# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 1, 2001 |
| v | No. 216872<br>Genesee Circuit Court |
| MARCUS EMANUEL GEORGE,<br><br>Defendant-Appellant. | LC No. 97-000043-FH |

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of assault with intent to inflict great bodily harm less than death, MCL 750.84; MSA 28.279.[1] Following a jury trial, defendant was acquitted of the CSC I charges, but convicted of the assault charge. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to sustain his conviction of assault with intent to commit great bodily harm less than murder because the evidence was circumstantial and specific intent was inferred solely from the victim's injuries. We disagree. In reviewing a challenge to the sufficiency of the evidence, this Court analyzes the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992). Conviction of assault with intent to do great bodily harm requires proof of an assault through "an attempt or offer with force and violence to do corporal hurt to another" with the "specific intent to do great bodily harm less than murder." *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996). Specific intent may be inferred from all the facts and circumstances. *People v Brown*, 159 Mich App 428, 431; 407 NW2d 21 (1987). Because it is difficult to prove an actor's state of mind, minimal circumstantial evidence may be sufficient to show intent. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

[1] Defendant was also charged with one count of kidnapping, MCL 750.349; MSA 28.581. However, the court dismissed the kidnapping charge before the commencement of trial.

Defendant argues that his testimony that he struck the victim in the face only three to four times in an attempt to retrieve his money from her and to induce her to leave his car precluded a finding of specific intent to inflict great bodily harm. However, his testimony was directly contradicted by that of the victim who not only said that she was hit twelve or thirteen times, but also that defendant used an unidentified object wrapped in a white towel to administer the beating. Questions of credibility are within the province of the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Evidence supporting the beating and medical testimony describing the victim's serious injuries support an inference of the specific intent necessary for a conviction of assault with intent to commit great bodily harm less than murder. *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997), modified on other grounds 457 Mich 885 (1998). The evidence was sufficient.

Next, defendant contends that the trial court, while instructing the jury, improperly informed the jurors that aggravated assault is a misdemeanor and thus impermissibly informed them of defendant's possible disposition on conviction. As a result, defendant alleges, the jurors convicted him of the greater offense of felony assault to avoid convicting him of a misdemeanor. The court first instructed the jury on the charge of assault with intent to commit great bodily harm less than death; it also instructed on the included offense of aggravated assault. The disputed instruction was made while informing the jurors that assault with intent to commit great bodily harm was a felony that would meet the aggravating circumstances requirement of CSC I:

> Second, that the alleged sexual act occurred under circumstances that also involved the commission of a felony, and it could be either one of the named felonies, or it could be either one of the – excuse me. Aggravated Assault is a misdemeanor; would that be correct?
>
> Okay. So it could be Assault With a – Assault With Intent to do Great Bodily Harm Less Than Murder. So if you were to find for the second or third element - for the second element that the alleged sexual act occurred under circumstances that also involved an assault with intent to do great bodily harm, that is another element that you must find in order to convict him of this offense involving Criminal Sexual Conduct in the First Degree.

The trial court then stopped and gave the instruction over again, this time eliminating any reference to aggravated assault. It also instructed the jury that, with regard to the included offenses, the jury should not be affected by the possible penalties for the offenses.

This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). "Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). "The instructions must include all elements of the charged offense, and must not exclude material issues, defenses and theories if there is evidence to support them." *Id.*

As a general rule, the court should not inform the jury of the consequences of its verdict. *People v Goad*, 421 Mich 20, 25-28; 364 NW2d 584 (1984). Our Supreme Court has discussed the issue as follows:

> [N]either the court nor counsel should address themselves to the question of the disposition of a convicted defendant. Indeed, it is proper for the court to instruct the jury that they are not to speculate upon such matters; that they are to confine their deliberations to the issue of guilt or innocence. [*People v Szczytko*, 390 Mich 278, 285; 212 NW2d 211 (1973).]

However, the trial court is also obligated to inform the jurors of the law by which the verdict is controlled in a way that enables the jury to apply the law to the facts of the case. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). When reviewing jury instructions, this Court considers those instructions in their entirety rather than extracting them piecemeal. *Id.* In making our determination, we must balance the tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989).

We question whether, on the facts of the case, the court committed any error at all. In order to convict of CSC I, a jury must find aggravating circumstances. See *People v Spivey*, 202 Mich App 719, 727; 509 NW2d 908 (1993) (aggravating circumstances are what distinguishes CSC I from CSC III). In this case, the prosecution alleged that the offenses occurred during the commission of a felony. See MCL 750.520b(1)(c); MSA 28.788(2)(1)(a)(c). The trial court first instructed on the assault charges. The court was then faced with a "Hobson's choice" of instructing the jury that it could convict of CSC I only if it found defendant guilty of the greater offense, thus inferring that aggravated assault was an offense with lesser consequences, or improperly instructing the jury that it could find defendant guilty of CSC I if it found defendant guilty of either the greater or lesser assaultive offense. We conclude that the court was required to differentiate between the two assault charges to instruct the jury on the charge of CSC I. The fact that it used the word "misdemeanor" for aggravated assault told the jury no more than the jurors would have necessarily inferred from the court's instruction on CSC I.

Even assuming that the inadvertent use of the word "misdemeanor" during the CSC I instructions was error, the error was harmless. While giving the offending instruction, the court stopped itself, then reread the instruction, this time eliminating any reference to aggravated assault as a misdemeanor. Further, it instructed the jury with regard to the included offenses that its decision should not be affected by the possible penalties for the offenses; we presume the jury followed the court's instructions. *People v Graves*, 458 Mich 476, 484; 581 NW2d 229 (1998). We conclude that error requiring reversal has not been shown. See *People v Torres*, 222 Mich App 411, 422-423; 564 NW2d 149 (1997) (reference to lesser offense as "less serious" did not entitle defendant to a new trial).

We affirm.

/s/ Richard A. Bandstra
/s/ Kurtis T. Wilder
/s/ Jeffrey G. Collins