

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH KARMONE BOGGS,

Defendant-Appellant.

UNPUBLISHED

July 7, 2000

No. 214119

Wayne Circuit Court

LC No. 97-010155

Before: Jansen, P.J., and Hood and Saad, JJ.

MEMORANDUM.

Defendant was convicted by a jury of two counts of assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to serve a mandatory two-year prison term for the felony-firearm conviction, consecutive to two concurrent prison terms of 3½ to 10 years for the assault convictions. He appeals as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that his trial counsel was ineffective in failing to request an instruction on the lesser included offense of felonious assault, MCL 750.82; MSA 28.277. To establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Trial counsel's conduct is presumed to be a permissible exercise of trial strategy, and the defendant bears a heavy burden to prove otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant is correct that felonious assault is a cognate lesser included offense of assault with intent to commit murder. *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). Here, even were we to assume that the evidence supported such an instruction, we would conclude that defendant has failed to overcome his burden of showing that counsel's conduct in failing to request the instruction did not constitute sound trial strategy. Indeed, an instruction on the lesser offense of felonious assault would have been inconsistent with the defense theory at trial that defendant was not the

shooter, and such an instruction might have reduced the chance of an acquittal. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996); *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986). Accordingly, defendant has failed to demonstrate entitlement to appellate relief on this basis.

Defendant next argues that his sentences are disproportionate. Defendant's 3½-year minimum sentences are within the recommended guidelines range and, therefore, are presumptively proportionate. *People v Harrington*, 194 Mich App 424, 431; 487 NW2d 479 (1992). Although a sentence falling within the guidelines range may violate the principle of proportionality in unusual circumstances, *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990), no such circumstances are present in this case. The sentences do not constitute an abuse of sentencing discretion. *Harrington, supra*.

Affirmed.

/s/ Kathleen Jansen

/s/ Harold Hood

/s/ Henry William Saad