STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON KENNEDY,

Defendant-Appellant.

UNPUBLISHED
January 31, 1997

No. 185235
Recorder's Court
LC No. 94-008797

Before: Taylor, P.J., and Gribbs and R. D. Gotham,* JJ.

PER CURIAM.

Defendant was convicted following a jury trial of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and was sentenced to five to ten years' imprisonment. We affirm.

I.

Defendant first argues that the trial court improperly refused to give jury instructions on self-defense and imperfect self-defense. We disagree.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if somewhat imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). Jury instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

A.

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

In order for a defendant to assert a defense of self-defense, he must have both an honest and a reasonable belief that his life was in imminent danger or that there was a threat of serious bodily harm. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). Defendant here could not have had an honest and reasonable belief that he was in danger of imminent death or great bodily harm when he fired the gun, as the argument between himself and the victim was over and the victim was running away from defendant when defendant shot at him. Thus, defendant was not entitled to an instruction on self-defense. *Id.*

B.

Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter. Where the defense is applicable, it serves as a method of negating the malice element of a murder charge. The doctrine is usually invoked when the defendant would have had the defense of self-defense had he not been the initial aggressor. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). Here, defendant was also not entitled to an instruction on imperfect self-defense because: 1) he was not charged with second-degree murder; 2) he was not entitled to an instruction on self-defense; and 3) he initiated the confrontation between himself and the victim with the intent to kill or do great bodily harm to the victim. *Id.* Because defendant was not entitled to these instructions, the trial court did not err when it declined to issue them. *Daniel*, *supra* at 53.

II.

Next defendant argues he is entitled to resentencing as his guidelines were incorrectly scored. Defendant specifically argues that the trial court improperly scored Offense Variable (OV) 1, OV 2 and OV 6.

Appellate review of guidelines calculations is very limited. *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). A sentencing judge has discretion in determining the number of points to be scored provided there is evidence on the record which adequately supports a particular score. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). Scoring decisions for which there is any evidence in support will be upheld. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993).

A.

Because the standard of proof differs from that necessary for a criminal conviction, a fact can be established for the purpose of guidelines calculations even though it was not found for the purpose of conviction. *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993), remanded on oth grounds, 447 Mich 984 (1994). Thus, calculations may be based on criminal activity for which the defendant was acquitted. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). According to the Michigan Sentencing Guidelines, if a firearm is discharged by the offender during the commission of the offense then he is to be scored twenty-five points for OV 1. Michigan Sentencing Guidelines (2d ed, 1988), p 26. Therefore, even though defendant was acquitted of the felony-firearm charge, there was evidence that he assaulted the victim with a pistol, and scoring him

twenty-five points for OV 1, aggravated use of a firearm, was proper. *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991).

B.

The Michigan Sentencing Guidelines provide that, under OV 2, a defendant is to be scored twenty-five points for any bodily injury which occurs as a result of his conduct. Michigan Sentencing Guidelines (2d ed, 1988), p 26. Because there was evidence that the victim hit his head when he was thrown over the porch by defendant, defendant was properly scored twenty-five points for OV 2. *Williams, supra* at 276. In any event, recalculation would not effect the guidelines range and any error would have been harmless.

C.

Defendant was scored ten points under OV 6 for having two or more victims because he also hurt two other people besides the victim. Michigan Sentencing Guidelines (2d ed, 1988), p 26. This score was incorrect. Because there was only one victim of the offense for which defendant was convicted, defendant should have been scored zero for OV 6. *People v Chesebro*, 206 Mich App 468, 469-473; 522 NW2d 677 (1994).

Normally, when a successful appeal results in a change in the guidelines scoring, remand for determination of the effect of the new scoring upon the sentence is required. *People v Polus*, 197 Mich App 197, 201-202; 495 NW2d 402 (1992). However, if the recalculation would not change the guidelines range or if the original sentence would still be within the new guidelines range, the error is harmless. *Johnson, supra* at 290. Because defendant's new OV Level would still be IV, his minimum sentence range would not change and thus the error in scoring defendant ten points for OV 6 was harmless. *Id.*

III.

Defendant also contends that he was denied effective assistance of counsel for counsel's failure to move for a directed verdict on the assault with intent to commit murder charge at the close of the prosecutor's proofs. We disagree.

Effective assistance of counsel is presumed, and a defendant bears the burden of proving that counsel's assistance was ineffective. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To establish a claim for ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as an attorney as guaranteed by the Sixth Amendment to the United States Constitution. Moreover, the defendant must overcome the presumption that the challenged action could be considered sound trial strategy. As well, the defendant must show that any deficiency was prejudicial to his case. *People v Pickens*, 446 Mich 298, 302-303, 314; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

The elements of assault with intent to commit murder, are: 1) an assault; 2) with the actual intent to kill; 3) which if successful, would make the killing murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). At the close of the prosecutor's proofs, there was evidence that defendant

was given a gun by a third party and as the victim was running away from him, defendant pointed the gun at the victim and pulled the trigger. This is ample evidence to support a charge of assault with intent to commit murder, *id.*, and a motion for a directed verdict on this charge would have been unsuccessful. Because counsel is not required to argue a frivolous or meritless motion, counsel's failure to make this motion did not render his assistance ineffective. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

IV.

In addition, defendant argues that his conviction of assault with intent to do great bodily harm was against the great weight of the evidence. Because defendant did not make a motion for a new trial on the ground that his conviction was against the great weight of the evidence before the trial court, he has waived appellate review of this issue. *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988); *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). In any case, defendant's conviction was not against the great weight of evidence.

V.

Finally, defendant contends that there was insufficient evidence to support his conviction for assault with intent to do great bodily harm. We disagree.

In a challenge to a conviction based on the sufficiency of the evidence presented, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that all the elements of the crime charged were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). In order to support a conviction for assault with intent to do great bodily harm, the prosecutor must show that there was: 1) an attempt or offer with force or violence to do corporal harm to another; coupled with 2) an intent to do great bodily harm less than murder. *People v Harrington*, 194 Mich App 424, 248; 487 NW2d 479 (1992). Where defendant, after struggling with the victim, pushed the victim over a porch railing and then pointed and fired a weapon at the victim while the victim was running away, there is evidence of an attempt or offer with force or violence to do corporal harm to the victim, coupled with an intent to do great bodily harm less than murder. *Harrington, supra* at 428. Thus a rational trier of fact could find that all the elements of the crime charged were proven beyond a reasonable doubt. *Petrella*, *supra* at 268-270.

Affirmed.

/s/ Clifford W. Taylor
/s/ Roman S. Gribbs
/s/ Roy D. Gotham