

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD SCOTT COOPES,

Defendant-Appellant.

UNPUBLISHED

May 16, 1997

No. 185721

Jackson Circuit Court

LC No. 94-070223-FC

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645, breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305, assault with intent to commit murder, MCL 750.83; MSA 28.278, assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a third felony offender, MCL 769.11; MSA 28.1083, to 80 to 120 months' imprisonment for UDAA, 180 to 360 months' imprisonment for breaking and entering, 240 to 360 months' imprisonment for assault with intent to murder, 160 to 240 months' imprisonment for intent to commit great bodily harm, 240 to 360 months' imprisonment for armed robbery, and two years' consecutive imprisonment for felony firearm. He appeals as of right. We affirm.

This case arises from the breaking and entering of a residence by defendant and his companion, Thomas Colon, during which the elderly occupant was tied hand and foot, beaten, pistol-whipped, stabbed, struck in the eye with a drawer, threatened with a handgun, kicked and robbed. Defendant presents four allegations of error concerning his numerous convictions and sentences.

Defendant first contends there is insufficient evidence to support his convictions of assault with intent to murder and assault with intent to commit great bodily harm less than murder. When determining the sufficiency of the evidence, a court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the

crimes were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) that, if successful, would make the killing murder. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). The elements of assault with intent to do great bodily harm less than murder are (1) an assault, coupled with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996). “Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of [an] offense. . . . The intent to kill may be proven by inference from any facts in evidence.” *Wolfe, supra*.

Defendant argues that the offense of assault with intent to murder was not fairly within the scope of the common unlawful enterprise because it was unanticipated and derived from Colon’s use of a handgun belonging to the victim and found inside the house. We disagree. Although it is true that, upon entering the premises, defendant did not foresee that Colon would subsequently find a gun inside, point it at the victim and pull the trigger, it is also true that whether a particular act or crime committed was fairly within the intended scope of the common criminal enterprise is a factual issue. *People v Flowers*, 191 Mich App 169, 178-179; 477 NW2d 473 (1991). Defendant could properly have been convicted as an aider and abettor if “(1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement which aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement.” *People v Genoa*, 188 Mich App 461, 463; 470 NW2d 447 (1991).

Our review of the record reveals that defendant unwaveringly continued aiding and assisting Colon even after becoming aware of Colon’s intent to shoot the victim. Therefore, the Court’s observation in *People v Kelly*, 423 Mich 261, 280; 378 NW2d 365 (1985), is equally applicable here: “Even assuming the defendant did not enter the house with the intent to murder, it is clear that he either formulated such an intent once inside the house, or at the *very least* became aware of his codefendant’s specific intent at some point during these gruesome proceedings.” See also *People v Barclay*, 208 Mich App 670, 674-675; 528 NW2d 842 (1995); *Warren, supra* at 588-589.

The jury also properly convicted defendant of assault with intent to commit great bodily harm less than murder. Defendant himself punched the victim, bound his hands and feet, tied him to a table, and at one time held the gun while Colon went to another part of the house. In addition, he aided and assisted Colon’s prolonged physical abuse of the victim. There was no error.

Defendant next maintains that his convictions of assault with intent to murder and assault with intent to do great bodily harm less than murder violate principles of double jeopardy because they are allegedly based on a single continuing transaction that plaintiff wrongly divided into two separate assaultive offenses. Both US Const, Am V and Const 1963, art 1, § 15, prohibit placing a defendant twice in jeopardy for a single offense. Defendant relies heavily on *People v Hooper*, 152 Mich App 243, 245-246; 394 NW2d 27 (1986), to support his argument. There, the defendant was convicted of attempting to fire a gun inside a bar, shooting the victim outside the bar, and, after an apparently minimal time had elapsed, again attempting to shoot the victim. This Court reversed the third conviction, holding

that the division of the single, continuing transaction into separate counts was improper and violative of the Double Jeopardy Clause.

Hooper is factually distinguishable. In the case at bar, the act supporting the charge of assault with intent to murder -- Colon's pointing the gun at the victim and pulling the trigger -- consumed only a moment and constitutes a discrete event logically and legally separable from the lengthy time period during which defendant and Colon brutalized the victim and which forms the basis for the charge of assault with intent to do great bodily harm less than murder. Because separate offenses warranting separate punishment occurred, double jeopardy principles are not implicated.

Defendant alleges that three instances of prosecutorial misconduct denied him a fair trial. He first notes that during closing argument the prosecutor incorrectly stated that the victim's blood was found on defendant's shirt. There was no objection at trial to this remark. Because the prejudicial effect of the comment could have been cured by an appropriate instruction given pursuant to timely objection, appellate review is foreclosed. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977).

During cross-examination, the prosecutor, without objection, asked defendant how he explained certain details of the victim's testimony. Defendant's present attempt to analogize this procedure to that described in *People v Buckey*, 424 Mich 1, 7, n 3; 378 NW2d 432 (1985), where the defendant was asked whether prior witnesses were lying, is unconvincing. In any event, we agree with the Court in *Buckey*, *supra* at 17, that "the substance of the exchange indicates that defendant dealt rather well with the questions. We fail to discern how he was harmed by the questions."

Defendant's allegation that plaintiff "engaged in conduct which had the effect of conveying to the jury that defense counsel could not be trusted" is without merit.

Defendant finally contends that his sentence for assault with intent to commit murder is excessive. Although the sentencing guidelines do not apply to habitual offenders such as defendant and are irrelevant in determining the proportionality of an habitual offender's sentence, such a sentence is nevertheless reviewed under the abuse of discretion standard. *People v Yeoman*, 218 Mich App 406, 419; 554 NW2d 577 (1996). In view of the seriousness of the offenses, defendant's extensive criminal record, and the trial court's comments regarding the sentences imposed, we find defendant's sentences are proportionate to the offenses and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald