STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH HERMAN COATES,

Defendant-Appellant.

UNPUBLISHED
March 24, 1998

No. 200658
Berrien Circuit Court
LC No. 96-003902-FC

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, kidnapping, MCL 750.349; MSA 28.581, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as an habitual offender to 10 to 15 years' imprisonment for each of the assault convictions, life imprisonment on the kidnapping conviction, and two years preceding each of those sentences on each of the felony-firearm convictions. He appeals as of right. We affirm.

I

The first issue is whether the trial court erroneously admitted certain evidence of defendant's prior bad acts because the prosecution failed to give notice to the trial court of its intention to do so. We hold that no error occurred.

Defendant failed to object to this evidence in a timely manner. Absent manifest injustice, a defendant waives appellate review of the admission of bad acts evidence by failing to timely object, by stipulation to its admission, or by voluntary injection of the information by his own actions. See *People v Yarger*, 193 Mich App 532, 538-539; 485 NW2d 119 (1992). Here, the prosecution offered the evidence for a proper purpose, it was relevant, and its probative value was not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Morris testified that she fearfully submitted to the sexual intercourse, thus making the earlier choking incident relevant to vitiate the apparent consent. *People v*

Ullah, 216 Mich App 669, 673; 550 NW2d 568 (1996). Accordingly, we find this issue waived on appeal.

II

The second issue is whether the trial court erred by refusing to grant defendant's motion for a directed verdict with respect to the charges of criminal sexual conduct and assault with intent to murder. The trial court, when ruling on a motion for a directed verdict, must consider the evidence presented by the prosecutor up to the time of the motion in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979) (Coleman, CJ). This Court applies the same standard on review. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *Jolly, supra*.

First-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), is committed when the actor "engages in sexual penetration with another person and if any of the following circumstances exists: . . . (e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon." The conduct satisfies the "armed with a weapon" element of the statute when the actor has either actual or constructive possession of a dangerous weapon. *People v Proveaux*, 157 Mich App 357, 361; 403 NW2d 135 (1987); *People v Davis*, 101 Mich App 198, 201-202; 300 NW2d 497 (1980). "One has constructive possession if one has proximity to the article together with indicia of control." *Davis, supra*. This Court held that the actor need not have the weapon in his hands while committing the offense charged, so long as he has knowledge of the weapon's location and it is reasonably accessible. *Id*. at 203.

Here, the evidence clearly established that defendant had a gun when this incident began. Furthermore, defendant had the gun in his hand when he asked Morris to make love to him; he brought the gun into the bedroom just before the sexual acts occurred. Defendant leaned the gun against the dresser that she had described as right next to the bed, and the gun was within arm's reach of defendant during the sexual acts. Accordingly, there was sufficient evidence that defendant had knowledge of the gun's location, and it was reasonably accessible during the sexual penetration.

The elements of assault with the intent to commit murder, MCL 750.83; MSA 28.278, are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). Circumstantial evidence and reasonable inferences from the evidence may constitute proof of these elements. *Id*. The intentional discharge of a firearm at someone within range is an assault. *Id*., citing *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). The prosecution may prove the intent to kill "[by] inference . . . from any facts in evidence . . . ." *Lawton, supra* at 350, quoting *People v Drayton*, 168 Mich App 174, 176; 423 NW2d 606 (1988).

Here, one police officer testified that when he confronted defendant in the house, defendant pointed the gun at him and threatened him. Another officer testified that when he heard the first shot, he looked out the window from his position at the bottom of the stairs and saw that the shots were coming from the south wall and headed southwest toward the area where Hampton was standing. When Lieutenant Singleton drove up to the scene, he immediately dropped to the ground to avoid gunfire. Morris testified that defendant fired from the window that was facing Hampton's house and that defendant was looking out the windows from which he was shooting. Both Singleton and Hampton testified that bullets hit them at some point during the shooting.

Detective Sergeant Joann Danneffel, the police negotiator, testified that when she spoke to defendant on the telephone and explained that a man in the house next door needed medical attention because he had been shot, defendant was unconcerned and said that there was no need because the man was probably already dead. Danneffel further testified that defendant told her that if anyone came toward the house, he would kill them. Officer Agay, who spoke to defendant several times that night, testified that defendant repeatedly threatened to shoot and kill any officers who approached the house. These facts are sufficient to support a rational trier of fact in inferring that from defendant's firing the gun at the police car and in the direction of where Hampton and Singleton were standing and defendant's threats to kill any police officers who attempted to get to the house, defendant intended to kill both Singleton and Hampton.

