

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL LAWRENCE MARCUM,

Defendant-Appellant.

UNPUBLISHED

December 16, 1997

No. 197665

Recorder's Court

LC No. 95-005581

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to six and one-half to ten years in prison for the assault with intent to do great bodily harm conviction, twenty-five to seventy-five years for the armed robbery conviction, and a consecutive two-year term for felony-firearm. We affirm.

Defendant's first claim on appeal is that the prosecution failed to present sufficient evidence from which the jury could find that the essential elements of the above crimes had been proven beyond a reasonable doubt. We disagree. This Court reviews a claim of insufficient evidence by considering the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

To support a conviction for assault with the intent to do great bodily harm less than murder, the prosecution must prove the following elements: (1) an attempt or offer with force or violence to do corporal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). A criminal assault constitutes either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Circumstantial evidence and reasonable inferences drawn therefrom may be

sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Here, the evidence that defendant opened the driver's side door to the victim's automobile and that he struggled with and pointed a handgun at the victim, was sufficient to establish a criminal assault. Indeed, the victim testified that he "froze." Although defendant argues that the testimony should not have been believed, it was up to the jury to determine issues of credibility. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 368 (1990). From the gunshot wound to the victim's face, it may be reasonably inferred that defendant's criminal assault was coupled with the specific intent of doing great bodily harm to the victim. The evidence in this case, viewed in the light most favorable to the prosecution, was more than sufficient to convict defendant of assault with intent to do great bodily harm.

To support a conviction for armed robbery, the prosecution must prove the following elements: (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute. *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994). Having determined that defendant's act constituted an assault, a rational trier of fact could also conclude that the felonious taking and dangerous weapon elements of the armed robbery offense were established beyond a reasonable doubt. Defendant's intent to permanently deprive the victim of his automobile may be reasonably inferred from the evidence that, after shooting the victim, defendant pulled the victim out of his automobile and drove away in the victim's car. The evidence, when viewed in the light most favorable to the prosecution, was sufficient to convict defendant of armed robbery.

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). There was ample evidence that defendant possessed a handgun during the commission of the felonies in this case.

Defendant's second claim on appeal is that his sentence violated the proportionality principle set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. Defendant's twenty-five-year minimum sentence for his armed robbery conviction fell within the guidelines range of 120 to 300 months (ten to twenty-five years). Defendant failed to present unusual circumstances which would render his presumptively proportionate sentence for his armed robbery conviction disproportionate. Therefore, this issue may not be raised on appeal. *People v Sharp*, 192 Mich 501, 505-506; 481 NW2d 773 (1992).

The proportionality of defendant's six and one-half-year minimum sentence for his assault with the intent to do great bodily harm conviction and twenty-five year minimum sentence for his armed robbery conviction are also supported by the seriousness and severity of the offense and defendant's criminal history. *Milbourn, supra*, 435 Mich 636. Defendant's shooting of the victim in the face represented a brutal and heinous crime. Moreover, defendant's criminal history reveals numerous contacts with the criminal justice system, including a conviction for a high severity felony offense, violation of probation, and escape from a correction center.

Defendant's final claim on appeal is that reversal is required because the trial court failed to give a special cautionary instruction on accomplice testimony. Defendant argues that witnesses Montgomery, Coleman and Gray had motivation to give false testimony. We find this issue meritless.

This Court reviews the issue of jury instructions for error. There is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995), lv den 451 Mich 854 (1996). "[I]f the issue is closely drawn, it *may be* reversible error to fail to give . . . a cautionary instruction [as to accomplice testimony] even in the absence of a request to charge." *People v Reed*, 453 Mich 685, 691; 556 NW2d 858 (1996) (emphasis added). This Court has held that the issue was "closely drawn" where the only evidence linking the defendant to the crime was the accomplice's testimony. *People v Fredericks*, 125 Mich App 114, 121-122; 335 NW2d 919 (1983); *People v Jackson*, 97 Mich App 660, 666; 296 NW2d 135 (1980); *People v Hall*, 77 Mich App 528, 531; 258 NW2d 547 (1977).

Here, defendant did not request or object to the omission of the cautionary instruction as to accomplice testimony. In any case, we hold that reversal is not warranted because the case was not "closely drawn". Defendant's guilt was not solely premised upon the testimonies of Montgomery, Coleman, and Gray.

An eyewitness whose automobile was stopped in front of the victim's automobile at the traffic signal, observed, just prior to hearing a gunshot, a white male opening the door of the victim's automobile, and holding out his hand as if pointing a handgun. The witness testified that the perpetrator came from the vehicle behind the victim's automobile. According to the witness, a gunshot then rang out, and the perpetrator grabbed the victim and threw him out of the car. The witness identified defendant, in court, as the perpetrator. A second eyewitness offered corroborating testimony and also identified defendant as the perpetrator. Because defendant's guilt was not solely premised upon the testimony of Montgomery, Coleman, and Gray, the case was not "closely drawn" as contemplated in *Fredericks, supra, Jackson, supra, and Hall, supra*. The trial court's failure to give a cautionary instruction as to accomplice testimony in this case was not error.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Myron H. Wahls

/s/ Roman S. Gribbs