STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERTO BENAVIDES,

Defendant-Appellant.

UNPUBLISHED
March 31, 2000

No. 210115
Oakland Circuit Court
LC No. 97-156814 FC

Before: Cavanagh, P.J., White and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278. He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to eight to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for new trial brought on the ground that the jury's verdict was against the great weight of the evidence. We disagree. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

In this case, the victim and his girlfriend both testified that defendant approached the victim from behind and struck him in the back of the head, attempted to stab the victim with a knife during the subsequent scuffle, and stated several times that he was "going to kill" the victim. In addition, a doctor testified that the lacerations on the victim's ear, neck, and back were inflicted during an attack from behind or the side and were caused by four separate knife cuts. In contrast, defendant maintained that he stabbed the victim in self-defense while he faced him. Although the credibility of the prosecution witnesses was hindered by some uncertainties, questions of witness credibility are the exclusive province of the jury and must not be disturbed by trial or appellate courts. *Lemmon*, *supra* at 642, 646-647; *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Consequently, after carefully

reviewing the record, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial based on the great weight of the evidence.

Defendant next argues that the trial court erred in denying his request to give CJI2d 17.4, which provides that a defendant is not guilty of assault with intent to murder if the presence of mitigating circumstances would have reduced a murder to voluntary manslaughter had the victim died. We disagree. This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Crawford*, 232 Mich App 608, 619; 561 NW2d 669 (1998). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence. *Id.* Conversely, an instruction that is without evidentiary support should not be given. *People v Wess*, 235 Mich App 231, 243; 597 NW2d 215 (1999).

To the extent defense counsel's one-time mention of the instruction during his opening statement, without more, could be construed as an assertion of the mitigation defense, we agree with the trial court that the instruction was not supported by the victim's version of the events as defendant claims. The element of provocation distinguishes the offense of manslaughter from murder. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. *Id.* The provocation must be adequate, namely, that which would cause a reasonable person to lose control. *Id.* Here, the victim testified that he demanded that defendant move out of his house after defendant had twice taken the victim's car without permission, had left the victim stranded at an auto repair shop late at night, and had initiated a fist fight in the victim's car. The victim also testified that when they arrived at the victim's house, the victim again told defendant to "get his stuff and get out" and that defendant attacked him from behind with a knife about four to five minutes later. We cannot conclude that the victim's act of asking the defendant to move out of the house was "so extreme or severe" as to provoke a reasonable person to act out of passion rather than reason under the circumstances presented here. See *id.* at 519 ([p]rovocation is adequate only if it is so severe or extreme as to provoke a reasonable man to commit the act"); *People v Pouncey*, 437 Mich 382, 389-390; 471 NW2d 346 (1991) ("[t]he law does not excuse actors whose behavior is caused by just any. . .emotional disturbance. . . . Rather, the law asks whether the victim's provoking act aroused the defendant's emotion to such a degree that the choice to refrain from crime became difficult for defendant). Accordingly, the trial court did not err in refusing defendant's requested instruction.

Defendant also argues that the trial court reversibly erred in omitting the bracketed clause "and the circumstances did not legally excuse or reduce the crime" from CJI2d 17.3, which sets forth the elements of assault with intent to murder. Defendant contends that the omission denied him a fair trial because he advanced theories of self-defense, intoxication, and mitigating circumstances at trial, which could have compelled the jury to excuse his actions or reduce the crime. However, this issue is unpreserved because defendant failed to object to the instruction at trial. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Therefore, our review is limited to whether defendant has demonstrated a plain error that was prejudicial, i.e., that could have affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

After a thorough review, we conclude that defendant has failed to meet his burden. The trial court instructed the jury at length regarding self-defense, the only legal excuse that was supported by the evidence adduced at trial.[1] In doing so, the court clearly informed the jury that "[i]f a person acts in lawful self defense, his actions are excused and he's not guilty of any crime." Therefore, we find that the jury was fully apprised of the applicable circumstances which would have legally excused or reduced the crime. See *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997) (no error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction). Consequently, the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998).

Defendant next argues that there was insufficient evidence to support his conviction. We disagree. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). The elements of assault with intent to commit murder are (1) an assault, (2) with the actual intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The intent to kill may be proved by inference from any facts in evidence, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Id.* Viewing the evidence in our discussion on the great weight of the evidence in the light most favorable to the prosecution, we conclude that a rational trier could have found that the essential elements of the offense were proven beyond a reasonable doubt.

Finally, defendant contends that the trial court imposed a disproportionate sentence because it erroneously believed that the guidelines applied despite his habitual offender status and that it had no discretion to deviate from the guidelines' range. We disagree. While the sentencing guidelines do not apply to habitual offenders and may not be used to review those sentences on appeal, *People v McFall*, 224 Mich App 403, 415; 596 NW2d 828 (1997), a trial court may consider or use the guidelines as a tool in determining a proportionate habitual offender sentence. *People v Haacke*, 217 Mich App 434, 438; 553 NW2d 15 (1996). The trial court also recognized its sentencing discretion as evidenced by its statement on the record that it "recognized its discretion" before ultimately imposing a minimum sentence at the low range end of the recommended guidelines range. Based on a review of the record and defendant's criminal history, we conclude that the sentence imposed was proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). Consequently, the trial court did not abuse its sentencing discretion. *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Michael J. Talbot

[1] Although there was evidence that defendant consumed alcohol on the day in question, our review of the record indicates that there was simply no evidence that defendant was intoxicated to the point at

which he was incapable of forming the intent to commit the charged crime. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). The victim and his girlfriend testified that defendant could walk and talk, that his threats were understandable, and that he knew what he was doing during the attack. The police officers who arrived at the scene minutes after the incident, testified that defendant appeared to have been drinking, but was able to speak with them in an understandable manner. Moreover, throughout his testimony, defendant claimed that he used the knife in a conscious effort to defend himself.