STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH RODRIGUEZ,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 185832
St. Clair County
LC No. 94-003258

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

PER CURIAM.

Defendant was convicted following a jury trial of assaulting David Bilyeu with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and assaulting Andrew Drouillard with a dangerous weapon, MCL 750.82; MSA 28.277 (felonious assault). Defendant was sentenced to serve concurrent terms of 42 to 120 months for the assault with intent to commit great bodily harm less than murder conviction and 24 to 48 months for the felonious assault conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court made several instructional errors. We review jury instructions in their entirety for reversible error. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). So long as the instructions, taken as a whole, fairly present the issues to be tried and sufficiently protect the defendant's rights, reversal is not required. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

First, defendant contends that the trial judge erred when instructing the jury on the assault with intent to commit great bodily harm charge by failing to instruct the jury on the misdemeanor offenses of assault and battery[1] and aggravated assault[2]. We disagree. A court must instruct on a misdemeanor offense in a felony trial when: "(1) there is a proper request; (2) there is an appropriate relationship between the felony charged and the requested misdemeanor; (3) the requested misdemeanor is supported by a rational view of the evidence; (4) the defendant had adequate notice that the

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

misdemeanor is an offense against which he must defend; and (5) the requested instruction would not result in undue confusion or other injustice." *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982). Here, defendant failed to properly request instructions on aggravated assault or assault and battery. The record contains no written request for jury instructions, and the transcript does not show that any oral requests were made. Because defendant failed to satisfy even the first prong of *Stephens*, the trial court did not err in failing to instruct the jury with regard to the misdemeanor offenses.

Next, defendant argues that the trial court erred when instructing the jury on the assault with intent to commit great bodily harm charge by failing to instruct the jury with regard to the lesser included offense of felonious assault. However, defendant did not request that the jury be instructed on felonious assault, therefore, defendant has failed to preserve this issue. *People v Todd*, 186 Mich App 625, 630; 465 NW2d 380 (1990).

Next, defendant argues that the trial court erred in failing to instruct the jury that its verdict "must be unanimous with regard to all counts." Because defendant failed to object to the instructions as given, we will only grant relief if a failure to do so would result in a miscarriage of justice. *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996). Defendant improperly relies on *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994). In *Cooks*, *supra*, 446 Mich 530, the Supreme Court held that, in order to protect the defendant's right to a unanimous jury verdict, a court must give a specific unanimity instruction to the jury in instances where the prosecution presents evidence of multiple acts by a defendant to prove a single charged offense. Here, defendant was charged with two separate and distinct offenses for two separate and distinct acts which he committed against two separate and distinct individuals. Because the facts in the instant case do not require a specific unanimity instruction, a general unanimity instruction will suffice to protect defendant's right to a unanimous verdict. *Cooks*, *supra*, 446 Mich 513. Here, the record reveals that the trial court instructed the jury that the verdict must be unanimous. The record also reveals that the jury returned a unanimous verdict and that the trial court offered to poll the jury. Clearly, defendant's right to a unanimous verdict was sufficiently protected. We find no miscarriage of justice.

Defendant also argues that he was deprived effective assistance of counsel based upon defense counsel's failure to object to the aforementioned instructional errors. We disagree.

Effective assistance of counsel is presumed; therefore, the defendant bears the burden of proving that counsel's assistance was ineffective. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish a claim of ineffective assistance of counsel, the defendant must show: (1) that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, and (2) that counsel's deficient performance so seriously prejudiced the defendant as to deprive the defendant of a fair trial. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). Furthermore, defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 446 NW2d 315 (1991). Upon thorough review of the record, we conclude that defendant has neither sustained his burden of proving that counsel made a serious error that affected the result of the trial nor overcome the presumption that counsel's actions were strategic.

Lastly, defendant argues that the trial court abused its discretion in denying the admission of a police report allegedly containing exculpatory evidence. Because defendant failed to make a detailed offer of proof regarding the content of the statement, appellate review is precluded absent a miscarriage of justice. MRE 103(a)(2); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992). We find that no miscarriage of justice would result in allowing the verdict to stand on this basis and, therefore, we decline to review this issue.

Affirmed.

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

[1] MCL 750.81; MSA 28.276.

[2] MCL 750.81a; MSA 28.276(1).