

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ISIAH WATSON,

Defendant-Appellant.

UNPUBLISHED

September 12, 1997

No. 191261

Recorder's Court

LC No. 95-007275

AMENDED

Before: White, P.J, and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assaulting Alberta Kelly with intent to murder, MCL 750.83; MSA 28.278, and assaulting Venetta Kelly with intent to do great bodily harm less than murder, MCL 750.82; MSA 28.277. Defendant was sentenced to serve concurrent terms of seventeen to thirty years' imprisonment for the assault with intent to murder conviction and six to ten years' imprisonment for the assault with intent to do great bodily harm conviction. Defendant appeals as of right, and we affirm.

I

Defendant's multiple claims of error concern the court's conduct of the proceedings during closing arguments, reopening of proofs, and rendition of the court's verdict. During closing arguments, the court engaged in several discussions with defense counsel and the prosecutor regarding the court's understanding of, and inferences drawn from, the proofs, and the court's thoughts regarding the arguments of counsel. The court engaged in a colloquy with counsel concerning their interpretation of Alberta Kelly's medical records, as relevant to the question whether her lung had been punctured during the stabbing attack, or whether her lung collapsed without direct trauma. Later, during argument, Alberta Kelly reentered the courtroom and, with counsel's consent, the court had her state her height and weight for the record. After further argument and colloquy with counsel, it became clear that the court attached a great deal of significance to the question whether Kelly's lung had been punctured, because the court had concluded that defendant could have killed Kelly if he had wanted to, and therefor the degree to which he actually inflicted injury was highly relevant to his state of mind. After

argument was completed, the court stated its findings regarding several issues. When the court reached the question of intent, the following transpired:

THE COURT:

* * *

The issue, however, is larger than that it's clearly a felonious assault. The question is the intent he had at the time of that assault. And, it's as equally clear to me that it's no self-defense. It's equally clear that had he intended to murder, had he intended her death, he could [have] affected [sic] the death of her. He had the physical means to, the strength to, the weapon to do so, the capacity to do so, yet no fatal wounds were struck.

If I thought that there in fact was a penetration of an organ of a body, a lung, a heart or any other vital organ by the knife, that would be a different story. But, there are 14 stab wounds inflicted. Most of them are superficial wounds. There are wounds to the legs, the arms, the upper chest and the back. And, those are not directed at vital organs of the body. And, if you had a knife penetrating the body and struck a vital organ of the body [sic], I would find it different.

I would find an assault with intent to murder.

MR. MAGUIRE [prosecutor]: Your Honor –

THE COURT: You want to say something? Go ahead.

MR. MAGUIRE: Could I ask you to take a look at the medical records?

THE COURT: Go ahead. Give it to me.

MR. MAGUIRE: Your Honor, it indicates a punctured lung.

THE COURT: She [defense counsel] has indicated that she has gone over the records and there is no evidence that there is a knife puncturing the lungs.

MS. LAFLORE [defense counsel]: They have said there is a collapsed lung. And, as the Judge indicated, she could have fallen, hit herself so hard that the lung collapsed.

THE COURT: Right.

MS. LAFLORE: Well, there [sic] no indication, you'll see, Judge.

MR. MAGUIRE: Your Honor, I would ask the Court to give me a moment to try and find it.

The prosecutor then read from the medical records and defense counsel commented. The proceedings for the day concluded with the court stating that defendant was at least guilty of assault with intent to commit great bodily harm, and that the court would review the medical records over the weekend and render its verdict the following Monday after reviewing the records.¹

The following Monday, the court explained that it had reviewed the medical records and construed them as supporting the prosecutor's position that there had been a puncture injury, but that there were entries that could be read as supporting defendant's position. The court stated that it wanted to be sure that its understanding was correct before finding defendant guilty of the greater offense of assault with intent to murder, and so it was going to call Dr. Daley as the court's witness.² Neither party objected.

After an adjournment, Dr. Daley testified, aided by the medical records, that Kelly's lung had been punctured by a sharp-edged instrument. The doctor was examined by defense counsel and the prosecutor, and the court then rendered its verdict finding defendant guilty of assault with intent to murder.

II

Under several argument headings, defendant argues that the trial court deprived him of his rights to due process and a fair trial by reopening the proofs, and then usurping the role of prosecutor to establish defendant's intent to kill, and by improperly questioning Dr. Daley. We disagree.

The reopening of proofs rests within the sound discretion of the trial court. *People v Keeth*, 193 Mich App 555, 560; 484 NW2d 761 (1992). In determining whether a trial court abused its discretion in allowing the proofs to be reopened, we consider whether there is any showing of surprise or prejudice to the nonmoving party. *Id.* A review of the record reveals that the trial court protected the parties against any unfair surprise or prejudice by (1) notifying the parties of its intent to question Kelly and Daley, (2) asking impartial questions of the witnesses, and (3) affording the parties an opportunity to challenge their testimony, either through cross-examination or the presentation of additional witnesses. Consequently, we find no abuse of discretion. Further, a review of the record demonstrates that the trial court questioned Kelly in an attempt to place certain matters observable to the court, her height and weight, on the record, and questioned Daley in a proper attempt to clarify evidence or elicit additional relevant information. *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994).

Additionally, contrary to defendant's argument, nothing in the manner in which the court questioned Daley even remotely suggests bias. Nor did the court cause the witness to make improper use of the medical records.

We also reject defendant's argument that the trial court violated the constitutional prohibitions against double jeopardy. Defendant asserts that before convicting him of assault with intent to murder for his attack on Kelly, the trial court already convicted him of assault with intent to commit great bodily

harm for the very same criminal episode by remarking, “Right now, you can count on the fact that [defendant] is at least guilty of assault with intent to do great bodily harm.”

First, we conclude that the court did not convict defendant of assault with intent to commit great bodily harm. Rather, it simply stated that defendant was at least guilty of that offense. In essence, the court revealed that, as between not guilty based on self defense, felonious assault, and assault with intent to do great bodily harm, the court had settled on the greater offense. The court very clearly announced, however, that it had not yet rejected the charged offense, and that its decision regarding that offense depended on the medical evidence. The court’s statements did not constitute a conviction.

Lastly, defendant argues that he was deprived of his right to the effective assistance of counsel based on trial counsel’s failure to object regarding the foregoing. However, as noted above, these issues are without merit. Consequently, counsel’s failure to object could not have affected defendant’s chances for acquittal and, therefore, his claim of ineffective assistance of counsel is also without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Affirmed.

/s/ Helene N. White
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski

¹ The court said:

I want to read the records. They are introduced and an Exhibit. I’ll read the records and draw my conclusions. Right now, you can count on the fact that your client is at least guilty of assault with intent to do great bodily harm, and I had intended to find that with respect to both complainants on both counts. But, if I find medical evidence in the record that supports that there - -

* * *

If the medical records prove that there is a penetration of the body and the striking of a vital organ with the knife, then I will consider whether that proves beyond a reasonable doubt that he intended murder here when he struck her with that knife. That’s what’s up for grabs. But, I can’t make that decision without looking at these medical records, okay.

² The Court said:

... we're gonna have to have another date because the Court is unable to reach a decision based on the injuries themselves, and I think the prosecutor has a right having introduced the exhibit to have inferences drawn from it, and the inferences that I would draw from it at this point by the use of the term traumatic pneumothorax is that there was a collapse of the lung due to an injury to the lung caused by the sticking in of a knife. But I don't want to draw that conclusion and therefore find the defendant guilty of assault with intent to murder unless that is supported beyond a reasonable doubt, and therefore the Court is gonna call as its own witness Dr. Daley. And any party then is free as well to examine these documents and to present any other witness that's pertinent to the issue before the Court as to whether there was a penetration of the chest cavity by the knife that caused the collapse of the lung or other internal injuries that led to the condition of either a pleural—a fluid build-up in the body or an air build-up that caused the collapse of the lung.