# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE KIRK DAVIS,

Defendant-Appellant.

UNPUBLISHED
June 13, 1997

No. 193484
Kalamazoo Circuit Court
LC No. 95-000779

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Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, breaking and entering of an occupied dwelling, MCL 750.110; MSA 28.305, assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and unlawful driving away of an automobile, MCL 750.413; MSA 28.645. He did not challenge his status as a fourth habitual offender. MCL 769.12; MSA 28.1084. He was sentenced as a fourth habitual offender to four concurrent sentences in prison: life in prison for the armed robbery conviction, forty to sixty years in prison for the breaking and entering conviction, life in prison for the assault conviction, and forty to sixty years in prison for the unlawful driving away of an automobile conviction. Defendant appeals as of right. We affirm.

Defendant first argues that his sentences are disproportionate either because of the claimed time intervals between his prior convictions or because the sentencing court did not sufficiently articulate its reasons for departing from the maximum sentences allowed by the sentencing guidelines. Initially, we note that the sentencing court was permitted to apply the habitual offender enhancement provision because of defendant's three or more prior felony convictions. MCL 769.12(1)(a); MSA 28.1084(1)(a). Each of the four felonies for which defendant was convicted is punishable upon a first conviction by five years or more in prison; therefore, the court could properly enhance defendant's sentence to life in prison or to a lesser term of years in prison. The sentencing guidelines do not apply to habitual offender convictions and should not be considered on appeal in determining an appropriate sentence for a habitual offender. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550

NW2d 265 (1996). We review this issue for an abuse of discretion. *People v Cervantes,* 448 Mich 620, 626; 532 NW2d 831 (1995).

Defendant contends that, although he has a significant history of criminal activity, the length of time between incidents should mitigate against a lengthened sentence. However, a review of defendant's extensive history of property offenses indicates a need to protect society from him and that defendant lacked the ability to be rehabilitated. In addition, the trial court fully set forth on the record the brutality of defendant's extended attack on an elderly widow in her own home in the middle of the night. In light of the nature of defendant and his crimes, we find that the sentences did not constitute an abuse of discretion; they were proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990).

Next, defendant argues that the trial court improperly instructed the jury regarding the armed robbery charge against him because the court used an amalgamation of the rule of law in two cases instead of reading the standard jury instruction or reading the rule of law from only one of the two cases. However, this issue is unpreserved for our review because of defendant's failure to object to the jury instruction below. Even if this issue had been preserved, defendant's argument would be without merit. The instruction about which defendant now complains was submitted in part by his attorney, and was specifically approved by both parties. Defendant cannot predicate error where he previously acquiesced. *People v Barclay,* 208 Mich app 670, 673; 528 NW2d 842 (1995). Defendant's argument further lacks merit because the trial court's instruction was a proper presentation of the applicable law and sufficiently protected defendant's rights. See *People v Davis,* 216 Mich App 47, 54; 549 NW2d 1 (1996).

Lastly, defendant argues that the trial court abused its discretion in admitting testimony from a co-perpetrator regarding the physical condition of the victim after she was assaulted by defendant. We disagree. In order to convict defendant of assault with intent to do great bodily harm less than murder, the prosecution had to prove the following two elements beyond a reasonable doubt: (1) that defendant attempted with force or violence to do corporal hurt to another; and (2) the intent to do great bodily harm less than murder. *People v Harrington,* 194 Mich App 424, 428; 487 NW2d 479 (1992). Defendant's own testimony and general denial of guilt put both elements at issue. *People v Mills,* 450 Mich 61, 69-70; 537 NW2d 909, modified 450 Mich 1212; 539 NW2d 504 (1995). For example, defendant testified on direct examination that it was not his "intentions to hurt anyone" and that he was "not a violent person." Thus, the witness' testimony that he did not believe the victim would survive the attack was relevant to show the extent of the violence against the victim. MRE 402. Although the testimony of the co-felon was damaging to defendant, it did not cause "unfair prejudice" and the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills, supra,* 75. Thus, the evidence of the victim's physical condition was admissible testimony under MRE 402 and 403. In addition, the testimony of the co-perpetrator that he thought the victim would die was also permissible opinion testimony by a lay witness under MRE 701.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh
/s/ Robert P. Young, Jr.