

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL DUCKETT,

Defendant-Appellant.

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UNPUBLISHED

March 23, 2010

No. 283792

Wayne Circuit Court

LC No. 07-011473-FH

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a bench trial of one count of breaking and entering a vehicle causing damage, MCL 750.356a(3), and one count of aggravated assault, MCL 750.81a. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent sentences of 46 months to 20 years for the breaking and entering conviction and 6 months to 1 year for the aggravated assault conviction. Because we conclude that there were no errors warranting relief, we affirm.

**I. Basic Facts and Procedural History**

Ronnie Jackson testified that he worked for Pacific Steel. On the day in question, Jackson was working the morning shift when he observed defendant in a trailer that was parked in the yard behind the business. Jackson said he saw defendant through the open doors of the trailer and he was cutting steel from the trailer. Jackson then went to get the owner of the business, Samomr Stojanovski (Sam).

Sam testified that he came out with Jackson and saw defendant in the trailer and observed him cutting the roof off the trailer with a pair of snips. Sam stated that the trailer had an aluminum roof. Sam stated that they had had problems recently with people breaking into the trailer and also with people stealing scrap from the yard. He also noted that the aluminum from the roof was folded and set by the side of the trailer.

Sam said he confronted defendant and defendant claimed that he had been told to cut the roof. When Sam ordered defendant to get out of the trailer, defendant threw the cutters and came out carrying a hammer. Sam stated that defendant then raised the hammer as if to strike him. Sam then grabbed defendant's arm to try and prevent defendant from striking him and they struggled briefly. Sam testified that the way he grabbed the hammer was "awkward" and that he

twisted his hand, got his finger caught, and later had some swelling. At some point Sam's father came out with his pistol and fired a single shot. Defendant then dropped the hammer. While Sam tried to call the police, defendant ran to the gate and tried to get away by crawling under it. After this, Sam and some employees grabbed defendant and locked him in a bathroom until the police arrived.

Defendant testified on his own behalf and stated that he lived near Pacific Steel and that on the day in question he was walking along an adjacent road when Sam and his father came out of the business and confronted him. Defendant stated that they accused him of having stolen property from their business, which he denied. They then grabbed him, beat him, dragged him onto the business property, and locked him in a bathroom. According to defendant's version of events, he was not on Pacific Steel's property, was not cutting aluminum from a trailer, and never possessed a hammer or tried to strike anyone. Indeed, he testified that it was one of his assailants who had a hammer.

After hearing the evidence, the trial court rejected defendant's version of events and found that defendant was on the business property and did cut the roof from the trailer. For that reason, the trial court concluded that the "People have met their burden as to the [breaking and entering] of the vehicle." However, the trial court indicated that he did not think that the prosecution met the burden of proof for the original charge of assault with the intent to do great bodily harm. The trial court explained:

I do find, however, that the assault is a bit overcharged. I do find that the People met their burden as to felonious assault, that the defendant raised the hammer, that he threatened to, with his body language he threatened to use that hammer on Sam and that he also fought with him and tried to strike him. So, therefore, I find him guilty for count one of the lesser felonious assault.

At this point, defendant's trial counsel reminded the trial court that felonious assault was not a lesser-included offense of assault with the intent to do great bodily harm. The trial court then apologized and defendant's trial counsel asserted that "the only lesser included would be aggravated." The Court agreed: "Then aggravated. Because he made the injury to the arm."

This appeal followed.

## II. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to support his conviction for aggravated assault.<sup>1</sup> This Court reviews a challenge to "the sufficiency of the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could have found the essential elements of the crime were proved beyond a reasonable doubt." *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000).

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<sup>1</sup> Defendant does not challenge whether it was proper for the trial court to even consider aggravated assault as a lesser-included offense of assault with the intent to do great bodily harm.

Aggravated assault is an assault without a weapon that inflicts serious or aggravated injury, which is performed without the intent to commit murder or to inflict great bodily harm less than murder. MCL 750.81a(1); see also *People v Brown*, 97 Mich App 606, 610-611; 296 NW2d 121 (1980). A serious or aggravated injury is defined as “substantial bodily [physical] injury or injury that necessitated immediate medical treatment or caused disfigurement, impairment of health or impairment of any bodily part.” *Id.* at 611, quoting what is now CJI2d 17.6(4).

