence of consciousness of guilt or innocent circumstances unrelated to the activities occurring in Ypsilanti. Moreover, overwhelming evidence of defendant's guilt was presented at trial. Defendant's allegation of instructional error is therefore without merit.

#### IV

Finally, defendant alleges that the trial court erred in denying his motion for a directed verdict of acquittal on the charge of assault with intent to commit murder. We disagree.

When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998). When reviewing a trial court's ruling on such a motion, this Court tests the validity of the motion by the same standard as the trial court. *Id.*

In the instant case, the jury convicted defendant of felonious assault. The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the offense of felonious assault had been proven beyond a reasonable doubt given the testimony of the victim that defendant struck her, told her to shut up, indicated that he was not playing games, placed a box-cutter, blade exposed, to her neck and told an eyewitness that he was going to tie up the victim, assault her, and kill the eyewitness if she did not cooperate.

Moreover, the record is devoid of compromise. *Graves, supra* at 481, 488. The jury acquitted defendant of the assault with intent to commit murder charge, as well as the next lesser included offense of assault with intent to do great bodily harm less than murder and convicted him of the offense of felonious assault, a still lesser included offense of the original assault charge. *People v Herbert Ross*, 73 Mich App 588, 592; 252 NW2d 526 (1977). Thus, we conclude that the trial court did not err in denying defendant's motion for a directed verdict of acquittal.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Helene N. White

<sup>1</sup> Indeed, this is precisely the reason why MCL 768.18; MSA 28.1041 allows fourteen-member juries to be impaneled so as to avoid mistrials in cases where one or more of the original jurors is necessarily discharged during the course of the trial. *People v VanCamp*, 356 Mich 593, 605-606; 97 NW2d 726 (1959).