

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVE HARRIS,

Defendant-Appellant.

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UNPUBLISHED

November 21, 2006

No. 263090

Calhoun Circuit Court

LC No. 2004-003661-FH

Before: O’Connell, P.J., and White and Markey, 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. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to 4 to 20 years’ imprisonment. We affirm.

Defendant hired the victim to repair a broken window in his apartment. The victim removed the window from defendant’s apartment and took it to be repaired at a local hardware store. When he returned to defendant’s apartment with the repaired window, defendant accused the victim of lying and assaulted him. Defendant hit the victim with a golf club, breaking the club in two places. The victim was ultimately able to leave defendant’s apartment and drive himself to the hospital, where he received four staples to close his head wound. He also fractured an elbow, requiring nine stitches, and sustained a finger wound that required two stitches.

At trial, defendant claimed self-defense. He testified that the victim had a large hammer in his hand and threatened defendant with it. Defendant also testified that the victim refused to leave his apartment until he was paid for the window repair. The jury rejected the self-defense claims and convicted defendant as charged.

Defendant first argues on appeal that there was insufficient evidence presented of his specific intent to commit an assault resulting in great bodily harm. “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any 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, amended 441 Mich 1201 (1992). This standard gives due deference to the factfinder, and “a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v*

*Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). “[I]ntent may be express or it may be inferred from facts and circumstances.” *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983). “Because the law recognizes the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient to sustain a conclusion that a defendant entertained the requisite intent.” *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

The evidence presented at trial was that defendant hit the victim in the head repeatedly and with enough force to break the golf club and damage the victim’s skull. Defendant also fractured the victim’s elbow. Defendant’s accusations before the assault indicated that he felt the victim was trying to swindle him. Under the circumstances, the prosecutor presented sufficient evidence to prove beyond a reasonable doubt that defendant intended to inflict great bodily harm on the victim.

Defendant next argues that the trial court pierced the veil of impartiality, which denied him a fair trial. We disagree. Although a trial court may question witnesses, “the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair or partial.” *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). Defendant first contends that the trial court’s questions to defendant during his testimony demonstrated partiality. During direct examination, defendant testified that the victim’s back was to him before the assault. His testimony about the assault, however, was that he “wrapped around” the victim to hit him. The trial court’s question to defendant, whether the victim’s back was turned toward defendant when he first struck the victim, was merely an impartial clarification of that testimony. Defendant also challenges the trial court’s question to the prosecutor regarding whether he had much more questioning left to do. However, the trial court’s question actually helped defendant and expedited trial by prompting the prosecutor to move on rather than cumulatively and endlessly explore the many contradictions in defendant’s confused testimony. Although the prompt favored defendant, a subtle nudge that further rehashing will unnecessarily waste the court’s time is an impartial act, not an indication of partiality toward either side. Therefore, defendant’s arguments are without merit.

Defendant next argues that the trial court reversibly erred when it failed to *sua sponte* instruct the jury that defendant did not have a duty to retreat. He argues that the failure to give a “no duty to retreat” instruction was plain error. We review de novo a defendant’s claim of instructional error. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). Where a defendant fails to object to instructions that are later alleged to be erroneous, appellate review is limited to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 761, 763-764; 597 NW2d 130 (1999). The jury was given a self-defense instruction, but defendant argues that the trial court should also have added the “no duty to retreat” instruction, CJI2d 7.17. Defendant argues that, without the instruction, the jury was oblivious of the fact that defendant was not required “to retreat from the perceived threat, but could stand his ground and resist the intrusion . . . .” He further argues that the jury was “deprived of determining whether a central component of the defense was present.” Contrary to defendant’s argument, whether defendant had a duty to retreat was not a “central component of the defense,” and not even an issue raised at trial. If the retreat issue is not raised during trial, a trial court’s failure to instruct on the defendant’s lack of duty is not error requiring reversal. *People v Davis*, 216 Mich App 47, 55; 549 NW2d 1 (1996). Therefore, defendant’s arguments lack merit.

Finally, defendant argues that the trial court committed error requiring reversal by giving jurors the option of touching the victim's head injury. We disagree. We review for abuse of discretion a trial court's decision on evidentiary matters. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). To support the reversal of a conviction, an evidentiary error must affect a defendant's substantial rights. MRE 103(a). None of the jurors actually felt the victim's injury, so defendant fails to demonstrate error in the introduction of any cumulative, prejudicial, or inflammatory evidence, or any consequential prejudice at all.

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Jane E. Markey