STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD HARDY,

Defendant-Appellant.

UNPUBLISHED
January 15, 1999

No. 189902
Midland Circuit Court
LC No. 95-007535 FC

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, felonious assault, MCL 750.82; MSA 28.277, breaking or attempting to escape from jail while awaiting examination or sentence on a felony, MCL 750.197(2); MSA 28.394(2), and malicious destruction of police property, MCL 750.377b; MSA 28.609(2). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, to concurrent terms of life imprisonment for the assault with intent to do great bodily harm less than murder conviction and five to fifteen years' imprisonment for the felonious assault, escape, and malicious destruction convictions. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial because he was restrained with shackles and handcuffs during trial. We disagree.

Because freedom from shackling is an important part of the right to a fair trial, the shackling of a defendant during trial is permitted only in extraordinary circumstances. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Restraints should be permitted only to prevent escape, to protect bystanders or officers of the court from injury, or to maintain a quiet and peaceable trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). There must be record evidence to support a trial court's decision to use restraints. *Id*. at 427. This Court reviews a decision to restrain a defendant for an abuse of discretion under the totality of the circumstances. *Dixon*, *supra* at 404-405.

At the time of trial, defendant had a lengthy criminal record, including a prior conviction for escape, and he was facing a lengthy prison sentence in another case. Moreover, the instant case

involved an armed attack against two jail guards during an escape attempt from jail. Because defendant's history established that he was both a flight risk and a risk to the safety of the other occupants in the courtroom, the trial court did not abuse its discretion in requiring defendant to wear restraints while in the court room.

Defendant next contends that the trial court deprived him of his right of allocution at sentencing by advising him that he should focus his comments on matters related to his potential sentence, rather than his factual guilt or innocence. We disagree.

MCR 6.425(D)(2)(c) provides that the trial court must, before imposing sentence, give the defendant a reasonable opportunity to advise the court of any circumstances that the defendant believes the court should consider when imposing sentence. Failure to comply with this rule requires resentencing. *People v Berry*, 409 Mich 774, 779-781; 298 NW2d 434 (1980); *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 453; 506 NW2d 542 (1993). Our review of the record convinces us that the trial court complied with MCR 6.425(D)(2)(c) and provided defendant a full opportunity for allocution. The court's comments were intended only as a guideline for defendant to consider in tailoring his remarks. Notwithstanding the court's comments, defendant was permitted to say whatever he desired on the record before sentence was imposed. The right of allocution was not violated.

Defendant next contends that his life sentence is so disproportionate as to constitute an abuse of discretion. We disagree. Defendant's reliance on the sentencing guidelines is misplaced because the guidelines do not apply to habitual offenders. *People v McFall*, 224 Mich App 403, 415; 569 NW2d 828 (1997). Defendant's sentence was statutorily authorized. See MCL 769.12(1)(a); MSA 28.1084(1)(a). The serious nature of the offenses and defendant's prior criminal history demonstrate that defendant has an inability to conform his conduct to the laws of society. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Accordingly, we conclude that defendant's life sentence is proportional and does not constitute an abuse of sentencing discretion. *Id*. See also *People v Crawford*, ___ Mich App ___; ___ NW2d ___ (Docket No. 200722, issued 11/20/98), slip op p 6. Because defendant's life sentence is proportional, we likewise conclude that this sentence does not constitute cruel or unusual punishment. Const 1963, art 1, § 16; *People v Bullock*, 440 Mich 15, 27-41; 485 NW2d 866 (1992); see also *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Next, defendant, relying on CJI2d 17.7(4) and *People v Miller*, 91 Mich 639; 52 NW 65 (1892), argues that the trial court erroneously failed to instruct the jury that great bodily harm means permanent injury. However, defendant failed to object to this aspect of the instructions as given. Thus, relief will be given only in cases of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997).

Jury instructions must include all elements of the charged offense and must not exclude material issues, defenses and theories if there is evidence to support them. Even if the instructions are somewhat imperfect, there is no error if they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

The Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court and trial courts are not required to use them. *McFall, supra* at 414. Although in *Miller, supra* at 643, the Court approved a jury instruction that equated the intent to do great bodily harm with the intent to do "serious and permanent bodily injury," the Court in other cases has defined the intent to do great bodily harm as the intent "to do a serious injury, of an aggravated nature." See *People v Troy*, 96 Mich 530, 537; 56 NW 102 (1893); see also *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922) (citing *Troy, supra*); *People v Ochotski*, 115 Mich 601, 608; 73 NW2d 889 (1898) (citing *Troy, supra*). In affirming the defendant's conviction of assault with intent to do great bodily harm in *People v Mulvaney*, 171 Mich 272, 278; 137 NW 155 (1912), the Court found that the instruction "'It must be an intent to do a serious injury of an aggravated nature'" correctly stated the law. And in *Ochotski, supra*, the Court noted that the trial court instructed the jury that

> no conviction could be had unless they found that in making the assault respondent intended to do great bodily harm less than the crime of murder.

The *Ochotski* Court stated that "[w]e think the charge of the trial court was sufficiently specific on the question of intent." *Id*.

In this case, the trial court instructed the jury that it must find "that at the time of the assault, the defendant intended to do great bodily harm," and that "[g]reat bodily harm means any injury that can seriously harm the health or function of the body." This instruction fairly presented the issue of great bodily harm to the jury and sufficiently protected defendant's rights. *Caulley, supra*. We find no manifest injustice with this instruction. *Mulvaney, supra*; *Ochotski, supra*; *Troy, supra*.

Next, defendant contends that the trial court should have instructed the jury on the lesser included misdemeanor offenses of assault and battery and aggravated assault. A trial court is required to instruct on a lesser included misdemeanor offense where (1) there is a proper request made, (2) there is an "inherent relationship" between the greater and lesser offense, (3) the requested instruction is supported by a "rational view" of the evidence, (4) the defendant has adequate notice if he did not make the request, and (5) no undue confusion or other injustice would result. *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996); *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993). This Court reviews a trial court's decision whether to instruct on a lesser included misdemeanor offense for an abuse of discretion. *Malach, supra*. After reviewing the record in this case, we agree with the trial court that a rational view of the evidence did not support the requested misdemeanor instructions and that the requested instructions were likely to cause undue confusion. Accordingly, we conclude that the trial court did not abuse its discretion in refusing to instruct on the requested misdemeanors.

Finally, defendant argues that he was deprived of his statutory right to a preliminary examination within fourteen days of his arraignment. See MCL 766.4; MSA 28.922. Although the record indicates that defendant waived this right in writing, defendant contends that his signature was forged on the waiver form by his attorney. After conducting an evidentiary hearing on this issue below, the trial court found that defendant's signature was not forged and that defendant knowingly and intelligently waived his statutory right to a preliminary examination within fourteen days of arraignment. Cf. *People v*

Losinger, 331 Mich 490, 496-497; 50 NW2d 137 (1951). Our review of the record discloses that the trial court did not clearly err in this determination. MCR 2.613(C).

Affirmed.

/s/ Michael R Smolenski
/s/ Henry William Saad
/s/ Hilda R. Gage