STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH PARSHAY BELL,

Defendant-Appellant.

UNPUBLISHED
July 22, 1997

No. 192285
Ingham Circuit Court
LC No. 95-068882-FC

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Defendant was charged with assault to commit murder, MCL 750.83; MSA 28.878. He was convicted, following a bench trial, of the lesser included offense of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, supplemented by habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to five to twenty years' imprisonment, and appeals as of right. We affirm defendant's conviction and sentence, but remand for clerical correction of errors in the presentence investigation report.

At the time of the trial, defendant and the victim were husband and wife. On the morning of the day of the incident, defendant confronted his wife in the parking lot of their workplace. Other than seeing defendant at church two days earlier, the victim had not seen defendant since they had a violent altercation at their apartment a week earlier. The victim testified that she locked her car doors as defendant approached, because he looked as if he had used drugs. The victim and defendant began to argue. Defendant then pulled the driver's side window completely out of the victim's car and smashed the window on the ground. The victim yelled, honked the car horn and attempted to get away from defendant by crawling over to the passenger side of the car. Defendant opened the driver's side door and entered the car. As the two were fighting (with defendant on top of his wife), the victim saw something in defendant's hands that she thought at the time was an ice pick. (Defendant admitted that he was carrying a set of keys and the stem of a crack cocaine pipe, which consisted of a three and one-half inch hollow stainless steel tube and a large paper clip.) The victim testified that after her car alarm went off, defendant stopped attacking her and ran to his car. She then ran into her workplace. The victim sustained puncture wounds to her face, inside her mouth and to her lower left leg.

I

Defendant first argues that because the prosecution failed to show that he had acted with the requisite intent, there was insufficient evidence to convict him of assault with intent to commit great bodily harm. When reviewing a claim of insufficient evidence, this Court must consider all the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *Wolfe, supra* at 524-526. Questions regarding the credibility of witnesses are left to the trier of fact. *People v Palmer*, 392 Mich 370, 375; 220 NW2d 393 (1974); *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991

The elements of assault with intent to commit great bodily harm less than murder are: (1) an attempt or offer with force or violence, to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder. *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922); *People v Mitchell*, 149 Mich App 36, 38; 385 NW2d 717 (1986); MCL 750.84; MSA 28.279. The only requirement in regard to intent is that a defendant have the intent to do great bodily harm. *Mitchell, supra* at 38-39.

This Court has noted that the assaultive "act itself, as well as the means employed, provide evidence of defendant's intent to do great bodily harm." *People v Cunningham*, 21 Mich App 381, 384; 175 NW2d 781 (1970); see also *People v Jassino*, 100 Mich 536; 59 NW 230 (1894). In *People v Miller*, 91 Mich 636, 642; 52 NW 65 (1892), the Michigan Supreme Court concluded that the defendant's spoken threat and the place where the victim was injured "were evidence tending to show that [the defendant] . . . intended to kick [the victim] . . . in a vital spot, and where a kick might do serious and permanent injury."

In this case, using the metal stem of a crack cocaine pipe, defendant inflicted a stab wound to his wife's leg, a stab wound to her face and a stab would to the back of her mouth. Although reluctant to testify against defendant, the victim testified that defendant might have verbally threatened her during the attack. In fact, the victim admitted at trial that she testified at the preliminary examination that defendant "'told me to shut up and he said he would kill me.'" According to the Lansing police officer initially dispatched to the scene, the victim said that she thought defendant had stabbed her with an ice pick and that defendant had told her during the attack, "'I'll kill you, bitch.'" The question of exactly what defendant said to his wife during the assault essentially turns on an evaluation her credibility, which is left to the trier of fact. In any event, viewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could conclude beyond a reasonable doubt that the threat, location of the wounds and the use of a metal cocaine pipe stem was sufficient evidence of defendant's intent to inflict great bodily harm on his wife.

