

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS MARCELLO BRIM,

Defendant-Appellant.

UNPUBLISHED

April 28, 2000

No. 212088

Calhoun Circuit Court

LC No. 97-002422-FC

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant, a juvenile, was convicted of two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, one count of armed robbery, MCL 750.529; MSA 28.797, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of twenty to forty years for each assault conviction and fifteen to forty years for the armed robbery conviction. Those sentences are to be served consecutively to two concurrent two-year terms for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant's convictions are based on the March 19, 1997, robbery of a Little Caesar's restaurant in Battle Creek. At approximately 9:00 p.m., defendant, then fifteen years old, and three other young men entered the restaurant. Defendant possessed a rifle, which he pointed at employee, Dorothy Bridges', face while ordering her to open a cash register. Defendant told Bridges she was moving too slow and ordered her to open a door that allowed access behind the store's front counter. After Bridges complied, defendant shot her once in the shoulder. As Bridges was falling to the floor, defendant shot her again in the inner thigh. When a second employee, Thomas Cornell, attempted to intervene, defendant fired a third shot past Cornell's head before running from the scene. Defendant admitted possessing the gun during the robbery, but claimed the shots were fired accidentally.

On appeal, defendant argues that he was denied effective assistance of counsel at trial. We disagree. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was objectively unreasonable, and (2) that defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v*

Rockey, 237 Mich App 74, 76; 601 NW2d 887 (1999). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *Rockey*, *supra*.

Defendant first contends that he was prejudiced when his trial counsel, while operating under the mistaken view that defendant could be sentenced as a juvenile if tried and convicted pursuant to a bench trial, recommended that he waive his right to a jury trial. During an evidentiary hearing held below,¹ defendant's trial counsel conceded that he originally believed it was possible for the trial court to sentence defendant as a juvenile, but discovered a few weeks before sentencing that the law had changed to preclude any possibility of juvenile sentencing. See MCL 769.1(1); MSA 28.1072(1). Defendant and his mother testified that counsel insisted that defendant opt for a bench trial. Counsel denied that assertion and claimed he had intended to conduct a jury trial, but that defendant requested a bench trial rather than appear before an all-white jury. According to counsel, he was surprised by defendant's request and, after he explained the ramifications of waiving a jury trial, defendant made the decision to seek a bench trial. Counsel testified further that he believed a bench trial would allow him to introduce greater mitigating evidence regarding defendant's alleged cognitive disabilities and emotional difficulties than would be possible at a jury trial, so that the trial court would not treat defendant too harshly at sentencing.

The evidence adduced below fails to convince us that defense counsel rendered ineffective assistance. The record does not support defendant's claim that, had his trial counsel not erroneously believed defendant could be sentenced as a juvenile if convicted following a bench trial, counsel would have pursued a jury trial to defendant's advantage. There was substantial evidence supporting defendant's guilt and there is no reasonable probability that, but for defense counsel's erroneous view of MCL 769.1(1); MSA 28.1072(1) or defense counsel's advice regarding waiver of a jury trial, the result of the proceedings would have been different. *Mitchell*, *supra*; *Rockey*, *supra*. Moreover, insofar as the decision to waive a trial by jury was based on the desire to avoid the possibility of a trial before an all-white jury or the desire to introduce greater evidence of defendant's cognitive and emotional disabilities that might have been excluded from a jury trial, the decision was one of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also contends that his trial counsel's failure to adequately prepare for defendant's sentencing hearing constituted ineffective assistance. At sentencing, defense counsel asked that he be allowed to present witnesses who would testify regarding defendant's current mental health status or mental functioning. The court denied the request in the absence of legal authority authorizing defendant to produce witnesses at a sentencing procedure. Defendant claims that, as a result of his trial counsel's failure to prepare for the hearing, the trial court was unable to properly individualize defendant's sentences. Evidence was presented at trial regarding defendant's cognitive and emotional disabilities. Dr. Lynne Schwartz of the Center for Forensic Psychiatry briefly testified regarding defendant's

competence to stand trial. Moreover, the presentence investigation report contains a resume of defendant's mental health history and defense counsel conceded at sentencing that the trial court, at a pretrial hearing, had "seen most of the written documentation" regarding defendant's mental functioning. Under the circumstances, defendant has failed to establish that his counsel's preparation for the sentencing hearing fell below an objectively reasonable level or resulted in the trial court's inability to impose individualized sentences. Consequently, defendant has failed to overcome the heavy presumption against a determination of ineffective assistance. *Stanaway, supra* at 687; *Rockey, supra*.

Defendant next argues that his convictions of assault with intent to commit murder were against the great weight of the evidence because the evidence suggests he lacked the capacity to form the requisite intent to murder Bridges or Cornell. We disagree. The trial court denied defendant's motion for new trial that was based, in part, on defendant's claim that the assault convictions were against the great weight of the evidence. We review a trial court's decision on a motion for new trial based on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). The elements 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." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Defendant only challenges the evidence regarding his intent to kill the victims.

Defendant's mother testified that defendant experienced mental and emotional difficulties that caused him to be placed in special education programs. However, defendant was found competent to stand trial and nothing in the evidence supports the conclusion that defendant's cognitive and/or emotional disabilities precluded his ability to form the intent to kill required for conviction of assault with intent to commit murder. Bridges testified that defendant pointed the gun at her face during the robbery. Bridges was shot once in the shoulder and again in the thigh as she was falling to the ground. Bridges recalled that, after being shot, she heard defendant ask an accomplice if there was any more money. Cornell testified that he entered the store during the robbery and, as he grappled with the individual holding the gun, a shot was fired past his head. While defendant acknowledged that he possessed the gun, he claimed the gun fired accidentally. "The intent to kill may be proven by inference from any facts in evidence." *Hoffman, supra*, quoting *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). To prove intent to kill, it is only necessary that the state of mind exists and not that it is directed at any particular victim. *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992). Based on the evidence presented in this case, we conclude that there was evidence upon which the trial court could infer that defendant had the requisite intent to kill both victims. *Hoffman, supra*. Thus, defendant's convictions for assault with intent to commit murder were not against the great weight of the evidence and the trial court did not abuse its discretion in denying defendant's motion for new trial with respect to those convictions.

Finally, defendant argues that his sentences constitute cruel and unusual punishment. We review a trial court's sentencing decision for an abuse of discretion. *Rice, supra* at 445. A sentence constitutes an abuse of discretion when it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *Rice, supra*. The two-year sentences imposed for the felony-firearm convictions in

the present case were required by statute. MCL 750.227(b)(1); MSA 28.424(2)(1). Defendant's twenty-year minimum sentences for the assault with intent to commit murder convictions were within the guidelines range of 180 to 300 months and his fifteen-year minimum sentence for the armed robbery conviction was within the guidelines range of 120 to 300 months. Thus, those sentences are presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Defendant has failed to present unusual circumstance to overcome that presumption. See *Milbourn*, *supra* at 661; *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). The presentence investigation report indicates that defendant has an extensive juvenile record. During the incident giving rise to the present case, defendant exhibited extremely violent and antisocial behavior. Defendant admitted that he possessed the gun and took part in the robbery. Defendant pointed the gun directly at Bridges' face and shot her twice as she was complying with his orders. Defendant fired a shot past Cornell's head when he attempted to stop defendant from fleeing. A sentencing court is not required to tailor a defendant's sentence to account for his age. *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997). In view of the facts, we conclude that defendant's sentences are proportionate to the offenses and the offender. Accordingly, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra

¹ See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).