

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMOS RICO BOWERS, JR.,

Defendant-Appellant.

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UNPUBLISHED

July 30, 2002

No. 225631

St. Joseph Circuit Court

LC No. 98-009280-FC

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, assault with intent to cause great bodily harm less than murder, MCL 750.84, and first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of twenty-five to fifty years for the assault with intent to commit murder conviction and ten to fifteen years for the assault with intent to cause great bodily harm conviction, to be served consecutive to a ten to thirty year term for the home invasion conviction. Defendant appeals as of right. We affirm.

I. Admission of Evidence

Defendant first argues that the trial court abused its discretion in admitting evidence of a bat and knife that were recovered from defendant's vehicle. Because defendant's trial counsel explicitly stated on the record that he had no objection to the admission of this evidence, this issue is waived and any error has been extinguished. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

II. Jury Instructions

Defendant next argues that the trial court erred by failing to instruct the jury on the lesser offense of felonious assault. Our review of the record reveals that, contrary to defendant's assertion, the trial court *did instruct* the jury regarding felonious assault. Thus, defendant has failed to demonstrate that error occurred.

III. Sufficiency of the Evidence

Defendant next argues that the evidence was insufficient to support his convictions of assault with intent to commit murder and assault with intent to cause great bodily harm less than murder, because the prosecution failed to present sufficient evidence to prove the specific intent elements of these crimes. Defendant claims that the evidence demonstrated that he was incapable of forming the requisite specific intent due to voluntary intoxication. We disagree.

When determining whether the evidence was sufficient to establish a crime, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 365-368; 285 NW2d 284 (1979). A defendant's intent may be proven by inference from any facts in evidence. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). An intent to kill may be inferred where the natural tendency of the defendant's behavior is to cause death or great bodily harm. *People v Anderson*, 112 Mich App 640, 649; 317 NW2d 205 (1981). Further, in determining whether an assault was committed with the intent charged, specifically in light of an intoxication defense, the jury may consider "the nature and circumstances of the assault, the actions, conduct and demeanor of the defendant, and his declaration before, at the time, and after the assault." *People v Savoie*, 419 Mich 118, 133; 349 NW2d 139 (1984), quoting *Roberts v People*, 19 Mich 401, 418 (1870).

Voluntary intoxication is a defense to specific intent crimes. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). In order for a jury to find that intoxication rendered a defendant incapable of forming the requisite intent, there must be evidence that the defendant "actually was intoxicated, or was intoxicated to the point at which he was incapable of forming the intent to commit the charged crime." *People v Gomez*, 229 Mich App 329, 334; 581 NW2d 289 (1998), quoting *People v Mills*, 450 Mich 61, 82-83; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The instant record reveals that defendant did not pursue an intoxication defense at trial, but claimed self-defense. Regardless, we conclude that sufficient evidence was presented to enable the jury to conclude that defendant was not so intoxicated that he could not form the specific intent to commit the charged crimes.

Although there was evidence that defendant had been drinking and had used cocaine the day before the incident, his behavior on the night in question supported a finding that he was capable of forming the requisite specific intent to commit the charged crimes. The testimony indicated that defendant returned to the victim's apartment with a billy club, hid outside view of the peep hole, pushed his way into the apartment, locked the doors and turned off the lights, obtained a knife from the kitchen, and tried to convince a responding neighbor that one of the victims was not serious when he was yelling for help. After assaulting the victims, defendant ran to his car, snuck into his house, hid in a closet, and called his wife, telling her that he was out of town. Viewed most favorably to the prosecution, the evidence was sufficient to support a jury finding that defendant was able to form the requisite specific intent. Considering the nature and extent of the on-going assaults against Huffman and Vogel, as well as defendant's threats to Huffman that she would leave the apartment in a body bag, there was sufficient evidence to enable the jury to infer that defendant intended to murder Huffman and, at a minimum, intended to inflict great bodily harm on Vogel.

#### IV. Ineffective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel. Because defendant did not pursue this issue in a motion for a new trial or a *Ginther*<sup>1</sup> hearing, our review is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001); *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000).

We must presume that a defendant has received the effective assistance of counsel, and the defendant bears a heavy burden of proving otherwise. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). As this Court stated in *Rodgers*, *supra* at 714:

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [Citations omitted.]

We must not avail ourselves the benefit of hindsight when considering an ineffective assistance claim, and we will not attempt to second-guess counsel regarding matters of trial strategy. *Williams*, *supra* at 331; *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that a defense counsel's strategy did not work does not constitute ineffective assistance of counsel. *Id.* However, strategic decisions may support a claim of ineffective assistance of counsel when there is no sound basis for the strategy and where the defendant would likely have been acquitted but for the strategy. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988).

#### A. Admission of Physical Evidence

Defendant argues that his trial counsel was ineffective for not objecting to the admission of a bat and knife that were recovered from defendant's vehicle, where those items were not connected to the charged crimes. We disagree. Whether to object to the admission of evidence is a matter of trial strategy which this Court will not second-guess. *People v Davis*, 248 Mich App 655, 666; \_\_\_ NW2d \_\_\_ (2001). Here, evidence that defendant kept a bat and knife in his vehicle, and that he did not bring those items with him when he returned to Vogel's apartment, tended to support defendant's theory that he did not intend to harm the victims. Therefore, defendant has not overcome the presumption that counsel's failure to object to this evidence was sound trial strategy.

#### B. Felonious Assault Instruction

Defendant next argues that his trial counsel was ineffective for not requesting a jury instruction regarding felonious assault. However, as previously indicated, the record shows that

<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

the trial court did instruct the jury regarding felonious assault. Accordingly, a claim of ineffective assistance of counsel cannot be based on this issue.

### C. Intoxication Defense

Defendant next argues that his trial counsel was ineffective for failing to present a voluntary intoxication defense. We disagree. Limiting our review to the record, defendant has not demonstrated a reasonable probability that a defense of intoxication would have been successful. As previously discussed, there was ample evidence of goal-oriented behavior by defendant, so as to negate any defense of intoxication. Moreover, defense counsel pursued a defense of self-defense, which would have been seriously undermined by a defense of voluntary intoxication. Counsel's decision to pursue a theory of self-defense instead of voluntary intoxication was a matter of trial strategy that we will not second-guess.

### V. Impartial Jury

Next, defendant argues that he was denied his right to an impartial jury drawn from a fair cross-section of the community because, out of eighty potential jurors in the jury pool, not one was African-American. "To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the under-representation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000), citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). We review de novo a lower court's legal determination regarding whether a plaintiff violated the fair cross-section requirement. *Smith, supra* at 203, 215.

While a criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community, he is not entitled to a petit jury that exactly mirrors the community. *People v Howard*, 226 Mich App 528, 532-534; 575 NW2d 16 (1997). In order to establish a prima facie violation of the fair cross-section requirement, a defendant must show:

- (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. [*Id.* at 533, quoting *Duren, supra* at 364.]

African-Americans are a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes. *Smith, supra* at 215; *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). Therefore, defendant has satisfied the first prong of the *Duren* test. However, apart from asserting that African-Americans were underrepresented in his particular jury array, defendant has not shown that African-Americans were underrepresented on jury venires in general. "Merely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *Williams, supra* at 526, quoting *Howard, supra* at 533. Therefore, defendant has failed to satisfy the second prong of the *Duren* test.

The third prong of the *Duren* test is satisfied by showing that the underrepresentation of African-American jurors was due to systematic exclusion, i.e., an exclusion resulting from some circumstance inherent in the particular jury-selection process utilized. *People v Hubbard (After Remand)*, 217 Mich App 459, 481; 552 NW2d 493 (1996). “A systematic exclusion is not shown by one or two incidents of a venire being disproportionate.” *Id.* Moreover, defendant’s assertion that he “believes that this prong will be met if a hearing is held on remand” is insufficient to make out a claim of systematic exclusion. *Williams, supra* at 526-527. Therefore, defendant has failed to satisfy the third prong of the *Duren* test.

Defendant’s alternative claim alleging an equal protection violation under the 14th Amendment must also fail. As this Court stated:

Defendant makes an alternative Fourteenth Amendment equal protection argument, claiming that he has shown a prima facie case of discrimination against African-Americans. Defendant cites *Jefferson v Morgan*, 962 F2d 1185 (CA 6, 1992), and *Alston v Manson*, 791 F2d 255 (CA 2, 1986), two cases challenging the composition of state grand juries, in support of his contention. To make out a case for systematic discrimination, a claimant must (1) show that the group excluded is a recognizable, distinct class capable of being singled out for different treatment under the laws, (2) prove the degree of underrepresentation by comparing the proportion of the excluded group in the total population to the proportion actually called to serve on the venire over a significant period, and (3) show that the selection procedure is either susceptible of abuse or not racially neutral. *Casteneda v Partida*, 430 US 482, 494; 97 S Ct 1272; 51 L Ed 2d 498 (1977). Just as with defendant’s Sixth Amendment claim, defendant has failed to make out a prima facie case under the Fourteenth Amendment. Defendant failed to show either that the system for selecting veniremen was subject to abuse or that his racial group was underrepresented over a significant period. [*Williams, supra* at 527-528 (footnotes omitted).]

Therefore, we reject defendant’s argument regarding this issue.

## VI. Motion for a Directed Verdict

Finally, defendant argues that the trial court erred in denying his motion for a directed verdict on the charge of first-degree home invasion. Defendant maintains that this offense was not proven because the evidence showed that he was invited back into the apartment. “In ruling on a motion for a directed verdict, the trial court must consider in the light most favorable to the prosecutor the evidence presented by the prosecutor up to the time the motion is made and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

MCL 750.110a(2) provides:<sup>2</sup>

A person who breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling or a person who *enters a dwelling without permission with intent to commit a felony* or a larceny in the dwelling is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exist:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling. [Emphasis added.]

At trial, Huffman testified that, as she was about to leave, the doorbell rang and she went to open the door. She looked through the peep hole, but she did not see anybody. As she started to open the main door, defendant shoved through the screen door. According to Vogel, defendant pushed Huffman back and began hitting her with a billy club that he carried into the apartment. At that point, defendant began choking Vogel with the billy club. Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant, armed with a billy club, entered the apartment without permission with the intent to commit an assault. Accordingly, the trial court properly denied defendant's motion for a directed verdict.

Affirmed.

/s/ Kathleen Jansen  
/s/ Michael R. Smolenski  
/s/ Kurtis T. Wilder

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<sup>2</sup> Because the instant offenses occurred in August 1998, we apply the statutory language in effect at that time.