

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES LAQUETTE HILL,

Defendant-Appellant.

UNPUBLISHED

April 27, 2004

No. 245727

Saginaw Circuit Court

LC No. 02-021863-FH

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction on charges of domestic violence, MCL 750.81(4), and aggravated assault, MCL 750.81a. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to 2 to 4 years' imprisonment for domestic violence and 170 days in jail for assault. We affirm.

Defendant first argues that the trial court erred in using his 1996 felony conviction for malicious destruction of a building with damage in excess of \$100.00 to sentence him as a third-offense habitual offender, because that crime was reclassified as a misdemeanor in 1998. MCL 750.380(3)(a); MCL 750.380(4)(a); 1998 PA 311. However, this Court has held that trial courts may use a conviction of a crime that was a felony at the time it was committed to enhance a subsequent habitual offender charge even though the prior crime has since been reclassified as a misdemeanor. *People v Odendahl*, 200 Mich App 539, 543-544; 505 NW2d 16 (1993). In any event, defendant waived this issue on appeal by indicating at sentencing that he had no objection to the trial court's use of the conviction to enhance his sentence. Accordingly, no error exists for our review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next argues that there was insufficient evidence to support his domestic violence conviction. Specifically, defendant contends that his testimony demonstrates that he acted in self-defense, and that reasonable doubt exists regarding whether he intended to batter the victim. We disagree. In determining whether the prosecution presented sufficient evidence to sustain a conviction, we review the record de novo and consider the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

To prove that defendant committed the offense of domestic violence, the prosecution was required to prove, beyond a reasonable doubt, that defendant and the victim were related in one of the ways set forth in MCL 750.81(4), i.e., that the victim was the defendant's spouse or former spouse, an individual with whom he has or has had a dating relationship, an individual with whom he has had a child in common, or a resident or former resident of his household, *and* that defendant either intended to batter the victim or that the defendant's unlawful act placed the victim in reasonable apprehension of being battered. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996).

At trial, the victim and her children testified that defendant punched her in the eye with his closed fist, and the emergency room doctor testified that the victim had bruising, swelling, and abrasions to her eye which were consistent with being punched with a closed fist. Further, defendant admitted intentionally striking the victim. However, defendant also testified that the victim and her children attacked him, and that he inadvertently hit the victim in the eye with his elbow when he was trying to get away from the victim and her children. Additionally, the emergency room doctor testified that the victim's injuries could be consistent with being hit by an elbow. Although defendant's account of the confrontation differed from the accounts of the victim and her children, we must, in considering proofs in a light most favorable to the prosecution, avoid weighing the proofs or determining what testimony to believe. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Rather, we must resolve all conflicts in favor of the prosecution. *Id.* Because we believe a rational trier of fact could have found that the essential elements of domestic violence were proven beyond a reasonable doubt, defendant is not entitled to relief on this basis.

Defendant next argues that the trial court erred in failing to instruct the jury that it could find defendant not guilty of domestic violence or the lesser included offense of assault and battery if the prosecutor did not prove each element of the offense beyond a reasonable doubt. We disagree. We review jury instructions in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). However, because defendant failed to preserve this issue, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999).

The record reveals that at the outset of the jury instructions, the trial court instructed the jury that if it found that the prosecutor had not proven every element of a crime beyond a reasonable doubt, it must find defendant not guilty. When the trial court instructed the jury regarding the domestic violence charge and the lesser included offense of assault and battery, it stated that to prove the charge, the prosecutor had to have proven each of the elements of the crime beyond a reasonable doubt. While the trial court did not specifically state that the jury could find defendant not guilty if the prosecutor failed to prove all of the elements of the crime at that point during the instructions, it indicated at the outset of the instructions that the jury must find defendant not guilty if all the elements of a crime were not proven beyond a reasonable doubt. Viewing the instructions as a whole, we find no plain error affecting defendant's substantial rights.

Defendant next argues that the trial court erred in failing to re-instruct the jury regarding the "no duty to retreat" rule, following a discussion between the prosecutor, defense counsel, and the trial court concerning the jury instructions which had already been given. While defendant correctly states that the prosecutor objected to defense counsel's request for an instruction on the

lesser included offense of assault and battery for the domestic violence charge, defendant mistakenly asserts that defense counsel requested the domestic violence charge to be amended to assault and battery. Following the prosecutor's objection, and pursuant to defendant's request, defense counsel asked the trial court to eliminate the lesser included offense instruction of assault and battery on the domestic violence charge. Then, pursuant to defendant's second request, defense counsel asked the trial court to keep the lesser included offense instruction. The trial court then stated that it would maintain its earlier ruling which allowed the lesser included offense instruction. Because the trial court had instructed the jury regarding the "no duty to retreat" rule in its original instructions, and because the charges against defendant were not changed after those instructions, the trial court did not commit plain error affecting defendant's substantial rights by failing to re-instruct the jury on that rule.

Finally, defendant argues that the prosecutor violated his equal protection rights by failing to charge the victim or her children in connection with this case. We disagree. We review a prosecutor's charging decision for an abuse of discretion. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). However, because defendant failed to preserve this issue, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 766-767.

It is well settled that the prosecution has broad discretion when deciding whom to prosecute. *People v Maxson*, 181 Mich App 133, 134; 449 NW2d 422 (1989). Our Supreme Court has adopted a two-prong test to determine whether a particular prosecution violates the Equal Protection Clause. First, it must be shown that the defendant was singled out for prosecution while others similarly situated were not prosecuted for the same conduct. *People v Ford*, 417 Mich 66, 101-102; 331 NW2d 878 (1982). Second, it must be established that this discriminatory selection in prosecution was based on an impermissible ground such as race, sex, religion or the exercise of a fundamental right. *Id.* at 102. However, defendant has failed to satisfy either prong. First, the prosecution could reasonably have concluded that defendant was the aggressor and that the victim and her children acted in self-defense. In that case, defendant and the others were not similarly situated. However, even if they were similarly situated, defendant has not demonstrated that the prosecution discriminated against him on an impermissible ground. There was no plain error affecting defendant's substantial rights; therefore, defendant is not entitled to relief on this basis.

We affirm.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald