

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD ALLEN FENNER,

Defendant-Appellant.

UNPUBLISHED

March 17, 1998

No. 196830

Oakland Circuit Court

LC No. 95-142219 FH

Before: Cavanagh, P.J., and White and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to a term of two to six years' imprisonment. Defendant now appeals as of right. We affirm.

I

Defendant argues that the trial court's instruction regarding self-defense was erroneous. Defendant further asserts that the doctrine of imperfect self-defense should be extended to mitigate a charge of felonious assault to aggravated assault. However, defendant did not object or request that an instruction on imperfect self-defense be given at trial. Therefore, our review is limited to the issue whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991).

After carefully reviewing the record, we conclude that the trial court's instructions on self-defense constituted a correct statement of the law. Therefore, manifest injustice will not result from our declining to further review this issue.¹

II

Defendant next argues that the trial court abused its discretion when it denied his request for a continuance to produce a res gestae witness who had undergone an emergency Caesarean section three days before trial. This Court reviews a trial court's decision whether to grant a continuance for an abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). When reviewing a denial of a request for a continuance, some factors to be considered include whether defendant (1) asserted a constitutional right; (2) had a legitimate reason for asserting the right; (3) had been negligent; and (4) had requested previous adjournments. A defendant must also demonstrate prejudice. *Id.*

After reviewing the record, we find that defendant has not established that the trial court abused its discretion in denying his request for a continuance. At the time defendant requested the continuance, both the prosecution and the defense had presented the rest of their evidence. Defendant gave no indication when the witness would be available to testify. Both defendant and the prosecutor stipulated to the admission of the statement the witness gave to police shortly after the incident occurred. The witness' statement corroborated defendant's theory of self-defense, and the prosecutor was deprived of the opportunity to cross examine the witness. Accordingly, we conclude that defendant has not established that he was prejudiced by the trial court's refusal to grant his request for a continuance.

III

Finally, defendant argues that the trial court erred in denying his motion for a new trial because the jury's verdict was against the great weight of the evidence. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Legrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994). A new trial may be granted when the verdict is against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). The trial court may vacate a verdict only when it does not find reasonable support in the evidence, but is more likely attributable to factors outside the record, such as passion, prejudice, sympathy, or other extraneous considerations. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

This Court has stated:

[W]hen sitting as a thirteenth juror, the hurdle a judge must clear to overrule a jury, is unquestionably among the highest in our law. It is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation. [*People v Bart (On Remand)*, 220 Mich App 1, 13; 558 NW2d 449 (1996).]

Defendant was convicted of felonious assault with a dangerous weapon, MCL 750.82; MSA 28.277. The elements of felonious assault are (1) an assault; (2) with a dangerous weapon; and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

After reviewing the evidence presented at trial, we conclude that the jury verdict was not against the great weight of the evidence. Competent evidence was presented to establish that defendant threw

a rock at Charlie Meyers with the intent to injure him, and Meyers did in fact sustain serious injuries as a result. Accordingly, the trial court did not abuse its discretion in declining to act as the thirteenth juror.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Helene N. White

/s/ Robert P. Young, Jr.

¹ Defendant also complains that the prosecutor misstated the law to the jury. However, because defendant failed to present the issue in his statement of questions involved, the issue is not preserved for appellate review. See *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).