STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS SNELL,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 185394
Genesee Circuit Court
LC No. 94-051300 FH

Before: Michael J. Kelly, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, MSA 28.279. Defendant was sentenced to 80 to 120 months in prison as a fourth habitual offender, MCL 769.12; MSA 28.1084. We affirm.

Defendant first argues that the trial court erred in admitting into evidence the testimony of the victim, Donna Brown, regarding uncharged acts of assault perpetrated upon Brown by defendant subsequent to the assault leading to defendant's conviction. Defendant raises a number of allegations of error regarding the admission of this evidence which we will address individually below.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. We find an abuse of discretion only if 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 McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Defendant first argues that evidence of uncharged acts of assault by defendant was irrelevant. We disagree.

All relevant evidence is admissible and evidence which is irrelevant is not. MRE 402. Relevant evidence means evidence having any tendency to make any material fact more or less probable than it would be without the evidence. MRE 401. There are two separate questions that must be first answered to determine whether evidence is relevant: (1) is the fact to be proven material to the action,

that is, is truly at issue? and (2) what is the probative force of the evidence or, does the evidence make a fact of consequence to the action more or less probable than is would be without the evidence? *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909 (1995). The elements of the crime of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporal hurt to another, and (2) the intent to do great bodily harm less than murder. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). Whether defendant assaulted Brown subsequent to the incident in question makes more probable defendant's intent to do great bodily harm less than murder to Brown in the instant case, *Id.*, and therefore was relevant, *Mills, supra* at 66-68.

Defendant next argues that evidence of uncharged acts of assault by defendant was more prejudicial than probative. We disagree.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. All evidence is prejudicial; however, evidence is unfairly prejudicial if it tends to affect the objecting party by injecting considerations extraneous to the merits of the action, such as bias, sympathy, anger or shock. *People v Fisher*, 449 Mich 441, 451-453; 537 NW2d 577 (1995). A review of the record reveals no showing that evidence of the subsequent, uncharged assault was so inflammatory or prejudicial that it would be given undue or preemptive weight by the jury. *Id.* Evidence of uncharged acts of assaultive conduct by defendant upon Brown, is not an extraneous consideration to the crime of assault with intent to do great bodily harm less than murder. Rather, whether defendant committed additional, uncharged acts of assault upon Brown is indicative of defendant's intent at the time he committed the charged offense and defendant's intent is an essential element of the crime, *Harrington, supra* at 428. Moreover, having been charged with the crime of assault with intent to do great bodily harm and the jury having heard evidence that defendant stabbed Brown with a knife, inflicting a wound deep enough to cause protrusion of her abdominal fistula and necessitating both between forty-six and forty-eight sutures, as well as eight days hospitalization, we find it unlikely that the presentation of evidence of Brown having sustained an additional assault would so inflame and impassion the jury that defendant would be unfairly prejudiced. *Fisher supra* at 451-453.

Defendant next argues that evidence of uncharged acts of assault by him constituted improper evidence of other crimes, wrongs or acts pursuant to MRE 404(b). We disagree.

To be admissible pursuant to MRE 404(b), evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993); *People v Cadle*, 204 Mich App 646, 655; 516 NW2d 520 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *VanderVliet, supra* at 74.

First, the language of MRE 404(b) clearly provides that evidence of other crimes, wrongs, or bad acts is admissible to prove intent or the absence of a mistake or accident. Intent is an element of the crime of assault with intent to do great bodily harm less than murder. *Harrington, supra* at 428. Additionally, defendant's testimony at trial suggested that Brown's injuries were inflicted accidentally.

Therefore, because this evidence may have been presented for a purpose other than to show defendant's character or propensities to commit the crime of assault with intent to do great bodily harm, MRE 404(b); *VanderVliet, supra* at 74; *Cadle, supra* at 655, this evidence was admissible for a proper purpose. Second, as we have found, the evidence was relevant, *Mills, supra* at 66-68. Finally, because of the nature of the other evidence admitted at trial, we find it unlikely that Brown's reference to having sustained additional injuries at defendant's hand would have so inflamed the jury such that its probative value would have been substantially outweighed by the danger of unfair prejudice. *VanderVliet, supra* at 74; *Cadle, supra* at 655. Therefore this evidence was properly admitted pursuant to MRE 404(b).

Defendant's final argument with regard to the admission of this evidence charges that the prosecutor acted improperly in examining Brown regarding injuries unrelated to the charged offense and thereby denied him a fair trial. We disagree.

Prosecutorial misconduct issues are decided on a case-by-case basis and this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Because we have concluded that the evidence at issue was relevant, was not excludable as more prejudicial than probative, and was admissible as evidence of other crimes, wrongs or bad acts to show defendant's intent or to prove the absence of a mistake or accident, we similarly conclude that the prosecutor did not act improperly in seeking to present this evidence to the jury.

Next, defendant argues that the evidence presented at trial was insufficient to sustain his conviction. We disagree.

In determining whether evidence presented at trial was sufficient to sustain a conviction, viewing the evidence presented in a light most favorable to the prosecution, we must determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995).

Viewing the evidence presented at trial in a light most favorable to the prosecution, defendant stabbed Brown in the area of her abdomen, causing protrusion of her abdominal fistula and necessitating between forty-four and forty-six sutures and eight days hospitalization. The intent to do great bodily harm less than murder may be inferred from the act itself and the means and manner employed. *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982). Viewing the seriousness of the knife wound inflicted upon Brown, together with the evidence of the uncharged act of assault upon Brown, an inference of defendant's intent to cause great bodily harm to Brown was supported by the evidence. *Id*. Therefore, sufficient evidence was presented at trial to establish that defendant attempted to and did physically injure Brown, doing her corporal harm with force or violence. *Harrington, supra* at 428.

However, defendant argues that evidence was introduced which supported the defenses of intoxication and accident and, therefore, there was insufficient evidence to sustain his conviction. The

trial court instructed the jury with regard to the defenses of intoxication and accident. Questions regarding the weight and credibility to be afforded witness testimony is a matter properly reserved to the discretion of the trier of fact and should not be disturbed by this Court. *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974); *Wolfe, supra* at 508. Whether the jury chose to apply the defenses of intoxication or accident to defendant's actions is matter which concerns the credibility of the witnesses who testified thereto and the weight assigned to that testimony. These are questions properly reserved to the jury.

As a final challenge to the sufficiency of the evidence presented at trial, defendant argues that a conviction for the crime of assault with intent to do great bodily harm necessitates a showing of serious and permanent bodily injury that could harm the health or function of the victim's body and that Brown's injuries failed to meet that standard.

To constitute the offense of assault with intent to commit great bodily harm, the prosecution must show that the defendant intended to do harm of a serious and aggravated nature to the victim. *People v Smith*, 217 Mich 669, 673; 187 NW2d 304 (1922). In light of the severity of Brown's wound and the degree of medical treatment required to facilitate her recovery, her injury was of a serious and aggravated nature.

Defendant finally argues that the trial court erred in refusing to instruct the jury with regard to the offense of misdemeanor assault and battery, MCL 750.81; MSA 28.276. We disagree.

Assault and battery is a lesser included offense of assault with intent to do great bodily harm less than murder. *People v Smith*, 143 Mich App 122, 131; 371 NW2d 496 (1985). Where the requested instruction concerns a lesser included misdemeanor, the trial court must so instruct the jury if: (1) the defendant makes a proper request, (2) there is an inherent relationship between the greater and lesser offense, (3) the jury rationally could find the defendant innocent of the greater and guilty of the lesser offense, (4) the defendant has adequate notice, and (5) no undue confusion or other injustice would result. *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982); *People v Rollins*, 207 Mich App 465, 468-469; 525 NW2d 484 (1994).

As noted above, the elements of the crime of assault with intent to do great bodily harm are: (1) an attempt or offer with force or violence to do corporal hurt to another, and (2) the intent to do great bodily harm less than murder. *Harrington, supra* at 428. The elements of the crime of felonious assault, MCL 750.82; MSA 28.277, are: (1) assault, (2) with a dangerous weapon, and (3) with intent to injure or place another in reasonable apprehension of an imminent battery. *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993). Felonious assault is distinguished from misdemeanor assault by the use of a dangerous weapon in the perpetration of the offense, *Smith, supra* at 133, and knives are dangerous weapons for purposes of felonious assault, MCL 750.82; MSA 28.277.

Where a defendant has been charged with assault with intent to do great bodily harm, it is not error for the trial court to deny a request to instruct the jury regarding the crime of misdemeanor assault

where, under the facts of the case, the jury could not have reasonably convicted the defendant of simple assault without also finding the defendant guilty of assault with a dangerous weapon. *People v Stinnett*, 163 Mich App 213, 216-218; 413 NW2d 711 (1987). The evidence adduced at trial showed that the injury to Brown was inflicted with a knife and because the use of a dangerous weapon, including a knife, is the element which distinguishes misdemeanor assault from felonious assault, MCL 750.82; MSA 28.277; *Smith, supra* at 133, the jury could not have found defendant guilty of misdemeanor assault without also finding defendant guilty of felonious assault. Therefore, the trial court did not err in refusing to instruct the jury regarding misdemeanor assault and battery.

Moreover, the jury was instructed with regard to the offense of felonious assault. Felonious assault is a lesser included offense of the crime of assault with intent to do great bodily harm. *People v Stewart*, 126 Mich App 374, 375; 337 NW2d 68 (1983). The failure to give a requested instruction on a lesser included offense, where sufficient evidence was adduced at trial to support the lesser offense, is harmless where the jury is instructed on an additional lesser offense, but nevertheless returns a verdict of guilty of a greater offense. *People v Beach*, 429 Mich 450, 490-494; 418 NW2d 861 (1988). Here, even in light of the instruction on felonious assault, the jury convicted defendant of the greater offense of assault with intent to do great bodily harm. Therefore, any error arising from the court's failure to instruct the jury on misdemeanor assault was harmless. *Id*

Affirmed.

/s/ Michael J. Kelly
/s/ Myron H. Wahls

I concur in result only.

/s/ Hilda R. Gage