

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON CHARLES STARK,

Defendant-Appellant.

UNPUBLISHED

October 11, 2002

No. 232850

Midland Circuit Court

LC No. 00-009620-FH

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to three to fifteen years' imprisonment. He appeals as of right. We affirm.

I. Background Facts

The incident in question arises out of an assault that took place on August 4, 2000. Timothy Codling was traveling east in a pickup truck on Saginaw Road with his fiancé and her son. As they approached the intersection of Hope and Saginaw Roads, Mr. Codling noticed a truck traveling southbound on Hope Road at a high rate of speed. Mr. Codling testified that he was afraid the truck was not going to stop and so he proceeded through the intersection just ahead of it. Looking in his rearview mirror, Mr. Codling saw another car braking hard to avoid hitting the speeding truck. Thereafter, the speeding truck turned onto Saginaw Road and began tailgating Mr. Codling. As the truck went to pass, Mr. Codling honked his horn and made an obscene gesture toward the truck's driver. According to Mr. Codling, the driver of the truck swerved sharply back in front of him, slammed on his brakes, and then lost control of his vehicle. The speeding truck fishtailed and eventually came to a stop on the shoulder of the road on the westbound side. Mr. Codling testified that he also stopped his vehicle and pulled onto the shoulder on the eastbound side of the road.

Mr. Codling stated that he saw the driver get out of the truck. In an attempt to see if there was a problem, Mr. Codling decided to exit his vehicle. At this point, Mr. Codling claimed that the driver of the truck immediately started to walk across the road with his hands in fists at his sides. Mr. Codling testified that the next thing he remembered was waking up on the side of the

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

road. Mr. Codling explained that at some point during the fight he lost consciousness and could not recall who threw the first punch.

Kelly Parmele, Mr. Codling's fiancé, and her son, Nick, witnessed the entire fight. According to Kelly and Nick, the driver of the truck punched Mr. Codling and quickly knocked him to the ground. At that point, both Kelly and Nick testified that the attacker began forcefully kicking Mr. Codling with his whole weight. Kelly claimed that she thought Mr. Codling was dead because he was not moving and looked like "a rag doll" when he was being kicked. Nick estimated that the attacker kicked Mr. Codling five or six times before the other man got out of the pickup and told him to stop. The man who stopped the fight dragged Mr. Codling to the side of the road. At trial, Kelly and Nick described the attacker as having short dark hair and not wearing a shirt.

During the fight, four women in a van were driving down Saginaw Road when they witnessed Mr. Codling being punched and kicked. The driver of the van, Geraldine Schultz, drove up to the scene to try and stop the fight. The testimony elicited from the passengers in the van was consistent regarding the fact that Mr. Codling was forcefully kicked several times about the head and upper body. Donna Thompson, the sister of the driver, testified that she thought Mr. Codling was dead because he was not moving when he was being kicked. Both Ms. Schultz and Ms. Thompson were registered nurses and assessed Mr. Codling at the scene. According to them, Mr. Codling was disoriented and had lost consciousness during the fight. Ms. Schultz testified that there was blood coming from several areas on Mr. Codling, including one of his ears.

Jill Schultz, the daughter of the van's driver, was able to positively identify defendant as the individual who was kicking Mr. Codling. At the scene, she recorded the license plate number of defendant's truck and confronted defendant and his passenger with a warning that she would remember them. However, Jill could not recall whether defendant was wearing a shirt, but she was positive that both individuals were punching Mr. Codling and that only defendant was kicking him. Margaret Evans, the mother of the driver of the van, testified that she was very upset by the scene and that she could only recall a man kicking Mr. Codling around his head and ribs.

Deputy Sheriff Michael Sutherland, of the Midland County Sheriff's Office, was the first officer at the scene. When he arrived, Mr. Codling had regained consciousness but refused to take an ambulance to the hospital. Rather, Mr. Codling insisted that his fiancé would drive him to the hospital. Deputy Sheriff Sutherland interviewed all the witnesses together at the scene. Each one, aside from Margaret Evans, described the perpetrator as a white male with dark hair and no shirt. After tracing the license plate number given to him, Deputy Sheriff Sutherland went to defendant's house. He described defendant as having dark hair that was either shorter or the same length as it appeared at trial. Deputy Sheriff Sutherland further testified that when he questioned defendant about the incident, defendant denied kicking Mr. Codling and claimed that any punching was done in self-defense.

