

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY PRATT,

Defendant-Appellant.

UNPUBLISHED

March 23, 1999

No. 206914

Kent Circuit Court

LC No. 96-014158 FC

Before: Gage, P.J., and White, and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced as a third habitual offender, MCL 769.10; MSA 28.1082, to a prison term of ten to twenty years' imprisonment. We affirm.

Defendant contends that the trial court erred in giving a jury instruction of assault with the intent to murder when there was insufficient evidence to support such a charge, thereby giving the jury the opportunity to reach a compromise verdict. We disagree.

We note at the outset that defendant concedes that the issue he raises is unpreserved for appellate review. During the trial, defense counsel agreed that the jury could consider the charge of assault with intent to murder and the charge of assault with intent to commit great bodily harm less than murder. However, we will discuss this issue because the submission of an improper charge to the jury may require reversal in certain situations. MCL 769.26; MSA 28.1096; See, e.g., *People v Graves*, 458 Mich 476, 484, 487-488; 581 NW2d 229 (1998); *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993).

In order to prove assault with intent to commit murder, the prosecution must establish (1) an assault, (2) with actual intent to kill, (3) which, if successful, would make the killing murder. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Our review of the record reveals sufficient evidence from which the trial court could find the essential elements of assault with intent to commit murder present. The victim testified that defendant pointed a gun at him, orally threatened his

life and shot, striking the victim in the face. Accordingly, we conclude that this charge was not improperly submitted to the jury. A reversal of defendant's conviction is not warranted.

We affirm.

/s/ Hilda R. Gage

/s/ Helene N. White

/s/ Jane E. Markey