

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEAN C. WATSON,

Defendant-Appellant.

UNPUBLISHED

April 13, 2001

No. 216495

Oakland Circuit Court

LC No. 98-160816-FC

Before: K. F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278 and sentenced to a term of ten to thirty years' imprisonment. Defendant appeals his conviction as of right. We affirm.

I. Basic Facts and Procedural History

The victim, sixty-eight- year- old Charles Ellis, managed the Madrid Hotel in Royal Oak. Defendant, a prior tenant of the motel, entered Ellis' room and struck him four times in the head causing skull fractures and injuries that mandated extensive surgery. In addition to the skull fractures, the victim sustained defensive injuries to his left hand requiring pins in three fingers. Defendant admitted to police that he struck the victim with a heavy metal object¹. Additionally, defendant indicated that he had been drinking on the night that he struck the victim. Defendant insisted that he struck the victim because of frustration but denied ever intending to hurt him. Accordingly, the central issue at trial was the defendant's intent. After a trial, the jury convicted defendant of assault with intent to commit murder. From this verdict, defendant appeals as of right.

II. Motion to Quash the Information

First, defendant argues that the trial court erred by denying defendant's motion to quash the information. We disagree. This court reviews a trial court's denial of a motion to quash an

¹ The object was a "rebar" or a metal bar that resembles a crow bar.

information for an abuse of discretion and must determine whether the district court erred in binding the defendant over for trial. *People v Riggs*, 237 Mich App 584, 587; 604 NW2d 68 (1999). An abuse of discretion may be found where the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993).

At a preliminary examination, when the prosecutor presents sufficient evidence to establish probable cause to believe that a felony was committed and defendant committed that felony, the district court must bind the defendant over for trial. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998)(citations omitted.) In *Northey*, the court recognized that while the district court should consider the weight of the evidence and the credibility of the witnesses, it is improper for the court to usurp the role of the jury. *Id.* at 575. Thus, competent evidence that both supports and negates an inference that the defendant committed the crime charged raises a factual question that the district court must leave to the jury. *Id.* (Citations omitted).

In the case at bar, defendant was charged with assault with intent to commit murder. The elements of assault with intent to commit murder are: (1) An assault, (2) with an actual intent to kill, (3) which, if successful would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999) lv den 444 Mich 958; 514 NW2d 770 (2000)(citations omitted). The crime of assault with intent to commit murder is a specific intent crime mandating that the assailant must have acted with the specific intent to kill the victim. *People v Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985). The requisite intent to kill may be inferred from any fact in evidence and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *McRunels, supra*, at 181.

At the preliminary examination, the prosecutor introduced evidence establishing that the defendant left the motel on bad terms and that shortly before the incident, defendant appeared "a little ticked off" or "discontented." Additionally, evidence established that defendant entered the victim's room while he was asleep. Before the victim became aware of defendant's presence, defendant struck the victim in the head repeatedly with the heavy metal object. When defendant stopped assaulting the victim and fled, the victim was still alive but bleeding profusely and badly injured. After defendant fled, he did not attempt to procure help for the victim but rather, left the victim to his own devices.

Defendant argues that the evidence indicating that the victim was still alive when defendant fled suggests that he lacked the specific intent to kill the victim. On the contrary, the prosecutor argues that defendant's act of repeatedly striking the victim in the head with a metal object circumstantially imparts a specific intent to kill the victim as required to establish the charged offense even though the defendant, at some point during the assault, may have abandoned the specific intent to kill thus leaving the victim alive. Competent evidence on the record both supporting and negating the inference that defendant formed the requisite specific intent to commit the offense charged, raises a factual question that the district court must leave to the jury. *Northey, supra*, at 574. Defendant was properly bound over for trial and the trial court did not abuse its discretion when it denied the motion to quash the information.

III. Prosecutorial Misconduct During Voir Dire

Next, defendant argues that the prosecutor's questioning during voir dire denied him a fair and impartial trial. He maintains that the prosecutor's questions were designed to prejudice the jury and intentionally obfuscate important legal concepts resulting in confusion of the issues. We disagree.

Issues pertaining to prosecutorial misconduct are decided on a case- by- case basis. This court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). A review of the record establishes that the prosecutor made inquiries relative to an individual's ability to commit a crime while allegedly intoxicated. Upon trial counsel's objection, the trial court promptly stated that it was "[g]oing to ask that the jury follow the instructions that [the court] give[s] them relating to that." Furthermore, the trial court then permitted trial counsel to ask prospective jurors whether they would have a problem acquitting defendant if the prosecutor failed to prove the requisite specific intent. Prosecutorial misconduct of the kind and degree that justifies reversal is that type of conduct so egregious that it effectively dispossesses defendant of a fair and impartial trial. *People v Howard*, 226 Mich App 528; 575 NW2d 16 (1997). The record here does not support defendant's contention that the prosecutor's questions amounted to that type of egregious conduct which deprived defendant of a fair and impartial trial requiring that this court reverse defendant's conviction. Accordingly, we find no error.

IV. Directed Verdict Motion

Next, defendant contends that the trial court erred by denying his motion for a directed verdict. In *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998), our Supreme court stated that, "[i]f the evidence presented by the prosecution in the light most favorable to the prosecution, up to the time the motion is made, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict must be entered." Stated otherwise, "[d]ue process commands a directed verdict of acquittal when 'sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt,' is lacking". *Lemmon, supra*, at 633-634. (Citation omitted.)

In the case at bar, the defendant moved for a directed verdict at the close of the prosecutor's case arguing that the prosecutor failed to meet its burden of proof on the intent to kill element. To that end, defendant argues that the prosecutor did not come forth with specific evidence indicating that defendant planned or otherwise intended to kill the victim, despite defendant's opportunity and ability to do so. We disagree. A review of the record establishes that a rational trier of fact could conclude beyond a reasonable doubt that defendant intended to kill the victim by the number, force and location of the blows, coupled with the extent and the severity of the injuries inflicted along with defendant's subsequent failure to notify authorities and call for assistance. Because the victim was essentially bedridden for medical reasons before the incident, defendant's act in leaving him with those severe head injuries could be taken as a decision to allow the victim to die from those injuries. Considering the evidence in a light most favorable to the prosecution, the evidence presented was sufficient to justify a reasonable trier of

fact in finding that the defendant was guilty beyond a reasonable doubt. The trial court did not commit error by denying defendant's motion for a directed verdict.

V. Misdemeanor Instruction

The trial court instructed the jury on: 1) Assault with intent to murder; 2) assault with intent to do great bodily harm less than murder²; and 3) felonious assault.³ The trial court denied defendant's request for an instruction on misdemeanor, aggravated assault.⁴ Defendant submits this was error requiring reversal. We disagree.

We review a trial court's decision whether to grant a requested lesser-included misdemeanor instruction for an abuse of discretion bearing in mind that the circuit court is vested with substantial discretion in determining whether the cause of justice would be served by giving lesser included misdemeanor instructions on the facts of any given case. *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982). To that end, the *Stephens* court stated that "[w]henever an adequate request for an appropriate misdemeanor instruction is supported by a rational view of the evidence adduced at trial, the trial judge shall give the requested instruction unless to do so would result in a violation of due process, undue confusion, or some other injustice." *Id.* at 255. A requested misdemeanor instruction comports with a "rational view of the evidence" where "proof on the element or elements differentiating the two crimes [are] sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense." *Id.* at 262-263. (Citations omitted.)

MCL 750.81a; MSA 27.28.276(1) provides in pertinent part that:

A person who assaults an individual *without a weapon* and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor
[Emphasis added.]

In the case *sub judice*, there was no dispute that defendant struck the victim in the head with a heavy metal object thus inflicting the extensive and severe injuries sustained thereof. The defense pursued at trial concentrated solely on disproving the specific intent element to the charged offense. Accordingly, an instruction on a lesser offense that, by its own terms, depends upon the absence of a weapon, would be patently inappropriate. On the facts set forth in the record, the jury could not find the defendant guilty of the lesser offense. In light of the foregoing, we conclude that the trial court properly exercised its discretion in its decision not to instruct the jury on the requested misdemeanor.

VI. Photographic Evidence

² MCL 750.84; MSA 28.279.

³ MCL 750.82; MSA 28.277.

⁴ MCL 750.81a; MSA 28.276(1).

Next, defendant argues that the trial court abused its discretion by admitting photographic evidence that illustrated the severe and extensive head injuries sustained by the victim. Defendant argues that the photographs were irrelevant on the issue of defendant's intent because other evidence would have sufficed to establish the extent of the victim's injuries. Defendant further argues that since he does not dispute that the victim sustained injuries as a result of the attack, the photographs were immaterial. Defendant finally contends that the photographs were admitted for the sole purpose of "inflaming" the jury and thus, more prejudicial than probative of any material fact at issue, rendering the trial court's decision to admit them an abuse of judicial discretion. We disagree.

Whether to admit or exclude photographic evidence is a decision that lies within the sole discretion of the trial court. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds, 450 Mich 1212; 539 NW2d 504 (1995). Although the mere "gruesomeness" of the photograph alone is insufficient for its exclusion, *Mills, supra*, at 76 nevertheless, it is clear that, "[p]hotographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions." *Id.* at 77. (Citation omitted). As our Supreme Court stated in *Mills*, "[t]he proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Id.* at 76.

As the *Mills* court noted, "[p]hotographs are not excludable simply because a witness can orally testify about the information contained in the photographs." *Id.* at 76. As the defendant himself concedes, the crucial element at trial was whether the defendant formed the specific intent to kill the victim. The extent and the severity of the victim's injuries were thus indicative of the defendant's state of mind and whether he formed the requisite intent to kill by inflicting the repetitive blows to the victim's head. Since the photographs were probative of the defendant's intent, the mere gruesomeness of the images depicted is not sufficient to order exclusion. Indeed, photographic evidence depicting a victim's injuries is admissible to prove intent to kill. *Mills*, at 71. Defendant does not argue that the photographs were enhanced or otherwise failed to accurately reflect the injuries inflicted by defendant and sustained by the victim. Consequently, the photographs are accurate factual representations of the harm caused by defendant. *Mills*, at 77. Even though the photographs contain graphic images, their probative value as to defendant's intent is not substantially outweighed by the potential for unfair prejudice to defendant. Accordingly, we hold that the trial court did not abuse its discretion by admitting the photographs into evidence.

VII. Sentencing

Finally, defendant argues that the trial court abused its discretion by sentencing him to a ten-year minimum term of imprisonment. We disagree.

This court reviews a trial court's imposition of a sentence for an abuse of discretion. *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). Sentencing is governed by the principle of proportionality which is violated when a trial court imposes a sentence that is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* Sentences that are within the sentencing guideline range enjoy the presumption of proportionality. *Id.*, at 515-516.

Assault with intent to murder is punishable by imprisonment for any term of years. MCL 750.83; MSA 28.278. Here, the recommended minimum sentence range under the guidelines was eight to twenty years' imprisonment. The trial court sentenced defendant to a prison term of ten to thirty years with credit for 173 days. This sentence is closer to the lower end of the recommended guidelines.

Although the defendant is "deeply remorseful" for the attack upon the victim and has a "long substance abuse history," that is insufficient to establish that the trial court's sentence was disproportionate to the offense committed. The evidence adduced at trial established that defendant, without provocation, approached the victim while he was laying in his bed and proceeded to deliver four blows to the victim's head causing serious and extensive injuries. But for the victim's own ability to procure assistance after the attack, he may not have survived considering that the injuries inflicted were life threatening.

In light of the foregoing, there was certainly no abuse of discretion in this instance.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter