

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAL DION THOMAS,

Defendant-Appellant.

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UNPUBLISHED

December 13, 2007

No. 270679

Wayne Circuit Court

LC No. 05-011901-01

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to murder, MCL 750.83, first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b (“felony-firearm”). Defendant was sentenced to 50 to 100 years’ imprisonment for the assault with intent to murder conviction, 26 to 50 years’ imprisonment for the first-degree home invasion conviction, 28 to 48 months imprisonment for the felonious assault conviction, 40 months to 60 years’ imprisonment for the possession of a firearm by a felon conviction and two years’ imprisonment for the felony-firearm conviction. We affirm.

In April 2005, Rodney Harrison was held hostage in his own home. Harrison was tricked into allowing a stranger, Larry Davidson, along with a little boy, into his back yard, on the pretense of looking for a baseball. After not finding the nonexistent baseball, Davidson asked Harrison if he could give Harrison his cellular telephone number in case the baseball was found. When Harrison refused, Davidson insisted on calling Harrison’s home phone from his cell phone so that Davidson’s number would be on Harrison’s caller identification. Davidson then asked Harrison to check his caller ID. Harrison went inside the house to do so. When Harrison turned around to walk back upstairs, Davidson had a handgun pointed at his head. Davidson had entered Harrison’s home without Harrison’s invitation or permission.

Davidson made a call on his cell phone and gave instructions, and soon after, defendant came into Harrison’s house with a pistol. Davidson told defendant to keep his eyes on Harrison and to shoot Harrison if he made a sound, after which defendant told Harrison to sit on the sofa with his hands underneath his thighs, and threatened to kill Harrison if he moved or made a sound.

While defendant held Harrison at gunpoint, Davidson went upstairs to search the house. Davidson ransacked the house for 2 ½ hours, apparently looking for a large sum of money. Eventually, Harrison was handcuffed, blindfolded, his feet and legs tied together, and he was placed on his stomach. Harrison was beaten when he would not answer where the sought-after money was.

Later Harrison's wife Theresa came home; saw defendant with a gun in his hand, and fled to a neighbor's house from where she subsequently called the police. The police arrived to find Harrison lying handcuffed on the basement floor. Davidson and defendant had fled. Defendant was charged, convicted and sentenced as noted above.

Defendant argues that the prosecution presented insufficient evidence to sustain his assault with intent to murder conviction. We disagree. We review an insufficiency of the evidence claim in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003).

To prove assault with intent to murder, the prosecution must show: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). For assault with intent to commit murder, "the requisite intent may be gleaned from the nature of the defendant's acts constituting the assault, the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, [the defendant's] conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made." *Brown, supra*, p 149 n 5, citing *People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985).

The prosecution presented sufficient evidence to support defendant's assault with intent to murder conviction. Evidence was presented showing that Rodney Harrison was held hostage in his home. Defendant pointed a .38 revolver at Harrison and told Harrison that he would kill him if he made a sound. While Larry Davidson ransacked the house for two and a half hours, defendant remained downstairs with Harrison, continuously pointing a gun directly at Harrison's head. Although no evidence was presented which showed that defendant actually harmed Harrison, the evidence showed that defendant pointed a gun at Harrison's head for several hours and threatened to kill him. "No actual physical injury is required for the elements of the crime to be established." *People v Harrington*, 194 Mich App 424,430; 487 NW2d 479 (1992). For the reasons stated, the prosecution presented sufficient evidence to show that defendant committed the offense of assault with intent to murder.

The prosecution also presented sufficient evidence to prove that defendant committed the offense of assault with intent to murder as an aider and abettor. To support a finding that a defendant aided and abetted a crime, the prosecutor must show that: (1) the 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. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). To support a finding that a defendant aided and abetted a crime, the prosecutor must show “beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.” *Robinson, supra*, p 15. A criminal defendant “must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense.” *Robinson, supra*, p 15.

