

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENNIE ALMONT HOWARD,

Defendant-Appellant.

UNPUBLISHED

August 6, 1996

No. 180846

LC Nos. 93-003079-FC

93-003080-FC

Before: Sawyer, P.J., and Bandstra and M.J. Talbot,* JJ

PER CURIAM.

Following a jury trial in Docket No. 93-003079-FC, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). After a subsequent bench trial in Docket No. 93-003080-FC, defendant was convicted of armed robbery and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to four to twenty-five years for the first armed robbery conviction, to run consecutive to a mandatory sentence of two years for the felony-firearm conviction. He was also sentenced to five to twenty-five years on the second armed robbery conviction and five to ten years for the assault conviction, both terms to run concurrent to the sentence in Docket No. 93-003079-FC. Defendant appeals as of right his convictions in both cases. We consolidated the dockets on appeal and affirm.

Defendant first contends that in Docket No. 93-003079-FC, the trial court incorrectly instructed the jury that operability was not an element of felony-firearm. We disagree. In *People v Thompson*, 189 Mich App 85, 86; 472 NW2d 11 (1991), this Court held that “[o]perability is not and has never been an element of felony-firearm.” Therefore, because we are bound by that decision, we find that the trial court properly instructed the jury. Notwithstanding *Thompson*, defendant argues that because this Court has interpreted the felony-firearm statute and the concealed weapons statute

* Circuit judge, sitting on the Court of Appeals by assignment.

inconsistently, a special panel should be convened to interpret the former statute as requiring operability to be proven as the latter statute so requires. We acknowledge that the two statutes have been inconsistently interpreted, contrary to our Supreme Court's directive in *People v Hill*, 433 Mich 464, 475; 446 NW2d 140 (1989). Cf. *People v Parr*, 197 Mich App 41, 45; 494 NW2d 768 (1992) (requiring the prosecutor to prove operability to convict a person under the concealed weapons statute). However, we agree with Judge Corrigan's concurring opinion in *Parr*, that the inconsistent interpretations should be resolved by the Supreme Court in an appropriate case. *Id.*, 47.

Defendant next contends that in Docket No. 93-003080-FC, the trial court erred when it admitted his accomplice's nolo contendere plea to the intent element of assault with intent to murder to prove that defendant intended to murder the complainant. Defendant further argues that because the plea was admitted and his accomplice did not testify at his trial, defendant's right of confrontation was denied. We agree.

MRE 803(22) excludes from the hearsay rule

[e]vidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.

MRE 803(22) is identical to FRE 803(22) except that the word "state" is substituted for "Government." MRE 803 n 5. The Advisory Committee to the federal rules of evidence noted that FRE 803(22)

[d]oes not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain a judgment of conviction. A contrary position would seem clearly to violate the right of confrontation.

While there is no case law in Michigan that directly addresses this issue, two cases from the federal circuits are particularly instructive. In *United States v Vandetti*, 623 F2d 1144, 1147-1148 (CA 6, 1980), the court concluded that the admission of evidence of the codefendant's guilty verdicts for conducting an illegal gambling business were inadmissible to prove any element of that charge against the defendant. The court further held that because the codefendants asserted their Fifth Amendment testimonial privilege in the defendant's trial, the admission of their guilty verdicts violated the defendant's right of confrontation. *Id.*, 1148. Similarly, the court in *United States v Diaz*, 936 F2d 786, 788 (CA 5, 1991), held that the defendant's right of confrontation was violated when a codefendant's guilty plea to the illegal transportation of aliens was admitted in the defendant's bench trial on the same charges to prove that two of the aliens were undocumented and that the defendant was aware of their illegal status.

The holdings of *Vandetti, supra*, and *Diaz, supra*, lead to the conclusion that the instant trial court erred when it admitted the accomplice's nolo contendere plea. That error was aggravated by the fact that the accomplice did not testify at defendant's trial. However, after a careful review of the record, we conclude that the admission of the plea was harmless beyond a reasonable doubt. *People v Spinks*, 206 Mich App 488, 493-494; 522 NW2d 875 (1994). The record clearly established that the trial court was presented with testimony sufficient to determine defendant's intent and did not consider the accomplice's nolo contendere plea as circumstantial evidence of that intent. Furthermore, this was a bench trial and not a jury trial and thus, there was less chance that the trier of fact was swayed by the accomplice's plea. *People v Lawson*, 124 Mich App 371, 377; 335 NW2d 43 (1983).

Finally, defendant contends that because his trial counsel failed to object to the admission of the accomplice's plea, he was denied effective assistance of counsel. Defendant failed to preserve this issue by making a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing. *People Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Kestl*, 167 Mich App 698, 702; 423 NW2d 365 (1988). This Court can nonetheless review the issue, but review is limited to the record. *People v Marji*, 180 Mich App 525, 535; 447 NW2d 835 (1989). Because we have already concluded that the admission of the accomplice's nolo contendere plea was harmless beyond a reasonable doubt, we conclude that defendant has failed to show that the result of his trial would have been different even if defense counsel had objected and the trial court had not admitted the plea. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael J. Talbot