

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR SIERRA MORENO, a/k/a SANTANA,

Defendant-Appellant.

UNPUBLISHED

May 22, 1998

No. 205229

Mason Circuit Court

LC No. 95-012263 FC

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and was sentenced to a term of five to ten years' imprisonment. He appeals as of right. We affirm.

Defendant argues that the trial court committed error requiring reversal when it omitted CJI2d 6.2, CJI2d 17.4, and portions of CJI2d 17.3 from the jury instructions. Although defendant may have requested CJI2d 17.4 and 17.3 at a conference that was not transcribed, the record does not reflect that they were requested before the jury retired for deliberations. CJI2d 6.2 was clearly requested afterward. Therefore, the issue is not preserved for appellate review. *People v Gaines*, 129 Mich App 439, 445; 341 NW2d 519 (1983). Our review of the record convinces us that failure to review this issue would not result in manifest injustice. *Id.*; *People v McMaster*, 105 Mich App 162; 306 NW2d 434 (1981). First, whether defendant was provoked is irrelevant because he was convicted of assault with intent to do great bodily harm less than murder, an intent that is not negated by provocation. *People v Mitchell*, 149 Mich App 36, 37-39; 385 NW2d 717 (1986). Second, an instruction on the defense of intoxication is proper only if the facts of the case would allow the jury to conclude that the defendant's intoxication was so great as to render him incapable of forming the requisite intent. *People v Mills*, 450 Mich 61; 537 NW2d 909, remanded on other grounds 450 Mich 1212; 539 NW2d 504 (1995). Here, the sole evidence of intoxication was the contradictory evidence of one witness who testified that he and defendant together consumed one-half gallon of vodka earlier in the day of the offense and another witness's testimony that defendant was "a little" intoxicated at the time of the offense. Several other witnesses testified that defendant did not appear intoxicated at the time of the

offense. Defendant's theory of the case was not that intoxication negated intent, and with evidence that defendant struck repeated blows to the victim's face, dragged the victim down stairs and pinned him down with a knee while striking him, kicked the victim, and then raised a grill to strike the victim before instructing a third person to get some "gasoline to finish him off," we cannot find that defendant was intoxicated to the point at which he was incapable of forming the intent to commit the crime. *People v Gomez*, ___ Mich App ___; ___ NW2d ___ (Docket No. 194432, issued April 14, 1998), slip op pp 2-3.

Defendant also claims that the sentence imposed is not proportionate. We disagree. Defendant's sentence, which is within the minimum recommended guidelines' range, is proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh