STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN BROWN,

Defendant-Appellant.

UNPUBLISHED
August 18, 2000

No. 219817
Berrien Circuit Court
LC No. 98-404333-FH

Before: Smolenski, P.J., and Zahra and Collins, 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. He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to eight to twenty years' imprisonment and ordered to pay $11,161.63 in restitution. Defendant appeals as of right. We affirm.

Defendant argues first that there was insufficient evidence to support his conviction. Specifically, he contends that there was insufficient evidence to support a finding that he possessed the requisite intent to do great bodily harm. We disagree. In reviewing the sufficiency of the evidence, this Court 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 proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Further, all conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Assault with intent to commit great bodily harm is a specific intent crime. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The elements of the crime include (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. *Id.* A defendant's specific intent to do great bodily harm may be inferred from circumstantial evidence. *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986). Such intent may "be inferred from the [defendant's] act itself, the means employed and the manner employed." *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982). The only requirement to be proven is that defendant had the intent to do great bodily harm. *People v Mitchell*,

149 Mich App 36, 38-39; 385 NW2d 717 (1986). "If a defendant has such intent, the fact that he was provoked or that he acted in the heat of passion is irrelevant to a conviction." *Id.*

Here, viewing the evidence in a light most favorable to the prosecution, there was clearly sufficient evidence that defendant assaulted the victim and that he had a specific intent to do great bodily harm. First, while defendant presented witnesses to support his theory that he was not in the alley at the time of the assault, the jury chose not to believe those witnesses. Rather, it obviously believed the prosecution's witnesses that defendant was in the back alley and participated in the assault. This Court should not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses. *Terry, supra*.

Second, the facts and circumstances surrounding the victim's injury provide sufficient evidence from which to infer that defendant intended great bodily harm. The evidence demonstrated that, after an initial confrontation in a restaurant, the victim and others stopped fighting and left the restaurant. Outside, another scuffle ensued and the victim struck the defendant. The victim then ran away and was pursued by several people. Later, defendant caught up with the victim in an alley where those who had chased him were beating him. Defendant became involved in the fight. Two prosecution witnesses testified that the victim was on the ground when defendant picked him up and slammed him to the ground head first. Both witnesses used the word "slam" to describe what defendant did to the victim. At the time defendant did this, the victim was no longer fighting with his attackers. The act of slamming the victim to the pavement head first after the victim stopped fighting is evidence from which an intent to cause great bodily harm can be inferred.

None of defendant's arguments compromise the aforementioned result. This is not, as defendant argues, a case where the prosecutor relied on the injury itself to prove intent. Rather the prosecutor relied on the means and manner of the injury-causing event to infer the necessary intent. In addition, defendant's argument that the evidence could have been interpreted in other ways more favorable to himself does not make the verdict invalid. This Court's review is limited to *viewing the evidence in a light most favorable to the prosecution. Hoffman, supra* at 103. This Court does not review the evidence to see if it could be interpreted in a manner favorable to defendant. Viewing the evidence in favor of the prosecution, a rational trier of fact could have determined that there was sufficient evidence to support defendant's conviction beyond a reasonable doubt.

Defendant also argues that there was evidence of a mutual fight and that evidence of a mutual fight negates specific intent.

> The theory of "mutual fight" may be asserted not for purposes of showing a justification or an excuse for what would otherwise be an assault, but rather to characterize the affray for purposes of negating a specific intent such as the intent to do great bodily harm. [*People v Sherman*, 14 Mich App 720, 722; 166 NW2d 22 (1968).]

A "mutual fight" requires that both participants be willing combatants, "each being eager for the fray." *White v Whittall*, 113 Mich 493; 71 NW 1118 (1897); *Brown v Swartz Creek VFW*, 214 Mich App 15, 23; 542 NW2d 588 (1995).

