

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE SIMMONS,

Defendant-Appellant.

UNPUBLISHED

January 28, 2000

No. 207772

Oakland Circuit Court

LC No. 97-152180 FC

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

PER CURIAM.

Plaintiff charged defendant with assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). A jury convicted defendant of felonious assault, MCL 750.82; MSA 28.277, and felony-firearm, for which the trial court sentenced him to consecutive prison terms of one to four years and two years, respectively. He appeals as of right, and we affirm.

I

Defendant argues that the trial court erred in denying his motion for a directed verdict on the charge of assault with intent to commit murder, as well as the lesser offense of assault with intent to do great bodily harm less than murder. The elements of the offense of assault with intent to commit murder are “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *In re Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). Similarly, assault with intent to commit great bodily harm less than murder requires proof of (1) an assault accompanied by (2) an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Specifically, defendant contends that there was insufficient evidence to establish the element of intent.

After reviewing the record de novo, we disagree. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Minimal circumstantial evidence of intent is sufficient because of the difficulty in proving an actor's state of mind. *People v McRunels*, 237 Mich App 168; 603 NW2d 95

(1999). It is not necessary that the state of mind be directed at any particular victim. *Abraham, supra*, 658.

Viewed in a light most favorable to the prosecution, the evidence of defendant's conduct, including his use of a weapon naturally adapted to produce death, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant intended to kill a police officer but did not succeed because his shooting was inaccurate. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993); *People v Drayton*, 168 Mich App 174, 177; 423 NW2d 606 (1988). We likewise conclude that the evidence was sufficient to establish an intent to do great bodily harm less than murder. *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

Furthermore, defendant's argument must fail because it is based in part on the now obsolete *Vail* rule. *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975). In *Vail*, our Supreme Court held that when a jury is permitted to consider a charge not supported by the proofs, the error is necessarily prejudicial because the possibility of a compromise verdict decreases the defendant's chance of an acquittal. Relying on *Vail*, defendant contends that the higher charges of assault with intent to murder and assault with intent to commit great bodily harm were unsupported by evidence, and thus might have induced the jury to compromise on the lesser felonious assault conviction instead of acquitting defendant. However, in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998), our Supreme Court overruled *Vail* and rejected its "automatic reversal" rule. *Id.*, 481-482. Instead, the Court applied the current standards for preserved nonconstitutional error and concluded that reversal is not justified unless it is more probable than not that a different result would have ensued without the error. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999). The *Graves* Court held that "[w]here a jury acquits a defendant of an unwarranted charge . . . and a lesser included warranted charge . . . before convicting of a still lesser charge . . ., we find that it is highly probable that the erroneous submission of the unwarranted charge did not affect the ultimate verdict." *Id.*, 487. The Court noted, however, that reversal may be warranted where "sufficiently persuasive indicia of jury compromise are present", such as where "1) logically irreconcilable verdicts are returned, or 2) there is clear record evidence of unresolved jury confusion, or 3) . . . where a defendant is convicted of the next-lesser offense after the improperly submitted greater offense." *Id.*, 487-488.

None of these three circumstances exists here. There are no irreconcilable verdicts or record evidence of unresolved jury confusion. There is also no indicia of jury compromise. Were we to find that the assault with intent to murder charge was unwarranted, reversal would not be necessary because the jury rejected the intermediate great bodily harm charge and convicted defendant of felonious assault. This claim is without merit.

II

We also find that defendant has not established any basis for relief due to instructional error. Defendant claims that the trial court's "state-of-mind" instructions improperly shifted the burden to the defendant, but this claim is not preserved for appeal because defendant did not object to the instructions

on this ground at trial. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Therefore, defendant must show plain error affecting his substantial rights. *Carines, supra* at 774.

The jury's acquittal on the charge of assault with intent to commit murder belies defendant's claim that the court's state-of-mind instructions prejudiced his defense. Further, defendant is wrong when he contends that the state-of-mind instructions shifted the burden of proof to defendant or created a mandatory presumption regarding his intent. *People v Kelly*, 423 Mich 261, 273-274; 378 NW2d 365 (1985). In accordance with the law, the trial court stated that the jury "may" infer that defendant intended the usual results that follow from the use of a dangerous weapon; the trial court did *not*, as defendant suggests, instruct the jury that it *must* draw this inference. *People v Wright*, 408 Mich 1, 20-22; 289 NW2d 1 (1980). The jury instructions as a whole fairly presented the intent issue to the jury and sufficiently protected defendant's rights. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). We find no basis for reversal.

III

Defendant next argues that he must be resentenced because the trial court failed to articulate its reasons for the sentences. We disagree. Defendant has not established that the sentences are invalid. *In re Dana Jenkins*, 438 Mich 364, 369 n 3; 475 NW2d 279 (1991), abrogated in part on other grounds, *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). Further, the articulation requirement was satisfied under the contextual approach in *People v Lawson*, 195 Mich App 76, 78; 489 NW2d 147 (1992). The two-year sentence for the felony-firearm conviction was imposed because it was mandatory and, while the trial court did not explicitly refer to the guidelines when imposing its sentence for the felonious assault conviction, it is apparent from the record that the trial court sentenced defendant in accordance with the guidelines. Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Hilda R. Gage