

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESMOND JOVAN TRICE,

Defendant-Appellant.

UNPUBLISHED

January 29, 2002

No. 226577

Midland Circuit Court

LC No. 99-009169-FH

Before: Gage, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant was convicted by jury of assault with intent to commit great bodily harm less than murder, MCL 750.84, carrying a concealed weapon (CCW), MCL 750.227, and possession with intent to deliver marijuana, MCL 333.7401(2)(D)(iii). The trial court sentenced defendant to imprisonment for thirty-six months to ten years on the assault conviction, for fifteen months to five years on the CCW conviction, and for fifteen months to four years on the possession with intent to deliver conviction, to be served concurrently. Defendant appeals as of right. We affirm.

Defendant first argues that his convictions must be reversed because the jury verdict of assault with intent to commit great bodily harm less than murder was against the great weight of the evidence. In essence, defendant argues that the trial court erred in denying him a new trial on that ground where the jury erred in rejecting his claim that he stabbed the victim in self-defense. We review this issue for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). “The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *Id.*, citing *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Here, there was no dispute that defendant stabbed the victim during an altercation. Witnesses testified that after the victim pushed defendant to the ground, defendant arose, drew a knife, stabbed the victim, and, admittedly, ran after the victim as the victim fled. There was ample testimony that defendant assaulted the victim with the intent to do great bodily harm, *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified on other grounds 457 Mich 885 (1998), and that defendant was not defending himself when he stabbed the victim, see *People v Heflin*, 434 Mich 482, 502-503, 503, n 16; 456 NW2d 10 (1990). Thus, the trial court did not abuse its discretion in denying defendant’s motion for a new trial on the basis of the great weight of the evidence.

Next, defendant argues that the court erred in denying his motion to sever the trial on the possession with intent to deliver charge from the other two charges. We agree. Because resolution of this issue involves interpretation and application of a court rule, our review is de novo. *Dykes v William Beaumont Hospital*, 246 Mich App 471, 482; 633 NW2d 440 (2001); *People v Robbins*, 223 Mich App 355, 359; 566 NW2d 49 (1997).

In pertinent part, MCR 6.120 addresses a defendant's right of severance of unrelated offenses for separate trials. MCR 6.120(B) provides:

On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

In *People v Tobey*, 401 Mich 141, 151-152; 257 NW2d 537 (1977), our Supreme Court explained:

“[S]ame conduct” refers to multiple offenses “as where a defendant causes more than one death by reckless operation of a vehicle.” “A series of acts connected together” refers to multiple offenses committed “to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery.” “A series of acts * * * constituting parts of a single scheme or plan” refers to a situation “where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank.” [Citations omitted.]

Here, defendant's act of stabbing the victim at a park and his unlawful possession of marijuana with intent to deliver do not conform to any of the standards in MCR 6.120(B). They certainly are not the same conduct, nor did one aid in the accomplishment of the other. The altercation at the park occurred as a result of hand gestures made and observed by defendant and the victim; it had nothing to do with the controlled substance and drug paraphernalia that defendant had in his possession at the time he was apprehended. For the same reason, the assault and the possession offenses are not part of a series of acts constituting a single scheme or plan. Thus, the trial court erred in denying defendant's motion to sever trial of the possession with intent to deliver marijuana charge.

However, we find the trial court's error harmless. Because this constitutional error was of a nonstructural character, harmless error analysis is appropriate. *People v Anderson (After Remand)*, 446 Mich 392, 404-407; 521 NW2d 538 (1994); see also *Arizona v Fulminante*, 499 US 279, 306-308; 111 S Ct 1246; 113 L Ed 2d 302 (1991). The question becomes “whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt.” *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), citing *Anderson, supra*. In *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001), our Supreme Court explained:

The standard that must be met to support reversal of a conviction for nonstructural constitutional error is the same standard as for forfeited non constitutional error, that is, the reviewing court “should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence.” [*Id.* at 640, citing *Carines, supra* at 774, and *People v Duncan*, 462 Mich 47, 57; 610 NW2d 551 (2000).]

Having reviewed the evidence in this case, we conclude that the error does not provide a basis for reversal of defendant’s convictions. Defendant claims that “[t]he jury rejected his claim of self-defense, because he was a drug dealer, who must be sent to prison.” Even disregarding any drug-related evidence, the evidence presented supported the jury’s conviction of defendant on the assault charge. Reversal is unwarranted.

Finally, defendant argues that he should be resentenced before a different judge because the trial court, in computing the sentencing guidelines, erred in scoring offense variables (OVs) 13 and 14. Because the crimes for which defendant was convicted were committed after January 1, 1999, the statutory sentencing guidelines apply here. MCL 769.34. “This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence.” *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000), citing MCL 769.34(10).

Defendant contends that he received an improper score of twenty-five points for OV 13 because that score is only appropriate when the offense is part of a pattern of criminal activities, over a period of time, but there is no pattern of defendant committing assaults against persons. He also maintains that OV 13 is meant to target professional criminals and deals primarily with the issue of a defendant’s membership in an organized criminal group. Rather than challenge the information the prosecutor relied on in support of a score of twenty-five points and the applicability of MCL 777.43(1)(b), defendant focuses on factors irrelevant to the trial court’s scoring decision. Having read MCL 777.43, which addresses the scoring of OV 13, we find defendant’s contentions without merit. Further, we affirmatively find that the trial court properly scored 25 points for OV 13. Defendant has three felonious convictions for offenses against a person within a five-year period, including assault with a dangerous weapon in August of 1995, resisting and obstructing a police officer in January of 1999, and the instant offense, which occurred in May of 1999.

Defendant also claims that the trial court improperly scored OV 14. OV 14 addresses the offender’s role and should be scored at ten points if “[t]he offender was a leader in a multiple offender situation.” MCL 777.44(1)(a). “The entire criminal transaction should be considered when scoring this variable.” MCL 777.44(2)(a). We find no error where the record clearly shows that defendant and a friend drove by the park, observed someone gesturing at them,

gathered multiple friends, returned to the park, and then defendant engaged in an altercation with the victim.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter