STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN LENDELL AUTREY,

Defendant-Appellant.

UNPUBLISHED
February 25, 1997

Berrien Circuit Court
No. 187828
LC No. 95-000041-FC

Before: Sawyer, P.J., and Neff and A. L. Garbrecht,* JJ.

PER CURIAM.

Defendant Shawn Lendell Autrey was convicted by a jury of three counts of assault with intent to murder, MCL 750.83; MSA 28.278, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to three concurrent terms of 100 to 360 months' imprisonment for assault with intent to murder, to be followed by three concurrent two-year terms of imprisonment for felony-firearm. Defendant appeals from his convictions and sentences as of right. We affirm.

I

We first consider whether sufficient evidence was presented at trial to sustain defendant's conviction of assault with intent to murder. Defendant had a heated argument with his girlfriend, Pam Jones, which concluded when he stormed out of her trailer. Moments later, defendant fired five shots into the trailer, striking Pam's two-year-old son, Jacoy Jones, and her pregnant sister, Marie Jones. Defendant was charged with three counts of assault with intent to commit murder, pertaining to Marie, Pam, and Jacoy. The elements of that offense are: (1) assault, (2) with an actual intent to kill, (3) which, if successful, would make killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Defendant is guilty of this offense only if there was an actual intent to kill. *People v Burnett*, 166 Mich App 741, 757; 421 NW2d 278 (1988). There was no evidence in this case that defendant intended to harm Marie or Jacoy; thus, the prosecution properly relied on the doctrine of transferred intent. *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992).

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

A

Defendant argues that there was insufficient evidence to permit the jury to find that defendant intended to kill Pam. In reviewing the sufficiency of the evidence, 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 the essential elements of the crime were proven beyond a reasonable doubt. *People v Jacques*, 215 Mich App 699, 702-703; 547 NW2d 349 (1996).

Circumstantial evidence and the reasonable inferences which arise therefrom can constitute satisfactory proof of the elements of a crime. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993), including intent, *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). Positive proof of intent to kill is not required to convict a defendant for assault with intent to murder; rather, there need only be evidence of an intent to kill or evidence from which an intent to kill may be inferred. *People v Moore*, 129 Mich App 354, 356; 341 NW2d 149 (1983).

After a careful review of the record, we conclude that sufficient evidence was presented from which defendant's intent to kill reasonably could be inferred by the jurors. Defendant and Pam were admittedly involved in a very heated argument in which defendant's anger escalated. Defendant testified that he walked "slowly" to his trunk, got the gun, and then walked back over to the trailer. Defendant testified that he had time to think about what he was doing. The five shots fired by defendant entered the trailer within a few inches of each other, just nineteen inches from the door; they passed through the living room, where defendant had just left the occupants, including Pam. Defendant was familiar with the layout of the trailer, although he denied purposefully aiming at the living room. Defendant admitted that he was consumed with anger toward Pam when he shot into the trailer. Presented with this evidence of defendant's deliberate behavior, the jury reasonably could have inferred that defendant intended to kill when he fired the shots.

B

Defendant also argues that there was not sufficient evidence of an assault. An assault is either: (1) an attempt to commit battery; or (2) an unlawful act which places another in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). According to defendant there was no assault because Pam admitted that she was not afraid when defendant got his gun out of the trunk; therefore, defendant posits, she was not in reasonable apprehension of receiving an immediate battery.

Defendant's analysis ignores the first definition of assault; that is, an attempt to commit a battery. A battery requires a willful touching of another. *People v Lakeman*, 135 Mich App 235, 239; 353 NW2d 493 (1984). Because there was sufficient evidence that defendant shot with the intent to kill Pam, there was also enough evidence that defendant attempted to "touch" her with his gunfire.

II

Defendant next claims on appeal that the trial court erred by not giving the jury CJI2d 4.1,[1] or a similar cautionary instruction regarding defendant's alleged out-of-court statement. Because defendant failed to request this instruction at trial, we will review this issue only for manifest injustice. *People v Johnson*, 187 Mich App 621, 628: 468 NW2d 307 (1991). Manifest injustice occurs where the omitted instruction "pertain[s] to a basic and controlling issue in the case." *Id.*

Pam testified that defendant stated during their argument, "like I told Demetrius, ain't no man worth to be shot killed over you all," which Pam took as a threat. Defendant admitted that he said, "I'm going to tell you like I told Demetrius. You all ain't worth shooting over," but denied that it was intended as a threat. Defendant claims on appeal that the trial court's failure to read CJI2d 4.1 to the jury resulted in manifest injustice because it pertained to intent, which was a basic and controlling issue in the case. We disagree.

