

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OMAR ANTWAN WALKER,

Defendant-Appellant.

UNPUBLISHED

March 1, 2005

No. 251354

Kalamazoo Circuit Court

LC No. 03-000786-FC

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and malicious destruction of personal property, MCL 750.377a(1)(b)(i). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 114 months to 50 years for the assault conviction, and 96 months to 32 years for the malicious destruction of property conviction. He appeals as of right. We affirm defendant's convictions and sentence for assault with intent to do great bodily harm less than murder, but vacate his sentence for malicious destruction of property and remand for resentencing. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. Other Acts Evidence

We reject defendant's claim that the trial court erred by admitting evidence of "other acts" that occurred in Georgia. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Evidence is admissible under MRE 404(b) if it is offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, is relevant to an issue or fact of consequence at trial, and is sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

In this case, there was evidence that defendant rammed into a police car and nearly hit an officer while escaping police capture; defendant denied any intent to harm and claimed that his foot accidentally slipped off the gas pedal. In the Georgia incident, defendant eluded the FBI by ramming two law enforcement vehicles and nearly hitting an FBI agent. Given defendant's

defense, the other acts evidence assisted the jury in weighing the witnesses' credibility and was probative of defendant's intent to cause great bodily harm, and the absence of mistake or accident. In short, the theories for which the evidence was admissible were legitimate, material, and contested grounds on which to offer the evidence. Further, defendant has not demonstrated that the evidence was unfairly prejudicial under MRE 403. Indeed, the trial court gave a limiting instruction to the jury concerning the proper use of the evidence, thereby alleviating the potential for unfair prejudice. Therefore, the trial court did not err by admitting the challenged evidence under MRE 404(b).

II. Sufficiency of the Evidence

We also reject defendant's claim that there was insufficient evidence to sustain his conviction of assault with intent to cause great bodily harm less than murder. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514.

"Assault 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." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Defendant challenges only the intent element.

The intent to cause great bodily harm less than murder may be inferred from facts in evidence; because an actor's state of mind is difficult to prove, only minimal circumstantial evidence is required. *Id.*; *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985). Evidence was presented that, after an officer ordered defendant to stop, defendant accelerated, struck a police car, turned, and drove directly toward the officer. When the officer moved, defendant followed him, forcing him to take "drastic, evasive action to get out of the way." Defendant's vehicle narrowly missed the officer. From this evidence, viewed in a light most favorable to the prosecution, a jury could reasonably infer that defendant intended to cause great bodily harm less than murder. Therefore, the evidence was sufficient to sustain defendant's conviction of assault with intent to commit great bodily harm less than murder.

III. Restitution

We reject defendant's claim that the trial court impermissibly ordered restitution in an amount that included the losses sustained by the Georgia FBI. The Crime Victim's Rights Act authorizes restitution "to any victim of the defendant's course of conduct that gives rise to the conviction . . ." MCL 780.766(2). The term "course of conduct" has been broadly interpreted by our Supreme Court, which has stated that "the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997). Contrary to what defendant argues, the Georgia incident, which was committed less than one month after this offense, was directly related to this offense. Indeed, the sole reason for the Georgia FBI's interaction with defendant

was to execute a fugitive warrant for this case. Therefore, the trial court did not err in concluding that the losses sustained by the Georgia FBI were attributable to defendant's "course of conduct."

IV. Sentence

Lastly, we agree that defendant is entitled resentencing on his malicious destruction of property conviction. Under the sentencing guidelines statute, the trial court must impose a minimum sentence in accordance with the calculated guidelines range, MCL 769.34(2), and may not depart from the recommended range unless it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3). The sentencing guidelines range for defendant's malicious destruction of property conviction was fourteen to fifty-eight months. When imposing a minimum term of ninety-six months, the trial court exceeded the guidelines range without articulating any substantial and compelling reason for doing so. Therefore, as the prosecution concedes, defendant must be resentenced. MCL 769.34(11). On remand, the trial court may impose a minimum sentence within the appropriate guidelines range, or a minimum sentence that exceeds the guidelines range if it finds, on the record, a substantial and compelling reason to do so. MCL 769.34(3).

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Karen Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio