STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LAMARR IRVIN,

Defendant-Appellant.

UNPUBLISHED
October 3, 1997

No. 185837
Kent Circuit Court
LC No. 93-062990-FC

Before: O'Connell, P.J., and MacKenzie and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with intent to inflict great bodily harm, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as an habitual offender, fourth offense, to a mandatory two-year term for the felony-firearm conviction, and a consecutive term of thirteen to thirty years for the assault conviction. We affirm.

Defendant, an African-American, first argues that he was denied equal protection and a fair trial because the court improperly allowed the prosecution to peremptorily strike the only African-American venireperson from the jury pool. Under the circumstances of this case, we find no error.

The prosecution is prohibited under law from striking a juror simply because of the juror's race, and when exercising a peremptory challenge to strike an African-American juror where the defendant is also African-American, the state must put forth a racially neutral purpose for the dismissal. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *People v Barker*, 179 Mich App 702, 706-707; 446 NW2d 549 (1989). The trial court must then consider the explanation and determine whether the defendant has established purposeful discrimination by the state. *Id.*, p 706. Such findings are given great deference by this Court on appeal. *Id*.

In this case, a review of the record supports the trial court's determination that defendant failed to present a case of purposeful discrimination. The record clearly establishes that the venireperson in question was not dismissed because she was African-American. The prosecutor gave each prospective juror the opportunity to voice his or her desire to withdraw from the jury panel, and even before the

African-American venireperson spoke up, the prosecutor had already indicated that he was willing to use his peremptory challenges to excuse those who did not wish to serve. Moreover, apart from the fact that the prosecution could not have predicted that the sole African-American in the jury array would be the only one to respond, it is evident that after she did so, her desire to be excused was genuine. The record reveals that she voiced reluctance in serving because she lived in the neighborhood where this offense occurred and often found herself too close to crimes such as the one committed by defendant. She also showed visible signs of being upset and displeased with the thought of being on the jury in the present case. Accordingly, we conclude that defendant is not entitled to a new trial on this issue.

Defendant next argues that he was denied his right to a fair and impartial jury due to the systematic exclusion and underrepresentation of African-Americans as jurors in Kent County. Defendant not only failed to properly preserve this issue for appeal by failing to object to the jury array before the jury was impaneled and sworn in his case, *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 493 (1996), but he has also failed to provide the evidence necessary for this Court to assess the merits of his argument. There is no record of the method used to select a jury venire in Kent County, the history of African-American representation, nor information concerning the actual makeup of the venire drawn in defendant's case. Consequently, this issue is not subject to review. See *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 146; 530 NW2d 510 (1995).

Third, defendant argues that the trial court erred in denying him the opportunity to cross-examine the victim concerning her mental health and her alleged stay in a mental institution, because that questioning concerns the credibility of her testimony. Defendant further argues that the court erred in denying him an opportunity to secure additional information and recall her as a witness. Although a broad range of evidence may be elicited on cross-examination for the purpose of discrediting a witness, the scope and duration of cross-examination is in the trial court's sound discretion and this Court will not reverse absent a clear showing of abuse. *Wischmeyer v Schanz*, 449 Mich 469, 474-475; 536 NW2d 760 (1995); *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). See also MRE 611.

We find no abuse of discretion in this case. Defense counsel admitted that he had no independent proof that the victim had been in a mental institution, and to allow him to pursue the issue, as the trial court noted, would create an unfounded perception of the witness by the jury. Moreover, even if defendant had been allowed to continue cross-examining the witness as he had planned, based on the offer of proof made outside the presence of the jury, she would have testified that she had not been institutionalized. Therefore, had the court allowed defense counsel to proceed, it is apparent that the desired line of questioning would have produced no facts from which lack of credibility might be inferred. See *People v Mack*, 218 Mich App 359, 360; 554 NW2d 324 (1996). Finally, the trial court did not preclude defendant from obtaining proof and recalling the witness, as defendant contends on appeal, but instead held that at that point defendant could not pursue the issue any further while in the presence of the jury, specifically stating: "I'm not going to give you time to bring her back *at this point*. She's going to get done today, and *if you want to call her* at this point, *you can as part of your*

case" (emphasis added). The record is devoid of any evidence indicating that defendant ever secured proof of the victim's confinement, or that he ever attempted to recall her as a witness.

Next, defendant argues that the trial court erred in denying his request to instruct the jury on the lesser offenses of attempted assault with the intent to commit murder and attempted assault with the intent to inflict great bodily harm. The claim is without merit. An instruction on intent need not be given unless there is evidence indicating that only an attempt was committed. *People v Weatherspoon*, 171 Mich App 549, 555; 431 NW2d 75 (1988). Here, there was no evidence to suggest that an assault was merely attempted; the victim sustained a five-centimeter shotgun wound that shattered bone and caused near-fatal blood loss. We find no error.

Finally, defendant argues that the trial court erred in instructing the jury concerning flight when there was no evidence indicating that he fled to Minnesota because of a consciousness of guilt. We disagree.

At trial, the court instructed the jury in pertinent part as follows:

> There has been some evidence in this case that the defendant left the state after he was aware of the fact that the police were looking for him. This evidence does not prove guilt. A person may leave the state for an innocent reason, such as panic, mistake, fear, or the fact that he wanted to go back to where he was living. However, a person may also leave because of a consciousness of guilt.
>
> You must decide whether the evidence is true, and if true, whether it shows that the defendant had a guilty state of mind or not.

After reviewing the record and the instruction itself, we conclude that the issue of flight was raised during trial and was supported by the evidence, and that the court fairly presented the issue to the jury. Defendant testified that he was arrested in Minnesota almost four months after the shooting incident occurred in Michigan. He admitted during cross-examination that when he left for Minnesota after the shooting, he knew that the police were looking for him in connection with the incident. In addition, the court instructed the jurors that evidence of flight did not necessarily prove guilt. Under these circumstances, reversal is not required. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995).

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage