STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2002
v RODNEY ULYSSES WILCOX, Defendant-Appellant.	No. 225657 Oakland Circuit Court LC No. 99-166631-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JAMOL DAVID GARRETT, Defendant-Appellant.	No. 226293 Oakland Circuit Court LC No. 99-166760-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MARCEL DION WILLIAMS, Defendant-Appellant.	No. 226294 Oakland Circuit Court LC No. 99-166756-FC

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

In these consolidated appeals, each defendant was convicted of assault with intent to rob while armed, MCL 750.89, following a joint trial before separate juries. Defendant Wilcox was sentenced as a third-offense habitual offender, MCL 769.11, to a prison term of thirty to sixty years. Defendant Garrett was sentenced as a fourth-offense habitual offender, MCL 769.12, to a

prison term of thirty-five to sixty years. Defendant Williams was sentenced to a prison term of nine to twenty years. Each defendant appeals as of right. We affirm.

I. No. 225657 - Defendant Wilcox

A. Sufficiency of the Evidence

Defendant Wilcox first argues that the evidence was insufficient to support his conviction of aiding and abetting the charged assault because the evidence shows that he was merely present during the assault. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994). The defendant's intent may be inferred from all of the facts and circumstances and, because of the difficulty of proving state of mind, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514-515.

The elements of assault with intent to rob while armed are an assault with force and violence, an intent to rob or steal, and the defendant being armed. *People v Federico*, 146 Mich App 776, 790, 381 NW2d 819 (1985). During trial, the prosecution relied on an aiding and abetting theory. "'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995) (citation omitted). To prove that a defendant aided and abetted a crime, the prosecution must show the following:

> (1) [T]he crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [*Id.* at 568-569 (citations omitted).]

In this case, the prosecution presented sufficient evidence to establish that defendant Wilcox aided and abetted the crime of assault with intent to rob while armed. There was evidence that the victim, the owner of the party store involved in this crime, was familiar with defendant Wilcox as a regular customer and knew his name because he worked at a nearby establishment. On the day of the incident, defendant Wilcox went into the store approximately five or six times. It is undisputed that defendant Wilcox again entered the store about 7:00 pm with the two codefendants

Defendant Wilcox asked for two cases of a specific type of beer, which caused the victim to leave the bullet-proof, plexiglass encased area to retrieve an empty box and additional beer from a back cooler. The victim gave defendants the empty box to load beer from the customer cooler, but they did not load any bottles. When the victim returned and indicated that he had enough beer to fill only one case, codefendant Garrett asked for a different type of beer. When the victim left to go to the back cooler, codefendants Garrett and Williams followed him, each carrying two forty-ounce bottles of beer. The victim walked out of the cooler carrying a case of forty-ounce bottles of beer. After he passed the codefendants, he was struck with the four beer bottles. He fell after the first blow, but regained his feet. As the victim ran towards the front door in an attempt to escape codefendants Garrett and Williams, he saw defendant Wilcox running away from the direction of the door towards the back of the store. When the victim made it to the front door, it had been locked. The victim testified that codefendant Garrett then stabbed him several times and demanded money. The victim ultimately was able to unlock the door and run out of the store, bleeding and badly hurt, when he was again stabbed by Garrett. Defendants ran from the store simultaneously, and were apprehended shortly thereafter, approximately two miles from the scene.

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have concluded that defendant Wilcox assisted in the crime in light of his actions and association with the codefendants. Defendant Wilcox was familiar with the store, went into the store on several occasions on the day of the incident, and made a request that caused the victim to leave the enclosed area of the store. Further, it can be inferred that defendant Wilcox was the person who locked the front door of the store preventing the victim from escaping while the codefendants attacked the victim. In addition, defendant Wilcox came into the store with the codefendants, stayed in the store while the codefendants attacked the victim, left the crime scene with the codefendants, and was with them when they were apprehended two miles from the scene. Having viewed the evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented to sustain defendant Wilcox's conviction of assault with intent to rob while armed beyond a reasonable doubt.

B. Ineffective Assistance of Counsel

Next, defendant Wilcox claims that trial counsel was ineffective when he failed to move for a mistrial after a police witness testified that defendant Wilcox's clothing was not submitted for serological testing because it would be a waste of investigative efforts and taxpayer's money[1], and because codefendant Garrett had already made statements placing himself at the scene.

Because defendant Wilcox failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). If the record does not contain sufficient detail to support defendant's ineffective assistance claim then he has effectively waived the issue. *Id*. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving

[1] This is a misstatement of the record. The reference to taxpayer money and investigative time was to the failure to have Garrett's clothing tested.

otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

We conclude that there was no basis for trial counsel to move for a mistrial where, contrary to defendant's claim, the police witness' response did not implicate him nor disclose any inculpatory information about him.[2] Here, the challenged response pertained to codefendant Garrett only. Further, the same witness testified that there were no visible dark red stains on defendant Wilcox's pants. Moreover, defendant Wilcox did not deny being present in the store during the assault on the owner. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Therefore, defendant Wilcox is not entitled to a new trial on this basis. *Effinger*, *supra.*

II. No. 226293 - Defendant Garrett

A. Batson Challenge

Defendant Garrett, a black man, first argues that he was denied his constitutional right to an impartial jury when the prosecutor used three peremptory challenges in a discriminatory manner to strike black jurors in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The record does not disclose whether any black jurors remained on the jury after voir dire was completed.

This Court reviews a trial court's ruling regarding a *Batson* challenge for an abuse of discretion. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996). This Court gives great deference to the trial court's findings "because they turn in large part on credibility." *Id*. at 320.

In *Batson*, the United States Supreme Court held that the Equal Protection Clause prohibits a prosecutor from using peremptory challenges to strike black jurors from a black defendant's jury simply because the jurors are black. The burden initially is on the defendant to make out a prima facie case of purposeful discrimination. *Batson, supra* at 93-94; *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989). In deciding whether the defendant has made a requisite showing of purposeful discrimination, a court must consider all relevant circumstances, including whether there is a pattern of strikes against black jurors, and the questions and statements made by the prosecutor during voir dire and in exercising his challenges. *Batson, supra* at 97. If a defendant makes such a prima facie showing of a discriminatory purpose, the burden shifts to the prosecutor, who must articulate a racially neutral explanation for challenging black jurors. *Id.* at 97-98. The trial court must then determine if the defendant has established "purposeful discrimination." *Id*.

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[2] "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

Here, defendant Garrett failed to establish purposeful discrimination. Defendant Garrett essentially argues that, because three black jurors were removed by peremptory challenge, the prosecutor's removals indicate a pattern of discrimination. The mere fact, however, that a party uses one or more peremptory challenges in an attempt to excuse minority members from a jury venire is insufficient to establish a prima facie showing of discrimination. *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996); *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989).

Even assuming that defendant Garrett established purposeful discrimination, giving deference to the trial court's findings that the prosecutor provided race-neutral reasons for excusing the three black jurors, we find no abuse of discretion. There is no evidence on this record that the dismissal of any of the jurors was racially motivated and the prosecutor gave reasonable, legitimate reasons for their removal. The court found that the prosecutor provided sufficient race-neutral reasons for excusing the three jurors and we agree. "[U]nless a discriminatory intent is inherent in the reason offered, which does not have to be persuasive or even plausible, the reason will be deemed race-neutral." *Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769; 131 L Ed 2d 834 (1995) (citation omitted). Further, it was reasonable for the prosecutor to attempt to achieve a jury that did not have preconceived negative notions about police officers or the prosecutor's office, as well as one that would not be overly sympathetic to defendant. Accordingly, defendant Garrett is not entitled to any relief on this basis.

B. Ineffective Assistance of Counsel

Defendant Garrett argues that trial counsel was ineffective because he failed to establish a nexus between the evidence and the lesser included offense of felonious assault during closing argument. Because defendant Garrett failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *Sabin (On Second Remand), supra.*

To support this claim, defendant Garrett relies on his statement to police that he entered the store only to steal beer, hit the victim with a beer bottle out of fear and the discrepancies in the victim's description of the man who stabbed him. Defendant Garrett argues that, given this evidence, it is likely that the jury would have found him guilty of the lesser offense of felonious assault had trial counsel made a proper argument during closing. We disagree.

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).

Although defendant Garrett focuses on discrepancies in the description given to the police, the victim testified during trial that defendant Garrett is the person who stabbed him with a knife and demanded money. Further, it is undisputed that defendant Garrett and codefendant Williams followed the victim to the back of the store, each with two forty-ounce bottles of beer in his hands and that immediately after passing them, the victim was struck over the head with at least one forty-ounce bottle of beer, and, ultimately, with all four. Indeed, even if defendant Garrett is not the individual who actually stabbed the victim or demanded money, as he claims on appeal, sufficient evidence was presented to support his conviction on an aiding and abetting theory. See *Turner, supra*.

Throughout trial and in closing argument, trial counsel clearly and coherently asserted defendant Garrett's defenses of mere presence and mistaken identity and he has not overcome the presumption that trial counsel's decision to focus on the principal charge was trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id*. As such, defendant Garrett has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged omission, the result of the proceedings would have been different. *Effinger*, *supra*. Accordingly, defendant Garrett is not entitled to a new trial on this basis.

III. No. 226294 - Defendant Williams

A. Ineffective Assistance of Counsel

Defendant Williams first argues that trial counsel was ineffective by erroneously telling the jury during opening statement that he would testify, and failing to inform the jury that his silence could not be used against him. We disagree.

In *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998), a panel of this Court rejected a similar claim where the defendant argued that his trial counsel was ineffective for informing the jury during voir dire that the defendant would testify, when the defendant did not in fact testify. The Court held that trial counsel was not ineffective where the defendant "unexpectedly changed his mind about testifying" against the advice of trial counsel, and where, in response to the trial court's inquiries, the defendant indicated that trial counsel had informed him of his rights, he was aware that his defense of self-defense could fail if he did not testify, and where he was satisfied with counsel's performance. *Id*. at 308-309.

Similarly, in this case, our review of the record shows that, on the sixth day of trial, and against the advice of counsel, defendant Williams unexpectedly decided not to testify. Defendant Williams did not indicate that he was dissatisfied with counsel's performance. Trial counsel stated that she had informed defendant Williams of his rights, and that his taking the stand would allow the jury to observe him and would greatly support his defense of mere presence. Further, during closing argument, trial counsel indicated that her statement that defendant Williams would testify was her mistake, and she urged the jury not to hold her statement against him. Moreover, the trial court instructed the jury that a defendant has the absolute right not to testify, and that defendant's decision not to testify must not be considered and must not affect the verdict in any way. Under these circumstances, we conclude that defendant Williams has not sustained his burden of showing that the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms. *Id*. Accordingly, defendant Williams is not entitled to a new trial on this basis.

B. Sufficiency of the Evidence

Defendant Williams' final claim is that the evidence was insufficient to support his conviction for assault with intent to rob while armed because there was no evidence of his involvement or that he struck the victim. We disagree.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant Williams' conviction for assault with intent to rob while armed as a principal or aider and abettor. It is undisputed that defendant Williams was with the codefendants in the store when the victim was assaulted. When the victim left to go to the back cooler, defendant Williams and codefendant Garrett followed him, each carrying two forty-ounce bottles of beer. Although the victim did not see who struck him, he was struck with four beer bottles, all of which shattered upon impact. It can be inferred from this evidence that defendant Williams struck the victim with the bottles in his possession. Finally, even if there was insufficient evidence that defendant Williams actually struck the victim or demanded money, a rational trier of fact could conclude that defendant Williams assisted in the offense in light of his presence in the store with the codefendants, his conduct in following the victim to the back of the store armed with two beer bottles, and defendants' association as previously discussed. See *Turner, supra*. Having viewed the evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented to sustain defendant Williams' conviction of assault with intent to rob while armed beyond a reasonable doubt.

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot