

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH IBARRA, JR.,

Defendant-Appellant.

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UNPUBLISHED

June 27, 1997

No. 182717

Ingham Circuit Court

LC No. 94-066840-FH

Before: Young, P.J., and O'Connell and W. Nykamp\*, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for assault with intent to do great bodily harm less than murder (assault GBH), MCL 750.84; MSA 28.279, and aggravated assault, MCL 750.81a; MSA 28.276(1). Defendant received five years of imprisonment for the assault GBH conviction a concurrent one year sentence for the aggravated assault conviction. We affirm.

Defendant was charged with two counts of assault GBH after he engaged in an altercation with the two complainants at a party in October 1993. Defendant attended as an uninvited guest and was eventually asked to leave by the complainants. Defendant testified that one of the complainants shoved him in the back and that he became scared and turned around and swung a bottle at the complainant. He also testified that the other complainant charged him and tried to hit him but missed; after which, defendant swung and hit the complainant in the face (apparently with the bottle). Other witnesses confirmed these events. Defendant testified that afterwards his hand hurt and was full of blood and glass. One complainant sustained a severe cut on his arm requiring seventy-eight stitches and forty staples, and the other complainant was cut across the eye and lost half his vision in that eye.

Defendant first argues that he was improperly impeached at trial by the introduction of a nonexistent prior conviction in contravention of MRE 609, and that the trial court's denial of his motion for a new trial based on this erroneous impeachment was an abuse of discretion. We disagree.

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

Based upon information gathered from a Law Enforcement Information Network (LEIN) printout, the prosecution moved in limine for the admission of a 1988 breaking and entering “conviction” as evidence to impeach defendant’s credibility if defendant took the stand. Defense counsel objected, arguing that the evidence was not probative of truthfulness and prejudicial. The trial court granted the prosecution’s motion, allowing the “prior conviction” to come in for impeachment purposes. The matter of the “prior conviction” was not raised in opening statements by either party. Before proceedings commenced on the second day of trial, defense counsel asked the trial court to reconsider its ruling on the grounds that the evidence was prejudicial and not probative of truthfulness. The trial court disagreed and affirmed its earlier ruling. When defendant took the stand during trial he responded affirmatively to the prosecution’s single question of whether he was “in fact a convicted felony, having been convicted on or about November 9th, 1988 of breaking and entering an occupied dwelling.” This was the only line of inquiry which raised the “prior conviction”. The evidence was not discussed again and it was not raised in the prosecution’s closing or rebuttal argument.

Following defendant’s conviction, however, the presentence investigation report (“PSIR”) revealed that defendant had never been convicted for breaking and entering, but had instead been granted trainee status pursuant to the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*; MSA 28.853(11) *et seq.* The grant of HYTA status is not a criminal conviction. MCL 762.14; MSA 28.853(14). Defendant subsequently moved for a new trial arguing that the admission of the breaking and entering charge was improper because it was not a conviction as required for admissibility pursuant to MRE 609. Although the trial court held that disposition of the prior offense under HYTA made the evidence inadmissible, the trial court went on to hold that the error was harmless because the jury was instructed that the prior offense was introduced for impeachment purposes only and given the jury’s verdict of one count of assault GBH and one count of aggravated assault, the jury had not given the impeachment evidence much weight such that its introduction denied defendant a fair trial.

Defendant argues on appeal that because his testimony regarding self-defense and intent was critical to determining his guilt, the erroneous introduction of evidence impeaching his credibility affected the jury’s verdict. We disagree. This is not a case in which the trial court knowingly admitted a prior offense that was disposed of under HYTA. If that had occurred, the admission of such evidence in this case would have been error. *People v Crutchfield*, 62 Mich App 149, 153-154; 233 NW2d 507 (1975); see *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973) (witness may not be impeached with prior charges that did not result in a conviction). However, based upon the uncontested information provided to the court at the time that it made its rulings, the court’s decisions were not erroneous.

A new trial based upon newly discovered evidence is not warranted unless a defendant demonstrates that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Miller*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). A trial court’s decision regarding a motion for a new trial based on newly discovered evidence will not be reversed absent an abuse of discretion. *Id.*

Defendant's claim of newly discovered evidence fails because he cannot show that the nature of the prior disposition was not discoverable or producible at trial with reasonable diligence. Although defendant contends that he was unaware of the precise disposition of the prior charge, defendant admitted that he was aware that he had previously been charged with breaking and entering. Defendant has not set forth any facts to indicate that the HYTA disposition was undiscoverable, and we conclude that he could not make this showing. Significantly, the author of the PSIR discovered this information in the records including a related orders dismissing the 1988 charge and a subsequent charge on December 13, 1990. Because this information could have been discovered with reasonable diligence, defendant's claim that the evidence is "newly discovered" is without merit, and the trial court properly denied his motion for a new trial.

Defendant alternatively argues that his counsel's failure to ascertain the nature of the prior charge denied him the effective assistance of counsel. Specifically, defendant contends that if his counsel discovered this information and successfully excluded it from trial, the jury could have believed his testimony regarding his intent that he was acting in self-defense. In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). We conclude that even though defense counsel could have discovered defendant's HYTA status with reasonable diligence, this shortcoming and the subsequent admission of the impeachment evidence did not deprive defendant of a fair trial.

To ascertain the impact of this evidence on the jury verdict, a reviewing court engages in a comparative analysis of the likely effect of the erroneously admitted evidence in light of the other evidence. See *People v Mateo*, 453 Mich 203, 206; 551 NW2d 891 (1996). Evidence, which is erroneously admitted for impeachment purposes, is reversible error only when it appears from the record that the admission of evidence of the reversed conviction would have materially influenced the trier of fact in arriving at its verdict. *People v Worden*, 91 Mich App 666, 679; 284 NW2d 159 (1979). That is not the case here.

Defendant surmises that absent the impeachment evidence, defendant's testimony regarding his intent could have been believed and resulted in an acquittal. Contrary to defendant's assertion, evidence regarding the intent element of assault can be established by a defendant's conduct as well as his words. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). The evidence against defendant was regarding his intent was overwhelming. Both defense and prosecution witnesses testified that defendant engaged in an altercation with the complainants. Defendant admitted that he fought with the complainants and that he swung a bottle and punched one of them, and that afterwards his hand was full of blood and glass. Significantly, the evidence concerning the complainants' injuries is undisputed. One complainant sustained two lengthy cuts to his forearm necessitating seventy eight stitches and forty staples, and the other complainant was slashed in the face and has lost half the vision in one eye. By contrast, the impeachment evidence consisted of one inquiry during defendant's cross-examination. As such, it is unlikely that the evidence materially influenced the jury's verdict.

Our review of the verdict indicates that the jury apparently gave some weight to defendant's testimony. Despite the fact that defendant was charged with two counts of assault GBH, defendant was only convicted of one count, and the jury returned a verdict on the lesser offense of aggravated assault on the other count. Therefore, we conclude that defense counsel's failure to investigate the nature of defendant's prior charge did not deny defendant a fair trial or the effective assistance of counsel.

Defendant next contends that his counsel was ineffective for failing to object to the trial court's instruction on self-defense and the court's supplemental instruction regarding the distinction between assault GBH and aggravated assault. Defendant maintains that his trial counsel should have objected to these instructions because they were erroneous or misleading. We disagree.

In reviewing a court's jury instructions, this Court balances the general correct, clear tenor of the instructions in their entirety against the potential misleading effect of a single sentence isolated by the defendant. *People v Kelly*, 423 Mich 261, 275; 378 NW2d 365 (1985). Instructions may not be extracted piecemeal to establish error. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Even if the instructions are somewhat imperfect, there is no error if they fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant. *Id.*

Defendant complains that the self-defense instruction was erroneous because the jury could only find that defendant was justified in using force if he was in danger of being killed or seriously injured. Defendant's claim is without merit. The trial court gave a lengthy instruction explaining that defendant would be entitled to defend himself if had an honest and reasonable belief that he was in danger of being seriously injured even if that belief was not true in fact, and that defendant could use as much force as was necessary to protect himself. This instruction is consistent with the law. See *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985).

Next, defendant complains that the court misstated the intent element underlying aggravated assault in its supplemental instruction to the jury. Defendant argues that this instruction allowed the jury to find him guilty of aggravated assault even if he did not intend to injure or convict him of assault with intent to do great bodily harm if he had any intent to injure. In answering the jury's request to clarify the distinction between the crimes charged, the court stated that:

Aggravated assault occurs when one person intends to batter or hit another person and as an unintended result a serious or aggravated injury occurs. Assault with intent to do great bodily harm occurs when one person intends not only to hit another, but intends to cause great bodily harm at the time they are doing the hitting.

As such, the court's instruction explains that for aggravated assault, the jury must find that (1) defendant *intended* to hit another person; and (2) a serious or aggravated injury resulted. This instruction is in accordance with the law. MCL 750.81a; MSA. 28.276(1); *People v Brown*, 97 Mich App 606, 611;

296 NW2d 121 (1980) (proof that serious bodily injury resulted is sufficient to sustain conviction for aggravated assault); CJI2d 17.6.

Because the trial court properly instructed the jury, defense counsel was not ineffective for failing to object to the court's instructions. Trial counsel is not required to make frivolous or meritless arguments. *People v Gist*, 188 Mich App 610, 613; 470 N.W.2d 475 (1991). Again, we conclude that defendant received the effective assistance of counsel.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Peter J. O'Connell

/s/ Wesley J. Nykamp