

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK MATTHEW DAVIS,

Defendant-Appellant.

UNPUBLISHED

July 2, 1996

No. 177101

LC No. 93-2759-FH

Before: Murphy, P.J., and Reilly , and C.W. Simon, Jr.*, JJ

PER CURIAM.

Defendant was convicted by a jury trial of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279 and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a second felony offender, MCL 769.10; MSA 28.1082, to ten to fifteen years of imprisonment on the assault conviction, consecutive to a two-year prison term for the felony firearm.

This case arises out of defendant's beating of his wife, resulting in a broken jaw, a severed facial nerve, a broken neck vertebra, broken teeth and multiple lacerations.

The court did not abuse its discretion by refusing to instruct the jury on the lesser misdemeanor offense of assault and battery. MCL 750.81; MSA 28.276. *People v Steele*, 429 Mich 12, 19-22; 412 NW2d 206 (1987). We agree with the trial court that the facts of this case presented "either a case of self-defense or a case of assault with intent to do great bodily harm less than the crime of murder."

Defendant challenges the court's scoring of fifty points for OV 2 for excessive brutality. The injuries sustained by the complainant support the scoring of this variable. In any event, the guidelines do not apply to the sentencing of habitual offenders. *People v Gatewood (On Remand)*, ___ Mich App ___, ___ NW2d ___ (1996) (Docket No. 193626, issued 5/14/96).

* Circuit judge, sitting on the Court of Appeals by assignment.

The trial court did not err in refusing defense counsel's request to give defendant ninety days of credit for time he served for violating a restraining order. MCL 769.11b; MSA 28.1083(2) requires credit only for time served because the defendant was either denied bond or could not make the bond that was set. MCL 600.1745; MSA 27A.1745 requires the court to take the sentence for contempt into consideration when imposing sentence. Inasmuch as the court was aware of the ninety day contempt sentence, we discern no basis for concluding that the court did not take it into consideration.

Finally, defendant contends that his sentence for the assault was disproportionate. In light of the nature of the offense and the offender, we conclude that his sentence does not violate the principle of proportionality and that the trial court did not abuse its discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Cervantes*, 448 Mich 620, 627, 631; 532 NW2d 831 (1995).

Affirmed.

/s/ William B. Murphy
/s/ Maureen Pulte Reilly
/s/ Charles W. Simon, Jr.