# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY EDWARD DALY,

Defendant-Appellant.

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UNPUBLISHED
January 28, 2000

No. 212451
Saginaw Circuit Court
LC No. 97-014201 FH

Before: Talbot, P.J., and Gribbs and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced to a term of six to ten years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from an assault upon Dennis Sawatzke. Before trial, defendant pleaded no contest to assault with intent to commit great bodily harm less than murder pursuant to a plea-based sentencing agreement, which specified that his minimum sentence was not to exceed 2-1/2 years' imprisonment. When defendant subsequently appeared for sentencing, the trial court indicated that it could not accept the sentencing agreement, explaining:

> The sentencing guidelines are 36 months to 80 months, and the Court is considering the high end of the guidelines. This was a very brutal offense, and the Court does not believe that a two and a half year sentence is sufficient.

As a result, defense counsel indicated that defendant wished to withdraw his plea and the matter proceeded to trial. A jury subsequently convicted defendant as charged.

Defendant claims that the trial court erred in denying his motion for a directed verdict. He asserts that the evidence was insufficient to show that he intended great bodily harm. We disagree.

When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that

the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, mod 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense. *People v Drayton*, 168 Mich App 174, 176; 423 NW2d 606 (1988).

The elements of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, are: (1) an attempt or offer with force or violence to do corporal hurt to another; (2) coupled with an intent to do great bodily harm less than murder. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod on other grounds, 457 Mich 885 (1998). An intent to do great bodily harm is an intent to do serious injury of an aggravated nature. *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

Evidence was presented that the assault occurred after the victim, Dennis Sawatzke, asked defendant to slow down as he was driving through a trailer park occupied by families with children. In response, defendant stopped his car, got out and walked towards the victim. When Sawatzke again told defendant to slow down and to get back in his car and leave, defendant shoved him. Sawatzke testified that, when he shoved back, defendant turned around and hit him in the jaw. In the ensuing tussle, defendant grabbed a walking cane used by the victim's sister, broke it in two, and then hit Sawatzke in the area of his eye, tearing the skin under Sawatzke's right eye. Defendant also struck Sawatzke with the broken cane four or five times in the back and back of his head. Sawatzke was hospitalized because of his injuries. His treating physician, Dr. Moylan testified that Sawatzke suffered "a very complex laceration" to his eye, an injury that could have seriously and permanently harmed him. Viewed in a light most favorable to the prosecution, the foregoing evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant assaulted the victim with an intent to inflict serious injury of an aggravated nature.

Defendant next argues that the trial court erred when, in rejecting the plea-based sentence agreement, it failed to advise him of the specific sentence that it intended to impose before offering him the opportunity to withdraw his plea. We do not agree. When a sentencing court is unable to abide by a plea-based sentencing agreement, the trial judge must explain to the defendant that the recommendation was not accepted by the court, and state the sentence that the court finds to be the appropriate disposition. *People v Killebrew*, 416 Mich 189, 209; 330 NW2d 834 (1982). See also MCR 6.302(C)(3).

In this case, the trial court informed defendant that it was unable to comply with the plea-based sentencing agreement and, in so doing, advised defendant that the sentencing guidelines were thirty-six to eighty months and that it was considering a sentence at "the high end of the guidelines." By identifying the guidelines range and then advising defendant that it was considering a sentence at the high end of the guidelines, the trial court sufficiently complied with the mandate in *Killebrew* that the court inform the defendant of "the sentence that the court finds to be the appropriate disposition." The court's statement enabled defendant to make an informed choice whether to affirm or withdraw his plea.

Next, defendant argues that his six to ten year sentence violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). We disagree. The sentence is

within the sentencing guidelines recommended minimum sentence range and, thus, is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant failed to present any unusual circumstances showing that this sentence violates the principle of proportionality. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992) .

Defendant raises several other issues in a supplemental brief, filed in propria persona, none of which have merit. He first argues that the trial court erroneously instructed the jury that it could not consider lesser included offenses until it first found him not guilty of the charged offense. Because defendant failed to preserve this issue with an appropriate objection to the trial court's instructions at trial, he must demonstrate plain error that was outcome-determinative or error that falls under a category of cases where prejudice is presumed or reversal is automatic. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Here, the trial court instructed the jury, in pertinent part, as follows:

> If you believe that the defendant is not guilty of assault with intent to do great bodily harm *or if you can't agree upon that crime*, you should consider the less serious crimes of felonious assault, aggravated assault and assault and battery.
>
> You decide how long to spend on assault with intent to do great bodily harm before discussing any of the less serious crimes. *You can go back to assault with intent to do great bodily harm after discussing the less serious charges if you wish to*. [Emphasis added.]

