STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of WILLIAM GAINES, Minor

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM GAINES,

Defendant-Appellant.

UNPUBLISHED
October 23, 1998

No. 204943
Wayne Juvenile Court
LC No. 95-332309

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Defendant, a minor, was charged with two counts of felonious assault, MCL 750.82; MSA 28.277, and two counts of aggravated assault, MCL 750.81a; MSA 28.276(1). After a delinquency proceeding, defendant was found guilty of two counts of aggravated assault, MCL 750.81a; MSA 28.276(1). He now appeals as of right from the order of the Wayne County Juvenile Court committing him to the Family Independence Agency. We affirm.

Defendant first argues that the probate court abused its discretion in denying his request for an adjournment based on the absence of two defense witnesses, Jason Brown and Pleasant Harrison. We disagree. A court's decision on a motion for an adjournment is within the court's sound discretion and will not be reversed on appeal absent an abuse of discretion resulting in prejudice to the defendant. *People v Norman*, 176 Mich App 271, 275; 438 NW2d 895 (1989).

An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence. MCR 2.503(C)(2). In the present case, defendant has established neither that the witnesses would provide material evidence nor that he made diligent efforts to secure their attendance. Under these circumstances, we cannot conclude that the probate court abused its discretion in denying defendant's request for an adjournment.

Defendant also contends that his aggravated assault convictions were based on insufficient evidence. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

To establish the misdemeanor offense of aggravated assault, the prosecution must prove that the defendant assaulted an individual without a weapon and inflicted serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder. MCL 750.81a; MSA 28.276(1). An assault is defined as "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).

Here, the evidence clearly established that defendant assaulted both Jimenez and Jones. Jones testified that defendant hit Jimenez at least twenty times. Jones further testified that he was hit by defendant in the face and stomach numerous times. Furthermore, the evidence indicated that Jimenez suffered an injury to his shoulder, broken ribs, a concussion, and cuts in his mouth; and that Jones suffered muscle spasms in his back, a sprained wrist, a gash under his eye, and contusions on his head. Such evidence was sufficient to establish that Jimenez and Jones suffered serious or aggravated injuries. Cf. *People v Brown*, 97 Mich App 606, 611; 296 NW2d 121 (1980). Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that defendant was guilty beyond a reasonable doubt of two counts of aggravated assault.

Defendant next argues that the probate court's finding that defendant was guilty of two counts of aggravated assault was against the great weight of the evidence. A new trial may be granted when the verdict is against the great weight of the evidence. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). A trial court may grant a new trial after finding that the testimony of the prosecutor's witnesses is not credible, thereby acting as the thirteenth juror; however, this power should be exercised only with great trepidation and reserve.[1] *Id*.

Defendant essentially maintains that the court's findings were against the great weight of the evidence because defendant's version of the events was more credible than that of Jones and Jimenez. However, questions of credibility are left to the trier of fact and will not be resolved anew by this Court. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997). Accordingly, we conclude that the probate court did not abuse its discretion in denying defendant's motion for a new trial on the ground that the verdict was against the great weight of the evidence.

In his final issue, defendant asserts that the probate court's order committing him to the Family Independence Agency was an abuse of discretion because the referee failed to consider a clinical evaluation report, a child study report, or defendant's home and school record before disposition. We disagree.

MCR 5.943(C)(1) provides that "[a]t the dispositional hearing all relevant and material evidence, including oral and written reports, *may* be received by the court and *may* be relied upon to the extent of its probative value, even though such evidence may not be admissible at trial" (emphasis added). The use of the word "may" rather than "shall" indicates a discretionary, rather than a mandatory, action. See *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). Accordingly, the probate court was not required to consider any evaluation reports, if they existed, or defendant's home and school record. The court's disposition was based on the circumstances of the offense. On the record before us, we find no abuse of discretion.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

[1] In the recent decision of *People v Lemmon*, 456 Mich 625, 647-648; 576 NW2d 129 (1998), the Supreme Court held that the "thirteenth juror" standard introduced in *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993), was erroneous. However, because the Court stated that its holding in *Lemmon* applies prospectively to cases not yet final as of the date of that decision, we review this issue under the *Herbert* standard.