STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EDWARD SHERMAN,

Defendant-Appellant.

UNPUBLISHED
June 27, 1997

No. 191591
Macomb Circuit Court
LC No. 93-000552-FC

Before: Markman, P.J., and Holbrook, Jr., and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with a dangerous weapon, MCL 750.82; MSA 28.277, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to one to four years' imprisonment for each conviction of assault with a dangerous weapon and two years' imprisonment for each conviction of felony-firearm. The assault with a dangerous weapon sentences are to run concurrent to each other and the felony-firearm sentences are also to run concurrent to each other. However, the assault sentences are to run consecutively with the felony-firearm sentences. Defendant appeals as of right. We affirm.

On December 10, 1992, defendant had an altercation with his neighbor, Michael Patino. One of Patino's windows had been broken by some neighborhood children and Patino accused defendant of breaking it. Both sides requested that friends come over to their respective homes to assist in maintaining their security. Patino's friends carried sticks and baseball bats. When one of defendant's friends arrived at defendant's home, he was allegedly surrounded and attacked by Patino and his friends. Subsequently, another one of defendant's friends was also "rushed" by Patino's friends who were armed with bats, clubs and tire irons. Defendant then went outside of his house, pulled out a gun and fired approximately seven to twelve shots. One bullet hit Patino, one bullet hit a friend of Patino's and one bullet went into Patino's house.

Defendant first objects to the court's failure to instruct the jury on the use of non-deadly force in self defense or defense of others. However, his failure to object to the omission of such a jury instruction waives appellate review absent manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

In *People v Hooper*, 152 Mich App 243; 394 NW2d 27 (1986), the defendant also alleged on appeal that an instruction regarding the use of non-deadly force in self-defense should have been given. The *Hooper* defendant was originally charged with assault with intent to murder and felony-firearm. He was convicted of intentionally aiming a firearm without malice, discharging a firearm without malice causing injury, felonious assault and felony-firearm. *Id*. at 245. Although the jury was instructed on the use of deadly force in self-defense, the defendant argued on appeal that the jury should also have been instructed on the use of non-deadly force in self-defense. This Court held that the defendant was not entitled to an instruction on non-deadly force where he was initially charged with three counts of assault with intent to murder and where a firearm was used. *Id*. at 246-247.

Defendant's attempts to distinguish *Hooper* by stating that he was charged not only with intent to commit murder but "also charged with the lesser included offenses of assault with intent to do great bodily harm less than murder, and felonious assault." Defendant argues that since he was only convicted of felonious assault, the jury apparently concluded that he used only non-deadly force. However, the defendant in *Hooper* was also convicted of the lesser included offense of felonious assault. Yet, this Court still ruled that defendant Hooper was not entitled to an instruction on non-deadly force in self-defense.

Futher, standard instructions were given by the trial court on Use of Deadly Force in Self-Defense, CJI2d 7.15, Burden of Proof of Self-Defense, CJI2d 7.20, Defense of Others-Deadly Force, CJI2d 7.21 and Self-Defense Against Person Acting in Concert, CJI2d 7.24. We are not persuaded that manifest injustice will result by not reviewing defendant's request for the instruction where he used a firearm during the crime and where he was initially charged with three counts of assault with intent to murder. *Hooper, supra*. Therefore, we decline to further address this issue.

Defendant next argues that the sentencing judge (who was not the trial judge) mistakenly believed that defendant was convicted of the charged offense of assault with intent to murder. A sentencing judge is not entitled to make an independent finding of a defendant's guilt on another charge for which he was acquitted, *People v Glover*, 154 Mich App 22, 45; 397 NW2d 199 (1986); however, the sentencing transcript shows that the sentencing judge here did not make such an erroneous finding. First, both the defense and the prosecutor provided the judge with a brief summary of the facts surrounding the criminal episode and advised the judge of the offenses for which defendant was convicted. Second, the sentencing judge commented on the record that he had had the opportunity to review the PSIR which fully described the incident. Third, the sentencing judge correctly enumerated the offenses defendant was convicted of by the jury when he rendered sentence. Moreover, the sentences rendered were within the guidelines which were scored for felonious assault. Therefore, the record does not support defendant's contention.[1]

Affirmed.

/s/ Stephen J. Markman
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell

[1] Defendant focuses upon the trial court's reference to deterring persons from "committing life offenses" and claims that this reference indicates that the judge believed defendant was guilty of assault with intent to murder, a life offense. Whatever the reason for this confusing reference on the court's part, we believe that the evidence clearly indicates that the court was aware of the offenses for which defendant had been convicted.