STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2012
v	No. 302719 Kalamazoo Circuit Court
LAYTON EARL WALLACE, JR., Defendant-Appellant.	LC No. 2010-001126-FC

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

Defendant Layton Earl Wallace appeals by right his jury convictions of assault with intent to murder, MCL 750.83, possession of a firearm while ineligible to possess (felon-in-possession), MCL 750.224f, assault with a dangerous weapon, MCL 750.82, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a third habitual offender, see MCL 769.11, to serve 40 to 60 years in prison for his assault with intent to commit murder conviction, three to ten years in prison for his felon-in-possession conviction, two to eight years in prison for his assault with a dangerous weapon conviction, and to two years in prison for each felony-firearm conviction. Because we conclude that there were no errors warranting relief, we affirm.

Defendant's convictions arise from an altercation with Fabian Hatchett. On the day at issue, Hatchett volunteered to help Patricia Haley move three boxes from an apartment. Hatchett drove with Haley to the apartment where they encountered defendant. Haley had had children with defendant. Defendant became agitated that Haley had brought another man with her to retrieve the boxes and pulled a handgun. Hatchett got into Haley's car and defendant fired several shots into the car. One shot struck Hatchett in the chest.

We shall first address defendant's contention that there was insufficient evidence at trial to prove that he intended to kill Hatchett. "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo 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 crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

In order to prove the charge of assault with intent to commit murder, the prosecutor had to show, in relevant part, that defendant assaulted Hatchett and that he did so with the intent to kill him. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); MCL 750.83. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to establish the intent to kill. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Defendant confessed that, after Hatchett arrived with his ex-girlfriend, "he needed to do something or he would lose respect amongst his peers." For that reason, he pulled out a gun and pistol-whipped Hatchett. Hatchett started the car and tried to flee, but crashed after one of defendant's associates attacked him. Defendant then approached the car and fired six shots at the lower passenger side, hitting Hatchett. Defendant's intent to kill Hatchett can be inferred from the fact that he shot at him. See *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Although there was also evidence to support defendant's theory that he only intended to intimidate Hatchett, the jury was free to reject that theory. *Roper*, 286 Mich App at 88. As such, when viewed in the light most favorable to the prosecution, there was sufficient evidence from which the jury could conclude that defendant intended to kill Hatchett when he fired six shots at him. *Id.* at 83.

Defendant also argues that defense counsel was ineffective for failing to request an instruction on assault with intent to commit great bodily harm. Because the trial court did not hold an evidentiary hearing on this claim, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To establish his claim, defendant must show that his trial lawyer's decision not to request the instruction fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for that decision, the outcome would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). The decision whether to request an instruction on a lesser offense is generally a matter of trial strategy. See *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). This Court strongly presumes that such decisions are sound; and, defendant bears a heavy burden to show otherwise. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

On appeal, defendant claims that an instruction on assault with intent to commit great bodily harm would have been consistent with his theory of the case. Defendant is correct; assault with intent to commit great bodily harm is a necessarily lesser included offense of assault with intent to commit murder and, as such, he likely could have gotten an instruction on this offense. See *People v Brown*, 267 Mich App 141, 150; 703 NW2d 230 (2005). However, his trial lawyer did request an instruction on felonious assault, which the trial court gave. And defendant's confession and theory were also consistent with felonious assault: he admitted to firing six shots, but claimed that he merely wanted to scare Hatchett. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Under the facts of this case, a reasonable trial lawyer could request a felonious assault instruction in lieu of an instruction on assault with the intent to cause great bodily harm. As such, we cannot conclude that defendant's trial lawyer's decision fell below an objective standard of reasonableness under prevailing professional norms. *Uphaus*, 278 Mich App at 185.

Defendant next argues that the trial court erred in scoring offense variable (OV) 6, MCL 777.36, at 50 points because there was no evidence that he premeditated the assault. Trial courts must sentence defendants in accord with the sentencing guidelines. MCL 769.34(2). Further, trial courts do not have the discretion to score the guidelines as they see fit; each variable must be scored and must be scored as the Legislature provided. See *People v Bemer*, 286 Mich App 26, 36; 777 NW2d 464 (2009) (holding that the trial court did not have the discretion to refuse to score the conduct at issue under OV 12 so that it could achieve a higher score by scoring the conduct under OV 13). This Court reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines. *People v Cannon*, 481 Mich 152, 156, 749 NW2d 257 (2008). However, this Court reviews the factual findings underlying a trial court's scoring of the variables for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

The Legislature provided that the trial court must score OV 6 at 50 points if the defendant had a "premeditated intent to kill." MCL 777.36(1)(a). "To premeditate is to think about beforehand." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). To premeditate, "sufficient time must have elapsed to allow the defendant to take a 'second look.'" *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Premeditation may be inferred from the circumstances surrounding the incident. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The time between defendant's physical attack on Hatchett and his decision to shoot him was sufficient for defendant to take a "second look." *Plummer*, 229 Mich App at 300. As such, the trial court did not clearly err to the extent that it found that defendant had a premeditated intent to kill. Accordingly, the trial court did not err in scoring OV 6 at 50 on the basis of that finding.

Defendant further claims that the trial court erred in scoring OV 13 at 25 points because one of the crimes used to score the variable was dismissed. Even assuming that the trial court could not properly use a dismissed charge to support the scoring of OV 13, any error was harmless. Had the trial court scored OV 13 at zero points, defendant's recommended minimum sentence range under the legislative sentencing guidelines would have remained the same. For that reason, even if it were error to score OV 13 at 25, defendant is not entitled to any relief. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro