

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE ALFRED BURPO, JR.,

Defendant-Appellant.

UNPUBLISHED
December 4, 2001

No. 226719
Kent Circuit Court
LC No. 99-008671-FH

Before: White, P.J., and Talbot and E.R. Post*, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and carrying a concealed weapon, MCL 750.227, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant, defendant's girlfriend, testified that on July 2, 1999 she and defendant consumed a large quantity of alcohol and engaged in a prolonged argument. A physical altercation ensued. Complainant took a knife and went to a neighbor's house. Complainant alleged that defendant came to the house, engaged her in a struggle, took the knife, and stabbed her in the back. Defendant testified that he managed to take the knife from complainant during the struggle, and that she was stabbed when the two of them stumbled backward into a chair.

Defendant requested that the trial court instruct the jury on both self-defense and accident. The trial court agreed to instruct on self-defense, but declined to instruct on accident. The jury found defendant guilty as noted above.

After defendant's trial concluded, the visiting judge who presided completed his assignment and left the bench. The case was assigned to a permanent member of the circuit bench. At sentencing, defendant raised several objections to the scoring of the sentencing guidelines. Upon learning that his challenges to the scoring of the guidelines would not be accepted, defendant requested that he be sentenced by the judge who presided over the trial. The trial court declined the request on the ground that the visiting judge was no longer available, and proceeded to sentence defendant.

* Circuit judge, sitting on the Court of Appeals by assignment.

Jury instructions must be read as a whole to determine if the trial court committed error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The instructions must include all elements of the crime charged, and must not exclude consideration of material issues, defenses, and theories for which evidence was presented. Error does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

Defendant argues that he was denied a fair trial by the trial court's refusal to instruct the jury on the defense of accident. We disagree. Accident is a defense to all specific intent crimes. *People v Owens*, 108 Mich App 600, 608-609; 310 NW2d 819 (1981). Assault with intent to do great bodily harm less than murder is a specific intent crime. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The evidence produced at trial did indeed support the giving of an instruction on the theory of accident; nevertheless, we conclude that reversal is not required.

The trial court instructed on defendant's theory of self-defense. In addition, the trial court instructed the jury that in order to find defendant guilty of assault with intent to do great bodily harm less than murder, it was required to find beyond a reasonable doubt that defendant committed the charged acts with the specific intent to do great bodily harm to complainant. CJI2d 17.7. The jury was instructed that it was required to find the requisite specific intent in order to convict defendant of assault with intent to do great bodily harm less than murder. The instructions were imperfect; nevertheless, they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). The substance of the accident instruction was covered.¹ Reversal of defendant's conviction of assault with intent to do great bodily harm less than murder is not required because the substance of the instructions actually given adequately covered the substance of the accident instruction. *Canales, supra*.

Furthermore, defendant argues that the trial court abused its discretion by proceeding with sentencing after he requested that he be sentenced by the judge who presided over the trial. We disagree. Defendant objected to proceeding with sentencing only after he learned that his challenges to the scoring of the sentencing guidelines would not be accepted. We find that defendant acquiesced to proceeding with sentencing, and waived all objections to the absence of the visiting judge. See *People v Robinson*, 203 Mich App 196, 197; 511 NW2d 713 (1993). Moreover, a review of the sentencing transcript reveals that the court was familiar with the facts of the case and defendant's theory thereof, and was sufficiently informed to address challenges to the guidelines and to impose sentence. Defendant was not prejudiced. See *People v McCline*, 442 Mich 127, 134; 499 NW2d 341 (1993).

¹ CJI2d 7.3a provides:

The defendant says that [he/she] is not guilty of <state crime> because [he/she] did not intend to <state specific intent required>. The defendant says that [his/her] conduct was accidental. If the defendant did not intend to <state specific intent required>, [he/she] is not guilty. The prosecutor must prove beyond a reasonable doubt that the defendant intended to <state specific intent required>.

Affirmed.

/s/ Helene N. White
/s/ Michael J. Talbot
/s/ Edward R. Post