

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SALAM LOUISSIA,

Defendant-Appellant.

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UNPUBLISHED

October 29, 1996

No. 149308

LC No. 90-007517

Before: Gribbs, P.J., and Markey and T. G. Kavanagh,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years in prison for the felony firearm conviction, to be served consecutively to a four to ten-year term for the assault conviction. Defendant now appeals these convictions on the grounds of ineffective assistance of counsel and instructional error. Defendant also claims that the sentence was based on inaccurate information in the Pre-sentence Investigation Report (PSIR). We affirm the conviction, but remand for resentencing.

Kenneth Phillips testified that he and his friend, Chad Dymond, engaged in a confrontation with defendant in the parking lot of defendant's party store on June 29, 1990. As Phillips and Dymond attempted to flee the scene on bicycles, defendant fired a shotgun, striking Phillips with b-b pellets in the side. Defendant then brought Phillips at gunpoint into the store, where he beat Phillips with his fists, a shovel and bottles.

At sentencing defendant claimed that the PSIR inaccurately reported that defendant had five previous felonies. The trial court stated that it would disregard this information in sentencing defendant. However, the trial court's sentence was based on guideline calculations which took into account the previous felonies.

On appeal, defendant argues that he was deprived of effective assistance of counsel. To establish an ineffective assistance of counsel claim, defendant must show that counsel's performance was

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\* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he has been prejudiced by the error in question. *Pickens, supra* at 308-309, 312, 313-314; *Tommolino, supra* at 17. That is, defendant must show that the error might have made a difference in the outcome of the trial. *Pickens, supra* at 314-315; *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant claims that his trial counsel failed to present evidence that Dymond and Phillips had harassed defendant over a period of time prior to the shooting, and failed to present evidence that defendant did not intend to hit Phillips with the shotgun fire, but merely fired into the air to scare him. Defendant suggests that trial counsel could have presented this evidence in his opening argument. Defendant also argues that trial counsel erred in failing to call witnesses suggested by defendant, and in advising defendant not to testify.

We find no error. Assuming that such harassment did indeed occur, this evidence would not form the basis of a viable defense to the charges against defendant. In Michigan, one is justified in using deadly force if that person honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). The mere fact that Phillips and his friends harassed defendant's customers would therefore not justify defendant's use of deadly force. Accordingly, defense counsel did not err in failing to present this evidence.

With regard to defendant's claim that he merely fired into the air, we find that this evidence would have been of little use to defendant. Assuming that the jury would find this account credible, the assault charge would still be supported by evidence that defendant beat Phillips with a shovel and bottles. Furthermore, an opening statement is not considered evidence, and does not provide supportive evidence for a defense theory. *People v Mills*, 450 Mich 61, 82, n 15; 537 NW2d 909 (1995). In addition, defendant's trial counsel testified at a hearing held pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), that he spoke with defendant's witnesses and found that their testimony would not corroborate defendant's account. Defendant failed to present evidence that these witnesses would have provided him with a substantial defense. Accordingly, defendant is not entitled to relief on this basis. *People v Reinhardt*, 167 Mich App 584, 594; 423 NW2d 275 (1988), vacated on other grounds 436 Mich 866; 460 NW2d 226 (1990), aff'd after remand 188 Mich App 80; 469 NW2d 22 (1991). Defense counsel also testified that he advised defendant not to testify because he believed defendant would make too volatile a witness. We will not substitute our judgment for that of counsel regarding trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Counsel was not ineffective in this case.

In his second issue, defendant claims that the trial court erred in failing to instruct the jury on aggravated assault. Aggravated assault is defined as an assault without a weapon which causes serious bodily harm when the defendant did not intend to commit murder or great bodily harm. MCL 750.81a; MSA 28.276(1). Assault with intent to do great bodily harm is defined as an assault committed with intent to do

great bodily harm less than murder. MCL 750.84; MSA 28.279. Aggravated assault is a cognate lesser offense of assault with intent to do great bodily harm. *People v Brown*, 87 Mich App 612, 615; 274 NW2d 854 (1978). A cognate lesser included offense is one in which the lesser offense shares some common elements with the greater offense, but which also may include some elements not found in the greater offense. *Heflin, supra*, 434 Mich App 495. A defendant may receive an instruction on a cognate lesser included offense if the evidence adduced at trial would support a conviction of the requested lesser offense. *Id.*

The evidence presented in this case did not establish that defendant caused Phillips serious injury by assaulting him without a weapon. Phillips testified that he was injured by the pellets in his side and by a cut from the shovel. He testified that defendant did not cause him any injury when he hit Phillips with his fists. There was no evidence that any injury Phillips sustained was not attributable to a weapon. Defendant was, therefore, not entitled to an instruction on aggravated assault.

In his third issue, defendant claims that the sentencing court relied on inaccurate information in the PSIR. The trial court must give each party an opportunity to explain or challenge the accuracy of information on the presentence report. MCR 6.425(D)(2)(b). If any information in the report is challenged, the trial court must make a finding with respect to the challenge, unless it determines that a finding is unnecessary because it will not take the challenged information into account in sentencing. MCR 6.425(D)(3). If the court finds merit in the challenge, or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to correct or delete the challenged information. MCR 6.425(D)(3). If the inaccurate information is not considered in sentencing, the information should still be stricken, and a corrected copy of the report should be conveyed to the Department of Corrections. *People v Martinez (After Remand)*, 210 Mich App 199, 203; 532 NW2d 863 (1995). In this case the trial court specifically indicated that it would not rely on the disputed information concerning defendant's prior felonies.

The sentencing court also declared an intent to sentence defendant at the "lowest end" of the guidelines. However, the trial court misstated the guidelines' range which was changed by defendant's challenge. As defendant contends, the corrected guidelines range is 36 to 80 months, rather than 48 to 80 months. It is unclear from the record whether the trial court was aware of the corrected guidelines range. Accordingly, we remand for resentencing under the appropriate guidelines.

The sentencing court also failed to strike the disputed information from the PSIR, and failed to specify the number of days of jail credit to which defendant was entitled as required by MCL 769.11b; MSA 28.1083(2) and MCR 6.425(D)(2)(d). On remand, the sentencing court should correct these errors.

Defendant's conviction is affirmed; his sentence is vacated. We remand for resentencing in accordance with this opinion.

/s/ Roman S. Gribbs

/s/ Jane E. Markey

/s/ Thomas Giles Kavanagh