STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 10, 2001
V DASHI HURSEY, Defendant-Appellant.	No. 222926 Wayne Circuit Court LC No. 98-003915

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

Defendant was charged with three counts of assault with intent to rob while armed, MCL 750.89, one count of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227(b). He was convicted of three counts of assault with intent to rob while armed and one count of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant to 15 to 25 years in prison for the assault with intent to rob convictions and 6 years, 8 months to 10 years in prison for the remaining assault conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court's failure to instruct the jury regarding the lesser offense of attempted armed robbery, MCL 750.529; MCL 750.92, demands reversal of his convictions of assault with intent to rob while armed. We disagree.

We review jury instructions as a whole to determine whether there is error requiring reversal. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The Legislature has mandated that trial courts "instruct the jury as to the law applicable to the case." MCL 768.29. Thus, a judge must instruct on lesser included offenses when so requested and if supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). A necessarily included offense is one which must be committed as part of the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. *People v Bearss*, 463 Mich 623, 627; __ NW2d __ (2001); *People v Reese*, 242 Mich App 626, 629-630; 619 NW2d 708 (2000). Because the evidence at trial will always support a necessarily included offense when it supports the greater offense, if either party requests an instruction regarding a necessarily included offense the court must instruct the jury on the lesser offense. *Id*.

This Court has previously determined that attempted armed robbery is a necessarily lesser included offense of assault with intent to rob while armed. *People v Bryan*, 92 Mich App 208, 225; 284 NW2d 765 (1979). In the present case, the trial court denied defendant's request for an attempted armed robbery instruction. Given that attempted armed robbery is a necessarily included offense of assault with intent to rob while armed, the trial court erred in denying defendant's request. However, failure to instruct on a lesser offense can be harmless error. *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992); *Reese, supra* at 635. The validity of a verdict is presumed, and the defendant bears the burden of showing that the instructional error resulted in a miscarriage of justice, in that, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000), quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000), citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is outcome determinative if it undermined the reliability of the verdict, considering the nature of the error in light of the weight and strength of the untainted evidence. *Id*.

In the present case, the evidence is such that the reliability of the verdict is not undermined by the trial court's failure to instruct the jury regarding attempted armed robbery. Substantial evidence supported a finding that defendant, himself, assaulted the three victims with an intent to rob while armed with a gun, or that defendant aided and abetted an acquaintance in the commission of the crimes. Trial testimony suggested that defendant approached the victims in a restaurant parking lot, pointed a gun directly at the victims, ordered "give me all you got," fired shots at one of the fleeing victim's cars, and ran from the scene. The victims took note of defendant's physical description and voice and contacted the police when defendant returned to their place of employment a few days later. Police officers recovered a mask and .25-caliber ammunition from defendant's home. Defendant gave a statement to the police, claiming that his roommate committed the assaults. However, defendant admitted to officers that he purchased ammunition to be used during the assaults and was near the scene during the assaults. Under these circumstances, the evidence overwhelmingly indicated that defendant committed three counts of assault with intent to rob while armed or, at least, aided and abetted in the crimes. Defendant has not shown that the trial court's failure to instruct the jury regarding attempted armed robbery resulted in a miscarriage of justice. Accordingly, we conclude that the court's instructional error was harmless. *Rodriguez, supra*.

II

Defendant next argues that there was insufficient evidence to convict him of aiding and abetting in the crimes. We disagree.

In reviewing the sufficiency of the evidence, we 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 Nowak*, 462 Mich 392, 399; 614 NW2d 78 (2000). Even assuming that the jury believed defendant's version of the incident – that defendant's roommate committed the assaults – there was sufficient evidence to convict defendant as an aider and abettor. In order to convict a defendant on an aiding and abetting theory, the prosecution must prove that: (1) the crime charged was committed

by the defendant or some other person, (2) the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or assistance. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993).

As stated prior, substantial evidence indicates that defendant, at least, aided and abetted in the commission of assaults with intent to rob while armed. Trial testimony indicates that defendant pointed a gun at the victims with the intent to rob them of their personal belongings. There was also evidence suggesting defendant and his roommate discussed the assaults and that defendant purchased ammunition so that the roommate could carry out the assaults. Moreover, there was sufficient evidence to support a finding that defendant, at least, aided and abetted in the commission of the assault with intent to do great bodily harm less than murder. Assault with intent to do great bodily harm less than murder requires that the prosecution prove (1) an assault with (2) the intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996). Trial testimony suggested that defendant fired shots at the fleeing victim's car. Furthermore, defendant told the police that he knew his roommate intended to commit the crimes, and there was sufficient evidence that defendant purchased ammunition and was in the vicinity when shots were fired at the fleeing victim's car. Under these circumstances, defendant is not entitled to relief.

III

Last, defendant argues that he is entitled to resentencing because the trial court mis-scored his sentencing information report. Defendant claims that offense variable one, regarding the use of a weapon, should have been scored zero points because it is evident that the jury convicted him as an aider and abettor. The court scored the variable in question twenty-five points. To state a cognizable claim of legal error regarding misapplication of the sentencing guidelines, a defendant must prove that "(1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997).

We first note that the trial court erroneously calculated defendant's total sentencing score as thirty points. The several offense variable scores noted on defendant's sentencing information report actually add up to forty points. However, defendant's minimum sentence of fifteen years (180 months) is within the guideline range regardless of whether the total score on the report is thirty or forty points. A sentence imposed within an applicable judicial sentencing guideline range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Killebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Defendant has not shown unusual circumstances to indicate that his sentence within the guideline range violates the principle of proportionality. See *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Moreover, there was substantial evidence at trial that defendant, himself, committed the assaults and fired shots at the fleeing victim. Therefore, the factual predicate supporting the scoring of variable one to indicate that defendant used a firearm during the assaults was not wholly unsupported or materially false. *Mitchell, supra*.

Accordingly, defendant's argument in regard to this issue lacks merit.

Affirmed.

/s/ Martin M. Doctoroff
/s/ William B. Murphy
/s/ Brian K. Zahra