

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARFIELD LAWSON III,

Defendant-Appellant.

UNPUBLISHED

February 19, 2002

No. 223285

Saginaw Circuit Court

LC No. 99-017330-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELVIN MAURICE TAYLOR,

Defendant-Appellant.

No. 223322

Saginaw Circuit Court

LC No. 99-017329-FC

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

In docket number 223285, defendant Garfield Lawson III was convicted of possession of a weapon in jail, MCL 801.262(2), carrying a firearm or dangerous weapon with unlawful intent, MCL 750.226, escape from jail through violence, MCL 750.197c, conspiracy to commit breaking jail through violence, MCL 750.157a, and two counts of assault with intent to commit murder, MCL 750.83. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to one year imprisonment for the possession of a weapon in jail conviction, five to fifteen years' imprisonment for the carrying a dangerous weapon conviction, ten to fifteen years' imprisonment for the escape from jail through violence and conspiracy convictions, and life imprisonment for the assault convictions. In docket number 223322, defendant Kelvin Maurice Taylor was convicted of possession of a weapon in jail, MCL 801.262(2), carrying a firearm or dangerous weapon with unlawful intent, MCL 750.226, escape from jail through violence, MCL 750.197c, conspiracy to commit breaking jail through violence, MCL 750.157a, and two counts of assault with intent to commit murder, MCL 750.83. Defendant was sentenced, as an habitual offender, third offense, MCL 769.11, to one year imprisonment for the possession of a weapon in

jail conviction, five to ten years' imprisonment for the carrying a dangerous weapon conviction, four to eight years' imprisonment for the escape from jail through violence and conspiracy convictions, and life imprisonment for the assault convictions. Defendants appeal as of right, and we affirm.

This case arose out of defendants' attempt to escape from the Saginaw County Jail by attacking guards with homemade weapons. Following a visit, defendant Taylor was being returned to his cell. Inmates would provide the guards with their cell numbers, and the guards would open the cell by a control panel. Defendant Taylor represented to Officer Barnett that he was in cell seven. Barnett opened up cell seven only to have defendant Lawson step out of the cell. Both defendants converged on Barnett, knocked him to the ground, and threatened him with "shanks." The men did not stab Barnett despite the opportunity, but proceeded on to combat other guards that responded to the area. Defendant Larson proceeded to an area where he encountered Officer Jolin and slammed him against the wall. Officer Lysogorski arrived on the scene to assist. Jolin broke free and ran to the control tower to prevent defendant Taylor from entering the area. Meanwhile, defendant Lawson picked up Lysogorski, threw him to the floor and threatened to slice his throat. Eventually, Lysogorski was able to break free, spray defendant Lawson with pepper spray, and trap defendant Lawson in a catwalk area with the assistance of other guards. Defendant Taylor managed to enter the control tower before the doors could be closed. He threatened officers Jolin and McClain in the tower and told them to drop to their knees. Defendant Taylor instructed Jolin to handcuff himself. While Jolin attempted to comply, defendant Taylor struck Jolin in the head with his radio. An inmate who observed the control tower ordeal testified that defendant Taylor stabbed at Jolin a few times and attributed his failure to make contact as "bad aim." Finally, Officer Welch entered the room and refused to lay down on the ground. Acting in concert with Jolin or McClain, he sprayed defendant Taylor with pepper spray or mace. Defendant Taylor began to swing wildly with the shank. Welch came from the side, hit defendant Taylor in the head, and knocked him to the ground. Officers testified that they were placed in fear by the attacks and that defendants threatened to "stick" them with the shanks.

I. Common Issue

Both defendants argue that there was insufficient evidence to support the assault with intent to murder convictions. We disagree. When evaluating a challenge to the sufficiency of the evidence, a reviewing court must examine the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Questions of credibility and intent are properly resolved by the trier of fact, *In re Forfeiture of \$25,505*, 220 Mich App 572, 581; 560 NW2d 341 (1996), and deference must be given to the jury's determination. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences that arise from the evidence may satisfy the elements of the crime. *Id.* Minimal circumstantial evidence is sufficient because of the difficulty proving an actor's state of mind. *Id.*

When deciding the question of intent, the jury may consider: (1) the nature of the acts constituting an assault; (2) the temper or disposition of mind with which the acts were

performed; (3) whether the instrument and means used were naturally adapted to produce death; (4) the defendant's conduct and declarations prior to, at the time, and after the assault; and (5) all other circumstances that shed light upon the intention with which the assault was made. *People v Guy Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985). When reviewing all of the facts and circumstances and giving deference to the jury's determination, we conclude that there was sufficient evidence of intent to support the convictions. Defendant Taylor lied about his cell placement in order to obtain the release of defendant Lawson. Both men, wielding homemade weapons known as "shanks," came at Officer Barnett, knocking him to the ground. On the ground, defendant Lawson held the shank to Barnett's neck, while Taylor held his shank to Barnett's side. Barnett was advised not to resist. Defendants continued to encounter responding officers with threats and gestures of violence and attempted to enter the control tower to gain access to an exit route. Accordingly, there was sufficient evidence to support defendants' convictions for assault with intent to murder.

II. Docket Number 223285

Defendant Lawson argues that the jury that tried and convicted him was drawn from a venire that unconstitutionally underrepresented the African-American community. We disagree. Challenges to the systematic exclusion of minorities from jury venires are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). To establish a prima facie violation of the fair cross-section requirement, the reviewing court must find: (1) the group allegedly excluded must be a distinctive group in the community; (2) the representation of this group in jury selection venires is not fair and reasonable in relation to the number of persons in the community; and (3) the underrepresentation is due to systematic exclusion of the group in the jury selection process. *People v Williams*, 241 Mich App 519, 525-526; 616 NW2d 710 (2000). Systematic exclusion cannot be demonstrated by one or two incidents of a particular venire being disproportionate. *Id.* quoting *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). A defendant is entitled to a fair jury drawn from the cross-section of the community, not a petit jury that exactly mirrors the community. *Id.* The defendant has the burden of demonstrating a problem inherent in the selection process that results in systematic exclusion, and a blanket assertion that systematic exclusion must have occurred does not satisfy this burden. *Id.* Review of the record reveals that defendant Lawson made a blanket assertion, but has failed to support the assertion. Accordingly, this issue is without merit.

Defendant Lawson next argues that there was insufficient evidence to support his conspiracy conviction. We disagree. "A criminal conspiracy is a mutual understanding or agreement between two or more persons, expressed or implied, to do or accomplish a criminal or unlawful act." *People v Bettistea*, 173 Mich App 106, 117; 434 NW2d 138 (1988). No overt acts are required to establish the conspiracy. *Id.* Rather, the elements of the crime are satisfied immediately upon entry by the parties into the mutual agreement. *Id.* There was sufficient circumstantial evidence to convict defendant of conspiracy in light of the concerted action with the same homemade weapons once defendant Lawson's release from his cell was achieved. *Johnson, supra; McRunels, supra.*

Defendant Lawson next argues that the sentence of life imprisonment for the assault convictions was disproportionate. We disagree. The maximum penalty for the crime of assault with intent to murder is life imprisonment, MCL 750.83, and defendant's sentences are within the sentencing guidelines recommended range. Accordingly, this claim of error is without merit.

III. Docket Number 223322

Defendant Taylor argues that trial counsel was ineffective for failing to object to the admission of improper evidence by the prosecutor. We disagree. To succeed on a claim of ineffective assistance of counsel, the defendant must show that his counsel's performance fell below an objective standard of reasonableness that so prejudiced the defendant that he was denied the right to a fair trial. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 661-662. Defendant has failed to meet this burden. Assault is one of the elements of the crime of assault with intent to commit murder. A simple assault has been defined as "an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Furthermore, the jury was instructed regarding the lesser offense of felonious assault. 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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Thus, the subjective fears of the officers were necessary to establish elements of the charged and lesser offenses. Defendant's claim of error is without merit.

Defendant Taylor next argues the prosecutor committed deliberate misconduct by injecting irrelevant issues into the case. We disagree. Prosecutorial misconduct issues are decided on a case by case basis, and the reviewing court must examine the pertinent record to evaluate the prosecutor's remarks in context. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). As previously noted, the fear or apprehension experienced by the officers was relevant to establishing an assault or the lesser included offense of felonious assault. Accordingly, this claim of error is without merit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer