STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN MICHAEL ROMANCHUK,

Defendant-Appellant.

UNPUBLISHED
October 11. 1996

No. 171946
LC No. 93-000409

Before: White, P.J., and Smolenski and R.R. Lamb,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2),[1] and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. The jury acquitted defendant of a second count of first-degree criminal sexual conduct. Defendant was sentenced to concurrent terms of twelve to twenty-five years' imprisonment for the criminal sexual conduct conviction and five to ten years' imprisonment for the assault conviction. We affirm defendant's criminal sexual conduct conviction, reverse his assault conviction, and remand for further proceedings.

Defendant first contends that the trial court abused its discretion in denying his request for an adjournment so that he could be represented by newly retained counsel. Upon review of the circumstances surrounding the request, we find that although the trial court's inquiry into the matter was rather abbreviated, the court did not abuse its discretion because defendant failed to indicate why new counsel was necessary on the first day of trial and the retained counsel, who did not file an appearance, could not be located. *People v Sinistaj*, 184 Mich App 191, 201-202; 457 NW2d 36 (1990). Moreover, defendant has failed to demonstrate that he was prejudiced by the trial court's decision, and thus, any error would not require reversal. *Id*. at 202.

Next, defendant argues that the trial court erred in failing to give the jury a specific unanimity instruction with respect to the first count of first-degree criminal sexual conduct. See, e.g., *People v*

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

Cooks, 446 Mich 503; 521 NW2d 275 (1994). However, defendant did not request this instruction and expressly approved the instructions as given concerning the first-count of first-degree criminal sexual conduct. Thus, we review this issue only to determine if there is manifest injustice. *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996). We find none. Although the court read the information to the jury, which, with respect to the first count, charged defendant with fellatio occurring either during the commission of another felony (assault with intent to commit great bodily harm) or through the use of force or coercion and resulting in personal injury, see MCL 750.520b(1)(c) and (f); MSA 28.788(2)(1)(c) and (f), the record indicates that with respect to the first count the court instructed the jury only on the latter theory.[2] In addition, the court gave the jury a general unanimity instruction pursuant to CJI2d 2.25. We conclude that the absence of a specific unanimity instruction did not result in manifest injustice. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). We likewise decline to address defendant's unpreserved argument that the prosecutor acted improperly with respect to the jury instructions concerning the first count of criminal sexual conduct. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Defendant argues that the trial court erred in failing to grant his motion for a directed verdict with respect to each count of first-degree criminal sexual conduct. We disagree. Viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to find the essential elements of the crime to be proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993); *People v Martinez*, 190 Mich App 442, 443-445; 476 NW2d 641 (1991).

Defendant contends that he was denied a fair trial by the prosecutor's failure to produce alleged res gestae witnesses at trial. However, defendant (1) failed to move for a new trial below on this ground; (2) made no attempt to call the witnesses even though the witnesses—defendant's sister and her husband—were known to defendant where defendant had resided in the same home as the witnesses, and; (3) did not object at trial to, or otherwise indicate to the trial court his dissatisfaction with, the witnesses' absence. Accordingly, we conclude that this issue is not preserved. *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996);

Defendant contends that he was denied the effective assistance of counsel by trial counsel's failure to take certain actions at trial. However, defendant failed to move for an evidentiary hearing or to remand in a timely fashion. Thus, our review is limited to deficiencies apparent in the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995); *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). Upon review of the record, we find that defendant has failed to establish that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment or that defendant was so prejudiced that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 121-122; 545 NW2d 637 (1996).

Defendant next argues that he was denied his right of confrontation by the prosecutor's failure to produce the police chemist who performed serology tests. We disagree. After defendant objected and

the prosecutor rephrased the question, the expert witness properly testified to her opinion based on the "findings and opinions of other experts." *People v Dobben*, 440 Mich 679, 696; 488 NW2d 626 (1992).

Defendant argues that the trial court erred in failing to give his requested instruction on impeachment by a prior inconsistent statement. However, given that defendant first requested an impeachment instruction after the trial court completed instructing the jury and that the trial gave extensive instructions regarding witness credibility, we conclude that defendant was not denied a fair trial by the trial court's refusal to give this instruction. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992); see also *People v Fountain*, 392 Mich 395, 40; 221 NW2d 3751 (1974).

Defendant argues that the trial court erred in failing to give his requested instruction on self defense. We agree that the trial court erred in not instructing on self defense because there was some evidence to support the theory. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978); *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368 (1991). Defendant's theory was that no sexual contact occurred and the only assault was that by complainant when she hit defendant with a bottle. In defendant's statement to police, which was read to the jury, he indicated that he struck complainant after she hit him with a bottle when he declined to give her money. An instruction was proper under these circumstances. *Hoskins, supra; Cross, supra*.

Defendant argues that the trial court erred in refusing to give his requested instruction concerning the lesser included misdemeanor offense of aggravated assault. We agree. A person is guilty of aggravated assault when he assaults another person without a weapon and inflicts serious or aggravated injury without intending either to commit the crime of murder or to inflict great bodily harm less than the crime of murder. MCL 750.81a; MSA 28.276(1). "The elements of assault with intent to do great bodily harm less than murder are (1) and assault, i.e., 'an attempt or offer with force and violence to do corporal hurt to another' coupled with (2) a specific intent to do great bodily harm." *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325, amended 453 Mich 1204 (1996).

A court must conduct a five-part analysis in determining whether to instruct on a lesser included misdemeanor offense. *People v Rollins*, 207 Mich App 465, 468-469; 525 NW2d 484 (1994). First, the defendant must make a proper request. *Id*. at 468. In this case, defendant specifically requested an instruction on aggravated assault. Second, there must be an inherent relationship between the greater and lesser offense. *Id*. An inherent relationship exists where (1) the two offenses relate to the protection of the same interests and (2) their general nature is such that proof of the lesser offense is necessarily, although not invariably, presented as part of the showing of the commission of the greater offense. *People v Hendricks*, 446 Mich 435, 445; 521 NW2d 546 (1994). In this case, both offenses relate to the protection of the same interests, i.e., protecting people from corporal harm. *People v Smith*, 143 Mich App 122, 131; 371 NW2d 496 (1985). Both offenses require proof of an assault, and evidence of the victim's injuries can often be used to establish that defendant's assault inflicted serious or aggravated injury for the purpose of the lesser offense or that defendant specifically intended to cause great bodily harm less than murder for the purpose of the greater offense. Thus, we conclude

that the greater and lesser offenses have an inherent relationship. The third part of the misdemeanor analysis is that the jury rationally could find the defendant innocent of the greater and guilty of the lesser offense. *Rollins, supra*. In this case, the jury could have rationally found that defendant assaulted and inflicted serious injuries on the victim without specifically intending to do great bodily harm less than murder. *People v Stinnett*, 163 Mich App 213, 217; 413 NW2d 711 (1987); *People v VanDiver*, 80 Mich App 352, 356; 263 NW2d 370 (1977). Fourth, the defendant has adequate notice of the lesser offense. *Rollins, supra*. As indicated previously, defendant specifically requested the instruction on aggravated assault. And, fifth, no undue confusion or other injustice would result. *Id*. at 468-469. In this case, the instruction would not result in confusion or injustice. Accordingly, we conclude that the trial court erred in refusing to give defendant's requested instruction on the lesser misdemeanor offense of aggravated assault.

We conclude that the court's refusal to instruct on self defense as a defense to the assault charge and on the lesser included misdemeanor offense of aggravated assault did not fairly present the issues to be tried or sufficiently protect defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Accordingly, we reverse defendant's conviction of assault with intent to do great bodily harm less than murder, and remand for a new trial. *Hoskins*, *supra* at 101; *People v Malach*, 202 Mich App 266, 277; 507 NW2d 834 (1993).

Defendant's final argument on appeal is that he was denied a fair trial by the trial court's refusal to reread trial testimony to the jury. By not objecting at trial, defendant failed to preserve this issue. *People v Hamacher*, 432 Mich 157, 168; 438 NW2d 43 (1989). Upon review of the record, we conclude that no miscarriage of justice will result from the failure to review this issue because the record reflects that the jury did not request to rehear trial testimony but instead requested a written statement not admitted into evidence. *People v Cook*, 153 Mich App 89, 92; 395 NW2d 16 (1986).

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Richard R. Lamb

[1] The amended judgment of sentence incorrectly lists defendant's conviction as second-degree rather than first-degree criminal sexual conduct. On remand, an amended judgment accurately reflecting defendant's conviction shall be entered.

[2] Because we conclude that the trial court did not instruct the jury on a theory of fellatio occurring during the commission of another felony (assault with intent to do great bodily harm less than murder), we decline to address defendant's argument that a conviction of such crime and a separate conviction of assault with intent to do great bodily harm less than murder would violate double jeopardy.