The evidence was sufficient to show that Davidson committed an assault with intent to murder and that defendant aided and abetted him in this offense. The evidence showed that Davidson tricked his way into Harrison’s home for the purpose of stealing money from him and/or his stepson. Once Davidson was situated inside of Harrison’s home, Davidson made a call informing someone that he was “in.” Davidson then instructed that person to “park the car around the corner” and “come to the side door.” Moments later, defendant entered the home with a .38 caliber gun. Defendant obeyed Davidson’s orders to keep an eye on Harrison and to shoot Harrison if Harrison made a sound. Throughout the entire incident, Davidson and defendant threatened to kill Harrison several times, and Davidson kicked Harrison in the kidney and hit him with the butt of the gun.

The evidence sufficiently showed that Davidson assaulted Harrison with an actual intent to kill, which, if successful, would make the killing murder. *Brown, supra*, pp 147-148. The evidence further showed that defendant aided and abetted Davidson in this offense, i.e., defendant had the criminal intent to aid, abet, procure, or counsel the commission of this offense. *Robinson, supra*, p 15.

Defendant further argues that the prosecution presented insufficient evidence to support his felonious assault conviction. The elements of felonious assault require the prosecution show that defendant committed: (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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *Starks, supra*, p 234.

The evidence showed that when Theresa Harrison entered her home on the night in question, her home was in disarray. Theresa looked up, saw defendant and stepped back out of the home. Defendant noticed that Theresa had entered the home, he looked up at her and stated, “she’s getting away.” During this time, defendant was armed with a weapon and he raised his gun up from his from side. Theresa ran away.

The evidence was sufficient to sustain defendant’s felonious assault conviction. Although defendant never physically harmed Theresa, when defendant raised his gun up from his side, defendant placed Theresa in reasonable apprehension of receiving an immediate battery. *Starks, supra*, p 234. This Court has found that displaying a weapon implies a threat of violence and causes a reasonable apprehension of an imminent battery. *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980). In light of the evidence presented, defendant’s words, “damn she’s here,” and his actions of raising his gun up from his side while looking at Theresa, were sufficient to prove the elements of felonious assault, i.e., an assault, with a dangerous weapon,

and with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *Avant, supra*, p 505. For the reasons stated, defendant's insufficiency of the evidence claims lacks merit.

Defendant also argues that the trial court improperly instructed the jury on the theory of aiding and abetting. We disagree. We review preserved claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). We review jury instructions in their entirety to determine if reversal is required. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995).

To support a finding that a defendant aided and abetted a crime, the prosecutor must show that: (1) the 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. *Robinson, supra*, p 6. To support a finding that a defendant aided and abetted a crime, the prosecutor must show "beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense." *Robinson, supra*, p 15.

Defendant was charged, as a principal or aider and abettor, for the offense of assault with intent to murder. The trial court instructed the jury that "any person who shall directly commit an offense or who shall procure, counsel, aid and abet another person in the commission of an offense, shall be tried, and if found guilty shall be punished as if he directly committed the offense himself." The trial court further instructed the jury that "mere presence is not enough to convict a person of aiding and abetting," but that "there must be some act done which assists, encourages, or aids and abets the other parties in the commission of the offense." The trial court then instructed the jury that assault with the intent to murder is a specific intent crime and that in order to convict a person as an aider and abettor of a specific intent crime, "the aider and abettor must have the specific intent to commit the offense, or he commits the offense knowing that the person that he is assisting has that particular offense [sic]."

Although the trial court mistakenly used the word "offense" rather than "intent" during its instructions, the jury instructions, in their entirety, were sufficient and protected defendant's rights. *Moldenhauer, supra*, p 159. "Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Canales, supra*, p 574, citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). The jury was instructed that assault with intent to murder is a specific intent crime and to convict defendant of this crime, as an aider and abettor, they must find that defendant had the specific intent to commit this crime or he knew that the person he was assisting had that particular "offense." *Robinson, supra*, pp 6, 15. Because the aiding and abetting jury instructions fairly presented the issues for trial and sufficiently protected defendant's rights, defendant's claim is without merit. *Canales, supra*, p 574.

