STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 287516 St. Clair Circuit Court
GREGORY JAMES CROZIER, Defendant-Appellant.	LC No. 08-001063-FH

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant was found guilty by a jury of felonious assault, MCL 750.82, and domestic assault, MCL 750.81, for which he was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 2 to 15 years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise out of a domestic incident involving himself, his girlfriend, and his girlfriend's roommate. The girlfriend and roommate provided slightly contradictory testimony. But they generally agreed that the girlfriend had gotten into an argument with defendant, and defendant became physically aggressive and attacked her. The roommate intervened, whereupon defendant retrieved a large meat fork from the kitchen and stabbed the roommate. The roommate then used a large bamboo stick to force defendant to leave the residence. Defendant contended that his girlfriend had been the person to initiate both the argument and the physical aggression, and that he only used the fork in self-defense because the roommate attacked him with the bamboo stick. The evidence showed that defendant and his girlfriend had had a long, dysfunctional history that included other acts of violence by defendant against her. The jury clearly found that defendant did not act in self-defense.

Defendant argues on appeal that he was entitled to a jury instruction on the lesser included offense of simple assault. We disagree.

"Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 532; 664 NW2d 685 (2003). An instruction on a lesser offense is proper where "all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *Id.* at 533. The elements of felonious assault are: "(1) an assault, (2) with a dangerous weapon, and (3) with an intent to injure or place the victim in

reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Since an assault is the first element of felonious assault, its elements are completely subsumed by felonious assault. Thus, it is a necessarily included lesser offense.

However, no rational view of the evidence supports a jury instruction on simple assault. There is no dispute that the meat fork was a dangerous weapon, nor is there any serious dispute that it was in some way involved in the altercation. If defendant's version of events was to be believed, he acted in self defense and therefore committed no assault of any kind. If defendant's roommate's and girlfriend's versions of events were to be believed, defendant attacked the roommate with a dangerous weapon and was consistently the aggressor. Either way, no simple assault occurred. Consequently, defendant was not entitled to any such instruction.

Defendant contends that trial counsel was nevertheless ineffective for failing to obtain an instruction on simple assault. We disagree. Such an instruction would have been inconsistent with a self-defense defense. Defense counsel's decision to pursue an "all or nothing" verdict based on self-defense, rather than requesting a simple assault instruction, was a matter of sound trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 685 (2003); *People v Lavearn*, 448 Mich 207, 214-216; 528 NW2d 721 (1995). This Court will not second-guess matters of trial strategy. *Gonzalez*, *supra* at 644-645. Furthermore, the mere fact that a strategy did not work does not render counsel ineffective. See *People v Kevorkian*, 248 Mich App 373, 415; 639 NW2d 291 (2001).

Defendant next argues the trial court erred in enhancing his sentence under MCL 769.12, fourth habitual offender, based on two out-of-state convictions. We disagree.

Statutory construction is an issue of law reviewed de novo. *People v Morales*, 240 Mich App 571, 575; 618 NW2d 10 (2000). The trial court's factual findings at sentencing are reviewed for clear error. MCR 2.613(C); *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

Prior to trial, the prosecution sought to treat defendant as an habitual fourth offender in accordance with MCL 769.13(1). Defense counsel stipulated that defendant had previously been convicted of interference with electronic communications equipment. The prosecutor brought two other convictions – one from New Jersey and one from Wisconsin – to the trial court's attention, but defendant refused to stipulate to them, claiming they occurred so long ago he had no recollection of them. The prosecutor only had LIEN reports reflecting the convictions, not the actual certifications of the convictions, but the convictions were nevertheless included in defendant's presentence investigation report. Defendant now argues that the prosecutor failed to present sufficient evidence of the existence of these convictions to satisfy MCL 769.13 because the prosecution failed to obtain the conviction certifications. We disagree.

Defendant has not shown any error in the habitual notice. A defendant who has been given notice that the prosecuting attorney will seek to enhance his sentence under the habitual offender statutes "shall be given the opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before sentence is imposed, and shall be permitted to present relevant evidence for that purpose." MCL 769.13(6). Furthermore, "[t]he defendant shall bear the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid." MCL 769.13(6). We agree

with the trial court's assessment that defendant appeared to tacitly concede the existence of the two out-of-state convictions, and he simply did not recall the details. His lack of recollection does not establish that the habitual notice was defective.

An individual can be sentenced as a fourth habitual offender if he "has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state. . . ." MCL 769.12. Defendant's prior convictions were for burglary in Wisconsin and breaking and entering in New Jersey; these are sufficient. See MCL 750.110a; MCL 750.110. A defendant's prior convictions must be determined by the court at sentencing or a scheduled hearing. MCL 769.13(5); see also MCL 769.12. A prior conviction may be established by any relevant evidence, including information in a presentence report. MCL 769.13(5)(c). A presentence investigation report is presumed to be accurate, and a trial court may rely upon factual information therein. *People v Grant*, 455 Mich 221, 233-234, 564 NW 2d 389 (1997). The two convictions at issue here had already been considered in sentencing defendant for a prior conviction six months prior to this proceeding. The PSIR prepared for that conviction also referenced the prior out-of-state convictions as felonies, and defendant did not challenge them at that time. His failure to challenge the convictions then could be reasonably viewed as admissions of their existence. Plaintiff also introduced evidence of the LEIN report regarding the prior convictions, which was also included in the PSIR. The trial court did not clearly err in finding the prior convictions established by a preponderance of the evidence as required by MCL 769.13.

The trial court's scoring of 50 points under PRV I for high severity convictions was likewise appropriate. A trial court has discretion in scoring the sentence guidelines. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court will uphold the trial court's guidelines scoring where there is any evidence in the record to support it. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Accordingly, this Court "reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Because sufficient evidence existed to establish that defendant committed burglary and breaking and entering, the 50 points scored under PRV I were warranted. MCL 777.50.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis