STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2011
v	No. 298159 Wayne Circuit Court
KUNTA TOLBERT, Defendant-Appellant.	LC No. 08-014671-FC

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of two counts of assault with intent to commit murder, MCL 750.83, and one count each of possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 25 to 40 years for each conviction of assault with intent to commit murder and 2 to 5 years for the felon-in-possession conviction. He was sentenced to a consecutive prison term of two years for the felony-firearm conviction. We affirm.

Defendant first argues that due process requires reversal of his convictions because the prosecution used perjured testimony to convict him. We disagree.

To preserve an issue for appeal, a defendant must generally raise an objection at a time when the trial court can correct the error. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Defendant did not object to the allegedly perjurious testimony given by the officers at trial; therefore, he did not preserve the issue for appeal. *Id*. at 277-278. Unpreserved issues are reviewed for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecution introduced the testimony of police officers Layman and Peirce as part of its case against defendant. Defendant points out that, at the preliminary examination, both officers stated unequivocally that defendant had used a handgun to assault them. However, after viewing a surveillance video entered into evidence, the officers changed their testimony and stated at trial that defendant used a rifle to assault them.

Defendant has failed to show that the officers willfully committed perjury in this case. See *In re Contempt of Henry*, 282 Mich App 656, 677-678; 765 NW2d 44 (2009) (describing

perjury as willful, false statements or testimony given under oath concerning material facts). Moreover, defendant has not explained how the officers' differing recollections of the type of firearm he used in the shooting could have affected the outcome of his trial. Both officers testified throughout the proceedings that defendant used a firearm. The officers changed their testimony only with regard to the type of firearm used. Otherwise, their testimony remained consistent and largely unchanged.[1]

The offense of assault with intent to commit murder requires "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). Whether defendant assaulted the officers with a handgun or a rifle is immaterial to the crime, as assault with intent to commit murder does not require a certain type of weapon. Although the discrepancy between the officers' preliminary examination testimony and their trial testimony may have been pertinent to the credibility of the witnesses, defendant has failed to establish the existence of outcome-determinative plain error in this regard.

Defendant also argues that because the police officers were not actually struck by any of the fired bullets, the trial court improperly instructed the jury on the issue of transferred intent. We disagree.

A claim of instructional error involving a question of law is reviewed de novo. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

Both parties struggle to cite relevant Michigan case law concerning the applicability of the doctrine of transferred intent in this case. Defendant cites a Maryland case, *Harvey v State*, 111 Md App 401; 681 A2d 628 (1996), and the prosecution cites a Texas case, *Kitchens v State*, 149 Tex Crim 135; 192 SW2d 449 (Tex App, 1946). However, we need not resort to out-of-state authority in this case because this Court has already held that the requisite intent for assault with intent to commit murder may be transferred. *Lawton*, 196 Mich App at 350.

In *Lawton*, the defendant and his fellow assailants tried to enter the victims' house, but when locked out, began firing their weapons into the window and front of the home. *Id.* at 344-345. The defendant claimed that he only intended to harm a man in the house, and had no intent to kill or harm a woman and child who were inside. *Id*. at 350. However, this Court held that the defendant's specific intent to assault the man could be transferred to the woman and the child. *Id*.; see also *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979).

We fully acknowledge that although the police officers in this case were not actually shot, at least one of the victims in *Lawton* was struck by bullets. However, this Court did not focus on the fact that the woman or the child actually suffered a battery. Instead, this Court found dispositive the fact that the defendant in *Lawton* had intended to harm the man, but had instead committed an assault on the woman and child while possessing the requisite intent. The

[1] Both officers testified at trial that they were mistaken regarding the type of firearm that defendant had used. The balance of their testimony remained consistent.

actual battery, therefore, was merely evidence of the assault. The battery was not critical to the Court's determination that the defendant's intent could be transferred.

In the instant case, although the officers were not actually struck by any of the fired bullets, they were nonetheless placed in reasonable apprehension of receiving an immediate battery when defendant began shooting at them. They were, therefore, assaulted by defendant. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Said another way, although defendant actually set out to shoot the intended victim, he nevertheless committed an assault on the officers while possessing the requisite, albeit transferred, intent to kill. *Lawton*, 196 Mich App at 350; see also CJI2d 17.17. The trial court's instruction on transferred intent was not erroneous. We perceive no error requiring reversal.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens