

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL CURRIE,

Defendant-Appellant.

UNPUBLISHED

October 11, 2002

No. 234933

Wayne Circuit Court

LC No. 00-012566

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82,¹ and was sentenced to a three-year probationary term with the first six months to be served in the county jail. He appeals as of right. We affirm.

This case arises from an incident where defendant and complainant engaged in oral sex and vaginal intercourse. Complainant asserted that she was sexually assaulted at knifepoint, while defendant asserted that the sexual intercourse was consensual and for money. During the sexual intercourse, complainant stabbed defendant with a knife. Complainant testified that she stabbed defendant in an attempt to escape, and defendant testified that complainant stabbed him because he refused her demand for more money. After the stabbing, defendant swung a board at complainant, causing her to put her arm through a window. Complainant testified that defendant hit her with the board, while defendant indicated in his statement to police that he swung the board at complainant but did not remember whether he hit her.

At trial, defense counsel impeached the complainant with prior inconsistent statements she made to police and at the preliminary examination. Defendant does not specify which particular prior inconsistent statements are of concern to him, but merely cites page numbers where impeachment with prior inconsistent statements occurred. A review of the transcript reveals that prior inconsistent statements were used to impeach complainant on seven occasions. First, complainant testified at trial that defendant offered her a ride home. Defense counsel impeached her with her testimony at the preliminary examination, where she said that she asked

¹ Defendant was originally charged with four counts of first degree criminal sexual conduct, MCL 750.520b(1)(e), and one count each of assault with intent to murder, MCL 750.83, and felonious assault, MCL 750.82.

defendant for a ride home. Second, complainant testified at trial that the duration of the oral sex was three or four minutes. Defense counsel again impeached her with her testimony at the preliminary examination, where she testified that it lasted ten to fifteen minutes. Finally, on five other occasions, defense counsel impeached complainant by pointing out that portions of her testimony at trial included facts that were not included in her police report. The trial judge failed to instruct the jury that the prior inconsistent statements were only to be used to impeach complainant's credibility, not to be used as substantive evidence of defendant's guilt. There was no objection to this failure on the record.

Defendant argues that the failure of the judge to instruct the jury on the limited use of prior inconsistent statements constituted error mandating reversal. He argues that as a result of the failure to give a limiting instruction, the jurors in this case might have used these prior inconsistent statements as substantive evidence of defendant's guilt; therefore, defendant was denied a fair trial. We disagree.

Defendant did not object on the record to the instructional failure. However, a criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). The instructional error did not pertain to a basic and controlling issue in the case and, therefore, defendant's substantial rights were not affected.

The elements of felonious assault are 1) an attempted battery, or an act that caused complainant to reasonably fear an immediate battery, 2) intent to injure complainant or place complainant in reasonable fear of a battery, 3) present ability to commit a battery, or belief by defendant that he has the ability to commit battery, and 4) commission of the assault with a dangerous weapon. CJI2d 17.9. Because defendant's felonious assault conviction was based on the portion of the incident where defendant assaulted complainant with a board, neither of the prior inconsistent statements had bearing on a basic or controlling issue in this case. The discrepancies between complainant's trial court statements and her preliminary examination statements were minor and not relevant to the crime for which defendant was convicted, and even if the jury used these particular prior inconsistent statements as substantive evidence, the statements did not affect the fairness of the trial.

Additionally, MCR 2.613(A) provides:

[A]n error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Similarly, MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury . . . unless in the opinion of the court, after an

examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

The insignificance and irrelevance of the prior inconsistent statements with regard to the felonious assault conviction means the failure of the court to instruct the jury on the proper use of the statements was not inconsistent with substantial justice, MCR 2.613(A), nor did the error result in a miscarriage of justice, MCL 769.26.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh