

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM WRAY,

Defendant-Appellant.

UNPUBLISHED

January 21, 1997

No. 164964

Jackson Circuit Court

LC No. 91-057173-FC

Before: McDonald, P.J., and Murphy and M.F. Sapala,* JJ.

PER CURIAM.

After being convicted by a jury, defendant was sentenced to two years' imprisonment for possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), to be followed by concurrent terms of ten to twenty years for assault with intent to commit murder, MCL 750.83; MSA 28.178, two to five years for carrying a concealed weapon, MCL 750.227; MSA 28.424, two to five years for carrying a weapon with unlawful intent, MCL 750.226; MSA 28.423; and two to four years for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Because the jury received improper supplemental instructions regarding the elements of assault with intent to commit murder, we reverse defendant's conviction for that offense and remand for a new trial; we affirm defendant's other convictions and sentences.

Although several intents can support a murder conviction, assault with intent to commit murder requires that the defendant specifically intended to kill. *People v Guy Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985); *People v Burnett*, 166 Mich App 741, 757; 421 NW2d 278 (1988). Defendant freely admitted shooting at the victim, but denied intending to kill him, thus making his intent the primary issue in this case.

In its supplemental instructions, the trial court advised the jury, contrary to earlier correct instructions, that the specific intent required for assault with intent to commit murder could be established by either actual intent to kill or by creating a very high risk of death. The jurors were

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

therefore advised that they could find defendant guilty on less than the required specific intent to kill, resulting in manifest injustice. MCL 768.29; MSA 28.1052; *Guy Taylor, supra*; *Burnett, supra*. Defendant is entitled to a new trial on this charge.

Defendant also challenges the performance of his defense counsel. We presume that counsel provided effective assistance and defendant bears the burden of proving otherwise, *People v Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991). We agree with defendant that defense counsel's failure to object to the trial court's supplemental instructions constitute ineffective assistance and that defendant is thus entitled to a new trial on the charge of assault with intent to commit murder..

Regarding defendant's other challenges to defense counsel's performance, our review of the record convinces us that these alleged mistakes and omissions were valid decisions pursuant to a reasonable trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). We will not second-guess such decisions. *Id.*

Defendant argues that the prosecutor committed various instances of misconduct during his closing remarks to the jury. We have carefully reviewed the record and find that each of the challenged comments was not improper, or that any error could have been cured by a cautionary instruction. Accordingly, defendant was not denied a fair trial. See *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995).

Defendant's conviction and sentence for assault with intent to commit murder are reversed and remanded for a new trial. Defendant's remaining convictions and sentences are affirmed. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ William B. Murphy

/s/ Michael F. Sapala