STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIEGO ABRAHAM MACIAS,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 175029
Kalamazoo Circuit Court
LC No. 93-000969-FC

Before: Hoekstra, P.J., and Markey and J.C. Kingsley*, JJ.

PER CURIAM.

Defendant was convicted of 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, conspiracy to break and enter a building with the intent to commit a felony, MCL 750.157a; MSA 28.354(1), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial judge sentenced defendant to concurrent terms of ten to thirty years' imprisonment for the assault with intent to commit murder conviction, five to ten years' imprisonment for the assault with intent to commit great bodily harm conviction, and five to ten years' imprisonment for the conspiracy conviction, to be served consecutively to the concurrent two-year sentences for the felony-firearm convictions. Defendant appeals as of right from his convictions and sentences. We affirm.

In July 1993, defendant and three compatriots decided to break and enter a store located at the Maple Hill Mall in Kalamazoo. When one accomplice was apprehended by mall security, defendant fired a twelve-gauge, sawed-off shotgun on one of the security guards, while another member of the group fired a pistol at the guard. A pellet from one of the shotgun blasts wounded the security guard, and the blasts severely damaged the guards' vehicle. Subsequently, the members of the group, save one who eluded capture, were detained and interrogated by the local sheriff's department. At a joint trial with one of his accomplices, defendant asserted an alibi defense, which the jury rejected.

* Circuit judge, sitting on the Court of Appeals by assignment.

I

Defendant argues that his conviction for assault with intent to commit murder is legally infirm because the prosecutor failed to introduce sufficient evidence for the intent element of this crime. We disagree. In a criminal action, the prosecution has a duty to introduce sufficient evidence concerning the charged offense that would allow a reasonable jury to decide that the accused is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). When reviewing this type of issue, this Court examines the evidence in the light most favorable to the prosecution to determine whether a reasonable jury would be able to find that all the elements of the charged offense had been proven beyond a reasonable doubt. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996).

In order to prove assault with intent to commit murder, the prosecutor must prove beyond a reasonable doubt the following elements: (1) an assault; (2) committed with an actual intent to kill; and (3) if the assault had been successful, the killing would have been a murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The intent element for this crime can be inferred from any fact in evidence. *Id*. Thus, evidence showing that the defendant shot at the victim, then chased after the escaping victim, and aimed his weapon a second time at the victim is sufficient for a finding that the defendant intended to murder the victim. See, e.g., *People v Hollis*, 140 Mich App 589, 593; 366 NW2d 29 (1985).

Similar to *Hollis*, *supra*, the record in the current case shows that defendant shot at the security guard as the guard sought refuge in front of his security vehicle, trapped him in front of the vehicle while firing multiple shots, and struck the guard with a pellet from one of the shots. Furthermore, the record shows that defendant left the scene of the crime without checking whether the guard had been killed or wounded during the melee. By taking this evidence in a light most favorable to the prosecution, we conclude that the prosecutor submitted sufficient evidence for the jury to find that defendant intended to kill the security guard in question. Considering this conclusion, defendant's instructional error concerning this crime is rendered irrelevant and, therefore, we decline to review it.

II

Defendant next argues that his trial attorney rendered ineffective assistance of counsel when he failed to request the redaction of the codefendant's statement to eliminate any mention of defendant before it was admitted into evidence. We disagree. Over the advice and objections of his trial counsel, defendant rejected the trial court's attempt to remedy any potential confrontational rights problem that the introduction of the statement may have caused. Furthermore, a review of the record clearly shows that defendant waived any defect with the statement itself. Thus, we conclude that defendant injected the alleged error into the proceedings below, not his trial counsel. Accordingly, defendant cannot predicate error on his own actions because to hold otherwise would allow a defendant to harbor error as an appellate parachute. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

III

Defendant argues *in pro per* that the prosecutor made various improper comments pertaining to evidence not in the record during her closing argument. We disagree. At trial, defendant failed to object to any of the comments now being challenged on appeal; therefore, this issue is unpreserved. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). Regardless, our review of the record reveals that all of the challenged comments were actually proper comments on evidence in the record. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996).

IV

Defendant also argues *in pro per* that his ten-year minimum sentence for his assault with intent to commit murder conviction is disproportionate. Defendant's sentence is presumed proportionate because it falls within the guidelines' recommended range. *People v Tolbert*, 216 Mich App 353, 356; 549 NW2d 61 (1996). Defendant's proffered reasons for a downward departure are insufficient to overcome this presumption. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ James C. Kingsley