STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2007
v	No. 270214 Gogebic Circuit Court
ROBERT JOHN RICK, Defendant-Appellant.	LC No. 05-000334-FH

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of assault with intent to commit great bodily harm less than murder, MCL 750.84, domestic violence, third offense, MCL 750.81(4), assault and battery, MCL 750.81(1), and tapping/cutting telephone lines, MCL 750.540. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arose from his assault on his estranged wife, Ann Marie Rick, and her friend, Neal Barron. At the time of the assault, complainant was living with Barron and his wife, Lynn Barron. Complainant and defendant began arguing. Defendant punched and strangled complainant, and prevented her from leaving the vehicle.

The Barrons were sleeping in their living room when complainant and defendant arrived. Neal Barron attempted to call the police, but defendant hit him from behind, and took the phone. Defendant left after threatening to "finish this job." Mr. Barron called the police.

The two paramedics and the nursing supervisor who observed complainant's injuries testified that choking to the point of unconsciousness could cause brain damage, loss of motor function, or possibly death. A paramedic testified that complainant's injuries appeared to be consistent with her claim that defendant had choked her.

Defendant first contends that the trial court erred when it allowed the paramedics and nurse to testify about the possible medical effects of defendant's strangulation of complainant. Defendant did not object to the admission of the relevant testimony at trial; therefore, appellate review is for plain error. *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003).

Defendant contends that the trial court was required to qualify the paramedics and nurse as expert witnesses under MRE 702 before they could offer their expert testimony concerning the

possible effects of strangulation. However, we agree with plaintiff's argument that the proffered testimony was properly admissible even under MRE 701 as lay witness opinion testimony. "Recent panels have liberally applied MRE 701 in order to help develop a clearer understanding of facts for the trier of facts." *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989). Thus, a lay witness may testify as to her opinion on matters that are related to her observations and findings and are not "'overly dependant upon scientific, technical, or other specialized knowledge.'" *Id*., quoting *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 629-630; 415 NW2d 224 (1987); see also *People v McLaughlin*, 258 Mich App 635, 657-659; 672 NW2d 860 (2003). Here, much of the witnesses' testimony concerned complainant's physical state and demeanor, and how those were consistent with a recent assault and with the history given by complainant. "These opinions do not involve highly specialized knowledge, and are largely based on common sense." *McLaughlin*, *supra* at 658, citing *Leavesly v Detroit*, 96 Mich App 92, 94; 292 NW2d 491, modified 409 Mich 926 (1980). Similarly, the opinion that prolonged strangulation could lead to oxygen deprivation, which could in turn lead to brain damage or, in extreme cases, death, is based on common sense.

In addition, even assuming that the statements did not fall under MRE 701, we find it highly improbable that the challenged testimony affected the outcome of the proceedings, given the other compelling evidence in this case. The jury could have reasonably believed that defendant intended to commit great bodily harm upon complainant. Defendant has not shown that he is entitled to relief here. *Spanke*, *supra*.

Defendant also argues that the trial court erred when it refused to instruct the jury on aggravated assault. However, as defendant admits, aggravated assault is a cognate lesser offense of assault with intent to murder, not a necessarily included lesser offense. *People v Brown*, 87 Mich App 612, 615; 274 NW2d 854 (1978). The trial court was not permitted to give the instruction. *People v Cornell*, 466 Mich 335, 355-356; 646 NW2d 127 (2002). Defendant maintains that this Court should at least hold this case in abeyance for our Supreme Court's resolution of three current cases in which it has signaled that it may reconsider whether *Cornell*, *supra*, was correctly decided. This argument is not persuasive. Two cases involve the interaction of the holding in *Cornell*, *supra*, with the statutory distinctions in the various degrees of criminal sexual conduct. See *People v Nyx*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2005 (Docket No. 248094), and *People v Apgar*, 264 Mich App 321, 326-328; 690 NW2d 312 (2004). The third case involves the issue of whether statutory involuntary manslaughter is a necessarily lesser included offense of murder. See *People v Smith*, 474 Mich 1100; 711 NW2d 83 (2006). The issues presented in these cases do not suggest that our Supreme Court questions the continuing viability of *Cornell*, *supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello