STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 23, 2010
v	No. 292681 Kent Circuit Court
ROBERT LINDSEY EUBANKS, Defendant-Appellant.	LC No. 08-008122-FC

Before: M.J. KELLY, P.J., and K.F. KELLY and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions for intentional discharge of a firearm at a dwelling, MCL 750.234b; carrying a concealed weapon, MCL 750.227; possession of a firearm during the commission of a felony, MCL 750.227b; and two counts of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant also pleaded guilty to possession of firearm by felon, MCL 750.224f, in this case.[1] For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

On June 26, 2008, defendant and his neighbors resumed an argument which had started earlier in the day. While the testimony presented at trial varied as to how, why and when the argument actually began, what is undisputed is that defendant fired a firearm at Frederick Taylor while he was either in the doorway or in his residence on Giddings Avenue in Grand Rapids, Michigan. The bullet struck a minor child living at the home causing serious injury. Taylor also received injuries as a result of bullet fragments striking his chest. Defendant admitted that his gun discharged in the direction of the residence, but maintained that his gun fired accidentally.

On appeal, defendant challenges the sufficiency of the evidence for his conviction for intentional discharge of a firearm at a dwelling. We review sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). MCL 750.234b(1) provides in relevant part that "an individual who intentionally discharges a firearm at a facility that he or

[1] The jury found defendant not guilty of two counts of assault with intent to murder, MCL 750.83, but convicted him on the two aforementioned lesser assault counts.

she knows or has reason to believe is a dwelling or an occupied structure is guilty of a felony." Intentional discharge of a firearm at a dwelling is a general intent offense. *People v Henry*, 239 Mich App 140, 145; 607 NW2d 767 (1999). "A general intent crime only requires proof that the defendant purposefully or voluntarily performed the wrongful act." *Id.* at 144. This Court has defined "at" for purposes of this offense as "in, on, or near." *People v Wilson*, 230 Mich App 590, 592; 585 NW2d 24 (1998).

Taylor testified that defendant fired the handgun in Taylor's direction, as Taylor and Dominique Motely-Moten were entering the residence. At trial, defendant admitted that he pointed his handgun at the Moten residence in Taylor's general direction and that he pulled the trigger. Although defendant claimed that the handgun did not initially discharge, but only did so accidentally after the fact, the jury was the arbiter of the witnesses' credibility. See *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Significantly, the offense "only requires proof that defendant intentionally discharged the firearm." *Henry*, 239 Mich App at 145. Defendant challenges the "intent" element, arguing that the jury rendered an inconsistent verdict by finding defendant guilty of the specific-intent offense of assault with intent to do great bodily harm less than murder, and the general-intent offense of intentional discharge of a firearm at a dwelling. A jury is not bound to any rules of logic; therefore, we conclude that the verdicts are not necessarily inconsistent. *People v Lewis*, 415 Mich 443, 448-449; 330 NW2d 16 (1982). Because we resolve conflicts regarding the evidence in favor of the prosecution, *Harrison*, 283 Mich App at 378, and conflicts regarding credibility of witnesses are resolved in support of the jury's verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), viewing the evidence in the light most favorable to the prosecution, we conclude that the prosecution adduced sufficient evidence to prove beyond a reasonable doubt each element of intentional discharge of a firearm at a dwelling. MCL 750.234b(1).

In a standard 4 supplemental brief, defendant raises three allegations of error, none of which have any merit. First, defendant complains that the trial court erroneously denied his request for a firearms expert. Defendant has misconstrued the record. Defendant moved to hire a firearms expert witness, requesting $1,500 to do so. Specifically, defendant wanted the expert witness to review Motley-Moten's x-rays, and for the trial court to order additional x-rays, if necessary. Following a motion hearing, the trial court denied without prejudice defendant's motion "subject to some showing that trajectory has a bearing in this case with regard to a material issue." In reaching its decision, the trial court noted that it was unaware of any authority that permitted a trial court to order additional x-rays. In a subsequent order, the trial court permitted defendant to retain a firearms expert to review the laboratory reports on the bullet fragment, to examine the bullet fragment, and to provide a report on his findings, but it limited defendant's request for payment of the firearms expert to $800. The defense did not call a firearms expert, or any other expert, as a witness. We conclude that there was no error, where the trial court ultimately granted defendant's request for a firearms expert. Defendant makes no arguments regarding the trial court's implicit limitations on the expert witness' potential testimony. "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Even assuming there was some kind of error, it was not inconsistent with substantial justice and did not affect defendant's substantial rights, because the defense never called a firearms expert at trial, even though the trial court permitted defendant to do so. See *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007).

Second, defendant asserts that he was denied his constitutional right to an impartial jury that was drawn from a fair cross-section of the community, because there were very few African-Americans in the jury pool. "Questions concerning the systemic exclusion of minorities in jury venires are generally reviewed de novo." *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). To establish a prima facie violation of the fair-cross-section requirement, defendant must demonstrate: (1) that the allegedly excluded group was a "distinctive" group in the community; (2) that the representation of this group in jury pools was not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation occurred due to systematic exclusion of the group in the jury-selection process. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

The first prong of the *Duren* test is satisfied, because "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes." *People v Hubbard (After Remand)*, 217 Mich App 459, 473; 552 NW2d 493 (1996). However, defendant has not satisfied the second or third prong. "[T]he second prong is satisfied where it has been shown that a distinctive group is substantially underrepresented in the jury pool." *Id.* at 474. Defendant has provided no actual evidence that there was an underrepresentation in the jury pool. Further, defendant has offered only unsupported assertions to satisfy the third prong, which requires him to show that any underrepresentation is due to systematic exclusion. *Id.* at 481. Defendant complains of a computer error that excluded eligible African-American residents from jury pools for a 16-month period. Defendant attached various documents to support his assertion that systematic exclusion occurred, which amounts to an improper expansion of the record. MCR 7.210(A)(1); *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004). Moreover, these documents do not support defendant's assertion of error, where these documents are from 1998 to 2002, and they do not support a conclusion that systematic exclusion was occurring in Kent County in 2009 when defendant was tried.[2] Defendant has failed to set forth a prima facie violation of the fair cross-section requirement, where there is no indication that African-Americans were underrepresented in the jury pool, and that that underrepresentation was the result of systematic exclusion. *Duren*, 439 US at 364.

Finally, defendant claims that trial counsel rendered ineffective assistance of counsel by failing to adequately investigate the case or present a defense, as well as failing to request a jury instruction on lesser included offenses. This claim lacks merit. Defendant's arguments are based on vague self-serving assertions without citing any specific things that defense counsel should have done differently. Defendant never states what evidence defense counsel should have obtained and produced at trial, or what additional defenses or objections should have been raised. Defendant also does not specify which lesser included offenses were applicable in this case. We decline defendant's implicit invitation to search for a factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460; 628 NW2d 120 (2001). Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). He has not done so in this case.

[2] Defendant's reliance on this Court's opinion in *People v Bryant*, ___ Mich App ___; ___ NW2d ___ (Docket No. 280073, issued July 20, 2010) is therefore misplaced.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello