

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD ALLEN HARDIN,

Defendant-Appellant.

UNPUBLISHED

September 29, 2009

No. 285639

Macomb Circuit Court

LC No. 2007-004542-FC

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant Todd Hardin appeals as of right his jury conviction of assault with intent to commit murder.¹ The trial court sentenced him as a habitual offender, second offense,² to 20 to 40 years' imprisonment. We affirm.

I. Basic Facts And Procedural History

On September 28, 2007, 18-year-old complainant, Anthony Thompson, and some of his friends attended a high school graduation party at a motel. Thompson testified that at about 2:00 a.m., a ruckus ensued in the parking lot between the group of people he was with and another group of people. As Thompson was attempting to leave, he heard someone say, "Who wants to get burned?" When Thompson turned around, Hardin lunged at him and stabbed him in the chest with an eight-inch long knife. Thompson testified that he did not communicate with Hardin at the party or in the parking lot, and had not done anything to Hardin. Immediately after stabbing Thompson, Hardin removed the knife and fled. Thompson struggled to breathe, bled profusely, and was transported to the hospital. Thompson's treating physician testified that the approximate three-centimeter stab wound was within one inch of Thompson's heart, was "life-threatening," and even though the wound was non-fatal, it could have been fatal if it had been inflicted one inch up, down, or to the right. The defense theory at trial was that Hardin did not intend to kill anyone, but was highly intoxicated and caught in the middle of a drunken mêlée.

¹ MCL 750.83.

² MCL 769.10.

II. Jury Instructions

Hardin argues that he was denied a fair trial because the trial court did not read the standard jury instruction for assault with intent to commit murder,³ in its entirety. However, defense counsel's affirmative approval of the trial court's jury instruction waived any claim of error.⁴ When the trial court asked defense counsel if he had any comments regarding the instructions, he only noted for the record that he had requested an instruction on assault with infliction of serious injury.

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Hardin also argues that defense counsel was ineffective for failing to object to the incomplete instruction. Because Hardin failed to raise this issue in the trial court in connection with a motion for a new trial or request for an evidentiary hearing, this Court's review is limited to mistakes apparent on the record.⁵

B. Legal Standards

Effective assistance of counsel is presumed, and Hardin bears a heavy burden of proving otherwise.⁶ To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error.⁷

C. Applying The Standards

Here, the trial court instructed the jury on assault with intent to commit murder in accordance with CJI2d 17.3, but did not read the bracketed portion of CJI2d 17.3(4). The instruction provides as follows:

(1) The defendant is charged with the crime of assault with intent to murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant tried to physically injure another person.

³ CJI2d 17.3.

⁴ *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

⁵ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

⁶ *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

⁷ *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

(3) Second, that when the defendant committed the assault, [he / she] had the ability to cause an injury, or at least believed that [he / she] had the ability.

(4) Third, that the defendant intended to kill the person [he / she] assaulted[, and the circumstances did not legally excuse or reduce the crime].

The brackets denote that the language is not always applicable, and the use notes and commentary accompanying the instruction indicate that the language should be read when appropriate. At trial, Hardin did not assert any circumstances that would legally excuse the crime nor did he request any affirmative defenses.⁸ Rather, the defense argued only that Hardin did not have an intent to kill when he committed the assault.⁹ Based on the defense presented, the trial court instructed the jury on the lesser included offenses of assault with intent to do great bodily harm less than murder,¹⁰ and assault and battery.¹¹

Reviewing the instructions in their entirety, we conclude that they fully apprised the jury of the applicable circumstances that would have legally excused or reduced the crime.¹² There was no dispute that Hardin stabbed Thompson, and the jury was fully aware of the defense theory that the assault occurred under circumstances that showed the commission of a lesser crime because Hardin did not act with an actual intent to murder. Because the instructions fairly presented the issues to be tried and adequately protected Hardin's rights, Hardin cannot

⁸ There was evidence that Hardin consumed alcohol on the day in question. To the extent that Hardin sought to imply that he could not form the specific intent to kill due to intoxication, MCL 768.37 abolished voluntary intoxication as a defense in this state (subject to a very limited exception not applicable in this case).

⁹ For example, defense counsel made the following statements during closing argument:

We are here in trial because we don't believe that beyond a reasonable doubt he intended to murder someone [A]nd it is our position that [the prosecutor] has not met this burden of proof for murder, intent to murder

* * *

I'm not standing here trying to convince you that my client is absolutely innocent, I'm not. My client knows and feels responsibility, he feels the regret, feels the failure to take good note of what he is doing at that moment of spontaneity. But he did not at any time with intent to murder—he may have done something less than that, but he did not do that.

¹⁰ MCL 750.84.

¹¹ MCL 750.81.

¹² See *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997) (stating that no error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction).

demonstrate a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different.¹³ Hardin is not entitled to a new trial.

IV. Sufficiency Of The Evidence

A. Standard Of Review

Hardin argues that the evidence was insufficient to sustain his conviction because there was no evidence of an intent to kill. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a 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.¹⁴ This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses.¹⁵ Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict."¹⁶

B. Legal Standards

To sustain a conviction for assault with intent to commit murder, the prosecution must establish beyond a reasonable doubt that the defendant committed "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder."¹⁷ An intent to kill may be inferred from facts in evidence, including the use of a dangerous weapon, the injuries inflicted, and the defendant's conduct.¹⁸ A pocket or folding knife may be a dangerous weapon if used in furtherance of accomplishing an assault and if capable of inflicting serious injury.¹⁹ Because an actor's state of mind is difficult to prove, only minimal circumstantial evidence is required.²⁰

C. Applying The Standards

Evidence was presented that immediately before the stabbing, Hardin exclaimed, "[w]ho wants to get burned." When Thompson turned around, Hardin, without warning or provocation, "fully out lunged" at Thompson from two feet away and stabbed him in the chest with a knife

¹³ *Frazier, supra*.

¹⁴ *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

¹⁵ *Id.* at 514.

¹⁶ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

¹⁷ *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); see also MCL 750.83.

¹⁸ See *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995); *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974).

¹⁹ See *People v Brown*, 406 Mich 215, 220-221; 277 NW2d 155 (1979).

²⁰ See *McRunels, supra*; *Ray, supra*.

“about eight inches long . . . a folding style knife, looked like a butterfly knife.” Hardin then pulled out the knife and ran “into the dark.” There was medical evidence that the three-centimeter stab wound was inflicted within an inch of Thompson’s heart, and was considered a “life-threatening” injury. Hardin’s declaration immediately before the stabbing, his use of a dangerous weapon, his infliction of a life-threatening injury, and his act of removing the knife and fleeing the scene, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to infer that Hardin acted with an intent to kill.

V. Scoring

Hardin argues that he must be resentenced because the trial court’s factual findings supporting its scoring of the sentencing guidelines were not determined by a jury, contrary to *Blakely v Washington*.²¹ In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant’s maximum sentence on the basis of facts that were not reflected in the jury’s verdict or admitted by the defendant. The Michigan Supreme Court has determined that *Blakely* does not apply to Michigan’s indeterminate sentencing scheme, in which a defendant’s maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence.²² Although Hardin argues that *Drohan* was wrongly decided, this Court is bound to follow decisions of the Supreme Court.²³ Consequently, Hardin’s argument is without merit.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

²¹ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

²² *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006).

²³ *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002).