STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2002
v	No. 227070 Genesee Circuit Court
TODD MICHAEL FORTIN, Defendant-Appellant.	LC No. 99-004010-FC

Before: Hood, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83, intentionally killing a police dog, MCL 750.50c(2), possession of a firearm by a felon, MCL 750.224f, carrying a concealed weapon, MCL 750.227, possession of a firearm during the commission of a felony, MCL 750.227b, and resisting and obstructing a police officer, MCL 750.479. The jury found defendant guilty on all of the charges, except for the assault and killing a police dog charges. Defendant was convicted on the lesser charge of assault with intent to do great bodily harm less than murder, MCL 750.84, and the jury could not reach a verdict on the charge regarding the killing of a police dog. Following the jury verdict, defendant pleaded nolo contendere to attempted killing of a police dog. Defendant appeals as of right. We affirm.

Defendant fled from a trailer after police officers arrived to arrest him on a felony warrant. After fleeing from the police officers into a wooded area, defendant shot and killed a police tracking dog while defendant was hiding in some tall brush. Defendant then fled from the brush and became involved in a shootout with a state trooper, who had been accompanying the K-9 handler in the search. Defendant was shot in the leg by the officer, after defendant fired twice at the officer while fleeing. The officer was not hit, and defendant was subsequently arrested near a party store in the area after trying to further elude police.

Defendant's first contention on appeal is that the trial court erred in denying his motion for directed verdict on the charges of assault with intent to commit murder, killing a police dog, and resisting and obstructing a police officer. We initially note that, although defendant argues that the trial court erred in denying the motion for directed verdict, defendant relies, in part, on his own testimony in supporting reversal. Although defendant moved for a directed verdict at the close of the prosecution's proofs, the trial court improperly reserved argument and its decision on defendant's motion until the close of all proofs. MCR 6.419(A). MCR 6.419(A) indicates that a motion for directed verdict may be made after a defendant presents proofs. We

believe that it is appropriate in this case to treat defendant's motion as one being made after the close of all proofs, thereby allowing us to consider all the evidence presented, as similar to a sufficiency of the evidence claim.

When reviewing a trial court's decision on a motion for directed verdict, this Court reviews the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court views the evidence presented up to the time the motion for directed verdict was made in a light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proved beyond a reasonable doubt." *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

As to defendant's claim that the charge of assault with intent to commit murder was improperly submitted to the jury, we find any error harmless. Defendant was convicted on the lesser charge of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant does not argue that there was insufficient evidence to support that charge. The submission to the jury of the charge concerning assault with intent to murder, even if erroneous, did not affect the ultimate verdict. See *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998). Regardless, the evidence presented, when viewed in a light most favorable to the prosecution, could lead a rational trier of fact to find beyond a reasonable doubt that defendant assaulted the state trooper with an actual intent to kill.

Defendant next argues that there was no evidence that defendant intended to kill a police dog; therefore the trial court should not have sent the charge to the jury. In light of defendant's unconditional nolo contendere plea to attempted killing of a police dog, which is not challenged on appeal, this issue is moot. See *People v Greenberg*, 176 Mich App 296, 302-303; 439 NW2d 336 (1989). Regardless, the evidence presented, when viewed in a light most favorable to the prosecution, could lead a rational trier of fact to find beyond a reasonable doubt that defendant intentionally killed a police dog.

Defendant next argues that he did not have the requisite state of mind to be guilty of resisting and obstructing a police officer.

MCL 750.479 states:

> Any person who shall knowingly and willfully obstruct, resist or oppose any . . . officer or person . . . authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor . . . .

"Willfully" means that defendant must have done the proscribed act intending to do it. *People v Gleisner*, 115 Mich App 196, 198; 320 NW2d 340 (1982). "Knowingly" means defendant must have done the act to an officer, knowing him to be an officer. *Id.* at 199. Knowledge can be inferred from circumstantial evidence. *People v Royal*, 62 Mich App 756, 761; 233 NW2d 860 (1975).

The state trooper testified that during his pursuit of defendant in the woods, he came to a point where he waited for defendant to emerge from the tall grass and trees into a clearing. When defendant reached the clearing, and the trooper had a clear view, he ordered defendant to

stop and drop the gun he was holding. Instead, defendant looked at the trooper and fired twice in his direction. At this time, the trooper was approximately fifty feet from defendant and dressed in full police uniform. The trooper also testified that he believed, from his police training, that he identified himself as a police officer. Further, after defendant reached the nearby party store, he was surrounded by approximately a dozen police officers with guns drawn and did not drop his weapon for several minutes. This all occurred in full daylight.

Viewing the evidence in a light most favorable to the prosecution, a rational factfinder could infer from the circumstances beyond a reasonable doubt that defendant willfully and knowingly resisted and obstructed a police officer. Therefore, the trial court properly denied defendant's motion for directed verdict on the charge.

Defendant's next contention on appeal is that the trial court abused its discretion in sentencing him because the sentence was not individualized and was not tailored to fit the offense and the offender.[1] The standard of review for a sentence imposed by the trial court under the habitual offender statute is whether the trial court abused its discretion. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Defendant was sentenced as an habitual offender. The judicial sentencing guidelines do not apply to habitual offenders and may not be considered on appeal in determining an appropriate sentence. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Defendant had one prior felony conviction. Therefore, the trial court was authorized to sentence defendant as an habitual offender and refuse to consider the judicial sentencing guidelines.

When an habitual offender's underlying felony and criminal history demonstrates that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). MCL 769.10 permits an habitual offender's maximum sentence to be 1½ times that of an original conviction.

MCL 750.84 provides that the crime of assault with intent to do great bodily harm less than murder is punishable by imprisonment in the state prison for not more than ten years. Therefore, defendant's maximum sentence was properly enhanced to fifteen years and under the two-thirds rule from *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972), defendant's ten-year minimum sentence is within the statutory limits. The two-thirds rule of

[1] Defendant was sentenced as a second habitual offender, MCL 769.10, to 10 to 15 years' imprisonment for assault with intent to do great bodily harm less than murder, 2½ to 3¾ years' imprisonment for attempted killing of a police dog, 5 to 7½ years' imprisonment for possession of a firearm by a felon, 5 to 7½ years' imprisonment for carrying a concealed weapon, 2 years' imprisonment for felony firearm, and 2 to 3 years' imprisonment for resisting and obstructing a police officer. The crime occurred in October 1998; therefore, the new statutory guidelines do not apply. MCL 769.34(2).

Tanner applies to sentences imposed under section 10 of the habitual offender act, MCL 769.10. *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994).

According to the presentence investigation report, defendant had a juvenile conviction and three misdemeanor adult convictions, including one weapons offense besides his prior felony conviction. Defendant's criminal history and the underlying felonies show that he is unable to conform his conduct to the law; therefore, his sentence was proportionate. The trial court based defendant's sentence on the fact that he had one prior felony conviction, and this case involved defendant killing a police dog and shooting at a police officer. Therefore, contrary to defendant's argument, the trial court did consider defendant's background and the circumstances, and it did not consider any improper factors. As a result, the trial court did not abuse its discretion in sentencing defendant.

Defendant's final contention on appeal is that the trial court erred in denying his request to instruct the jury on the lesser offenses of intentionally pointing a firearm without malice, MCL 750.233, and intentional discharge of a firearm at another without malice, MCL 750.234. "[T]he decision to grant or deny a requested lesser included misdemeanor instruction will be reversed on appeal only upon a finding of abuse of discretion." *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982). "Failure to give such an instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made." *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

The standard in deciding whether to give requested misdemeanor jury instructions is as follows:

> "Whenever an adequate request for an appropriate misdemeanor instruction is supported by a rational view of the evidence adduced at trial, the trial judge shall give the requested instruction unless to do so would result in a violation of due process, undue confusion, or some other injustice." [*People v Steele*, 429 Mich 13, 18; 412 NW2d 206 (1987), quoting *Stephens*, *supra* at 255.]

Defendant argues that a rational view of the evidence supported the requested misdemeanor jury instructions, and the trial court erred in considering only defendant's theory of the case instead of analyzing whether the misdemeanor jury instructions were supported by a rational view of the evidence. Initially, we note that read in context, although the trial court focused on defendant's theories of the case, the trial court was essentially stating that the requested misdemeanor jury instructions were not supported by a rational view of the evidence. This is evident by the fact that the trial court quoted *Steele* immediately before commenting on defendant's theories.

Both of the offenses for which defendant requested instructions require a finding that defendant intentionally pointed a gun without intending to threaten or harm anyone. See CJI2d 11.23 and CJI2d 11.24. The state trooper testified that defendant, while running away, raised his gun and fired at him twice. In addition, the trooper testified that defendant continued to point the gun at him after firing twice. Defendant testified "the gun was in his pocket the entire time." If the jury believed the state trooper, it could only conclude that defendant pointed the gun with the intent to harm the trooper. If the jury believed defendant, it could only conclude that defendant did not point the gun. There was no evidence from which the jury could conclude that defendant

pointed the gun without the intent to harm or threaten someone. Therefore, the misdemeanor jury instructions for intentionally pointing a firearm without malice and discharge of a firearm while intentionally aimed without malice were not supported by a rational view of the evidence. As a result, the trial court properly declined to give the instructions and did not abuse its discretion.

Further, even if the trial court had erred in refusing to give the misdemeanor jury instructions, the error would have been harmless. Failure to instruct on requested misdemeanor jury instructions is harmless if the jury rejects the least serious offense charged and convicts of a greater offense. *People v Beach,* 429 Mich 450, 494; 418 NW2d 861 (1988); *People v Taylor,* 195 Mich App 57, 63; 489 NW2d 99 (1992). In the instant case, the jury rejected reckless use of a firearm and convicted defendant of assault with intent to do great bodily harm less than murder. Therefore, any error in failing to instruct on the misdemeanor offenses of intentionally pointing a firearm without malice and discharge of a firearm while intentionally aimed without malice was harmless.

Affirmed.

/s/ Harold Hood
/s/ William B. Murphy
/s/ Jane E. Markey