Even if the evidence were insufficient to support an inference that defendant intended to kill anyone other than Lieutenant Singleton (because of his status as a police officer approaching the house), defendant's intent may be transferred to the shot that hit Hampton. *Lawton*, *supra* at 350. Thus, even if defendant were unaware that Hampton was in the vicinity of the officers at whom he was shooting, defendant's intent to kill the police officers may be transferred to the shot that hit Hampton.

The trial court therefore did not err in denying defendant's motion for directed verdict with respect to the first-degree criminal sexual conduct charge or assault with intent to commit murder as the evidence, taken in a light most reasonable to the prosecution, supports a rational trier of fact's conclusion that the prosecution established the essential elements of these crimes.

III

The third issue is whether sufficient evidence existed as a matter of law to support the conviction of assault with intent to do great bodily harm less than murder. Due process requires the prosecution to introduce sufficient evidence to justify a trier of fact in its conclusion that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to 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, amended 441 Mich 1201 (1992).

We find that the evidence presented at trial was sufficient to support defendant's conviction of assault with intent to do great bodily harm less than murder. The elements of this crime are an attempt or

offer with force or violence to do corporeal arm to another, coupled with intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). This Court has found sufficient evidence to support the specific intent element when a defendant made threats to the victim and fired a gun at him, despite the fact that the victim sustained no actual injury. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). Here, the victims suffered injuries as a result of the gunshots directed against them. Additionally, this Court has held that a defendant who shot at one party intending to hurt him can be convicted of two separate counts of assault with intent to do great bodily harm less than murder where the bullet struck a second party. *People v Lovett*, 90 Mich App 169, 171-175; 283 NW2d 357 (1979).

Here, defendant testified that he fired out one of the bedroom windows and admitted, when speaking about the area into which he shot, that he "didn't know nobody was there except the officer who was there." He testified that he was only trying to scare people but admitted that he saw the police car and, not knowing whether people were in the car, he intentionally shot at the car. One officer who spoke to defendant several times that night testified that defendant repeatedly threatened to shoot and kill any officers who approached the house. Under the transferred intent doctrine, even if defendant only intended to shoot at police officers, the fact that he struck Hampton and was convicted on a separate count is permissible under *Lovett*, *supra*. Thus, the evidence was sufficient to support a conviction for two counts of assault with intent to cause great bodily harm less than murder.

IV

The fourth issue is whether resentencing is required because the trial judge did not sufficiently articulate the reasons for the sentence imposed. Despite defendant's status as an habitual offender, this Court must determine whether the trial court abused its discretion in imposing the sentence. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995); *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentencing court must articulate on the record the criteria considered and the reasons for the sentences it imposes in order to facilitate appellate review. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991). Because the trial court sufficiently articulated numerous reasons for the sentences imposed, we find no error.[1]

V

The fifth and final issue is whether defendant's sentences were disproportionate and so disparate that they amount to cruel and unusual punishment violating the United States and Michigan Constitutions. Notably, because defendant was sentenced as an habitual offender, the sentencing guidelines do not apply to him. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997); *People v Gatewood*, 450 Mich 1021 (1996). Defendant has cited several statistical reports which, he alleges, show that his kidnapping and assault sentences are more severe than the average sentences for those crimes. In addition to the fact that this Court has specifically disapproved of the use of statistics to show that a parolable life sentence is more severe than another sentence, *People v Carson*, 220 Mich App 662, 677; 560 NW2d 657 (1996), defendant's statistics are not meaningful. There is no information about the prior records of the criminals that make up the statistics,

nor do they reflect information about the circumstances of those offenses. We also do not know whether these statistics take into consideration habitual offenders.

Given the facts of the present case, in addition to defendant's prior convictions and the nature of those crimes, the trial court's sentences were not disproportionate to the offense and the offender and, therefore, do not constitute cruel or unusual punishment. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997); *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

We affirm.

/s/ Jane E. Markey
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] The trial court noted that defendant had nine juvenile convictions, four of which were for assaultive crimes, and six prior adult convictions, four of which were for assaultive crimes. Defendant had served the maximum sentence on his most recent felony, and had a "pattern of weapons possession." The court further noted that probation has not worked for defendant, as he was on probation for an assaultive crime when he committed the instant offenses. The court also stated that neither the community corrections system nor the prison system had caused defendant to change his assaultive behavior. The trial court finally concluded that defendant was a serious threat to the community and expressed its intent to protect the community and to deter others from similar conduct.