

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DOUGLAS MICHAEL TUTTLE,

Defendant-Appellant.

UNPUBLISHED

March 18, 2004

No. 244704

Macomb Circuit Court

LC No. 01-003656-FH

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant was found guilty by a jury of two counts of assault with a dangerous weapon, MCL 750.82, one count of reckless use of a firearm, MCL 752.863a, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of thirty-two to forty-eight months' imprisonment for the assault convictions, to be served consecutively to concurrent terms of two years' imprisonment for the felony-firearm convictions; the sentence for the reckless use of a firearm conviction was for time served. Defendant appeals as of right. We affirm in all particulars except for technical correction of the judgment of sentence, and remand for that correction.

Defendant first argues that there is insufficient evidence to sustain his convictions. We disagree.

We review a challenge to the sufficiency of the evidence for a criminal conviction de novo to determine if, when reviewed in the light most favorable to the prosecutor, it could lead a rational trier of fact to find all the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of assault with a dangerous weapon, MCL 750.82, are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place a victim in reasonable fear or apprehension of an immediate battery. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

Viewing the evidence in a light most favorable to the prosecution, we hold that a rational trier of fact could find that the elements of assault with a dangerous weapon were proven beyond a reasonable doubt. The police officers testified that defendant fired gunshots in their direction whenever they moved and that they believed defendant was shooting at them. The shots caused

the officers to be scared, fearful and concerned. In light of that testimony, the jury could reasonably find that the officers had a reasonable fear or apprehension of an immediate battery, and that defendant intended to create this reasonable apprehension. Defendant's use of a dangerous weapon is uncontested and the fact of the assaults is clear given the firing of a weapon in the direction of the officers. The record reveals evidence on each element of the offense from which a jury could reasonably conclude guilt beyond a reasonable doubt.

Defendant next argues that his conviction must be reversed because, during closing argument, the prosecutor racked the shotgun in open court, and argued that defense counsel's reaction was proof that such an act could create a reasonable fear of imminent personal danger, adding for emphasis the words, "Trust me," and "Believe me." Although the prosecutor's action was arguably improper, we hold that reversal of defendant's convictions is not required.

We find no error in the prosecutor's use of the phrases "trust me" and "believe me." Read in context, these phrases were mere colloquial expressions, not literal appeals to the jury to accept the prosecutor's vouching for his case. The prosecution concedes in its brief that the racking of the shotgun was in effect demonstrative evidence. A jury is limited to consideration of actual evidence admitted at trial. It is improper for an attorney to attempt to present in closing argument a demonstrative aid not introduced in the case in chief. However, the jury was properly instructed by the court to consider only the evidence and to disregard the remarks of counsel. Because a jury is presumed to obey the instructions it is given, *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998), any error was harmless.

Defendant next argues that he was denied the effective assistance of counsel at trial because his attorney (1) failed to prepare for trial, (2) did not present an expert witness on defendant's intoxication, and (3) did not have defendant testify. We disagree.

Because there was no evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to ineffective assistance apparent from the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). We find ineffective assistance only where counsel's performance falls below an objective standard of reasonableness, and where the ineffective assistance was so prejudicial to the defendant that there is a reasonable probability that without the ineffective assistance, the outcome would have been different. A reasonable probability that the outcome would have been different means one sufficient to undermine confidence in the case's outcome. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich 298, 311, 314, 326; 521 NW2d 797 (1994). Defendant has not made a showing that this standard has been met.

Defendant's assertion that counsel did not prepare for trial in advance is not supported in the record. Accordingly, we cannot consider it on appeal. *Wilson, supra*, 196 Mich App 612.

Both the decision not to call an expert witness on the issue of intoxication and the decision not to have defendant testify were matters of trial strategy normally left to counsel's discretion and, accordingly, not a reason for a finding of ineffective assistance. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Because no showing has been made that these decisions were anything other than sound trial strategy, we find no ground for reversal. We also note that defendant agreed on the record with counsel's decision not to have him testify.

Finally, defendant argues that the trial court failed to provide a substantial and compelling reason for its upward departure from the statutory sentencing guidelines, MCL 777.1 *et seq.* The court acknowledged that under the guidelines, the longest minimum sentence defendant could receive on the assault counts was twenty-three months, but nevertheless sentenced him to concurrent terms of thirty-two to forty-eight months' imprisonment for the assault convictions. We find no error in this departure.

A trial court's departure from the statutory sentencing guidelines is reviewed under a clear error standard. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). This standard is more deferential than a *de novo* one, but less deferential than the traditional abuse of discretion standard. *Id.* at 269. Our review must focus, as must the trial court's, on the question of whether the trial court had a substantial and compelling reason for the departure and stated reasons for it on the record, as required by MCL 769.34(3), and whether the departure results in a sentence more proportional to defendant's conduct than would be permitted by a sentence within the guidelines. *Id.* at 256, 264-265.

As the trial court noted, *People v Marshall*, 204 Mich App 584; 517 NW2d 554 (1994), is authority for departing from the guidelines when a police officer is the victim in a firearm-related offense. The trial court found victimization of police officers to be a substantial and compelling reason for departure. The reason is, moreover, an objective and verifiable one, as required by *Babcock*. We see no clear error in the trial court's ruling that a substantial and compelling reason existed for a departure, or that its consideration permitted a more proportional sentence than would have been possible without its consideration, by adding an additional nine months to the length of the minimum sentences, from twenty-three to thirty-two months. Hence, there is no basis for vacating defendant's sentences.

However, we direct the trial court to make a clerical correction in the judgment of sentence. The judgment cites the reckless use of a firearm statute, under which defendant was convicted, as MCL 750.863a. The correct citation, however, is MCL 752.863a. The judgment should be corrected accordingly. We remand the case for this limited purpose.

Defendant's convictions and the lengths of his sentences are affirmed, but the matter is remanded for the limited purpose of correcting the judgment of sentence to reflect the correct statutory citation for the reckless use of a firearm conviction. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Helene N. White

/s/ Pat M. Donofrio