

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY COTTON,

Defendant-Appellant.

UNPUBLISHED

September 24, 1996

No. 178270

LC No. 94-906-FC

Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83; MSA 28.278, and of possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive prison terms of ten to twenty years for the assault with intent to commit murder conviction and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions stemmed from shooting at a car containing Terrill Butler and Lorenzo Coy. Defendant fired shots at the car. Though bullets hit the vehicle, neither Butler nor Coy was struck. Defendant was charged with assault with intent to commit murder only as to Butler.

I

Defendant argues that the doctrine of transferred intent had no application to the case, and, for that reason, the trial court erred when it read the transferred intent instruction, CJI 17:1:05, to the jury. We disagree.

Defendant failed to object to the instruction at trial. Generally, this Court is obliged to review only those issues which were properly raised and preserved, *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994), and an objection not raised at the trial court is waived on appeal, *People v Furman*, 158 Mich App 302, 330; 404 NW2d 246 (1987). Specifically, a party waives review of

* Circuit judge, sitting on the Court of Appeals by assignment.

jury instructions to which it acceded at trial. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). Nevertheless, an exception exists to the preservation rule where, as here, a constitutional deprivation is asserted which was potentially outcome-determinative. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). In such an instance, we will not disturb the verdict unless “the error complained of has resulted in a miscarriage of justice,” MCL 769.26; MSA 28.1096, or the result is “inconsistent with substantial justice,” MCR 2.613(A).

We review jury instructions de novo to ensure that they fairly present the issues to be tried and adequately protect the defendant’s rights. *People v Davis*, 199 Mich App 502, 525; 503 NW2d 457 (1993). Defendant is entitled to have a properly instructed jury weigh the evidence. *People v Vaughn*, 447 Mich 217, 226; 524 NW2d 217 (1994). However, the fact that a jury was not properly instructed entitles a defendant to reversal only where this error resulted in prejudice. *Id.* at 235. Accordingly, we must determine first whether the trial court, in fact, committed an instructional error and, second, if so, whether “this error resulted in prejudice to defendant to the extent that a miscarriage of justice occurred requiring reversal.” *Id.* To assess prejudice it must be determined whether the jury could have reached a different result had the error not occurred. *Id.*

Defendant’s argument is premised on the false notion that this case involved no unintended victim because neither Butler nor Coy was shot. The transferred intent instruction, CJI 17:1:05, however, speaks expressly in terms of an assault and contains no requirement that anyone actually be shot.

Defendant raises a related issue by arguing that the wording of the instruction itself was flawed because the trial court described transferred intent in terms of an intent to assault rather than an intent to commit murder. Thus, the jury may have convicted defendant without finding that he had the requisite specific intent. Our review of the record reveals that the trial court read the assault with intent to commit murder instruction, CJI 17:2:01, essentially verbatim, with the only difference being the use of the words “person he assaulted” in exchange for the word “complainant.” In our opinion, this difference is inconsequential because the term “complainant” is merely descriptive, denoting only that defendant had the intent to murder someone. We note that while an intent to commit murder is an essential element of the crime, and the trial judge so instructed the jury, an intent to murder the complainant is not. *People v Warren*, 200 Mich App 586, 588; 504 NW2d 907 (1993). “It is only necessary that the state of mind exist, not that it be directed at a particular person.” *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979). If it were otherwise, there would be no such thing as the doctrine of transferred intent. Further, after the trial court read the transferred intent instruction, it also read the specific intent instruction, CJI2d 3.9, thus reinforcing to the jury that a conviction must rest on a finding of defendant’s specific intent to commit murder and clearing up any confusion as to the requisite intent, assuming any existed.

In sum, there was no instructional error.

II

Defendant next contends that the trial court erred when it refused his post-trial request for an evidentiary hearing to determine whether a certain juror had lied during voir dire, concealing the fact that she had years earlier lived nearby defendant and was thus likely to be prejudiced against him from events that had taken place at that time. Our review of the record reveals that the factual premise underlying this argument is false. The trial judge never refused to conduct an evidentiary hearing. He instead directed the prosecutor and defense counsel to meet privately with the juror to determine what she knew or remembered about defendant. The judge also advised that defendant could renew the request following that meeting if he thought that was necessary. The result of the meeting was an affidavit signed by the juror averring that at the time of trial she had no recollection of defendant or his family. Defendant never renewed his motion.

Aside from the fact that defendant failed to preserve this issue, he has presented no evidence whatever to counter the affidavit or to show that the juror lied or was in any way deceptive during voir dire.

Affirmed.

/s/ Michael J. Kelly

/s/ Peter D. O'Connell

/s/ Kenneth W. Schmidt