

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ANTHONY HILL,

Defendant-Appellant.

UNPUBLISHED

March 18, 2008

No. 276205

Kent Circuit Court

LC No. 06-005827-FH

Before: O’Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant to one year in jail, to be served at boot camp, and three years of probation. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that the trial court committed reversible error when it instructed the jury regarding the meaning of great bodily harm. We review jury instructions de novo. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). Great bodily harm is defined as “a physical injury that could seriously and permanently harm the health or function of the body.” CJI2d 17.7(4). In giving its instruction, the trial court stated the following, among other explanations:

Frankly, the law says, if someone is rendered unconscious or semi-conscious, that’s enough. But any significant injury or impairment of health or body function is sufficient.

We have reviewed the entire explanation of great bodily harm given by the trial court and find that the instruction could not have misled the jury except for this statement regarding the victim’s state of unconsciousness or semi-consciousness being sufficient to establish intent to do great bodily harm. In overruling defendant’s objection to the instruction, the trial court cited *People v Brown*, 97 Mich App 606, 611; 296 NW2d 121 (1980), which held that evidence was sufficient to establish “a serious or aggravated injury” where the victim was rendered unconscious by a blow to the head, the victim’s head hit concrete as he fell, and the victim suffered cuts to the face, an eye injury, and a bruised neck. It should be noted that the *Brown* court did not find that unconsciousness or semi-unconsciousness on its own was sufficient to establish a serious injury, but that the victim’s constellation of injuries was sufficient. The trial

court's instruction that the law said that unconsciousness or semi-consciousness was a serious injury equal to great bodily harm was inaccurate and more importantly, misleading to the jury.

Further, this Court has held that a trial court may not give examples that remove an element from the jury's consideration. Where a trial court uses an example, the court must "clearly indicate" that the example is only an example and that the jury must follow the instructions as a whole to determine guilt or innocence. *People v Edwards*, 206 Mich App 694, 696; 522 NW2d 727 (1994), quoting *People v Shepherd*, 63 Mich App 316, 322; 234 NW2d 502 (1975). In *Shepherd*, *supra*, this Court stated: [T]he jury is likely to give undue weight to examples, since they are easier to comprehend, and it may simply compare the defendant's conduct with the example. To prevent these adverse effects, the trial judge must clearly indicate that the examples are *only* examples, and that the jury must determine guilt or innocence by following the jury instructions as a whole. *Id.* at 696-697; (internal citations omitted). In *Edwards*, at issue was whether a mother's act in leaving a bucket of boiling hot water where it was easily accessible to her children was reckless under a child abuse statute. The trial court stated in its jury instruction that leaving a bucket of hot water in an area accessible to small children was reckless. *Id.* at 695-696. This Court determined that using the defendant's conduct as an example of a reckless act took the determination of one of the elements of the offense away from the jury and reversed the defendant's conviction. *Id.* at 697.

Here, the victim testified that he was thrown to the ground, did not remember whether he was kicked in the head, and was wobbly when he tried to get up. Others testified that the victim was kicked in the head after he was thrown to the ground. It was implicit in this testimony that the victim was at least semi-conscious for a moment. Therefore, as in *Edwards*, the trial court's example too closely mirrored the facts of the case and took away the jury's ability to make a critical determination in the case. The trial court also did not follow the requirement that it explain that examples were just examples, and that the jury instructions as a whole were to be followed.

This error is not harmless where, but for the directions to jurors, which almost mandated a finding of intent to do great bodily harm, the jury may have found defendant guilty of assault and battery. As previously stated, the trial court also failed to instruct the jury that examples are nothing more than an illustration not intended as a substitute for the requirement that the jury must find each element of the crime beyond a reasonable doubt by considering the court's instructions as a whole. Thus, we conclude, as we did in *Edwards*, *supra*, [that] ". . . the court's 'example' made a determination regarding one of the elements of the charged offense." *Id.* at 697. Accordingly, we reverse defendant's conviction and remand the matter to the trial court for a new trial.

In light of our decision on the error of the trial court in giving its "example" during the reading of the jury instructions, it is unnecessary to address defendant's remaining issue on appeal.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher