

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER THURMAN,

Defendant-Appellant.

UNPUBLISHED

May 16, 2000

No. 206328

Recorder's Court

LC No. 90-011920

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Defendant was charged with three counts of 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). After a jury trial in April 1991, he was convicted of the lesser offenses of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and felony-firearm. In a prior appeal, this Court reversed, concluding that the trial court erred in denying defendant's motion to suppress weapons seized from his house without a warrant. *People v Thurman*, unpublished per curiam opinion of the Court of Appeals, issued 3/30/95 (Docket No. 144401). At his retrial, defendant was convicted as charged of three counts of assault with intent to commit great bodily harm and felony-firearm. He was sentenced to three concurrent terms of 80 to 120 months' imprisonment for each assault conviction and to two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

We first reject defendant's claims that procedural defects in the preparation of the complaint and warrant or in his arraignment require dismissal of the charges. Assuming, without deciding, that the arrest warrant was defective, any defect did not affect the court's jurisdiction to try defendant. *People v Burrill*, 391 Mich 124, 133-134; 214 NW2d 823 (1974). Likewise, any improper delay in arraignment did not entitle defendant to dismissal of the charges. *People v Harrison*, 163 Mich App 409, 421; 413 NW2d 813 (1987). Because the errors would not have entitled defendant to any relief, other than suppression of the evidence that this Court previously ordered suppressed, and further factual development would not have altered that fact, the trial court did not err in denying defendant's motion for an evidentiary hearing regarding the validity of his arrest.

Next, the constitutional prohibitions against double jeopardy did not preclude defendant's retrial on the lesser offense of assault with intent to commit great bodily harm because his initial conviction was reversed for reasons other than the legal sufficiency of the evidence. *People v Setzler*, 210 Mich App 138, 139-140; 533 NW2d 18 (1995); see also *People v Head*, 211 Mich App 205, 212; 535 NW2d 563 (1995). Moreover, considering that assault with intent to commit great bodily harm is a lesser included offense of the original charge of assault with intent to commit murder, and that defendant requested an instruction on the lesser offense at his first trial, he had adequate notice of the lesser offense and was not prejudiced by the subsequent amendment of the information or by the absence of a preliminary examination on the amended charges. *People v McKinley*, 168 Mich App 496, 506-507; 425 NW2d 460 (1988); *People v Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980); *People v Barnwell*, 60 Mich App 291, 297-298; 230 NW2d 400 (1975); See also *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993); *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990).

Defendant also contends that there was insufficient evidence to support his convictions. In reviewing the sufficiency of the evidence, we must view the evidence in the 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 drawn therefrom may be sufficient to prove the elements of the crime. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

The elements of assault with intent to commit great bodily harm less than murder are "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Intent may be inferred from all the facts and circumstances surrounding the crime, *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995), including the defendant's acts, the means employed to commit the assault, and the extent of the victim's injuries, although actual physical injury is not required. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992); *People v Cunningham*, 21 Mich App 381, 384; 175 NW2d 781 (1970); CJI2d 17.7(4).

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession of a weapon may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989).

Viewed in a light most favorable to the prosecution, the evidence showed that defendant threatened his son over the telephone, then called back and said he was coming to "get him." A short time later, the son's house was decimated by gunfire while he was inside with his wife, child, and brother-in-law. Several shots came from the vicinity of defendant's house next door, and the brother-in-law testified that he saw muzzle flashes coming from defendant's upstairs window. During a lull in the shooting, the wife saw defendant standing in front of her house armed with three long guns. The damage to the house was consistent with the use of high-powered rifles and shotguns. Further, when defendant was arrested he had a strong odor of gunpowder about his person and the wife heard him laughing and saying, "I did it." In our view, this evidence was more than sufficient to establish each element of the offenses beyond a reasonable doubt. While defendant contends that the prosecutor's witnesses were

not worthy of belief, the credibility of the witnesses' testimony and the weight to be given their testimony were questions for the jury to resolve. *Avant, supra* at 506; *People v Yancy*, 33 Mich App 352, 353; 189 NW2d 827 (1971).

Defendant's contention that the police had an obligation to test his body or clothing for gunpowder residue is also without merit. It is well established that the police are not required to seek and find exculpatory evidence. *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995) (the defendant's right to due process was not violated when the police failed to test his hands for gunpowder residue so that he could be exculpated); *People v Stephens*, 58 Mich App 701, 705-706; 228 NW2d 527 (1975). Moreover, unlike the case upon which defendant relies, the testing was not required because it was not necessary to establish the relevancy of any item offered into evidence. *People v Jordan*, 23 Mich App 375, 388-389; 178 NW2d 659 (1970).

Finally, defendant argues that his concurrent sentences for the assault convictions, which exceeded the guidelines' recommended minimum range are disproportionate. We review a trial court's sentencing decision for an abuse of discretion. *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). An abuse of discretion will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *Id.*, citing *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 1990). Here, the instant offenses involved factors not considered or adequately weighed by the guidelines, and the sentencing range was disproportionate to the seriousness of the offense. *Castillo, supra* at 448; *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Further, any presumption of judicial vindictiveness that may have arisen from the harsher sentence imposed after the second trial was overcome where defendant was resentenced by a different judge and the guidelines were rescored. *People v Lyons (After Remand)*, 222 Mich App 319, 324; 564 NW2d 114 (1997); *People v Grady*, 204 Mich App 314, 315, 317; 514 NW2d 541 (1994). Accordingly, the trial court did not abuse its sentencing discretion.

Affirmed.

/s/ Gary R. McDonald

/s/ Hilda R. Gage

/s/ Michael J. Talbot