There was no evidence to support a theory of mutual fight in this case. It is uncontested that, after the victim knocked the defendant down outside of the restaurant, he ran away from the restaurant and from defendant. Others followed the victim and began beating him with objects in an alley. Defendant went to the alley and joined with those who were beating the victim. While the victim initially attempted to fight off his numerous attackers, he eventually stopped fighting. Defendant and others continued to kick him in the head and beat him. Defendant then picked the victim up and slammed him to the ground. The record does not support defendant's claim that the victim was a willing participant in the beating that occurred in the alley after he had run from the mob scene in front of the restaurant. Thus, defendant's argument that his specific intent was negated by a mutual fight theory fails in light of the record developed at trial.

Defendant also argues that the trial court erred when it failed to sua sponte give an instruction on mutual fight. A trial court is not required to instruct the jury on a defendant's theory unless the defendant makes such a request. *People v Maleski,* 220 Mich App 518, 521; 560 NW2d 71 (1996). Here, defendant failed to request an instruction on mutual fight and the record reveals that mutual fight was not defendant's theory. Moreover, a trial court's instructions do not require reversal if they "include all elements of the charged offenses" and do not "exclude material issues, defenses, and theories, *if there is evidence to support them.*" *People v Daniel,* 207 Mich App 47, 53; 523 NW2d 830 (1994) (emphasis added). A review of the instructions reveals that there was no error requiring reversal. The jury was fully and fairly instructed and, as discussed above, there was no evidence to support an instruction on mutual fight.

Defendant also argues that his trial counsel was ineffective for failing to pursue a defense based on mutual fight. This issue is not properly before this Court because it is not raised in the statement of questions presented. *People v Miller,* 238 Mich App 168, 172; 604 NW2d 781 (1999). Even if this issue was properly before us, we find that it has no merit. Defendant has failed to overcome the presumption that counsel's decision not to pursue a mutual fight theory was a matter of sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant argues next that several comments made by the prosecutor during closing argument amounted to prosecutorial misconduct. Because the issue is unpreserved, our review is precluded unless the prejudicial effect of the alleged misconduct could not have been cured by a cautionary instruction or if the failure to consider the issue would result in the miscarriage of justice. *People v Nimeth,* 236 Mich App 616, 626; 601 NW2d 393 (1999). We find that no miscarriage of justice will result from our failure to consider this issue. We note that defendant's argument that the prosecutor argued facts not in evidence is not supported by the record. The prosecutor fairly argued the facts in evidence and reasonable inferences therefrom. *People v Fisher,* 220 Mich App 133, 156; 559 NW2d 318 (1996).

Defendant also argues that his sentence is disproportionate and resentencing is required. We disagree. A sentence constitutes an abuse of discretion only if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Crawford,* 232 Mich App 608, 621; 591 NW2d 669 (1998). We find that defendant's sentence is proportionate to the seriousness of the offense and the history of the offender in this case. Defendant has a significant criminal history.

Although most of his crimes were nonassaultive, it appears that his level of criminal activity was steadily increasing. He was on probation for both carrying a concealed weapon, a loaded gun, and attempting to resist and obstruct an officer at the time of the present offense. In addition, the crime at issue was particularly brutal and left the victim with continuing deficits.

We reject defendant's attempt to statistically compare his sentence with other, anonymous offenders. The statistics presented to this Court do not reveal the history of the offenders or the circumstances of their crimes. Similarly, the codefendants, who pleaded guilty, had different criminal histories than defendant and the exact nature of their participation in the beating of the victim is unclear from the record. A trial court is not required to sentence a defendant in accordance with statistics or in accordance with sentences received by codefendants. Rather, it is required to fashion an individual sentence that is proportionate. The trial court did exactly that.

We also find that the trial court adequately articulated the reasons for its sentence. A review of the entire sentencing transcript reveals that the trial court was aware of the criteria to be considered when sentencing a defendant, that it took that criteria into consideration, and that it fashioned a sentence appropriate for defendant.

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins