STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VNDERSO C. RODRIGUEZ,

Defendant-Appellant.

UNPUBLISHED
December 13, 1996

No. 181041
Oakland County
LC No. 94-131967

Before: McDonald, P.J., and Murphy and J.D. Payant,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of three counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, one count of felonious assault, MCL 750.82; MSA 28.277, and four counts of felony-firearm, MCL 750.227b; MSA 28.424(2). He was sentenced to three to ten years' imprisonment for the assault with intent to do great bodily harm convictions, thirty to forty-eight months' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm convictions. Defendant now appeals as of right. We affirm.

Defendant first argues that the police stop of his vehicle was unconstitutional and the evidence seized should therefore be suppressed. We disagree. At the suppression hearing, the officer who first responded to the police dispatch report of a driveby shooting testified that the dispatcher reported the car was "light colored," "possibly a Cavalier," had "multiple occupants" some of whom might be Hispanic, and was heading southbound on Van Buren street. Defendant was actually driving a light gray Diplomat with multiple occupants, two of whom appeared to be Hispanic. The officer observed defendant commit several traffic violations. It was the only vehicle in the area. The trial court ruled that under "the totality of the circumstances," the stop of the car was lawful and the evidence seized from the car could be admitted against defendant.

In order to justify an investigatory stop, the police must have a particularized suspicion, based on objective observations, that the person stopped has been, is, or is about to engaged in some type of

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* Circuit judge, sitting on the Court of Appeals by assignment.

criminal activity. *People v Armendarez*, 188 Mich App 61, 66-67; 468 NW2d 893 (1991). At the suppression hearing, the officer articulated specific facts that warranted an investigatory stop of the vehicle. Defendant's citation of *People v Whalen*, 390 Mich 672; 213 NW2d 116 (1973) as authority does not help his position. In *Whalen*, the Michigan Supreme Court approved of a traffic stop under similar circumstances except that the officers had not witnessed any traffic violations. Moreover, the Court found that because the stop was constitutional, the police officer's notice of stolen items in the vehicle, the occupants' subsequent arrest, the search of the car, and the admission of the evidence seized were lawful. *Id.* at 682-683. Similarly, the trial court in the case at bar did not err in determining that the stop of defendant's car was lawful and the evidence seized from the car was admissible against defendant.

Defendant next argues that the trial court erred in admitting evidence of prior bad acts. Defendant has waived appellate review of the admission of this evidence by failing to object to its admission at trial. MRE 103(1)(1); *People v Grant*, 443 Mich 535, 545; 520 NW2d 123 (1994). The admission of evidence is not grounds for setting aside a verdict or granting a new trial unless refusal to take this action is inconsistent with substantial justice. MCR 2.613(A); *Grant, supra* at 545. Substantial justice does not require that we review this issue because the testimony was logically relevant and was not introduced to infer defendant's bad character as evidence that he committed the charged act. Its admission therefore did not offend MRE 404(b). *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993).

Defendant next argues that the trial court erred in failing to charge the jury with all lesser included offenses, particularly assault and battery and attempted assault. In conjunction with its duty to instruct the jury on the applicable law, a trial court must instruct on lesser included offenses of the charged offense if requested by the defendant and if the lesser offenses are supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). However, defendant did not request the additional instructions and has therefore not preserved this issue for our review absent manifest injustice. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). No manifest injustice would occur because the evidence did not support these instructions.

Defendant's next argument is that the trial court abused its discretion in departing from the guidelines in sentencing him for the felonious assault conviction when the trial court's stated reason for the departure was his use of a weapon. Although we agree that the upward departure was unwarranted, the error was harmless. Because defendant had multiple convictions, the trial court was obligated to complete the sentencing guidelines only for the conviction that carried the highest statutory maximum. Michigan Sentencing Guidelines (2d ed), p 1, B, 4. The trial court completed the guidelines for defendant's assault with intent to do great bodily harm convictions, and defendant does not complain about that scoring. Moreover, defendant's sentence for felonious assault will run concurrently with his longer sentence for the assaults with intent to do great bodily harm.

Defendant next contends that the trial court erred in failing to instruct the jury that its verdict must be unanimous with respect to each count, thus allowing the jury to reach compromise verdicts. This argument is without merit. Moreover, defendant did not request such an instruction and has

therefore waived this issue for review on appeal absence manifest injustice. *Paquette, supra* at 339. No manifest justice results from our refusal to address this issue because the trial court's instructions did not deprive defendant of his right to a unanimous verdict on each count and therefore did not deprive defendant of a substantial right.

Defendant next argues that he was denied effective assistance of counsel because his trial attorney failed to object to errors at trial. We disagree. In order to succeed on an ineffective assistance of counsel claim, a defendant must first show that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994). Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 687-688. Defendant does not specify to this Court the errors of which he complains. However, we note that defendant's counsel did preserve the issue of the unconstitutionality of the stop of defendant's car through a motion to suppress the evidence seized and preserved the issue of proportionality of defendant's sentence. Although defendant's counsel did not object to the admission of "bad acts" evidence, any objection by defense counsel would have been futile. Defense counsel did not request that the jury be instructed on the offenses of assault and battery and attempted assault, but the evidence did not support instructions on these lesser offenses. Defendant's argument that the jury should have been instructed that their verdict must be unanimous with regard to all counts is without merit. Because defendant has not demonstrated that he was prejudiced by any of his counsel's supposed errors, nor demonstrated that counsel actually committed clear errors, he was not denied effective assistance of counsel.

Defendant's last argument is that his sentence was excessive and disproportionate. Defendant was sentenced to three to ten years' imprisonment for his convictions of three counts of assault with intent to do great bodily harm, which was within the guidelines range of twelve to thirty-six months. A sentence that is within the sentencing guidelines is presumptively neither excessively severe nor unfairly disparate. *People v Broden,* 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant's age, difficult childhood, and lack of a prior record do not represent unusual circumstances which might overcome the presumption of proportionality. *People v Fleming*, 428 Mich 408, 423-424, n 17; 410 NW2d 266 (1987); *People v Daniel,* 207 Mich App 47, 54; 523 NW2d 830 (1994).

Affirmed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ John D. Payant