Lastly, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to: (1) suppress the photographic lineup evidence because a corporeal lineup should have been conducted in its place, (2) suppress the photographic lineup because the lineup was suggestive and prejudicial, and (3) argue that the Harrisons did not have an independent basis for their in-court identifications of defendant. We disagree. We review defendant's unpreserved evidentiary claim for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because the trial court did not hold an evidentiary hearing, review of defendant's ineffective assistance of counsel claim is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish a claim of ineffective assistance of counsel a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005), vacated in part on other grounds 477 Mich 856 (2006). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *Walker, supra*, p 545. This Court has found that counsel's decision not to request a corporeal line-up and not to move for suppression of identification testimony were matters of trial strategy. *People v Wilki*, 132 Mich App 140, 145; 347 NW2d 735 (1984).

Defendant argues that the photographic lineup testimony should have been suppressed because defendant was in custody when the photographic lineup was conducted, and therefore, a corporeal lineup should have been conducted rather than a photographic lineup. Generally, when in police custody, an accused should not be identified by a photographic lineup unless a legitimate reason for doing so exists. *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993), citing *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). A photographic lineup is permissible in place of a corporeal lineup if, among other things: (1) it is not possible to arrange a proper lineup, (2) the nature of the case requires immediate identification, (3) there are insufficient number of persons available with the defendant's physical characteristics, or (4) the subject refuses to participate in a lineup and by his actions would seek to destroy the value of the identification. *Anderson, supra*, p 187 n 23.

Here, the evidence shows that the police tried to arrange a corporeal lineup but defendant refused to participate. Defendant's refusal to participate in the live lineup was a permissible reason why a photographic lineup was conducted in place of a corporeal lineup. *Anderson, supra*, p 187 n 23. For that reason, defendant's claim is meritless.

Defendant further argues that the photographic lineup was unduly suggestive and prejudicial. When the photographic lineup was conducted, the Harrisons were given six photographs to choose from. After a review of the photographic lineups, we find that the lineups were not improperly conducted. To sustain a due process challenge, "a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk, supra*, 443 p 302. The photographic lineups were not suggestive by any means. The Harrisons were given a

photo array and it was customary to assemble the photographs in a manner to create similar circumstances and people. Because the other persons used to comprise the lineups had physical characteristics that were similar to defendant, there was not a substantial likelihood of misidentification. *Kurylczuk, supra*, p 302. Defendant's claim is meritless.

Defendant also argues that the Harrisons did not have an independent basis for their in-court identifications. We disagree. When a pretrial identification has been improperly conducted, an independent basis for any in-court identification must be established. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). Although we find that the pretrial identification was properly conducted, we will still address this issue.

When determining if there is an independent basis for an identification, the court should consider the following: (1) the prior relationship with or knowledge of the defendant, (2) the opportunity to observe the offense, including such factors as length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act, (3) the length of time between the offense and the disputed identification, (4) accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description, (5) any previous proper identification or failure to identify the defendant, (6) any identification prior to lineup or showup of another person as defendant, (7) the nature of the alleged offense and the physical and psychological state of the victim, and (8) any idiosyncratic or special features of defendant. *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998).

Both Harrisons had an independent basis for their identifications. Rodney Harrison had ample opportunity to view defendant during the incident at issue, and this opportunity to observe defendant during the time he was held hostage provides sufficient independent basis for his identification of defendant. *Gray, supra*, p 116.

Theresa Harrison observed defendant step from the dark into the light and look directly at her, providing an independent basis for her identification of defendant. *Gray, supra*, p 116.

The record provides permissible reasons why a photographic lineup was conducted in lieu of a corporeal lineup. The record further shows that the photographic lineup was not suggestive, and that the Harrisons had an independent basis for their in-court identifications of defendant. Counsel is not obligated to make futile objections or motions, and therefore, defense counsel was not ineffective for failing to move to suppress the photographic line-up and the in-court identifications. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Defendant's ineffective assistance of counsel claim is without merit.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Stephen L. Borrello  
/s/ Jane M. Beckering