

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARKELL LAVELLE SMILES,

Defendant-Appellant.

UNPUBLISHED

February 5, 1999

Nos. 195913; 203338

Recorder's Court

LC No. 95-007938

Before: Markman, P.J., and Jansen and J. B. Sullivan*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts 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). Defendant was sentenced to nine to twenty years' imprisonment for each of the assault with intent to commit murder convictions, and two years' imprisonment for the felony-firearm conviction, the assault sentences to run concurrently with each other, and consecutive to the felony-firearm sentence. Defendant was later resentenced, receiving the same sentences as initially imposed. Defendant appeals as of right and we affirm.

Docket No. 195913

In this appeal, defendant raises four issues related solely to his trial. We do not find any issue to require reversal.

I

Defendant first argues that he was denied a fair trial when the prosecutor informed the trial court before defendant's trial that a codefendant had pleaded guilty. This issue was not raised below. In any event, no error occurred because the trial court in defendant's case had already accepted the codefendant's plea and sentenced the codefendant before the start of defendant's trial. Therefore, the trial court was aware that the codefendant had pleaded guilty at the time the prosecutor told the court.

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

Defendant cites no authority for the proposition that it is improper for the same trial court to accept a guilty plea in a codefendant's case and be the finder of fact in a defendant's case. Likewise, defense counsel was not ineffective for failing to object to this procedure.

II

Defendant next argues that the trial court failed to consider a defense made out by the evidence. Defendant argues that the stress caused by the argument he had with Dominique Bryant, and the fact that he was attacked by a dog, would have reduced the crime to manslaughter had Bryant been killed. Defendant essentially argues that one of the elements of assault with intent to commit murder was, therefore, not satisfied in this case.

The elements of the crime of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Plummer*, 229 Mich App 293, 305; 581 NW2d 753 (1998). Defendant argues that the third element of assault with intent to commit murder was not satisfied and that the trial court erred in failing to consider this "obvious defense." However, a review of the trial transcripts reveals that the trial court did in fact consider this third element of the crime. In addressing the third element of assault with intent to commit murder, the trial court stated, "this Court finds that [defendant] certainly intended to kill the person he assaulted, and the circumstances did not legally excuse or reduce the crime." Therefore, defendant's assertion that the trial court did not address mitigation is simply not supported by the record.

In connection with this issue, defendant argues that his trial counsel was ineffective in failing to argue that there were mitigating circumstances present. However, a review of defense counsel's closing argument reveals that he attempted to convince the trial court that defendant was guilty of a lesser crime. Accordingly, defense counsel did argue that defendant was guilty of a lesser crime, and defendant can prove neither prejudice nor that counsel's performance fell below an objective standard of reasonableness. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995).

III

Defendant's third argument is that there was insufficient evidence to support his conviction for assault with intent to murder regarding Terri Thompson. When reviewing the sufficiency of the evidence in a criminal case, the court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). When considering whether a defendant is guilty of assault with intent to commit murder, intent may be proven by inference from any fact in evidence. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

Defendant argues that his conviction for assault with intent to commit murder cannot stand because he did not intend to kill Thompson. This case began out of an altercation that occurred between Bryant (Thompson's son), defendant, and codefendant Lamont Paris. Defendant was armed with a shotgun and Paris had an AK-47. There was testimony that, after a dog ran toward defendant,

Paris shot at the dog at defendant's instruction. Defendant and Paris then aimed their guns at Thompson's porch and fired. Thompson testified that the shots impacted in several different places in her home, including the living room, the dining room, the hallway, and her son's bedroom. Thompson also stated that some of the shots impacted in the doorway where she was standing. Further, Thompson testified that "[t]hey were aiming it looked like directly at me." A police officer later recovered three twelve-gauge shotgun casings and fifty-five casings which could have come from an AK-47. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found that defendant aimed at Thompson and intended to kill her. Therefore, sufficient evidence was presented to support defendant's conviction of assault with intent to commit murder.

IV

Defendant's next issue is that the trial court erred in accepting his waiver of a jury trial because it was not voluntary and specific. A trial court's determination that a defendant voluntarily waived his right to a jury trial is reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

Defendant claims that his waiver of his right to a jury trial was ineffective because the trial court failed to explain that defendant could participate in jury selection, that a jury is composed of twelve members of the community, and that a jury verdict must be unanimous. However, this Court has specifically held that a trial court need not explain that a jury must reach a unanimous verdict. See *id.*, p 596; *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992). Furthermore, the trial court specifically inquired of defendant and his trial counsel whether defendant understood what it meant to have a trial by jury. The trial court also asked defendant whether he had any questions about what his right to a jury trial meant. Defendant's waiver of jury trial is extremely thorough and is entirely in accord with MCR 6.402(B). Finally, the lower court record contains a written waiver of defendant's right to a jury trial. Given this factual setting, the trial court did not clearly err in concluding that defendant knowingly, voluntarily, and understandingly waived his right to a trial by jury.

Docket No. 203338

In this appeal, following his resentencing, defendant primarily contends that the sentencing guidelines are unconstitutional and that his sentence for the assault convictions violates the principle of proportionality.

The sentencing guidelines do not have the force of law because they do not have a legislative mandate, nor does a guideline error violate the law. *People v Mitchell*, 454 Mich 145, 174-175; 560 NW2d 600 (1997). "Guidelines are tools to aid the trial court in the exercise of its authority and a framework for the appellate courts' inquiry into the question whether the sentence is disproportionate and, hence, an abuse of the trial court's discretion." *Id.*, p 178 Because sentencing guidelines do not have the force of law, there is no need to decide whether the sentencing guidelines are unconstitutional; the constitution only applies where governmental conduct is involved.

Further, to the extent that defendant claims that his sentence of nine to twenty years for each conviction of assault with intent to commit murder is disproportionate, we disagree. In this case, the sentencing guidelines range was 120 to 300 months. Defendant's minimum sentences are below the guidelines range. Moreover, a review of the sentencing transcript reveals that the trial court clearly tailored the sentence to the circumstances of the offense and defendant's background. The trial court noted that defendant shot a gun about three times into a house where there were several children and that defendant had two prior convictions for carrying a concealed weapon. We find no abuse of the sentencing court's discretion and cannot conclude that the sentence is disproportionately harsh.

Affirmed.

/s/ Stephen J. Markman

/s/ Kathleen Jansen

/s/ Joseph B. Sullivan