

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT TODD SMIT,

Defendant-Appellant.

UNPUBLISHED

April 23, 1996

No. 177698

LC No. 92-59996

Before: Doctoroff, C.J., and Hood and Gribbs, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit great bodily harm, second offense. MCL 750.84; MSA 28.279. The trial court sentenced defendant to four to fifteen years of imprisonment. Defendant appeals as of right. We affirm.

First, defendant argues that, because there was insufficient evidence to establish that he intended to cause great bodily harm to the victim, the trial court should have granted his motion for a new trial. We disagree.

To determine whether sufficient evidence has been presented to convict a defendant, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v McMillan*, 213 Mich App 134, 139; __ NW2d __ (1995). The elements of assault with intent to commit great bodily harm less than murder include an attempt or offer with force or violence to do corporal harm to another coupled with an intent to do great bodily harm less than murder. *People v Bailey*, 207 Mich App 8, 9; 523 NW2d 798 (1994). Intent may be inferred from any facts in evidence. *People v Warren (Aft Rem)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

We find that sufficient evidence existed for a jury to infer defendant's intent to commit great bodily harm. The victim testified that she had been defendant's girlfriend. After a fight, the victim told defendant that she did not love him anymore. The victim and defendant began to argue. The victim testified that defendant then punched her in the face, lifted her off the ground by her chin, shoved her down some patio stairs and threw her against a wall. A witness testified that, after the incident, she called "911" because the victim was having trouble breathing. The emergency room doctor at the hospital testified that, when defendant arrived, her condition was initially life-threatening. The doctor also testified that the victim's bruises and upper respiratory swelling could not have been self-inflicted wounds. The upper respiratory swelling was consistent with strangulation. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence of defendant's intent to sustain his conviction. The trial court did not abuse its discretion when it denied defendant's motion for a new trial.

Next, defendant maintains that the trial court erred when it refused to vacate his conviction because he was denied his right to a speedy trial. We disagree.

In determining whether a defendant was denied a speedy trial, this Court considers the length of the delay, the reason for the delay, defendant's assertion of the right to a speedy trial, and any prejudice to defendant. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). Defendant was out of jail on bond prior to trial. Defendant's failure to assert his right to a speedy trial until after his conviction undermines his claim. *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993). Because the trial was delayed for less than eighteen months, no presumption of prejudice arises. *People v Gravedoni*, 172 Mich App 195, 199; 431 NW2d 221 (1988). Some of the delay was caused when defense counsel received a trial adjournment due to a conflict with another trial. Defendant did not appear on the day of trial and the trial court had to issue a bench warrant to force defendant to appear. We find that the trial court properly determined that defendant's conviction should not be vacated for failure to receive a speedy trial.

Finally, defendant alleges that the trial court improperly scored two sentencing guideline variables. Defendant claims that the trial court improperly assessed fifty points for Offense Variable Two (OV 2). OV 2 considers physical attack and/or injury. A sentencing court should award fifty points for OV 2 if the victim is treated with excessive brutality. Michigan Sentencing Guidelines (2d Ed, 1988). We consider punching the victim, lifting her by her chin, pushing her down the stairs and throwing her against a wall, to be excessive brutality. Although defendant argues that severe injury is required to justify an assessment of fifty points, there is no such limitation in the sentencing guidelines. We note that OV 2 contemplates physical attack *and/or* injury. The "and/or" distinction indicates that an injury is not required if there is a physical attack.

Defendant also claims that the trial court scored offense variable seven (OV 7) improperly. OV 7 considers the offender exploitation of victim vulnerability. The trial court assessed five points under OV 7 due to defendant's exploitation of the difference in size/strength between himself and the victim.

Defendant was a muscular man weighing over two hundred pounds and the victim was a small woman weighing under one hundred pounds. The trial court did not err when it scored OV 7.

The trial court properly denied defendant's motion for a new trial because sufficient evidence existed to convict him of assault with intent to commit great bodily harm, second offense. MCL 750.84; MSA 28.279. Defendant was not denied a speedy trial. The trial court properly scored the sentencing guideline variables.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Roman S. Gibbs