STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE PATRICK GHESQUIERE,

Defendant-Appellant.

UNPUBLISHED
February 26, 1999

No. 200573
Monroe Circuit Court
LC No. 96-027379 FH

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305; unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645; fleeing and eluding a police officer, MCL 750.479a; MSA 28.747(1); attempted disarming of a peace officer, MCL 750.479b(2); MSA 28.747(2)(2); MCL 750.92; MSA 28.287, and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to serve, as a fourth habitual offender, ten to twenty years' imprisonment for the breaking and entering conviction, ten to twenty years' imprisonment for the UDAA conviction, one year's imprisonment for the fleeing and eluding conviction, fifteen to thirty years' imprisonment for the attempted disarming of a police officer conviction, and twenty to forty years' imprisonment for the assault with intent to do great bodily harm less than murder conviction. We affirm.

After stealing an automobile in Ohio, defendant picked up a companion and the two traveled to Michigan where they broke into a bar that was temporarily closed and stole beer and liquor. A nearby neighbor witnessed the events and called the police. Officers on patrol spotted defendant's car and a high speed pursuit ensued. At one point during the chase, defendant drove off the road and he and his companion continued their flight on foot. Defendant ran into a wooded area where he encountered a Michigan State Police trooper who had drawn his weapon. The trooper testified that defendant quickly walked toward him. When the trooper attempted to kick defendant in the chest, he lost his footing. Defendant took this opportunity to dive on the trooper and wrestled for control of the trooper's gun. During this confrontation, the trooper shot defendant in the neck. At trial, defendant admitted to the breaking and entering, UDAA, and fleeing and eluding charges. However, he denied that he attempted

to disarm the trooper or that he engaged in any form of assault. Defendant testified that when the trooper approached him and kicked him in the stomach, the trooper lost his footing and pulled defendant to the ground with him.

On appeal, defendant first argues that the trial court abused its discretion when it bound defendant over on the charge of assault with intent to commit murder and that this error was compounded when the court denied defendant's motion for directed verdict. With respect to both issues, defendant argues that there was no evidence of an intent to murder. We disagree.

"[A] defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998). Cf. *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990); *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989) (an evidentiary deficiency or error in the sufficiency of proofs at the preliminary examination is not grounds for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error). In the instant case, defendant was not convicted of assault with intent to commit murder, but rather assault with intent to do great bodily harm less than murder. Thus, even if defendant was improperly bound over on the charge of assault with intent to commit murder and that charge was improperly submitted to the jury, the error, if any, was harmless in light of the fact that the charge of assault with intent to do great bodily harm less than murder was properly submitted to the jury and defendant was convicted of this offense.

Defendant's related argument that there was insufficient evidence to support his conviction of assault with intent to do great bodily harm less than murder is without merit. When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The elements of assault with intent to do great bodily harm less than murder include (1) an attempt or offer with force or violence to do corporeal hurt to another (an assault), (2) coupled with intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995); *People v Mitchell*, 149 Mich App 36, 38; 385 NW2d 717 (1986).

In the instant case, the evidence presented at trial would permit a reasonable juror to infer that defendant intended, at the very least, to commit great bodily harm to the trooper. The trooper testified at trial that despite continual commands to defendant to "freeze" and "get down on your knees," defendant walked at a rapid pace closer to the trooper, yelling "shoot me, shoot me; go ahead and shoot me." When defendant came in "close enough," the trooper delivered a frontal kick to defendant's chest, trying to push him back. However, the trooper lost his footing and as he fell backwards, defendant dove on top of him. Defendant then placed his left hand on top of the trooper's gun and with his right hand held the trooper's left wrist. A struggle for the gun ensued and ended when the trooper pulled the trigger and struck defendant in the left side of his neck. Viewing these facts in the light most favorable to the prosecution, a reasonable factfinder could certainly conclude that defendant intended to do great bodily harm to the trooper. *Lugo, supra* at 711.

Next, defendant argues that because his companion's testimony supported his version of the events, the trial court erred when it gave the cautionary instruction regarding accomplice testimony, CJI 2d 5.6. We disagree. Contrary to defendant's position, the companion's testimony was not completely supportive of defendant's position. Indeed, the testimony went a long way to establishing the intent element of the crimes.[1] Under these circumstances, the trial court did not err when it instructed the jury that it should view the companion's testimony with caution. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

Next, defendant contends that he was denied the effective assistance of counsel because his trial counsel failed to have the leather gloves he was wearing tested for gun powder, failed to call a ballistics expert to testify, and failed to present defendant's medical records. We disagree. What evidence to present and what witnesses should be called are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). The failure to call a witness or present other evidence will only be deemed the ineffective assistance of counsel when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one which might have made a difference to the outcome of the case. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Since defendant has not properly preserved this issue on appeal, our review is limited to the record available. *People v McMillian*, 213 Mich App 134, 141; 539 NW2d 553 (1995).

In this case, defendant clearly was not denied a defense. Both defendant and his companion testified that defendant did not have his hand on the gun. Further, another state trooper that examined the gun testified, consistent with defendant's theory, that the spent casing might not have ejected if the gun had been pressed up against defendant's body. Thus, defendant presented the desired defense. It, however, was rejected by the jury. Since the available record is otherwise devoid of any evidence showing how the outcome of the trial would have been different, defendant has not established that he was denied the effective assistance of counsel. *Kelly, supra*.

Finally, defendant contends that his sentence of fifteen to thirty years for attempted disarming of a police officer and twenty to forty years for the assault with intent to do great bodily harm was disproportionate. We disagree. In reviewing sentences imposed for habitual offenders, this Court must determine whether there was an abuse of discretion. *People v Hansford*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). A trial court does not abuse its discretion in giving a sentence within the statutory limits when an habitual offender's underlying felony, in the context of his previous felonies, evidences that defendant has an inability to conform his conduct to the laws of society. *Id.* In this case, defendant's sentences are within the limits authorized by the Legislature for an habitual offender, fourth offense. MCL 769.12(1)(a); MSA 28.1084(1)(a). Further, defendant's prior record, which included four felony convictions, two misdemeanors, a juvenile record, and the gravity of the instant offenses, warrants the sentences imposed.

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin

[1] Defendant's companion testified that defendant stated to the trooper, "you ain't taking me nowhere."