

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK CARLYLE MOULTON,

Defendant-Appellant.

UNPUBLISHED

July 9, 1996

No. 168693

LC No. 92-002802-FC

Before: Saad, P.J. and McDonald and M.A. Chrzanowski,* JJ

PER CURIAM.

The jury convicted defendant of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The judge sentenced defendant to twelve to twenty years' imprisonment for the assault conviction, plus a two-year consecutive prison term for felony-firearm. Defendant appeals: we affirm.

Defendant's convictions arise from his assault upon a police officer who was attempting to arrest him for shoplifting. While resisting arrest, defendant took the officer's pistol, and shot twice at the officer. The pistol jammed after the second shot. Defendant raises three issues on appeal.

I.

Defendant first argues that insufficient evidence was presented to prove that he intended to kill the officer when he shot at him. We disagree.

Defendant argues that the evidence at trial proved that he suffered from mental illnesses which prevented him from possessing the intent to kill. He claims he suffered from paranoid personality disorder and post-traumatic stress disorder. According to defendant's expert witness, at the time of his arrest defendant would have been unable to form the intent to kill. However, on cross-examination, defendant's expert admitted that although defendant's mental abilities were limited, he could have formed

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

the specific intent to kill. The prosecutor's expert witness testified that although defendant suffered from paranoid personality disorder and symptoms of post traumatic stress disorder, he did not suffer from any sort of diminished capacity and did have the mental capacity to form the intent to kill.

Actual intent to kill is a necessary element of assault with intent to murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Such an intent can be proven by circumstantial evidence and reasonable inferences arising therefrom. *Id.* The evidence at trial showed that defendant grabbed a policeman's pistol and shot at him until the gun jammed. The evidence regarding defendant's mental capacity was conflicting and inconclusive. Viewing this evidence in a light most favorable to the prosecutor, a rational trier of fact could have found beyond a reasonable doubt that defendant intended to kill the arresting officer. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), *cert den* 449 US 885 (1980).

II.

Second, defendant argues that reversal is required because the trial judge failed to properly instruct the jury regarding the defense of diminished capacity. Defendant asserts that the trial judge erroneously omitted the bracketed language contained in CJI 2d 17.3(4). We disagree. Defendant's trial counsel initially objected to the omission, then subsequently stated that he was satisfied with the trial judge's rationale and resulting jury instruction. Our review of the instructions indicates that no manifest injustice occurred; accordingly, review of this issue is waived. *People v Johnson*, 187 Mich App 621, 627-628; 468 NW2d 307 (1991).

III.

Finally, defendant argues that he must be resentenced because the trial judge erred in scoring OV-2 in the sentencing guidelines. We disagree.

The evidence before the trial judge at sentencing showed that the victim, the policeman that attempted to arrest defendant, did sustain bodily injury as a result of the assault. This evidence supported the trial judge's scoring of OV-2. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993); *People v Reddish*, 181 Mich App 625, 628; 450 NW2d 16 (1989).

Affirmed.

/s/ Henry William Saad
/s/ Gary R. McDonald
/s/ Mary A. Chrzanowski