

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD CLAIR RETZLAFF,

Defendant-Appellant.

UNPUBLISHED

July 29, 2008

No. 279074

Oakland Circuit Court

LC No. 2006-211255-FC

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83. After a jury trial, he was found guilty of assault with intent to do great bodily harm less than murder, MCL 750.84. He appeals his conviction as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

According to the prosecution's theory of the case, defendant stabbed Jarelle Watkins in connection with a drug transaction. Watkins and his girlfriend, Kailey Goit, met defendant at a drug house. Watkins provided the drugs to defendant but, apparently, defendant did not have any money. He claimed that he could obtain money from his grandfather's home. Watkins and Goit drove defendant to the home. Defendant's uncle, who cared for defendant's grandfather, refused to allow defendant into the home. The three returned to Goit's car to drive to an apartment. Defendant and Watkins started to argue. Goit stopped the car at the apartment. Watkins and defendant left the car, and then began to fight. Watkins allegedly punched defendant, and defendant then stabbed and slashed Watkins repeatedly, puncturing Watkins' aortic valve.¹

At trial, defendant maintained that the stabbing was in self-defense in response to Watkins' attack. The trial court provided a jury instruction on this theory. However, defense counsel also requested that the trial court include the "mitigating circumstances" instruction

¹ Watkins was taken to the hospital. His heart stopped on the operating table, but he was resuscitated. As of the date of sentencing, Watkins remained in a coma.

found in CJI2d 17.4. The trial court denied counsel's request, finding that the instruction was not appropriate based on the facts of the case.

Defendant maintains that the trial court erred in refusing to provide the requested instruction on mitigation. We disagree.

If a defendant requests a jury instruction on a defense theory and it is supported by the evidence, the trial court must give the instruction. *People v Hawthorne*, 474 Mich 174, 181; 713 NW2d 724 (2006). The trial court's determination whether a requested jury instruction is applicable to the facts of a case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Even if there is error, however, reversal is warranted only if defendant can establish that the error caused a miscarriage of justice, i.e., it is more likely than not that the error was outcome determinative, and the error undermined the reliability of the verdict. *Hawthorne*, *supra* at 181-182.

Defendant argues that even though he was convicted of the lesser included offense of assault with intent to do great bodily harm less than murder, the verdict would have been different had the jury received a provocation instruction. The jury could have found that defendant reacted "in the emotional excitement of the moment" and that he "was under adequate provocation to justify the offense."

Defendant is mistaken in his assertion that a finding of provocation would likely have been used by the jury to negate the specific intent necessary for a conviction of the crime of assault with intent to do great bodily harm less than murder. In *People v Mitchell*, 149 Mich App 36, 37-38; 385 NW2d 717 (1986), the defendant was charged with assault with intent to murder and was found guilty of assault with intent to do great bodily harm. The trial court found that the defendant had been adequately provoked by a coworker and that, had the victim died, the defendant would have been found guilty of voluntary manslaughter rather than murder. The *Mitchell* Court disagreed with the defendant's assertion that this finding meant that he could not be found guilty of assault with intent to do great bodily harm less than murder:

The elements of assault with intent to do great bodily harm less than murder include (1) an attempt or offer with force or violence, to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder. MCL 750.84; MSA 28.279, *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922); *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982). The only requirement in regard to intent is that a defendant have the intent to do great bodily harm. If a defendant has such intent, the fact that he was provoked or that he acted in the heat of passion is irrelevant to a conviction. An assault is not mitigated to a lesser offense because of the existence of provocation.

The need to address the provocation issue arose in this case only in connection with the trial court's consideration of the charge of assault with intent to commit the crime of murder, MCL 750.83; MSA 28.278. The court must consider provocation in connection with that crime since the statute refers to an assault with intent to commit "the crime of murder". The statute requires more than a simple intent to kill. Because the statute refers to the crime of murder, provocation is relevant. In a situation where provocation is present, if a killing

had occurred, the defendant could only have been convicted of manslaughter. Since defendant could not have been convicted of murder if a killing had occurred, he could not be convicted of assault with intent to commit the crime of murder when the killing did not occur. It must be kept in mind that the statute does not refer to an assault with “intent to kill”. A killing may be manslaughter, even though there is an intent to kill. *People v Bourne*, 385 Mich 170, 172; 188 NW2d 573 (1971).

The statute under which defendant was convicted, MCL 750.84; MSA 28.279, requires only an intent to do great bodily harm less than the crime of murder. The term “intent to do great bodily harm less than the crime of murder” has been defined as an intent to do serious injury of an aggravated nature. *People v Ochotski*, 115 Mich 601, 608; 73 NW 889 (1898). The elements of the crime of murder and the existence of provocation are irrelevant to a conviction under this statute. [*Mitchell*, *supra* at 38-39.]

We find *Mitchell* persuasive. In the instant case, even if the trial court erred in refusing to give the requested instruction, defendant cannot show that any error was outcome determinative. The jury did not credit defendant’s claim of self-defense, and found that defendant had the specific intent to harm Watkins. Had a provocation instruction been provided, defendant would likely still have been convicted of assault with intent to commit great bodily harm. Provocation is not a mitigating circumstance of this offense. In order for defendant to have received a more favorable outcome, the jury would have had to erroneously conclude otherwise. Defendant cannot show he is entitled to relief due to the alleged instructional error. *Hawthorne*, *supra* at 181-182.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello