

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDISON ALEXANDER PEOPLES,

Defendant-Appellant.

UNPUBLISHED

April 3, 2007

No. 265481

Saginaw Circuit Court

LC No. 04-024516-FC

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to rob while armed, MCL 750.89, assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felonious assault, MCL 750.82, third-degree fleeing and eluding the police, MCL 750.479a(3), carrying a dangerous weapon with unlawful intent, MCL 750.226, and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to two concurrent prison terms of two years each for the felony-firearm convictions, to be served consecutive to the concurrent prison terms of 20 to 40 years for the assault with intent to rob while armed conviction, 5 to 15 years for the assault with intent to do great bodily harm less than murder conviction, two to six years for the felonious assault conviction, and two years to 90 months for the third-degree fleeing and eluding the police, carrying a dangerous weapon with unlawful intent, and carrying a concealed weapon convictions. Defendant appeals and, for the reasons stated below, we affirm defendant's convictions but remand for the trial court to determine the correct amount of credit for time served.

I. Sufficiency of the Evidence

Defendant argues that the prosecution presented insufficient evidence to support his conviction for assault with intent to do great bodily harm less than murder.¹ Under MCL 750.84,

¹ Whether sufficient evidence exists to support a conviction is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723-724; 597

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“[a]ssault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. Assault with intent to commit great bodily harm is a specific intent crime.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1998). The intent to do great bodily harm requires the intent to do serious injury of an aggravated nature. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). An intent to harm can be inferred from the defendant’s conduct. *Parcha*, *supra* at 239.

Here, defendant shot at one of the victims twice during their struggle. Simply because the victim was not hit by defendant’s gunfire does not establish that defendant discharged the weapon inadvertently. To the contrary, a jury could reasonably infer that, had the victim failed to prevent it, defendant would have shot the victim. Accordingly, we reject defendant’s claim that insufficient evidence supported his conviction.

II. Assistance of Counsel

Defendant contends that his trial counsel was ineffective for failing to ask the victims whether the person they identified as the perpetrator had his two front teeth.² Assuming that defendant does not have his front teeth, defendant has failed to demonstrate that, had trial counsel asked the question, a reasonable probability existed that the outcome of the trial would have been different. Uncontested evidence presented at trial reflected that, shortly after the assaults, defendant fled from the arresting officer at a high rate of speed while driving a vehicle that two victims positively identified as the vehicle involved in the assaults. Regardless whether defense counsel could have attempted to discredit the witnesses who identified defendant as an individual involved in the assaults, there was abundant evidence adduced at trial to demonstrate defendant’s involvement in the crime. Accordingly, there is no reasonable probability that, had

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NW2d 73 (1999). In reviewing the sufficiency of the evidence, the evidence is viewed in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility are left to the trier of fact to resolve, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999), and it is for the trier of fact to determine what inferences can be drawn from the evidence and to determine the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

² This ineffective assistance of counsel claim is unpreserved because the claim was not raised below in a proper request for an evidentiary hearing or in a motion for new trial. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Thus, review is limited to errors apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish a claim of ineffective assistance of counsel, a defendant bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Specifically, a defendant must show that counsel’s performance was objectively unreasonable and that, but for defense counsel’s errors, there was a reasonable probability that the result of the proceeding would have been different. *Id.* at 600. In addition, there is a strong presumption that defense counsel’s performance was sound trial strategy. *Id.* Constitutional error warranting reversal does not exist unless counsel’s error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *People v Pickens*, 446 Mich 298, 312 n 12; 521 NW2d 797 (1994).

defense counsel asked about the perpetrator's teeth, the jury would have reached a different verdict.

Defendant further claims that trial counsel was ineffective for failing to present evidence that defendant had undergone testicular surgery one or two weeks before the attacks. Defendant maintains that counsel should have used this evidence to contradict eyewitness testimony because it would have been highly improbable that someone recovering from surgery would have engaged in a physical struggle or would have run away as some of the witnesses described. Presumably, as a matter of trial strategy, defense counsel elected not to raise this argument in light of uncontested evidence that defendant engaged in a high speed vehicle chase with an officer, exited the vehicle after it came to a stop, and engaged an apparent lengthy foot chase that ultimately resulted in his arrest. To raise such a defense below would be unpersuasive in light of defendant's apparent ability to run. Accordingly, we will not substitute our judgment for that of trial counsel on this matter involving trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant also argues that his attorney was ineffective for failing to request jury instruction CJI2d 4.4.³ The instruction informs the jury that a guilty conscience may be evidenced by flight, but notes that a person may have innocent reasons to flee. Defense counsel conceded that the video tape played to the jury showed defendant fleeing from police, but he argued that defendant fled because he did not want to go back to jail concerning other charges that were pending at that time. Presumably, trial counsel did not ask for the instruction, which would raise the question of defendant's consciousness of guilt, because counsel was able to argue an exculpatory reason for defendant's flight without instructing the jury that an inculpatory reason may have existed as well. Again, we will not substitute our judgment for that of trial counsel on this matter involving trial strategy. *Rockey, supra* at 76.

