

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAMES TRAYLOR, JR.,

Defendant-Appellant.

---

UNPUBLISHED

October 12, 2001

No. 222169

Wayne Circuit Court

LC No. 98-009169

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced to twenty-five to fifty years' imprisonment. We affirm.

Defendant first argues that he was denied a fair and impartial trial because the prosecutor's comments on the absence of his corroborating alibi witness tended to shift the burden of proof from the prosecution to him. We disagree. Allegations of prosecutorial misconduct are reviewed case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We examine the pertinent portions of the record and view the alleged misconduct in light of the defendant's arguments and the evidence admitted at trial. *Id.*

Prosecutorial comments that infringe on a defendant's right not to testify may constitute error; however, where a defendant testifies at trial and advances an alternative theory of the case that would exonerate him from the crime, prosecutorial comments on the validity of the theory do not shift the burden of proof to the defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Once a defendant makes an issue legally relevant by advancing a theory, the prosecutor is permitted to comment on the improbability of the defendant's theory. *Id.* at 115-116. Arguing that a witness or evidence does not exist attacks defendant's credibility and questions the reliability of a defendant's theory. *Id.* at 106-107. Further, a prosecutor is permitted to comment on a defendant's failure to produce corroborating witnesses whenever the defendant takes the stand and testifies on his own behalf. *People v Spivey*, 202 Mich App 719, 723; 509 NW2d 908 (1993), overruled on other grounds 450 Mich 1025 (1996). Here, the prosecutor's remarks during cross-examination and closing argument were proper responses to defendant's assertion that the police had the wrong man and that he had an alibi.

Defendant next argues that the trial court erred by not instructing the jury on the cognate lesser included offense of assault with intent to do great bodily harm less than murder. We review a trial court's determination whether the evidence supports the giving of a requested instruction for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Cognate lesser included offenses share several elements with the charged offense, and are of the same class or category, but contain some elements not found in the higher offense. *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). To determine if the trial court should have instructed on a cognate lesser included offense, we review the record to determine if the evidence would support a conviction of the lesser offense. *Id.* at 254. The cognate lesser included offense must be consistent with the evidence and defendant's theory of the case. *Id.*

The elements of assault with intent to do great bodily harm less than murder are (1) an assault, i.e., an attempt with force and violence to do corporal hurt to another, coupled with (2) the specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325, amended 453 Mich 1204 (1996). Assault with intent to do great bodily harm less than murder is a cognate lesser included offense of second-degree murder. *Id.* at 668. A finding that a defendant committed the crime of assault with intent to do great bodily harm less than murder presupposes that the defendant's acts did not cause the victim's death. *Id.* at 671.

In this case, it is clear that an assault occurred when defendant bludgeoned the victim numerous times in the forehead with a two-by-four board. However, for the trial court to instruct the jury on assault with intent to do great bodily harm less than murder, there must have been evidence to support the finding that defendant only intended to inflict great bodily harm, and did not intend to murder the victim. *Bailey, supra* at 671-672. The fact that defendant struck the victim numerous times in the head with the board supports the finding that he intended to do more than just inflict great bodily harm. *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). We are satisfied that the evidence supported the finding that defendant intended to kill the victim, and, therefore, an instruction on assault with intent to inflict great bodily harm less than murder was not supported by the evidence.

Further, contrary to defendant's argument, it is apparent that the victim died as a direct and proximate result of the injuries sustained from defendant's assault. Defendant's argument that the victim's seizure disorder, drug use, and bronchial pneumonia were the cause of death, rather than the blows to the head, is without merit. Because defendant failed to furnish a basis for a reasonable jury to find that his actions were not the cause of the victim's death, an instruction on a cognate lesser offense that would permit a finding of nonculpability for the death was not appropriate. *Bailey, supra* at 676. We conclude that the trial court did not abuse its discretion in denying defendant's request to instruct the jury on assault with intent to do great bodily harm less than murder.

Affirmed.

/s/ Martin M. Doctoroff  
/s/ William B. Murphy  
/s/ Brian K. Zahra