STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2000
v	No. 221028 Kent Circuit Court
KELLY DEAN FROESE, a/k/a KELLY WEEKS. Defendant-Appellant.	LC No. 98-006041-FH

Before: Neff, P.J., and Bandstra and Griffin, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, following a jury trial, and was sentenced to two to ten years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant contends that there was insufficient evidence to sustain his conviction of intent to do great bodily harm. We disagree. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements 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, 2) with an intent to do great bodily harm less than murder. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod on other grounds, 457 Mich 885 (1998). Defendant's argument focuses on the intent element.

Assault with intent to commit great bodily harm is a specific intent crime. *People v Parcha*, 227 Mich App 236; 239; 575 NW2d 316 (1997). Intent may be inferred from circumstantial evidence, including a defendant's conduct or words. *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986); *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). What distinguishes assault with intent to do great bodily harm from simple misdemeanor assault or aggravated assault "is the actor's intended result." *People v Van Diver*,

80 Mich App 352, 356; 263 NW2d 370 (1977). Intent to do great bodily harm is intent to do serious injury of an aggravated nature. *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

We have said that the use of a weapon or the infliction of serious injury is evidence of intent. See *Parcha, supra*; *People v Lugo*, 214 Mich App 699, 711; 542 NW2d 921 (1995); *People v Harrington*, 194 Mich App 424, 429-430; 487 NW2d 479 (1992); *People v Buckner*, 144 Mich App 691, 697; 375 NW2d 794 (1985). However, the use of a weapon is not required. *Van Diver, supra* at 356. Nor is physical harm an essential element. *Harrington, supra* at 430.

Viewing the evidence in a light most favorable to the prosecution, there is sufficient evidence to sustain defendant's conviction. An eyewitness described the altercation between defendant and Troy VanHooren as a beating rather than a mutual fistfight. Defendant approached VanHooren and apparently landed a first blow that dazed VanHooren.[1] VanHooren had no recollection of the assault; he last remembered replacing a weight, and then finding himself in the restroom, having been escorted there by others. After defendant struck him, VanHooren fell to the ground. Defendant straddled VanHooren on the floor and punched him several times in the head. Defendant got up and was heard to say: "Next time it will be your life." Defendant was apparently unable to resist defendant's blows.

The possibility of serious injury existed in this case. Defendant was a body builder, and it is reasonable to conclude that continuous blows to the face could inflict great bodily harm. VanHooren's injuries included a closed head injury, which can be life-threatening; lacerations on his face and ear, which required stitches; bruises; and a black eye. Furthermore, the fact that VanHooren may have provoked defendant does not mitigate the assault to a lesser charge. *Mitchell, supra* at 39. The court did not err in refusing to grant defendant's motion for directed verdict or for a new trial.

II

Defendant next contends that he was prejudiced when the court did not exclude all of VanHooren's testimony after VanHooren committed perjury on the witness stand. We disagree.

VanHooren lied to the jury about his prior 1995 conviction for assault, stemming from a fight outside a bar. He was recalled to the witness stand, apologized to the jury and corrected his false testimony.

Due process requires that criminal prosecutions comport with prevailing notions of fundamental fairness. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). "Prosecutors therefore have a constitutional obligation to report to the defendant and to the trial

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[1] Witnesses did not testify to any provocation by VanHooren. Defendant testified that the complainant made eye contact with him, so defendant approached; defendant then testified that the complainant "chest bumped" him, but other witnesses observed no such contact.

court whenever government witnesses lie under oath." *Id.* This also applies to matters which affect the credibility of the witness:

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." [*People v Wiese*, 425 Mich 448, 454; 389 NW2d 866 (1986), quoting *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959); see also *People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992).]

This duty is an affirmative duty to correct false testimony. *People v Woods*, 416 Mich 581, 601-604; 331 NW2d 707 (1982). Our Supreme Court has said that "[c]learly, the better practice is to introduce evidence on the record. The prosecutor would then *manifestly fulfill* his duty to correct false evidence." *Id.* at 601 (emphasis added). This occurred in this case. The witness was recalled to the witness stand and corrected the false evidence. There is no further obligation. Furthermore, even if the prosecution failed to correct the false testimony, automatic reversal is not required. *Lester, supra* at 280. A new trial is required only if there is a reasonable likelihood that the false testimony could have affected the judgment. *Id.;* see also *Wiese, supra* at 454. Here, the jury heard the corrected testimony. This gave the jury the full opportunity to assess VanHooren's credibility. In addition, because VanHooren could not remember the details of the altercation from which the present offense stemmed, the evidence concerning each element of the offense was established through the testimony of other witnesses. Therefore, we conclude that the outcome would not have been different even if VanHooren's testimony was stricken.

III

Lastly, defendant contends that he was prejudiced by the incorrect supplemental information and by the court's rule that a plea must be made within a forty-two-day time period preceding trial because those two circumstances combined to prevent meaningful plea negotiations. Although these circumstances may have affected the plea process, they did not operate to deprive defendant of any constitutional right.

"The defendant has only an opportunity, not a right, to plead guilty. No right is denied when the opportunity is not timely exercised." *People v Grove*, 455 Mich 439, 471; 566 NW2d 547 (1997); see also *Santobella v New York*, 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971). In *Grove*, our Supreme Court quoted with approval this Court's statement that "the trial court had the authority to reject a plea that was entered into after the date set forth in the scheduling order." *Grove, supra* at 464, quoting *People v Austin*, 209 Mich App 564, 567; 531 NW2d 811 (1995), rev'd sub nom *Grove, supra*. The court has discretion to reject that plea and proceed to trial, in the interests of docket control and eliminating unjustifiable expense and delay. *Id.* at 464. "The court rules provide for and encourage the use of scheduling orders to promote the efficient processing of civil and criminal cases." *Id.* at 465.

In this case, the fact that the negotiations may have been hampered by the prosecutor's incorrect belief that defendant had a prior felony conviction does not render defendant's trial and conviction unfair or infirm. Defendant did not have a constitutional right to plea negotiations. In

addition, the forty-two-day limit on pleas is a reasonable method by which the court can maintain control over its docket, juror time, and court expenses. The trial court properly denied defendant's motion for a new trial.

IV

Our review of defendant's supplemental brief leaves us unpersuaded that defendant's sentence represents an abuse of discretion. As indicated in § I, we are convinced that there was sufficient evidence to sustain a conviction of assault with intent to do great bodily harm.

Affirmed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Richard Allen Griffin