STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2004
v	No. 241143 Kent Circuit Court
LEONARDO SIMMONS, a/k/a BOO, a/k/a B-DUB, Defendant-Appellant.	LC No. 01-001143-FJ

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

PER CURIAM.

Defendant appeals by right from his conviction by a jury of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and two counts of possessing a firearm in the commission of a felony, MCL 750.227b. The trial court sentenced him to two concurrent terms of 3 to 10 years in prison for the assault convictions to be served consecutively to concurrent terms of two years for each of the felony-firearm convictions. We affirm.

The instant case stems from a shooting on January 20, 2001, at the Knights Inn at 35 28th Street in Wyoming, Michigan. During a seventeenth birthday celebration, one of the partygoers shot two of the other guests. During the trial, five witnesses identified defendant as the gunman.

Defendant asserts that at the time of his trial, many of the minorities living in Kent County were excluded from serving as jurors because of a computer error. While nearly nine percent of the county's population is African-American, none of the 35 to 40 people in the jury pool were minorities.[1] He contends that this error systematically excluded minorities and violated his Sixth Amendment right to a jury drawn from a venire representing a fair cross section of the community. Although defendant failed to object to the composition of the jury array at trial, he argues that enforcement of the preservation requirement would violate his rights to due process and a fair trial.

[1] This statement was set forth in defendant's motion to remand. We do not however, know whether this is an accurate fact.

The Sixth Amendment entitles a criminal defendant to an "impartial jury drawn from a fair cross section of the community." *People v Hubbard* (*After Remand*), 217 Mich App 459, 472; 552 NW2d 493 (1996), citing *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975). The petit jury does not have to mirror the community, but distinct groups cannot be systematically excluded from the venire. *Hubbard, supra* at 472-473.

Despite the existence of this right, defendant in the instant case is precluded from raising the issue on appeal. In *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), our Supreme Court stated that a defendant cannot waive an objection to an issue at trial and then make a claim of error on appeal. The Court found that because the defendant's counsel had expressed satisfaction with the trial court's jury instructions, the defendant had waived the issue. *Id.* Waiver is presumed to be "available in a broad array of constitutional and statutory provisions." *Id.* at 217-218, internal punctuation and citations omitted. Defendant must personally waive "certain fundamental rights such as the right to counsel or the right to plead not guilty." *Id.* at 218. But attorneys have "full authority to manage the conduct of the trial" and determine trial strategy. *Id.* at 218-219. Concerning such issues, waiver can be "effected by the action of defense counsel." *Id.* Waiver "*extinguishes* any error" and precludes appellate review. *Id.* at 216, emphasis in original.

In the instant case, defendant waived his right to a jury array representing a cross section of the community. Defendant's counsel actively participated in the jury selection process. After a panel had been chosen from the array, the court asked defendant's attorney if he wished to exercise any peremptory challenges. He responded, "We're satisfied with the jury, your Honor." This constitutes an express waiver of the issue. And defendant's lawyer had the authority to waive this right on behalf of his client. This Court has noted that decisions regarding the selection of jurors generally involve matters of trial strategy. *People v Johnson*, 245 Mich app 243, 259; 631 NW2d 1 (2001). A decision to not object to the racial composition of a jury array is similarly within the realm of strategy. Under *Carter*, a lawyer can waive such issues without the consent of his client.

This Court has previously granted review of the composition of a jury array even where the defendant's counsel has expressed satisfaction with the jury selected. *Hubbard, supra* at 466-467. But such situations have only occurred where the "record demonstrated that the party was not satisfied with the jury" and the expression of satisfaction was '"a necessary part of trial strategy designed to avoid alienating prospective jurors."' *Id.* at 467, citing and quoting *Leslie v Allen-Bradley Co, Inc*, 203 Mich App 490, 493; 513 NW2d 179 (1994). In *Hubbard*, the defendant challenged the jury array before the jury was sworn. *Id.* at 465. This Court found that a later expression of satisfaction with the jury did not constitute a waiver of the issue. *Id.* at 467.

Unlike *Hubbard*, defendant in the instant case never communicated any dissatisfaction with the jury array. Nothing in the record supports the conclusion that defendant's counsel

merely expressed satisfaction to avoid alienating members of the jury. Therefore, we find that the exception to the rule concerning waiver does not apply and the issue is not subject to review.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot