STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME DOINELL LEWIS,

Defendant-Appellant.

UNPUBLISHED
May 2, 1997

No. 191623
Kalamazoo Circuit Court
LC No. 95-716-FH

Before: Griffin, P.J., and Doctoroff, and Markman, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault with a weapon, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.1083. Subsequently, he was convicted of being an habitual offender, third offense, MCL 769.11; MSA 28.1083 Defendant was sentenced to sixty-four to ninety-six months' imprisonment for the felonious assault conviction, consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant first contends that there was insufficient evidence to support his felonious assault conviction. We disagree. In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). In order to prove felonious assault, the prosecution must establish "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable fear or apprehension of an immediate battery." *People v Coddington*, 188 Mich App 584, 594; 470 NW2d 478 (1991). Here, two witnesses testified to observing defendant shoot at them at least five times. Mark Slack testified that he observed defendant draw a firearm and heard the bullets passing by. Another witness heard the gunshots. Viewed in a light most favorable to the prosecution, we conclude that this presents sufficient evidence to justify the submission of the felonious assault charge to the jury.

Defendant next argues that the prosecutor improperly injected racial references into the trial, and that the trial court violated its duty to control the proceeding by failing to immediately rule on defense counsel's objection to proposed racial testimony. During opening statement, the prosecutor stated that evidence would be presented that defendant hated whites. In addition, throughout the trial, testimony was offered that defendant rode by the victim's home on several occasions yelling "kill the honkey," "kill the white man," and "white people have no business on this side of town." Defense counsel objected to the introduction of testimony that defendant hated whites, and the trial court deferred its ruling until such time that the evidence was intended to be introduced. However, at no time, including when the testimony was elicited at trial, did defense counsel object to the testimony concerning defendant's conduct. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Thus, on appeal we need only address the proposed introduction of evidence that defendant hated whites in general.

The trial court correctly ruled that it would not allow testimony that defendant hated whites. *People v Williams*, 143 Mich App 574, 586-587; 374 NW2d 158 (1985). However, defendant maintains that he was prejudiced by the prosecutor's remark during opening statement that such evidence would be presented. We disagree. The jurors heard ample testimony regarding defendant's racially motivated conduct toward the victim, a white man, and, therefore, the inference of defendant's racial attitudes was present in any event. Additionally, defense counsel chose not to request a curative instruction for tactical reasons, and defendant agreed, on the record, with that decision.

Defendant also argues that the trial court committed error requiring reversal in precluding Detective Joseph Pineda from testifying about the contents of a police report authored by Officer Andre Hicks. We disagree. First, the information defendant sought to introduce through Pineda was already before the jury through defense counsel's cross-examination of the victim. Second, there is no reasonable probability that introducing the report through Pineda would have changed the result of trial. Therefore, we hold that the error, if any, is harmless. See *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995), quoting *People v Hall*, 435 Mich 599, 609, n 8; 460 NW2d 520 (1990).

In a related argument, defendant claims that his counsel was ineffective for failing to call Officer Hicks as a witness. However, there was no evidentiary hearing on this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 671; 528 NW2d 842 (1995). After a 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 trial nor overcome the presumption that counsel's actions were strategic. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994); see also *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900 (1996).

Finally, defendant argues that his sixty-four-month minimum sentence for his felonious assault conviction violates the principle of proportionality. We disagree. Defendant was sentenced as a third

habitual offender. This Court's review of habitual offender sentences using the sentencing guidelines in any fashion is inappropriate and review is limited to determining whether the sentence violates the principle of proportionality, without consideration of the guidelines. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). In light of the circumstances of this case and the criminal history of defendant, we do not find that the sentence violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman