

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RUSSELL LEE MASSON,

Defendant-Appellant.

UNPUBLISHED

October 9, 2003

No. 240731

Iosco County Circuit Court

LC No. 01-004262-FH, 01-

004263-FH, 01-004269

Before: Fitzgerald, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of attempted murder, MCL 750.91.¹ The trial court sentenced defendant to 295 to 480 months in prison for the attempted murder conviction, and we affirm.

While defendant frames his appeal as a sufficiency of the evidence issue, it is clear that his claim of error concerns whether he should have been convicted under the attempted murder statute instead of the assault with intent to murder statute. We hold that defendant has waived this issue. A similar issue arose in *People v Ng*, 156 Mich App 779, 785-786; 402 NW2d 500 (1987) and, as this Court explained:

Defendant first argues that, since attempted murder and assault with intent to commit murder are mutually exclusive charges, and the evidence established that an assault was committed, it was improper to convict defendant of attempted murder rather than assault with intent to commit murder.

Defendant was originally charged with attempted murder, assault with intent to commit murder, and the manufacturing of an explosive device with unlawful intent. At the conclusion of proofs during the preliminary examination, defendant moved for an election of counts. The examining magistrate held that the attempted murder charge was the appropriate count on which to bind

¹ In three consolidated cases below, defendant was also convicted of multiple counts of felonious assault, MCL 705.82, and multiple counts felony-firearm, MCL 750.227b. Defendant does not challenge those convictions or sentences in this appeal.

defendant over. Thereafter, defendant was bound over on the counts of attempted murder and the manufacturing of an explosive device with unlawful intent.

At the outset of trial, defendant moved to quash the attempted murder charge on the theory that the prosecutor failed to prove that the bomb would have ensured death had it detonated. The trial judge denied the defendant's motion, holding that there was sufficient evidence for the bindover. At no time did the defendant indicate that the examining magistrate had erred in not binding defendant over on assault with intent to murder.

Defendant did not object at trial that he was not charged with assault with intent to commit murder as opposed to attempted murder. Failure to object at trial precludes appellate review absent manifest injustice. *People v Handley*, 415 Mich 356, 360; 329 NW2d 710 (1982). In the proceedings below, if defendant believed this to be an assault case, the examining magistrate should have been notified at the time of the election of counts or at trial. This Court has held that it is improper to make an appellate parachute out of issues not raised below. *People v Brocato*, 17 Mich App 277, 305; 169 NW2d 483 (1969). Manifest injustice will not result if this Court declines to review the issue. Defendant's failure to object in the lower court, especially after requesting an election of counts, precludes review by this Court. [*Ng, supra* at 784-785.]

Here, defense counsel did not move to quash the attempted murder charge, despite the seemingly contradictory alternative count of assault with intent to murder. Furthermore, defense counsel did not dispute the charge during trial and did not challenge the charge in his motion for directed verdict except to argue that the prosecutor did not prove the required element of intent. Defense counsel also stated that he had no objection to the jury instructions, other than on the intoxication defense, and he otherwise stated that *both he and defendant were "satisfied" with the instructions*. Moreover, during their deliberations, the jury requested the trial court to clarify the difference between assault with intent to murder and attempted murder and defense counsel again expressed satisfaction with the jury instructions.

Under these circumstances, defendant clearly and repeatedly waived this issue on the record. *Ng, supra*. Further, "[b]ecause error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendant has waived appellate review of this issue." *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003), quoting *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard Allen Griffin
/s/ Henry William Saad