Dr. Daniel Sorenson was the emergency room physician that treated Mr. Codling. The doctor described Mr. Codling as having deep lacerations to his upper and lower lips, swelling and bruising on the right side of his face under his eye, a bruise on his back, and abrasions on his arms and legs. Dr. Sorenson stated that these injuries were the result of blunt trauma and that he

wanted to suture the lacerations on Mr. Codling's lips, but Mr. Codling declined. According to Dr. Sorenson, an unconscious person would be more susceptible to injury from trauma. Mr. Codling was never admitted to the hospital and was able to fully recover from his injuries.

Defendant elected to testify at trial and evidence was admitted regarding his three previous convictions for breaking and entering. Defendant claimed that on the night in question he was taking his friend, Jay Davis, to the hospital because Jay's girlfriend was in labor. Defendant admitted to speeding, passing Mr. Codling, and then losing control of his vehicle. However, defendant claimed that he never exited his truck to fight with Mr. Codling. Rather, defendant maintained that he hit a mailbox when he skidded across the road and was assessing the damage to his truck when he heard Mr. Codling yelling at him. Defendant testified that when he started to walk across the road Mr. Codling rushed him. Defendant claimed that he defended himself by punching Mr. Codling five or six times in the mouth. At that point, defendant claimed that he fell to the ground with Mr. Codling and that they continued to fight until Jay started kicking at them to stop. According to defendant, Mr. Codling only lost consciousness when he hit him across the face with his elbow before standing up. Defendant alleged that he left the area as soon as Jay dragged Mr. Codling to the side of the road and assured him that Mr. Codling was going to be all right.

Defendant further testified that a few months before this incident, in May 2000, he was involved in an automobile accident and was still recovering from his injuries. After the accident, defendant was left with scars and underwent a bone graft on his face. Defendant showed the jury the scars on his shoulder and arm. He explained that he always wore a shirt and kept his hair longer because he was self-conscious about these scars. At the time of the incident, defendant claimed that it was Jay who had a crew cut and was not wearing a shirt. Defendant also testified that many people mistook him for Jay.

II. Jury Instructions

Defendant initially argues that that trial court erred in denying his request for a jury instruction on the cognate lesser offense of aggravated assault, MCL 750.81a(1). We disagree. It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *Id.*

Defendant claims that there was sufficient evidence to warrant an instruction on the cognate misdemeanor offense of aggravated assault and that the element of specific intent, which distinguishes aggravated assault from the charged offense, remained in dispute. Conversely, the prosecution purports that the requested misdemeanor instruction was not supported by the evidence produced at trial. Further, the prosecution suggests that it was the identity of the perpetrator, and not the element of intent, that was at issue. In support of this argument, the prosecution notes that defendant testified at trial that he agreed that anyone who forcefully kicked an unconscious person in the head was trying to seriously injure that person.

This issue is controlled by our Supreme Court's recent decision in *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002). In *Cornell*, *supra* at 354-355, 358-359, our Supreme Court construed MCL 768.32(1) as permitting jury instructions on necessarily lesser included offenses only, and not on cognate lesser offenses. A necessarily included lesser offense contains

all of the elements required to commit the greater offense, such that a person could not commit the greater offense without first committing the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). Conversely, a cognate lesser offense shares some common elements and is in the same class as the greater offense, but also has some elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999).

In his argument on appeal, defendant admits that aggravated assault is a cognate lesser offense of assault with intent to do great bodily harm. Aggravated assault is a misdemeanor offense requiring: (1) an assault without a weapon; (2) the infliction of a serious or aggravated injury; and (3) no intent to commit murder or great bodily harm. MCL 750.81a(1). Whereas, “[a]ssault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997); see also MCL 750.84. Because all of the elements of aggravated assault are not contained within the crime of assault with intent to commit great bodily harm, it is a cognate lesser offense. In view of the fact that MCL 768.32(1) precludes courts from instructing on cognate lesser offenses, we find no error in the trial court’s decision. *Cornell, supra*.

III. Character Evidence

Defendant further opines that the trial court permitted improper character evidence to be presented to the jury. Specifically, defendant cites the prosecution’s inquiry into whether defendant “belonged to a ‘Saginaw gang’ that practiced a code of retribution.” We disagree. This Court reviews a trial court’s decision to admit or deny evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Such abuse is only found when “an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made.” *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Defense counsel objected at trial to a line of questioning concerning defendant’s alleged involvement with a Saginaw gang known as the 30-30 Crypts and their rules regarding signs of “disrespect.” According to defendant, this “other acts” evidence was irrelevant and was solely presented for the improper purpose of showing his propensity toward wrongdoing. Defendant further contends that the prosecution failed to present any extrinsic evidence that he belonged to a gang practicing rules of retribution. However, the prosecution asserts that this argument is meritless because defendant denied belonging to the 30-30 Crypts and the trial court instructed the jury that attorneys’ arguments were not evidence.

During trial the following colloquy took place between the prosecution and defendant on cross-examination:

Q. Mr. Stark, who are the 30-30 Crypts?

A. That dates back to a long time ago. That—

* * *

Q. Question was, Mr. Stark, who are the 30-30 Crypts?

A. It was a group of kids at a middle school that went around from on TV, like on TV and stuff, just considered themselves like a group, like a gang.

Q. It is a Saginaw gang, isn't it?

A. I have no idea about a Saginaw gang.

Q. What is that tattoo on your arm?

A. That's a court jester from a music group.

Q. That isn't the logo that the 30-30 Crypts use?

A. That's an ICP clown from a music CD.

Q. Isn't it a fact, Mr. Stark, that with the 30-30 Crypts, like any other gang, there's certain rules that you have about people that show you what you would phrase disrespect?

A. I don't think—I don't think middle kids know anything about respect. It was just, what they wanted to be—it was just like, something to go by. Like a group of kids. Like, you ever see that movie the Rascals? . . .

Q. Isn't it a fact, Mr. Stark, that you were associated with that group through 1999?

A. I had friends, yes. My friends—I grew up with them from home, like, yeah, I had friends.

Q. And part of the rules of the group is that if somebody shows you disrespect like another gang sign or giving you the middle finger, that you don't walk away from it. Isn't that a fact?

A. There was never any gang signs. It wasn't even really a gang. Like I said, it was a kid thing. You're blowing it way out of proportion.

Nothing further was presented during trial regarding defendant's alleged gang involvement. Evidence is defined as "[s]omething (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact Black's Law Dictionary (7th ed). Defendant denied belonging to a Saginaw gang and only conceded that he knew friends who belonged to a gang, that "wasn't even really a gang," in middle school. Further, the trial court instructed the jurors that attorney questions and arguments were not evidence. Jurors are generally presumed to follow their instructions. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001). Because defendant denied any former or current membership in a Saginaw gang and there was no extrinsic evidence of his involvement, defendant has failed to show that he was prejudiced by impermissible "other acts" evidence.

However, even if this testimony could arguably be construed as an admission to gang activity and considered improper "other acts" evidence, there is still no reason to reverse

defendant's conviction. Reversal is not required "for a preserved, nonconstitutional error 'unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.'" *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001), quoting *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). In this case, defendant admitted to being at the scene and punching Mr. Codling. While defendant claimed that he never kicked Mr. Codling and that it was Jay who was kicking both of them to stop fighting, there were several eyewitnesses that described the kicking as being very forceful and deliberate. Further, none of these witnesses corroborated defendant's contention that he was on the ground with Mr. Codling. Indeed, almost all of the witnesses claimed that only one person was punching and kicking Mr. Codling. Accordingly, we find no reversible error in admitting evidence of defendant's possible gang involvement. *Knapp, supra* at 378.

Affirmed.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Robert J. Danhof