II. Double Jeopardy

Defendant claims that his conviction for carrying a dangerous weapon with unlawful intent violated his constitutional right against double jeopardy. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v*

³ CJI2d 4.4 provides as follows:

(1) There has been some evidence that the defendant [tried to run away / tried to hide / ran away / hid] after [the alleged crime / (he / she) was accused of the crime / the police arrested (him / her) / the police tried to arrest (him / her)].

(2) This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt.

(3) You must decide whether the evidence is true, and, if true, whether it shows that the defendant had a guilty state of mind.

Nutt, 469 Mich 565, 574; 677 NW2d 1 (2004). At issue here is the third protection against double jeopardy.

Defendant specifically claims that his convictions for assault with intent to rob while armed, MCL 750.89, assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82, subsumed his conviction for carrying a dangerous weapon with unlawful intent, MCL 750.226, resulting in factual double jeopardy. We reject defendant's reliance on the factual double jeopardy test because that test has been rejected by our Supreme Court. *People v Sturgis*, 427 Mich 392, 404-405; 397 NW2d 783 (1986), citing *People v Robideau*, 419 Mich 458, 484-485; 355 NW2d 592 (1984); *People v Wakeford*, 418 Mich 95, 111; 341 NW2d 68 (1983); *People v Hurst*, 205 Mich App 634, 637; 517 NW2d 858 (1994).⁴ Accordingly, no plain error occurred and defendant's derivative ineffective assistance of counsel claim also fails. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (concluding that the failure to make a futile objection does not constitute ineffective assistance of counsel).

III. Sentence

Defendant relies on the rule pronounced in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and reiterated in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), and contends that he is entitled to resentencing because the trial court violated his due process rights when it scored points for certain offense variables based on facts that were neither proved beyond a reasonable doubt at trial nor admitted by defendant. However, in *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), our Supreme Court held that the rule of *Blakely* does not apply to Michigan's legislative sentencing guidelines. Accordingly, we reject this argument.

Finally, defendant argues that, pursuant to MCL 769.11b, he is entitled to receive credit for the entire time he was jailed after his arrest on March 15, 2004. Though this issue was not preserved below, we hold that relief is warranted because plain error occurred that affects the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 769.11b provides as follows:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

⁴ Defendant relies on *People v Davis*, 122 Mich App 597; 333 NW2d 99 (1983), to support his factual double jeopardy claims. However, *Sturgis* effectively overruled *Davis* and is binding on this Court. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

A sentencing court is required to apply the sentencing credit provision in MCL 769.11b. *People v Seiders*, 262 Mich App 702, 706; 686 NW2d 821 (2004). A credit is required only for time served as a result of a defendant being denied or unable to furnish bond for the offense of which he is convicted. *People v Whiteside*, 437 Mich 188, 196-197; 468 NW2d 504 (1991); *Seiders, supra* at 707.⁵

Here, defendant was arrested on March 15, 2004, and a bond was later set by the trial court. The presentence investigation report (PSIR) provides that defendant did not post bond. Defendant was initially sentenced on August 15, 2005. The PSIR prepared for the then-scheduled July 25, 2005 sentencing date provides that defendant was entitled to 146 days' credit for time served as to the two felony-firearm convictions that were required to be served consecutive to the remaining convictions under MCL 750.227b(2). During the August 15, 2005 sentencing, the trial court added 21 days to the previously calculated 146, totaling 167 days. However, we are unable to determine how the probation department calculated the original 146 days.

It appears that, on the record before us, it was plain error for defendant to not be awarded the appropriate credit for time served from March 15, 2004 through August 15, 2005 because it appears that he was incarcerated during that period of time for the instant offenses and was unable to post bond. *Whiteside, supra* at 196-197; *Seiders, supra* at 707. Further, the fairness, integrity, and public reputation of judicial proceedings are affected when a defendant is sentenced to period longer than that authorized by law. *People v Kimble*, 470 Mich 305, 313; 684 NW2d 669 (2004). Accordingly, we remand for the sentencing court to recalculate credit for time served in an amended judgment of sentence under the framework discussed above.

We remand for recalculation of defendant's credit for time served on the instant sentences consistent with this opinion. In all other respects we affirm. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kurtis T. Wilder

⁵ However, the statute does not permit a credit "where a defendant is released on bond following entry of charges arising from one offense and, pending disposition of those charges, is subsequently incarcerated as a result of charges arising out of an unrelated offense or circumstance and then seeks credit in the former case for the latter period of confinement." *People v Prieskorn*, 424 Mich 327, 340; 381 NW2d 646 (1985). Additionally, a parolee who is arrested for a new offense and incarcerated on a parole detainer is given credit under the sentencing credit statute against the paroled sentence. *Seiders, supra* at 707. The probation revocation statute, MCL 771.4, provides, in relevant part, as follows: "If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made."