

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD JOHNSON,

Defendant-Appellant.

UNPUBLISHED

October 28, 2008

No. 278955

Wayne Circuit Court

LC No. 07-005580-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUIS JACKSON,

Defendant-Appellant.

No. 279522

Wayne Circuit Court

LC No. 07-005580-01

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant Johnson was convicted of assault with intent to murder, MCL 750.83, armed robbery, MCL 750.529, and carjacking, MCL 750.529a. Defendant Johnson was sentenced to 15 to 20 years' imprisonment for assault with intent to murder, 15 to 20 years' imprisonment for armed robbery, and 15 to 20 years' imprisonment for carjacking. Defendant Johnson appeals as of right. We vacate his conviction for assault with intent to murder and remand with instruction to substitute a conviction for assault with intent to do great bodily harm less than murder, MCL 750.84¹, and to resentence on all of his convictions. We affirm his other convictions.

¹ We note that we find insufficient evidence to support defendant Jackson's conviction of assault with intent to murder. Because co-defendant Johnson's conviction for assault with intent to murder was based upon an aiding and abetting theory, his conviction should also have been for
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In the same jury trial, defendant Jackson was convicted of assault with intent to murder, MCL 750.83, armed robbery, MCL 750.529, carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.2275. Defendant Jackson was sentenced to 15 to 20 years' imprisonment for the assault with intent to murder conviction, 15 to 20 years' imprisonment for the armed robbery conviction, 15 to 20 years' imprisonment for the carjacking conviction, 40 to 60 months' imprisonment for the felon in possession of a firearm conviction and two years' imprisonment for the felony-firearm conviction. Defendant Jackson appeals as of right. We vacate his conviction for assault with intent to murder, MCL 750.83, and remand with instruction to substitute a conviction for assault with intent to do great bodily harm less than murder, MCL 750.84, and to resentence on all of his convictions. We affirm his other convictions.

I. Facts

On July 24, 2006, Larry Chester, Jr. parked his Suburban near the door of a gas station. As he came out of the station, defendant Jackson and defendant Johnson approached him. Defendant Jackson pulled a gun from his waist and pointed it at Chester. He said to Chester, "you know what time it is," and asked him for his keys. Chester testified that he was scared, in shock and that he froze. Defendant Johnson then began to go through Chester's pockets and took Chester's cell phone. Defendant Jackson continued to point the gun at Chester as he stood 10 to 15 feet away from him. Chester testified that "the gun went off" and he was shot in the leg below the knee. He ran and ducked behind one of the pumps. While there, he observed one of the defendants get into his Suburban. The man was not able to move the car as Chester had never surrendered his keys. Chester ran to the side of the gas station to take cover. He stayed there until defendant Jackson and defendant Johnson departed. After they left, Chester got into his vehicle and drove himself to the hospital.

II. Defendant Johnson, Docket No. 278955

A. Motion for Recusal

Defendant Johnson first asserts that Judge Townsend erred in denying his motion for recusal. We disagree. A trial judge's decision on whether to recuse himself is reviewed for an abuse of discretion. *People v Upshaw*, 172 Mich App 386, 389; 431 NW2d 520 (1988).

Pursuant to MCR 2.003(B)(1), a trial court judge is disqualified from hearing a case where he is not impartial as a result of personal bias or prejudice against one of the parties or attorneys. In order to successfully establish that a trial judge was required to recuse himself

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the lesser crime of assault with intent to do great bodily harm less than murder. Although defendant Johnson has not sought review of this matter, we chose to raise and decide this issue in the interest of consistency and to avoid further appellate litigation. Even if not raised on appeal, an issue may be decided by this Court, *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004), and this Court may choose to address issues raised by codefendants in consolidated cases to avoid inconsistent results. *People v Hayden*, 132 Mich App 273, 288 n 8; 348 NW2d 672 (1984).

pursuant to MCR 2.003(B)(1), a defendant must demonstrate actual prejudice or bias on the part of the judge. *Upshaw, supra* at 388. In the present case, defendant asserts that Judge Townsend was biased against him because Judge Townsend had recently been the victim of an armed robbery and a carjacking. At the hearing on defendant Johnson's motion for recusal, Judge Townsend explicitly stated that he was not biased and that his view of criminals had not changed as a result of the incident. Judge Townsend explained that he had been the victim of many crimes over the years and that merely being a victim has not resulted in prejudice.

On appeal, defendant Johnson merely concludes that Judge Townsend was biased without pointing to any instance in which the alleged bias exhibited itself. Defendant Johnson makes no allegation that the outcome of his jury trial was affected by Judge Townsend's presence on the bench nor does he cite any authority indicating that Judge Townsend had a responsibility to recuse himself. Because there is no evidence that Judge Townsend was biased where he explicitly stated that he was not, defendant Johnson is not entitled to a new trial.

B. Offense Variable 4

Defendant Johnson next asserts the trial court erred in scoring offense variable 4 at ten points. We disagree. This Court reviews the scoring of sentencing guidelines for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). When not properly preserved, this Court reviews claims of alleged scoring errors for plain error affecting the substantial rights of the defendant. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

As provided by MCL 777.34:

(1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Serious psychological injury requiring professional treatment occurred to a victim 10 points

(b) No serious psychological injury requiring professional treatment occurred to a victim 0 points

(2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

Defendant Johnson argues that there was no indication at trial that Larry Chester suffered a psychological injury. However, as this Court has previously stated, a scoring decision will be upheld if it is not clearly erroneous and it is not clearly erroneous if the record includes any evidence in support of the score. *Hicks, supra* at 522. The record includes evidence in support of the trial court's scoring of OV 4. While Chester did not explicitly state that he was suffering from psychological injury, his statement that he anticipated the possibility of future psychological treatment implies that he suffers from a current psychological malady that requires professional help. As a result, the trial court properly scored OV 4 and defendant is not entitled to resentencing.

C. Sentencing

Defendant Johnson next asserts that his sentences violate the two-thirds rule. We disagree. When not properly preserved, this Court reviews claims of alleged sentencing errors for plain error affecting the substantial rights of the defendant. *Carines, supra* at 763-764.

MCL 769.34(2)(b) provides, “[t]he court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.” In the present case, the sentences challenged by defendant were for his armed robbery, carjacking and assault with intent to murder convictions. Each of those statutes carries a statutory maximum of life in prison. MCL 750.529; MCL 750.529a; MCL 750.83. In *People v Harper*, 479 Mich 599, 617 n 31; 739 NW2d 523 (2007) our Supreme Court explicitly stated that MCL 769.34 “does not apply when a defendant is convicted of an offense punishable by a prison sentence of ‘life or any term of years’ because the minimum will never exceed 2/3 of the statutory maximum sentence of life authorized by the jury verdict.” As a result, defendant Johnson is not entitled to resentencing.

D. Aiding and Abetting Instruction

Defendant Johnson next contends the trial court issued an improper aiding and abetting instruction to the jury. At trial, the court instructed the jurors and then asked the attorneys whether they had any objections. Defendant Johnson’s attorney affirmatively approved the instructions. The issue was waived. Where a defendant affirmatively approves of an instruction he waives any objection to the instruction and extinguishes any resulting error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

III. Defendant Jackson, Docket No. 279522

A. Sufficiency of the Evidence

Defendant Jackson asserts that there was insufficient evidence presented at trial to convict him of assault with intent to commit murder. We agree. In reviewing a challenge based on the sufficiency of the evidence, this Court conducts a de novo review. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). A conviction will be affirmed when, viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

In order to secure a conviction for assault with intent to murder, the prosecution must prove beyond a reasonable doubt that there was “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Barclay*, 208 Mich App 670, 674, 528 NW2d 842 (1995). As stated above, in reviewing a challenge to the sufficiency of the evidence, the evidence is viewed in the light most favorable to the prosecution. At issue in the present case is whether the prosecution proved beyond a reasonable doubt that defendant possessed the requisite intent to kill. “The intent to kill may be proved by inference from any facts in evidence. Because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The relevant evidence establishes that defendant Jackson approached Chester with a gun. While standing 10 to 15 feet from Chester, defendant Jackson stated, “you know what time it is,” and demanded Chester’s keys. According to Chester, when he refused to turn over his keys, “the gun went off” and he was shot in the shin. The bullet severed a major artery, which required surgery to repair. We conclude that the evidence does not establish that defendant Jackson possessed an intent to kill. The prosecution urges that because defendant utilized a firearm to sever a major artery of Chester, the requisite intent was established. However, to accept the prosecution’s argument, one would have to conclude that defendant Jackson shot Chester in the shin with the hope that a fatal injury would result. Such a theory is contrary to logic. Had defendant Jackson intended to kill Chester when he was standing stationary 10 to 15 feet away, one must assume that he would have aimed for Chester’s head or torso. Furthermore, if defendant Jackson was aiming for Chester’s head or torso, it is not likely he would have struck his shin unless some other factor drastically altered his shot. There is no indication from the record that Chester was moving when he was shot or that defendant Jackson’s shot struck an unintended portion of Chester’s body. As a result, there was insufficient evidence that defendant Jackson possessed intent to kill. However, as defendant Jackson concedes, there was sufficient evidence presented to establish assault with intent to do great bodily harm less than murder.

This Court vacates both defendant Johnson’s and defendant Jackson’s assault with intent to murder convictions and remands with instruction to enter convictions for assault with intent to do great bodily harm less than murder (MCL 750.84) and to resentence on all convictions. *People v Buck*, 197 Mich App 404, 431; 496 NW2d 321 (1992) (rev’d in part on alternative grounds 444 Mich 853 (1993)).

Affirmed in part and vacated in part and remanded for resentencing of both defendants. We do not retain jurisdiction.

/s/ Kurt T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens