

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALI, a/k/a MICHAEL WALKER,

Defendant-Appellant.

UNPUBLISHED

March 27, 1998

No. 199664

Recorder's Court

LC No. 95-011048

Before: Holbrook, Jr., P.J., and White and J. W. Fitzgerald,* JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for assault with intent to do great bodily harm, MCL 750.84; MSA 28.279. On April 8, 1996, defendant was sentenced to three to ten years' imprisonment. We affirm.

Defendant's first issue is that his trial counsel was ineffective in failing to object to the preliminary examination being held beyond fourteen days, in failing to file a motion to dismiss the charge, and in not alerting the court to defendant's desire to exercise his right to a trial by jury. We disagree. Because defendant failed to fully preserve this issue for our review by moving for a new trial or an evidentiary hearing in the trial court, our review is limited to errors evident in the existing trial record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, that the result of the proceeding was fundamentally unfair or unreliable, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Defendant argues that his trial counsel was ineffective for failing to object to the preliminary examination being held one day beyond the statutorily required fourteen days, and in failing to file a motion to dismiss the charge. MCL 766.4; MSA 28.922, provides that a "magistrate before whom any

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

person is arraigned on a charge of having committed a felony shall set a day for a preliminary examination not exceeding 14 days after the arraignment.”

Defendant was arraigned on the information on September 13, 1995, and the preliminary examination was held fifteen days later on September 28, 1995. Therefore, defense counsel could have moved for a dismissal pursuant to MCL 766.4; MSA 28.922. However, violation of this rule means that, on a timely motion, the charges must be dismissed, albeit without prejudice. *People v Smith*, 200 Mich App 237, 242; 504 NW2d 21 (1993). Only time limitations inherent in the constitutional right to a speedy trial preclude the prosecutor from re-filing charges in those circumstances. *Id.* Thus, although defense counsel could have moved for a dismissal of the charges, the dismissal would have been without prejudice, and defendant could have been immediately re-arrested and re-charged. Defendant has failed to offer evidence that he would not have been re-charged with the crime, or that the result of the preliminary exam would have been different but for the one day delay. Thus, defendant has failed to show that he was prejudiced by trial counsel’s failure to move for the dismissal of the charges, and thereby has failed to show that counsel was ineffective.

The issue whether trial counsel was ineffective for “not alerting the court of defendant’s desire to exercise his right to a trial by jury,” was not discussed in defendant’s brief and has no support in the record.

Defendant’s second issue is that his waiver of the right to trial by jury was invalid because the trial court failed to properly establish that the waiver was voluntarily, knowingly, and intelligently made, free of improper threats, coercion, or suggestions of leniency. We disagree. This Court reviews the trial court’s determination on this issue for clear error. *People v Leonard*, 224 Mich App 569, 595; 596 NW2d 663 (1997).

The trial court questioned defendant in a manner substantially similar to that approved by this Court in other cases. See *People v Shields*, 200 Mich App 554, 560; 504 NW2d 711 (1993). The court informed defendant of the right to a jury trial, asked whether defendant wanted the court to hear the case without a jury, and ascertained that defendant’s waiver was not the product of a threat or promise. Further, although it was not required, the court also secured a written waiver of defendant’s right to a jury trial. The trial court’s finding that defendant’s waiver was knowingly, intelligently and voluntarily made is adequately supported by the record.

Defendant’s final issue is that the prosecution failed to prove beyond a reasonable doubt each element of assault with intent to do great bodily harm. We disagree. This Court must view the evidence in the 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 Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *Id.*

The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence, to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder. *People v Pena*, 224 Mich App 650; 659; 569 NW2d 871 (1997);

MCL 750.84; MSA 28.279. The law presumes that every person intends the usual consequences which accompany the use of the means employed in the manner employed. *People v Gilliam*, 27 Mich App 314, 317; 183 NW2d 364 (1970). The intent necessary to commit an offense may be found in conduct as well as words. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981).

The victim testified that defendant hit her on the head at least four times and said that he was going to get a gun and kill her. Several witnesses saw defendant hit the victim and then put his hands around her throat and begin to choke her. When a hospital security guard arrived at the scene, defendant was choking the victim. The security guard sprayed defendant with Freeze Plus P, a chemical similar to pepper spray, to effect an arrest. Defendant did not stop choking the victim the first time he was sprayed, so the security guard sprayed him a second time at which time defendant released the victim. As a result of the altercation, the victim sustained some lacerations and bruises to her wrists and bruises around her neck. Viewing defendant's actions in the light most favorable to the prosecution, the trial court reasonably could have inferred that defendant had the required specific intent to inflict great bodily harm.¹ Thus, there was sufficient evidence for a rational trier of fact to find defendant guilty beyond a reasonable doubt of assault with intent to do great bodily harm.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ John W. Fitzgerald

¹ *People v Emerson*, 319 Mich 225; 29 NW2d 161 (1947), relied on by defendant is distinguishable. Here defendant was stopped by outside intervention before he completed his assault. Further, defendant made a statement regarding his intent at the time of the affray.