Defendant contends that there was insufficient evidence to support his conviction of aggravated assault because there was evidence that he had a weapon—the hammer—and there was no evidence that the victim suffered a serious injury. We note that there was conflicting testimony about whether defendant had a hammer and whether he tried to strike Sam with it. Given the disputed testimony, we conclude that the trial court could reasonably find that defendant assaulted Sam causing the injury at issue without the hammer even while also finding that defendant tried to strike Sam with the hammer. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Therefore, there was sufficient evidence with regard to whether defendant was unarmed at the time of the assault.

However, we agree that there was insufficient evidence that Sam suffered a serious or aggravated injury within the meaning of MCL 750.81a. It is a violation of due process to convict a defendant without sufficient evidence to prove each element of the crime beyond a reasonable doubt.<sup>2</sup> *Jackson v Virginia*, 443 US 307, 315-316; 99 S Ct 2781; 61 L Ed 2d 560 (1979). However, courts have long held that a defendant may—through the actions of his trial counsel—affirmatively waive appellate review of some claims of error. See *People v Carter*, 462 Mich 206, 215-218; 612 NW2d 144 (2000) (noting that waiver is available for a broad array of constitutional and statutory provisions and that, with the exception of a few fundamental rights, a waiver may be effected by action of counsel). Under the unique facts of this case, we conclude that defendant’s trial counsel waived any claim that there was insufficient evidence to prove a serious injury.

During his closing argument, defendant’s trial counsel argued that there was no evidence that defendant assaulted Sam with the intent to do great bodily harm:

Even the witness says all he did was raise the hammer up, but he didn’t know whether he was going to hit him. Okay. It takes more than that to have an assault with intent to do great bodily harm. There has to be a specific intent to cause that. Just holding the hammer up in the air is not enough.

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<sup>2</sup> The prosecution bears the burden of proving every element of the crime beyond a reasonable doubt and, for that reason, every element is at issue regardless of whether the defendant specifically disputes or offers to stipulate to any of the elements. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). However, a defendant’s admission or stipulation can support an element of a charge. See *Old Chief v United States*, 519 US 172, 186; 117 S Ct 644; 136 L Ed 2d 574 (1997) (noting that a defendant’s offer to admit to an element is good evidence); see also MRE 801(d)(2).

Defendant's trial counsel emphasized the absence of evidence supporting the intent to do great bodily harm by arguing that, at best, the evidence supported aggravated assault: "Now, I guess since there was an injury, I guess the Court could find him guilty of aggravated assault. But that's the best there is in this matter, your Honor." With this argument, defendant's trial counsel essentially conceded that there was sufficient evidence that the injury described during the trial could support a conviction of aggravated assault. Further, after the trial court found that defendant was guilty of felonious assault, defendant's trial counsel advised the trial court that felonious assault was not a lesser included offense and asserted that "the only lesser included would be aggravated."

Defendant's trial counsel made a conscious decision to argue that the facts of this case amounted to aggravated assault—a misdemeanor—rather than the far more serious crime of assault with the intent to do great bodily harm. Moreover, he specifically referred to the injury in this case as sufficient to support such a conviction. These statements clearly influenced the trial court and led it into the error about which defendant now complains. A defendant waives any claim of error to which his trial counsel contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003); *People v Simon*, 174 Mich App 649, 657; 436 NW2d 695 (1989) ("We decline to allow defendant an appellate parachute fashioned from the fiber of his own agreement."). Similarly, by affirmatively arguing that the injury at issue could support a conviction for aggravated assault, defendant's trial counsel waived any claim regarding the sufficiency of the evidence in support of that element. See *Carter*, 462 Mich at 219.

### III. Sentencing Issues

Defendant first argues that the trial court erred when it sentenced him to serve six months to one year for his aggravated assault conviction. Specifically, defendant contends that the trial court did not have the discretion to give him an indeterminate sentence for his aggravated assault conviction. Generally, whether a sentence violates Michigan's indeterminate sentencing act is a question of law that this Court reviews de novo. See *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). However, because defendant failed to preserve this argument, we shall review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in the conviction of an innocent defendant or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

Although it appears that the trial court did err in imposing an indeterminate sentence for the aggravated assault conviction because an indeterminate sentence may not be imposed where the maximum penalty for an offense is one year or less, *People v Lyles*, 76 Mich App 688, 690; 257 NW2d 220 (1977), defendant fully served this sentence as of June 2008. Therefore, there is no remedy available to defendant for the trial court's error, and the issue is moot. *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004).

Defendant also challenges the sentence for his breaking and entering conviction, arguing that the trial court erred in enhancing his sentence under MCL 769.12. We review this unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Defendant first asserts that he is entitled to resentencing because a notice of the habitual offender sentence enhancement was not filed in this case as required under MCL 769.13 and MCR 6.112(F). MCL 769.12 provides that a person who has been previously convicted of three or more felonies shall be subject to an enhanced sentence if convicted of a subsequent felony. However, the prosecutor must file a written notice of intent to seek sentence enhancement within 21 days after the defendant's arraignment on the information charging the underlying offense. MCL 769.13(1); MCR 6.112(F). The notice must "list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement" and it must be filed with the court and served personally on defendant or his attorney at the arraignment or served in any manner provided by law or court rule. MCL 769.13(2). The prosecuting attorney must also file a written proof of service with the clerk of the court. *Id.*

Nonetheless, failure to file proof of service can be deemed harmless error. *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999). To determine whether the failure to file proof of service is harmless, the courts will consider whether the defendant received notice of possible sentence enhancement and whether the failure to comply with the notice requirement prejudiced the defendant. *Id.* Further, the failure to file a proof of service with the court is harmless if it is clear that the defendant had notice of the prosecution's intent to seek enhancement. *Id.*

Here, while the prosecutor failed to file a proof of service with the court as required by MCL 769.13(2), the prosecutor clearly gave defendant notice of her intent to seek an enhancement. Specifically, the complaint, warrant, and information all gave notice of the habitual offender enhancement and specifically listed the prior convictions the prosecutor intended to rely on in support of the enhancement. Further, at sentencing, when the prosecutor noted a correction in the sentencing guidelines based on the probation department's failure to calculate defendant's guidelines with the enhancement, neither defense counsel nor defendant gave any indication that they were surprised by the enhancement or made any mention of a lack of notice. Similarly, there was no objection by defendant or defense counsel when the trial court listed aloud defendant's prior felony convictions. Therefore, we conclude that defendant was on notice of the enhancement over six months prior to trial, which gave him ample opportunity to deny, refute, or explain his prior convictions.

Defendant also contends that his breaking and entering sentence is invalid because the prosecutor failed to show that his prior convictions were valid and because the trial court failed to find him guilty of being a fourth habitual offender. A defendant's prior convictions must be determined by the court at sentencing or a scheduled hearing. MCL 769.13(6). A prior conviction may be established by any relevant evidence, including information in the presentence investigation report (PSIR). MCL 769.13(5)(d). A PSIR is presumed to be accurate, and a trial court may rely upon the factual information therein. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). The trial court properly relied on the PSIR, which set forth eight prior felony convictions, to support defendant's status as a fourth habitual offender. Further, while the trial court did not explicitly state on the record that it was finding defendant guilty of being a fourth habitual offender, it did so implicitly by listing on the record defendant's prior felony convictions from the PSIR and sentencing him to the enhanced sentence recommended by the prosecutor.

Likewise, defendant's argument that the prosecutor was required to prove that his prior convictions were valid also fails. Under MCL 769.13(6), the defendant "bear[s] the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid." Indeed, only after "defendant establishes a prima facie showing that an alleged prior conviction is constitutionally invalid, [does] the prosecuting attorney . . . bear the burden of proving, by a preponderance of the evidence, that the prior conviction is constitutionally valid." *Id.*

Defendant further argues that his sentence is invalid because the trial court never pronounced him guilty of breaking and entering. However, defendant's argument is contrary to the record.

Finally, we reject defendant's argument that the trial court abused its discretion in failing to strike the information concerning defendant's education from his PSIR. "This Court reviews a trial court's response to a defendant's challenge to the accuracy of a PSIR for an abuse of discretion." *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Id.*

Under MCR 6.425(E)(2), when a trial court determines that information in the PSIR was inaccurate, it must strike or correct the disputed information before sending the PSIR to the Department of Corrections (DOC). *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003). "[C]ritical decisions are made by the [DOC] based on the information contained in the [PSIR]." *Uphaus*, 278 Mich App at 182, quoting *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986).

Here, contrary to defendant's argument, the trial court did not abuse its discretion in failing to strike the information about his education because the information was not inaccurate. The PSIR stated that defendant had "some college" education. While the information is not as detailed as defendant would have liked, the information was not inaccurate. Therefore, there was no need for the trial court to strike it or correct it under MCR 6.425(E)(2) as defendant contends.

There were no errors warranting relief.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Michael J. Kelly