STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2008
v	No. 278582 Wayne Circuit Court
BOBBY LEON MORRIS, Defendant-Appellant.	LC No. 06-013473-01

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant was found guilty by a jury of first-degree home invasion, MCL 750.110a(2), and was sentenced as a fourth-offense habitual offender, MCL 769.12, to twenty to thirty years' imprisonment. He appeals as of right. We affirm defendant's conviction and prison sentence, but remand for consideration of his ability to pay attorney fees for court-appointed counsel.

In October 2006, defendant and another man allegedly forced their way into the home of a distant relative, stole money from her, and assaulted and stole money from her 25-year-old son. Defendant allegedly was armed with a 9-millimeter handgun and the other man with an AK-47 rifle. Defendant was charged with two counts of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), larceny in a building, MCL 750.360, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was found guilty by the jury of first-degree home invasion, but was acquitted of the remaining charges.

On appeal, defendant first argues that he was denied the effective assistance of counsel because of his trial attorney's failure to request a jury instruction on the lesser included offense of entering without permission. We disagree.

Because no evidentiary hearing took place below concerning ineffective assistance of counsel, "our review is limited to mistakes apparent on the record." *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his attorney's conduct so undermined the proper functioning of the proceedings that the trial cannot be relied on as having produced a just result. See *Strickland v Washington*, 466 US 668, 692-696; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must overcome a presumption

that his attorney served him competently, *People v Curry*, 175 Mich App 33, 43; 437 NW2d 310 (1989), and must establish a reasonable probability that the outcome of the proceedings would have been different had counsel not made a serious mistake. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

> [A] trial court, upon request, should instruct the jury regarding any necessarily included lesser offense . . . if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational view of the evidence would support it. [*People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002).]

A conviction of entering without permission requires "(1) breaking and entering or (2) entering the building (3) without the owner's permission." *Id*. at 392. Defendant argues that there was a disputed factual issue regarding whether he committed an additional crime or had the intent to commit an additional crime necessary for a home invasion conviction, see MCL 750.110a(2), because he told the homeowner that he came to her house to use the telephone, and because there was some question regarding whether defendant spoke to the homeowner's son on the telephone earlier on the day in question, in order to make plans for defendant to return to the house in the evening.

Defendant's arguments fail because a rational view of the evidence would not have supported a finding of entry without permission as opposed to first-degree home invasion. This is apparent from testimony given on the record that was not contradicted by any other record evidence. The homeowner testified that when defendant was standing outside her house he told her that he just wanted to use the telephone, and as soon as she opened the door slightly, defendant forcefully pushed his way into the house, knocked her down, put a gun to her head, and then proceeded to steal money from her and physically assault and steal money from her son. Thus, a rational view of the evidence would not support a finding that defendant entered the house without permission with the intent to use the telephone. A rational view of the evidence also fails to support a finding that defendant made plans with the homeowner's son to come to the house that evening. The son repeatedly testified that he did not know that defendant was going to come back to the house that evening and that he did not recall speaking to defendant on the telephone earlier in the day to make plans for defendant to return to the house. This testimony was not contradicted by any evidence on the record.

Because an instruction on entering without permission would not have been warranted even if requested, defendant has failed to overcome the presumption that his attorney served him competently.

Defendant next argues that the trial court violated his constitutional right to confront the witness against him by admitting into evidence the preliminary examination testimony of the homeowner's son because the son was unavailable at trial. We disagree.

"The trial court's determination will not be disturbed on appeal unless a clear abuse of discretion is shown." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

For the trial court to properly deem a witness unavailable, the prosecutor has to establish that he made a diligent, good-faith effort to produce the witness for trial. *Id*. The proper test is

"one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id*. at 684.

Defendant argues that the prosecution did not exercise due diligence in attempting to produce the homeowner's son at trial because it waited until two weeks before trial to attempt to serve the son with a subpoena and did not take any affirmative steps to secure his appearance at trial.

The trial court did not abuse its discretion in finding that the prosecution acted diligently in attempting to produce the son for trial and in allowing his preliminary testimony into evidence. The son had been a willing witness before, and thus the prosecution did not have any reason to anticipate that there would be any difficulty in securing his appearance at trial or in serving him. Moreover, the prosecution's efforts in contacting the son's family and his employer in order to locate him produced no specific leads regarding his whereabouts.[1] Finally, the trial court determined that the son's preliminary examination testimony was adequately developed and there was no restriction on defense counsel's cross-examination of him at the preliminary examination.

Thus, defendant has failed to demonstrate that the trial court made a decision outside the range of reasonable and principled outcomes, which is needed to establish an abuse of discretion. *People v Farquaharson*, 274 Mich App 268, 271-272; 731 NW2d 797 (2007). The trial court acted within its discretion in finding the prosecution's efforts diligent and allowing the son's preliminary examination testimony into evidence.

Defendant next argues that he was denied his federal and state constitutional rights to an impartial jury drawn from a fair cross-section of the community because there were only two African-Americans in the array of forty-two people from which his jury was selected. He argues that this was due to the systematic exclusion of African-American residents of Wayne County from jury service. We disagree.

Questions of constitutional law are considered de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A defendant in a criminal trial has a constitutional right to a jury drawn from a venire representative of a fair cross-section of the community in which the case is tried. US Const; Am VI, XIV; Const 1963, art 1, § 20; *Taylor v Louisiana*, 419 US 522, 527; 95 S Ct 692; 42 L Ed 2d 690 (1975). The legal test used by the courts to determine whether a violation of this right has occurred requires a defendant to establish

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in

[1] The son was a truck driver who apparently was on an extended trip and did not have a telephone with him.

> the community; and (3) that this underrepresentation is 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); see also *People v Smith*, 463 Mich 199, 203, 205-206, 213-230; 615 NW2d 1 (2000).]

The second prong requires a showing of several instances of a venire being disproportionate. *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). Defendant has not made such a showing. Further, defendant has failed to demonstrate a systematic exclusion of African-Americans in Wayne County's jury-selection process. Defendant cites to the Third Judicial Circuit of Michigan Jury System Assessment Final Report dated August 2, 2006, which identified three reasons for the disproportionate representation of African-Americans: the "jury source list itself," the "application of a suppression file in the jury automation system,"[2] and "low rates of qualification of residents in predominantly African-American zip codes, mainly due to non-response rates."[3] However, "[a]ll that is required is that 'jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups. . . .'" *Smith*, *supra* at 203, 226, quoting *Taylor*, *supra* at 538. The "influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans." *Smith*, *supra* at 206. Where discrepancies in the participation of a group are caused by forces outside the criminal justice system, for example, by a greater number of juror questionnaires that are undeliverable, individual jurors who are exempted by reason of hardship or disqualified by their lack of eligibility, or any other socioeconomic reason that is not built into the jury selection process, then any alleged underrepresentation stems from social factors beyond the control of the criminal justice system. *Smith*, *supra* at 203, 226-228; *People v Howard*, 1 Cal 4th 1132, 1160, 824 P2d 1315 (1992). Defendant has failed to adequately demonstrate any reason for the alleged underrepresentation beyond forces outside the criminal justice system.

Defendant has failed to satisfy the *Duren* test and we thus find no basis for appellate relief.[4]

Defendant next argues that he is entitled to resentencing because the sentencing guidelines range was enhanced by the scoring of Offense Variables 1, 2, 3, and 16 on the basis of facts not proven to a jury beyond a reasonable doubt, in violation of the Sixth and Fourteenth Amendments and contrary to the principles underlying *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

We review this constitutional issue de novo. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

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[2] Defendant does not attempt to explain the meaning of or elaborate on the first two factors. As noted in *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), an appellant may not leave it up to this Court to unravel his arguments for him.

[3] Paula L. Hannaford-Agor & G. Thomas Munsterman, National Center for State Courts, Third Judicial Circuit of Michigan Jury System Assessment, Final Report, at i (August 2, 2006).

[4] We also note that defendant was dilatory in his pursuance of this claim at the trial-court level.

The Michigan Supreme Court has rejected defendant's claim that *Blakely* applies to our state's system of indeterminate sentencing. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *Drohan*, *supra* at 162-164. Defendant states that he raises this issue to preserve it should the Supreme Court hold that *Blakely* does apply to Michigan's indeterminate sentencing scheme. The Supreme Court has not so held.

Finally, defendant argues that the trial court erred in imposing attorney fees without first inquiring into his ability to pay. We agree.

In *People v Dunbar*, 264 Mich App 240, 251, 254-255; 690 NW2d 476 (2004), this Court held that even if the defendant does not object, the trial court must

> provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay.

Any "amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay." *Id*. at 255 (emphasis in original).

At sentencing, defendant was ordered to pay $600 in attorney fees for the court-appointed defense counsel he received at trial. In assessing attorney fees, the court failed to indicate whether it considered defendant's financial circumstances. Therefore, we remand this case for the trial court to consider the assessment in light of defendant's current and future financial circumstances.

Defendant's conviction and prison sentence are affirmed, but the matter is remanded for a determination of his current and future ability to repay his court-appointed attorney fees. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter