

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELANO L. COLLINS,

Defendant-Appellant.

UNPUBLISHED

March 20, 1998

No. 187248

Oakland Circuit Court

LC No. 93-129618-FH

Before: O’Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to five to ten years’ imprisonment. Defendant appeals his conviction and sentence as of right. We affirm.

First, defendant argues that he was prejudiced during closing argument when the prosecutor made denigrating remarks about defense counsel. We do not agree. This Court reviews questions of prosecutorial misconduct on a case by case basis. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). The challenged remarks are considered in context and evaluated in light of arguments by defense counsel and their relationship to the evidence presented at trial. *Id.* The test is whether defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Viewing the challenged remarks in context, we do not believe that the prosecutor’s argument improperly attacked defense counsel’s veracity. The prosecutor was merely commenting that she believed that defense counsel had mischaracterized the evidence during his closing arguments and later urged the jury to rely on their own memory of the evidence presented. Moreover, the trial court immediately instructed the jury that the lawyers comments were not to be considered as evidence immediately following the challenged remarks. This cautionary instruction cured any possible prejudice which could have resulted. *People v DeLisle*, 202 Mich App 658, 671; 509 NW2d 885 (1993). We find that the prosecutor’s remarks did not deny defendant a fair and impartial trial.

Next, defendant argues that there was insufficient evidence of the requisite force and intent presented at trial to support his conviction. There is no merit to this claim. When reviewing the sufficiency of the evidence in a jury trial, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992).

This Court has defined the required intent as “an intent to do serious injury of an aggravated nature.” *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). Intent to do great bodily harm may be inferred from all of the facts and circumstances. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995). Testimony was offered at trial that defendant used a considerable amount of force to throw the victim into a plate glass window, delivered blows to her head with a telephone receiver, caused her to fall onto the ground, and continued to beat and kick her as she lie on the ground. Medical testimony was offered at trial that the victim suffered a fracture to the bony orbit of her right eye and multiple lacerations on her face which required a total of ten stitches and, that if a person were thrust into a plate glass window and struck in the face with a telephone receiver, it could result in serious and permanent harm. Viewing this evidence in a light most favorable to the prosecution, the jury could infer that defendant assaulted the victim with the intent to do serious injury of an aggravated nature.

Next, defendant argues that the trial court subjected him to double jeopardy and abused its discretion by instructing the jury on the cognate lesser included offense of felonious assault. A double jeopardy challenge is a question of law and is reviewed de novo by this Court. *Lugo, supra* at 705. We find defendant’s claim of double jeopardy is without merit. In the present case, defendant was convicted of only one offense. Therefore, double jeopardy is not implicated. *People v Whiteside*, 437 Mich 188, 200; 468 NW2d 504 (1991), cert den 502 US 889; 112 S Ct 249; 116 L Ed 2d 204 (1992).

Nor was it improper to instruct the jury on felonious assault. This Court reviews the jury instructions given by the trial court as a whole to decide whether the lower court committed errors that require reversal. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). Reversal is not warranted where the instructions presented the issues to be tried and sufficiently protected the rights of the defendant. *Id.* Where a cognate lesser included offense is requested, the trial court must conduct a review of the record in order to determine if there is support for a conviction on the requested instruction. *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996). Our review of the record indicates support for a conviction on the challenged instruction of felonious assault. Evidence was presented at trial that defendant assaulted the victim by using a telephone receiver to strike the victim in the face. A telephone can be used as a dangerous weapon. *People v Heflin*, 434 Mich 482, 508 n 19; 456 NW2d 10 (1990). Evidence of defendant’s intent to injure the victim was presented at trial through the testimony of three different witnesses to the incident who saw defendant grab the victim, throw her into a plate glass window, hit her repeatedly on the head with a telephone receiver, and continue to hit the victim as she fell to the ground with his fists, feet, and the telephone receiver. Additional evidence of defendant’s intent to injure the victim was presented at trial through the victim’s

testimony of what he said to her at the hospital, specifically that he felt that she deserved what she got and that if he would have had a gun, she would be dead. These facts were more than sufficient to support a conviction of felonious assault.

Defendant argues that the instruction on felonious assault was improperly given because it violated his right to be adequately apprised of the charges he would be required to defend against. This issue is without merit. A court may not instruct on a lesser offense over defendant's objection unless the language of the charging document gave defendant fair notice that he could be charged with the lesser offense. *People v Usher*, 196 Mich App 228, 232; 492 NW2d 786 (1992). In the present case, there is a logical connection between the charge of assault with intent to commit great bodily harm and felonious assault. The difference is one of degree. The facts of the case as charged clearly indicate that at least some portion of the assault was carried out with a telephone receiver. Therefore, we find that defendant had adequate notice that he might face the cognate lesser included offense of assault with a dangerous weapon.

Next, defendant argues that his sentence was disproportionate. We disagree. We review the trial court's sentencing decision for an abuse of discretion. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). A sentencing court abuses its discretion when it violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the crime and the prior record of the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Defendant's minimum sentence of five years fell within the guidelines' range of 36 to 80 months; therefore it is presumed proportionate and defendant must show unusual circumstances which render it disproportionate. *Rivera, supra* at 652. Defendant argues that his sentence should be reduced because he was remorseful, the victim forgave him, and he prefers to be home with his family rather than serving his prison term. These circumstances are not sufficiently unusual to overcome the presumption that his sentence was proportional. Accordingly, we find that the trial court did not abuse its discretion by imposing a minimum sentence within the guidelines range.

Finally, defendant argues that the trial court abused its discretion in denying his motion for new trial based on newly discovered evidence. The decision whether to grant a new trial is within the sound discretion of the trial court. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993); *People v Leonard*, 224 Mich App 569, 578; 569 NW2d 663 (1997). We find no abuse of discretion here.

Defendant's claim is based on the affidavit of the victim, his girlfriend, that she may have prosecuted the wrong person and that since the trial she has become aware that defendant was not the individual who assaulted her. Defendant also offers the bare statement of a corroborating witness that defendant was not the person who assaulted the victim. Newly discovered evidence in the form of recanted testimony is traditionally considered to be suspect and untrustworthy. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). In the present case, the victim has a long-standing close association with defendant. She has forgiven defendant, she and defendant have children together, and she has pleaded for leniency on defendant's behalf. The corroborating witness merely makes a bald statement that defendant was not the person who assaulted the victim, he does not implicate any other

person as the attacker. However, three other trial witnesses, unknown to either defendant or the victim, specifically identified defendant as the person who assaulted the victim.

Moreover, before a new trial is warranted, defendant must demonstrate that the evidence itself, not merely its materiality (1) is newly discovered, (2) is not cumulative, (3) is such that it renders a different result probable on retrial, and (4) was not, with reasonable diligence, able to be discovered and produced at trial. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977); *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). The trial court determined that defendant failed to satisfy these requirements. We agree.

The proffered evidence was clearly known to defendant at trial and cannot be considered newly discovered. Had defendant wished to defend at trial on the theory that he was not the person who assaulted the victim, he could have, with reasonable diligence, discovered and produced such evidence at trial. Defendant's theory of the case throughout the trial was that *he did assault White*, but he did not intend to do her great bodily harm. We find no abuse of discretion in denying defendant's motion for new trial.

Affirmed.

/s/ Peter D. O'Connell

/s/ Roman S. Gibbs

/s/ Michael R. Smolenski