STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 5, 1997
v	No. 155397 Eaton Circuit Court
ROBERT WESLEY KILBOURN, Defendant-Appellant.	LC No. 91-000445-FH ON REMAND

Before: Saad, P.J., and Bandstra and M.G. Harrison*, JJ.

PER CURIAM.

This case is on remand from the Supreme Court, which reversed this Court's previous decision. *People v Kilbourn*, 454 Mich 677; 563 NW2d 669 (1997). This Court had reversed defendant's conviction on the basis of one of the six arguments advanced on appeal; we now consider the remaining five arguments.

Defendant argues that the trial court should have granted a directed verdict motion because there was insufficient evidence on the element of intent. Conviction of assault with intent to do great bodily harm less than murder requires proof of specific intent. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). Intent may be inferred from the facts in evidence, and circumstantial evidence and reasonable inferences arising from the evidence are sufficient to prove intent. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). We view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that this element of the crime was proven beyond a reasonable doubt. *Id.*

The evidence showed that defendant and his companions knew that the McNamaras had telephoned the police to complain about the noise from the Kilbourn residence. Defendant accompanied three other men to the McNamaras' house after insisting he be allowed to carry the revolver. Defendant fired at least one shot into an illuminated room; this bullet narrowly missed both Gary and Pamela McNamara. The fact that the bullet missed these victims does not negate the element of intent. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). The evidence

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

supported a finding of specific intent, and defendant's motion for directed verdict on this issue was properly denied.

Defendant next argues that his conviction of two counts of assault with intent to do great bodily harm less than murder violated the double jeopardy clause because there was only one shot fired into the house. This Court has previously determined that a person, as the result of a single act, can be found guilty of multiple offenses, consistent with the double jeopardy clause. *People v Lovett*, 90 Mich App 169, 174-175; 283 NW2d 357 (1979). That holding has been applied in a situation, like the present case, where the intended victim of the criminal act was not actually harmed. *People v Lawton*, 196 Mich App 341, 351; 492 NW2d 810 (1992). Defendant's argument is without merit.

Defendant next claims that the jury was improperly instructed on simple assault. However, no objection was raised regarding that instruction and appellate review is precluded unless manifest injustice would result from our failure to address the issue. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). The jury could have consistently found that defendant did not intend to cause great bodily harm to the McNamaras, but merely to frighten them with a simple assault and presentation of this question to the jurors through the simple assault instruction was not unduly confusing. Further, defendant had adequate notice that issues surrounding simple assault would be presented at trial, that offense being a necessarily included offense of the original charge, assault with intent to do great bodily harm. *People v Ora Jones*, 395 Mich, 379, 387-388; 236 NW2d 461 (1975); *People v Usher*, 196 Mich App 228, 231-232; 492 NW2d 786 (1992). No manifest injustice will result from our lack of further review of this issue.

Next, defendant argues that his trial counsel provided ineffective assistance in failing to call a witness, Brian Kilbourn, who pled guilty to the crime a few days before the trial. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989). The decision whether to call witnesses is a matter of trial strategy, and the failure to call a witness or present other evidence can constitute ineffective assistance of counsel only when it deprived the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1993). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Because defendant failed to move for a new trial or an evidentiary hearing, our review is limited to the record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991).

In his appellate brief, defendant admits that the plea entered by the person whom he claims should have been called to testify was nolo contendere, which is usually allowed to avoid forcing a defendant to make an admission. *People v Kenneth Johnson*, 122 Mich App 26, 28; 329 NW2d 520 (1982). The nolo contendere plea is also appropriate when defendant cannot remember the facts because of intoxication. *People v Harvey*, 146 Mich App 631, 634-635; 381 NW2d 779 (1985). Although the trial court must state in every case why a plea of nolo contendere is appropriate, MCR 6.302(D)(2)(a), defendant has not supplied this Court with the trial court's rationale in accepting the plea. Considering the evidence that all four participants had been drinking heavily, it is quite plausible that Brian's intoxication and consequential loss of memory was the basis for the plea. Alternatively, the nolo contendere plea may have been entered with respect to aiding and abetting defendant in the crime.

Either way, Brian's testimony would not have been helpful to defendant. We conclude that defendant has failed to meet his burden of establishing ineffective assistance of counsel.

Finally, defendant argues that the trial court erred in scoring offense variable (OV) 2 and that his sentence is disproportionate.[1] A sentencing guidelines argument presents a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Because the sentencing guidelines do not have the force of law, and because we conclude that defendant's five-year minimum sentence is proportionate based on the circumstances surrounding this offense and offender, relief is unavailable to defendant based on an alleged scoring error of OV 2. *Id.* at 175-177; see, also, *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990).

We affirm.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Michael G. Harrison

[1] We note that defendant's sentencing arguments may be moot because his five-year minimum sentence may have already been fully served by the time this opinion is released.