

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY ALLEN HITE,

Defendant-Appellant.

UNPUBLISHED

February 16, 1999

No. 203724

Berrien Circuit Court

LC No. 96-004163-FC

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

Defendant was convicted of escape from jail with violence, MCL 750.197c; MSA 28.394(3), and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced, as a fourth habitual offender, MCL 769.12; MSA 28.1084, to ten to fifteen years' imprisonment for his conviction for escape from jail with violence and to life in prison for his conviction for assault with intent to do great bodily harm less than murder. Defendant appeals by right. We affirm defendant's convictions and sentences.

Defendant and Keith Coates' attempted to escape from the Berrien County Jail. In the course of that escape, Tim Gray, a guard, was severely beaten. At trial, defendant admitted that he broke confinement but minimized his involvement in the attack on Gray.

Defendant's first issue on appeal is whether the trial court erred in refusing to grant defendant's motion for a mistrial. This motion was based upon the presence and movement of extra sheriff's deputies in the courtroom; specifically, a deputy changed locations as defendant moved to and from the witness stand to testify in his own behalf, which defendant claims denied defendant his constitutional right to a fair trial by unmistakably marking defendant as a person who was both guilty and exceptionally dangerous. This Court reviews for an abuse of discretion the denial of a motion for mistrial. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of that discretion is found only where the trial court's denial of the motion deprived the defendant of a fair and impartial trial. *Id.*

It is evident from the video-transcript of the third day of defendant's trial, which was provided to this Court, that there were at least three deputies posted at strategic positions between defendant and

the exits throughout the course of the proceedings. A fourth deputy moved about the courtroom throughout the course of the videotape; the deputy was sometimes seated in the second row or by the main door and sometimes not in the courtroom at all.

When defendant took the stand in his own defense, the configuration of deputies in the courtroom shifted. When defendant returned to his seat, the deputy, who had moved across the courtroom, returned to his original position by circling around the counsel table in the opposite direction as defendant traveled. The other deputies returned to their original positions, as well.

At the end of the day's proceedings on March 6, 1997, defendant moved for a mistrial based on the deputies' movements during defendant's testimony. After considering that defendant was charged with escape, defendant admitted to the escape, and defendant admitted to the jury that he faced up to life in prison, the trial court denied this motion. We agree.

The United States Supreme Court has found that the noticeable deployment of security in the courtroom is not "the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." *Holbrook v Flynn*, 475 US 560, 568-569; 106 S Ct 1340; 89 L Ed 2d 525 (1986). In *Holbrook, supra* at 570, the courtroom security staff for six defendants included four uniformed state troopers, two deputy sheriffs, and six committing squad officers; the defendant only challenged the presence of the four uniformed and armed state troopers. Defendant concedes that *Holbrook, supra*, is "most directly relevant to the present case." In *Holbrook*, the US Supreme Court found no prejudice due to the presence of armed, uniformed officers in the courtroom:

While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm. . . . In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.

* * *

[I]f the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over. Respondent has failed to carry his burden here. [*Id.* at 569, 572; emphasis added.]

The same is true in the case at bar. The presence of extra security is not inherently prejudicial, *id.* at 568-569, and any argument about actual prejudice to defendant as a result of the security detail lacks merit. In *People v Loy-Rafuls*, 198 Mich App 594, 598-599; 500 NW2d 480 (1993), reversed on other grounds 442 Mich 915 (1993),¹ we found no prejudice to a defendant who had been convicted in a proceeding during which there was a power outage and the lights went out in the courtroom. When the lights were restored, the defendants, in the presence of the jury, were seen surrounded by a group of armed sheriff's deputies who had their guns drawn. *Id.* at 598-599. In a footnote, we stated our rationale for finding that the defendant could not show actual prejudice from the event:

We note that one of defendant's codefendants who was presumably also surrounded by the police, was acquitted. Therefore it seems unlikely that the incident prevented the jury from fairly considering the evidence presented. [*Id.* at 599 n 2.]

In the present case, defendant was convicted of assault with intent to do great bodily harm less than murder, despite being charged with assault with intent to commit murder, MCL 750.83; MSA 28.278. Following our logic in *Loy-Rafuls*, *supra* at 599, "it seems unlikely that the [movement of the sheriff's deputies] prevented the jury from fairly considering the evidence presented." Only one deputy moved close to defendant when defendant was on the witness stand; the deputy apparently did so to position himself between defendant, the jury box, and the jury exit door. After defendant finished testifying, this deputy did not escort defendant back to counsel table but rather retraced his own steps to resume his position behind the prosecutor's table. As such, defendant cannot show actual prejudice and "has failed to carry his burden here." *Holbrook*, *supra* at 572.

Next, defendant argues that the trial evidence showed, at best, that defendant played only a minor role in the assault on Gray. On this basis, defendant requested a sentence less severe than the term of life given to Coates for Coates' conviction for assault with intent to commit murder. Defendant contends that his sentence of life in prison is disproportionate. We disagree.

This Court reviews the proportionality of defendant's sentence for an abuse of discretion by the trial court. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Although the trial court determined the sentencing guidelines for assault with intent to do great bodily harm less than murder before sentencing defendant, the guidelines are not applicable to defendant as an habitual offender. *People v Kennebrew*, 220 Mich App 601, 612; 560 NW2d 354 (1996). Defendant's sentence need only be proportional to the offense and the offender. *Milbourn*, *supra* at 630.

The penalty enhancement prescribed by the Legislature in MCL 769.12; MSA 28.1084 for habitual offenders provides:

(1) If a person has been convicted of 3 or more felonies ... and that person commits a subsequent felony within this state, the person shall be punished upon conviction as follows:

(a) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more, or for life, then the court . . . may sentence the person upon conviction of the fourth or subsequent offense to imprisonment in a state prison for the term of life or a lesser term.

Defendant conceded at sentencing that the offense of assault with intent to do great bodily harm less than murder provides for a maximum sentence of ten years for a first offense and that defendant had a substantial prior record.

It is clear from the transcript of the sentencing hearing that the trial court considered both defendant's participation in the offense and defendant's individual history before sentencing defendant to life in prison for the assault on Deputy Gray. Gray testified that during the assault, he was beaten with a second solid object in nearly simultaneous blows as Coates beat him with a piece of iron bar. Considering that defendant is an habitual offender, demonstrated no remorse, was found by the jury to be involved in the severe beating of a jail guard, and was incarcerated at the time he committed these felonies, we cannot find that the trial court abused its discretion in sentencing defendant to a term of life in prison pursuant to MCL 769.12(1)(a); MSA 29.1084(1)(a). *People v Hansford*, 454 Mich 320, 323-326; 562 NW2d 460 (1997); *Milbourn*, *supra* at 630.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins

¹ Our Supreme Court reversed this Court's decision in *Loy-Rafuls*, *supra*, solely because we held that defendant's mandatory sentence of life imprisonment without the possibility of parole constituted cruel or unusual punishment under the Michigan Constitution. The Supreme Court made no reference, however, to the defendant's conviction or other issues raised regarding his conviction, including the security measures employed during trial when the lights went out. Thus, we believe that this Court's reasoning in *Loy-Rafuls*, *supra*, may be persuasive even though it is not precedentially binding on this Court.