

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERB BAKER,

Defendant-Appellant.

UNPUBLISHED

March 3, 1998

No. 195517

Recorder's Court

LC No. 95-010232

Before: Michael J. Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two concurrent terms of ten to twenty years in prison on the assault with intent to commit murder convictions, and two years in prison on the felony-firearm conviction, with the former sentences to be served consecutively to the latter. We affirm.

Defendant first argues that the trial court erred by misstating the law governing the intent to kill element of assault with intent to commit murder. We disagree. The trial court essentially stated that defendant's intent to kill could be inferred from his use of a gun against complainants, and this is a correct statement of the law. The intent to kill may be proven by inference from any facts in evidence. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The intent to kill may be inferred from the use of a dangerous weapon. *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993). We find no error.

Next, defendant argues that the prosecution presented insufficient evidence to sustain his assault with intent to commit murder convictions. We disagree. The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *Davis, supra* at 53. It is necessary to find an actual intent to kill for conviction of assault with intent to commit murder. *People v Brown*, 196 Mich App 153, 159; 492 NW2d 770 (1992).

We conclude that the prosecution presented sufficient evidence at trial to allow the trial court to find that all the essential elements of assault with intent to commit murder were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). When

complainants, who were police officers, took defendant's companion aside for questioning, they heard gunshots. Complainants then saw defendant running toward their patrol car, firing shots over his shoulder. Complainants identified themselves as police officers and yelled at defendant to drop his weapon. Instead of complying, defendant turned toward complainants, raised his gun and fired a shot toward them. Complainants had taken cover behind their patrol car but their upper bodies were exposed to defendant's shot. We hold that this evidence was sufficient to establish the elements of assault with intent to commit murder. *Davis, supra* at 53.

Defendant's third claim on appeal is that the trial court failed to make adequate findings of fact and conclusions of law, and also failed to consider lesser included offenses. We disagree. The trial court's findings of fact clearly indicate that the court was aware of the factual issues in defendant's case and correctly applied the law. *People v Porter*, 169 Mich App 190, 194; 425 NW2d 514 (1988). *Davis, supra* at 53. There is no merit to defendant's claim that the trial court erred in failing to consider lesser included offenses. Defendant did not request the consideration of any lesser included offenses and, in any event, the evidence presented at trial did not support the consideration of any. *People v Wofford*, 196 Mich App 275, 280-281; 492 NW2d 747 (1992).

Defendant also contends that his ten to twenty-year prison sentences for his assault with intent to commit murder convictions are disproportionate. We disagree. Defendant's minimum sentences are within the range recommended by the sentencing guidelines and are therefore presumptively proportionate. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1996). Defendant did not present any unusual circumstances to overcome this presumption of proportionality. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Further, the circumstances surrounding the offense support the proportionality of defendant's sentences. *Milbourn, supra* at 635-636. Defendant shot directly at complainants after they identified themselves as police officers. We find no abuse of discretion.

Finally, in a supplemental brief, defendant argues that the trial court erroneously failed to require that the prosecution demonstrate that it exercised due diligence in seeking to locate and produce a res gestae witness and that his trial counsel's failure to move for a due diligence hearing denied him of the effective assistance of counsel. The prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). Here defendant did not object to the witness' absence or indicate that he was dissatisfied with the absence of the witness. There is no merit to defendant's claim of ineffective assistance of counsel. The witness' testimony would have been cumulative and the decision not to pursue her testimony was a matter of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Roman S. Gribbs