It is apparent that the trial court's instructions did not require the jury to acquit defendant of the charged offense before considering lesser offenses. See *People v West*, 408 Mich 332, 342; 291 NW2d 48 (1980); *People v Mays*, 407 Mich 619, 622-623; 288 NW2d 207 (1980); *People v Hurst*, 396 Mich 1, 10; 238 NW2d 6 (1976). Accordingly, plain error has not been shown.

Defendant also claims that his constitutional rights were violated when testimony was presented regarding certain statements that he made while in police custody where he was not advised of his rights under *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). Because defendant did not preserve this issue by objecting to the challenged testimony at trial, he must establish plain error that was outcome-determinative. *Carines*, *supra*. Here, defendant cannot establish error because the testimony was permissibly offered to impeach his earlier trial testimony. *Harris v New York*, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971); *People v Sutton (After Remand)*, 436 Mich 575, 579-580; 464 NW2d 276 amended 437 Mich 1208 (1990); *People v O'Brien*, 113 Mich App 183, 192-193; 317 NW2d 570 (1982).

Defendant also argues in propia persona that the prosecutor failed to prove beyond a reasonable doubt that he had the requisite intent to commit the charged assault. As we have previously concluded, however, there was sufficient evidence to enable the jury to find that defendant assaulted the victim with an intent to inflict serious injury of an aggravated nature.

Next, contrary to what defendant argues, the trial court's reasonable doubt instruction sufficiently presented the concept of "reasonable doubt" to the jury. By issuing CJI2d 3.2(3) in near verbatim form, the trial court adequately apprised the jury of the quantum of proof necessary to convict defendant. *People v Hubbard (After Remand*), 217 Mich App 459, 487; 552 NW2d 493 (1996); *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991); *People v Jackson*, 167 Mich App 388, 390-391; 421 NW2d 697 (1988).

Finally, defendant argues that he was denied the effective assistance of counsel. He alleges the following deficiencies on the part of trial counsel: (1) failure to object to the reasonable doubt instruction; (2) failure to object to the elements of the charged offense; (3) failure to object to the court's instruction regarding consideration of lesser offenses; (4) allowing defendant to be prosecuted for assault with intent to commit great bodily harm less than murder when he allegedly was originally charged only with felonious assault; (5) failure to require the trial court to articulate its reasons for denying his motion for a directed verdict and then not renewing that motion at the close of the proofs; (6) failure to object to the admission of the cane; (7) failure to have blood examined; (8) failure to call an expert witness to testify about the severity of the victim's injuries; (9) asserting an intoxication defense when defendant said he had not been drinking; (10) failure to file for dismissal on the basis of a violation of his constitutional rights when the arresting officer questioned defendant without advising him of his *Miranda* rights; (11) allegedly advising the trial court that defendant wished to withdraw his plea without consulting defendant and by not requiring specific performance of the plea agreement.

None of defendant's allegations have merit. To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The alleged deficiencies associated with claims (1) - (5), and also claim (10), pertain to issues that we have already addressed and determined provide no basis for relief. Regarding defendant's claim that he was originally charged with felonious assault, a review of the arrest warrant reveals that the listed charge is described as "assault-feloniou[s]," but specifies the charging code as "750.84," which corresponds to assault with intent to do great bodily harm less than murder. In any event, defendant was properly bound over on the charge of assault with intent to commit great bodily harm following a preliminary examination on that charge, and then convicted of that charge at trial upon sufficient proofs. Claims (6) - (9), all involve matters of trial strategy and defendant has not overcome the presumption of sound strategy, nor has he shown that he was deprived of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995) vacated in part on other grounds 453 Mich 902 (1996). Finally, regarding claim (11), the trial court had the discretion whether to accept or reject the sentencing agreement and defense counsel could not properly insist upon specific performance of the sentencing agreement. *Killebrew, supra* at 209. Further, it is not apparent from the record that defendant objected to the decision to withdraw his plea. In any case, defendant cannot show that he was prejudiced by the decision to withdraw his

plea considering that the trial court ultimately sentenced defendant to a minimum term that was eight months lower than the high end of the guidelines.

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gribbs
/s/ William C. Whitbeck