A trial court is obligated to accurately instruct the jury on all of the essential elements of the crime. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). In this case, the jury was accurately instructed regarding the essential elements of assault with intent to murder, including the key element in this case - - intent to kill the person he assaulted. However, on its face, CJI2d 4.1 does not relate to intent in any way. The notes and commentary to CJI2d 4.1 indicate that the instruction was designed for use when a defendant's confession is introduced by the prosecution at trial. There is no suggestion that the instruction must be given in every instance that a defendant's out-of-court statement is admitted as evidence.

Moreover, the trial court provided the following cautionary instruction to the jury:

> You decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness said. You are free to believe all, none, or a part of any person's testimony.

This instruction informed the jurors that they did not have to accept as true the testimony of any witness, including Pam's. Defendant also ignores the fact that he admitted making a statement very similar to the one described by Pam. With defendant's corroboration, the only issue surrounding the statement was whether defendant intended it as a threat to shoot Pam.

We find no manifest injustice in the trial court's failure to, sua sponte, read CJI2d 4.1 to the jury.

III

Defendant next claims that defense counsel's failure to request instruction CJI2d 4.1 constituted ineffective assistance of counsel. Because no *Ginther*[2] hearing was held, our review is limited to mistakes apparent on the record. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing

professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Here, defense counsel's failure to request the instruction did not fall below an objective standard of reasonableness. As discussed above, CJI2d 4.1 was not an essential "intent" instruction. Furthermore, there was very little purpose in cautioning the jury against an out-of-court statement that defendant admitted to making, and may have placed emphasis on a damaging out-of-court statement made by defendant. Defendant has failed to overcome the strong presumption that counsel's assistance constituted sound trial strategy.

IV

Defendant's final two issues on appeal concern his sentence, neither of which merits reversal.

A

First, defendant argues that the trial court, in imposing sentence for assault with intent to murder, failed to consider all of the appropriate mitigating factors. A court may consider a wide variety of factors when fashioning an appropriate sentence. *People v Clark*, 185 Mich App 127, 131; 460 NW2d 246 (1990).

In this case, the court properly considered the nature and severity of the crime, *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989); the circumstances surrounding the criminal behavior, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985); defendant's attitude toward his criminal behavior, *id.*; and the effect of defendant's crime on the victims, *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987). The appropriate factors must be balanced with the objectives of imposing sentence, which include: discipline of the defendant, protection of society, reformation of the defendant, and deterrence of others. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).

Although the trial court specifically mentioned punishment, it also acknowledged that defendant committed the crime "in the heat of passion" and that defendant was remorseful. The court is not obligated to articulate each and every possible factor and objective when imposing sentence. See, e.g., *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). The trial court sufficiently considered appropriate sentencing factors and objectives, including mitigating factors, when sentencing defendant.

B

Second, defendant claims that his minimum sentences for assault with intent to murder were disproportionate. A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Defendant was sentenced to three concurrent sentences of eight years and four months to thirty years for the three

assault convictions. Defendant's minimum sentence was at the low end of the guidelines range, and therefore presumptively valid. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Nevertheless, a sentence within a guideline range can conceivably violate proportionality in "unusual circumstances." *Milbourn*, *supra* at 661.

Defendant further argues that the mitigating factors in this case warranted a lower sentence than that suggested by the sentencing guidelines. We disagree.

Although the trial court could consider mitigating factors such as defendant's lack of criminal record, his assistance and cooperation with the victims and police after the crime, his young age, and his fairly stable work history, these are not "unusual" factors that would overcome the presumption of proportionality. See, e.g., *Piotrowski*, *supra* at 532; *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). The fact that the trial court sentenced defendant at the bottom of the guideline range when he shot and critically wounded two innocent bystanders is further evidence that the trial court took the mitigating circumstances into consideration. In sum, defendant's sentence does not violate the doctrine of proportionality.

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Allen L. Garbrecht

[1] CJI2d 4.1 provides as follows:

> (1) The prosecution has introduced evidence of a statement that it claims the defendant made. You cannot consider such an out-of-court statement as evidence against the defendant unless you do the following:
>
> (2) First, you must find that the defendant actually made the statement as it was given to you. If you find that the defendant did not make the statement at all, you should not consider it. If you find that [he/ she] made part of the statement, you may consider that part as evidence.
>
> (3) Second, if you find that the defendant did make the statement you must decide whether the whole statement, or part of it, is true. When you think about whether the statement is true, you should consider how and when the statement was made, as well as all the other evidence in the case.
>
> (4) You may give the statement whatever importance you think it deserves. You may decide that it was very important, or not very important at all. In deciding this ,you should once again think about how and when the statement was made, and about all the other evidence in the case.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).