We reject defendant's assertion that the evidence was insufficient because it was based on evidence outside of the record Specifically, defendant argues that the trial court erred in conducting an out-of-court experiment to determine whether an instrument the size of a crack cocaine pipe could have

inflicted the victim's mouth wound.[1] Defendant correctly argues that the trial court erroneously asserted that it had the authority to perform such an experiment. In a bench trial, the presiding judge "can assume no greater prerogatives than if a jury were impaneled to determine the facts." *People v Grable*, 57 Mich App 184, 186; 225 NW2d 724 (1974); see also *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991) (observing that a trial "judge may not go outside the record in determining guilt").

Nevertheless, reversal is not required because the results of the experiment did not prejudice defendant. *Grable*, *supra* at 187. The trial court's reference to the experiment only concerned the wound the victim sustained inside her mouth. It did not implicate either the nose wound or the leg wound. Before the experiment, the court stated that it found that all three of the "wounds were inflicted on purpose." The trial court also found that, given their location, the wounds were inflicted with the intent to seriously and permanently harm the victim. As such, the "results" of the experiment did not affect these findings. Moreover, the intent with which defendant stabbed the victim is not dependent on the length of the instrument used.

We also reject defendant's assertion that the trial court should have made findings of fact regarding cognate offenses of aggravated assault and felonious assault. *People v Brown*, 87 Mich App 612, 615-616; 274 NW2d 854 (1978); *People v Hutson*, 25 Mich App 109, 110; 181 NW2d 88 (1970). A judge need only make findings of fact in a bench trial about a cognate offense if that offense is supported by evidence on the record. See *People v Wofford*, 196 Mich App 275, 280-281; 492 NW2d 747 (1992). For a defendant to be found guilty of aggravated assault, it must be proved that: (1) the defendant assaulted a person, (2) without a weapon, (3) inflicting serious or aggravated injury, (4) without the intent to commit either murder or assault with intent to commit great bodily harm. MCL 750.81(a)(1); MSA 28.276(1). The evidence in this case did not support a finding that defendant had committed aggravated assault. The injuries that the victim suffered to her mouth, nose and leg clearly established that the wounds could only have been inflicted by some sort of sharp weapon. The trial court therefore did not need to make findings of fact concerning aggravated assault.

As for the cognate offense of felonious assault, the difference between that offense and assault with intent to commit great bodily harm is the intent with which the perpetrator acted. Compare MCL 750.82; MSA 28.277 with MCL 750.84; MSA 28.279. The trial judge had to have considered the degree of intent with which defendant acted when finding that he had committed assault with intent to commit great bodily harm and not assault with intent to commit murder. For the trial judge to have found defendant guilty of assault with intent to commit great bodily harm, he had to find that defendant acted with the intent to inflict great bodily harm. The definition of felonious assault specifically excepts those who act with the intent to inflict great bodily harm. MCL 750.82; MSA 28.277. We conclude that the court implicitly rejected felonious assault in favor of assault with intent to commit great bodily harm. We therefore find the trial court's failure to articulate reasons concerning felonious assault was harmless. *People v Beach*, 429 Mich 450, 493; 418 NW2d 861 (1988).

II

Defendant next argues that he was denied his constitutionally protected right of due process when the trial court's questioning of him went beyond what is allowed. Although defendant did not object during this questioning, we review the issue because of defendant's claim that his constitutional rights were violated. This Court reviews questions of law regarding constitutional issues de novo. *People v Slocum (On Remand)*, 219 Mich App 695, 697; 558 NW2d 4 (1996).

MRE 614(b) expressly states that "[t]he court may interrogate witnesses, whether called by itself or by a party." In a bench trial, a court may ask questions "designed to clarify points or to expand upon the path of inquiry in order to assist the court in its role of factfinder." See *In re Forfeiture of $53*, 178 Mich App 480, 497; 444 NW2d 182 (1989). In fact, a trial judge has more discretion to question a witness during a bench trial than during a jury trial. *People v Wilder*, 383 Mich 122; 174 NW2d 562 (1970); *People v Meatte*, 98 Mich App 74, 78 (1980). Nevertheless, the court's power to interrogate witnesses "is not unlimited, though, and should not be used to pierce 'the veil of judicial impartiality.'" *People v Roby*, 145 Mich App 138, 144; 377 NW2d 366 (1985).

For the most part, the trial court's questioning was limited to clarifying the exact sequence of events that had occurred during the assault. This questioning was proper, particularly given defendant's confusing testimony concerning the cause of his wife's wounds. Toward the end of his examination, however, the trial judge arguably appeared to assume the role of an advocate when he asked the following question in response to defendant's testimony that, at the time of the attack, he was concerned someone might see his pipe stem: "It's okay to be seen publicly tussling with your wife, but you didn't want anybody seeing the stem, is that it?" This singular expression of disbelief concerning defendant's motivations does not evidence a bias against defendant and it was not decisive to the outcome of the trial. Reversal is not warranted on this basis.

III

Defendant further argues that the testimony of the emergency room physician who treated his wife was erroneously admitted as rebuttal evidence. "Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). A conviction will not be reversed on appeal unless the trial court's evidentiary error was prejudicial. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

We agree that the evidence should not have been admitted as rebuttal evidence, but we conclude that reversal is not required because defendant was not prejudiced by the error. The test of whether rebuttal evidence was properly admitted is whether the evidence is properly responsive to evidence introduced or a theory developed by defendant. *Figgures*, *supra* at 399. The record indicates that the prosecution's primary motivation behind calling the doctor was to help establish that defendant had acted with the requisite intent. It was not until this argument was challenged by defendant that the prosecutor indicated the testimony would be offered in response to defendant's account of the way in which his wife sustained her injuries. Intent is an essential element of the crime at issue. MCL

750.84; MSA 28.279; CJI2d 17.7; *Smith, supra*. Therefore, testimony concerning defendant's intent should have been offered during the prosecution's case in chief. *People v Quick*, 58 Mich 321, 323; 25 NW 302 (1885); *People v Williams*, 118 Mich App 266, 270; 324 NW2d 599 (1982). However, because the effect of the doctor's testimony was minimal when compared to the overwhelming character of the properly admitted evidence on intent, we conclude that this evidentiary error did not prejudice defendant.

IV

Defendant next argues that the conviction should be reversed because an incorrect copy of the presentence investigation report was sent to the Department of Corrections. While we disagree that the errors cited require reversal, we conclude that the case should be remanded so that the trial court can correct the presentence investigation report and then forward the corrected report on to the Department of Corrections. The errors defendant identifies were properly brought to the attention of the trial court, who ruled that the report would be changed to reflect defendant's corrections. Apparently, however, the uncorrected report was sent to the Department of Corrections. As we observed in *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986), "the presentence investigation report should accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained."

V

Defendant's final argument is that the sentence imposed by the trial court was disproportionate to the circumstances of the case. We disagree. This Court reviews sentences for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Honeyman*, 215 Mich App 687, 697; 546 NW2d 719 (1996). The principle of proportionality requires that sentences be proportionate to the "seriousness of the circumstances surrounding the offense and the offender." *Milbourn, supra*.

Viewing the circumstances surrounding this offender, the evidence indicates that defendant has a long term drug abuse problem; has a problem controlling his emotions; has a tendency to explode into violence, especially when under the influence of drugs; engages in self-destructive behavior in his significant relationships, including a tendency to violently assault those women with whom he is romantically involved. As for the circumstances surrounding this offense, defendant confronted his wife while under the influence of crack cocaine; became involved in an argument with his wife that quickly escalated into violence; ripped the car window out of his wife's car; and stabbed at his wife's head with a crack cocaine pipe, inflicting two serious head lacerations. Defendant argues that the fact that the wounds were not life threatening should be a mitigating factor. Given his intent when stabbing his wife in the face, the failure to inflict more serious wounds may be seen as fortuitous, but not a reason to lessen the severity of defendant's sentence. The circumstances surrounding this offense and this offender clearly support the severity of the sentence imposed.

Defendant's conviction and sentence are affirmed, but we remand for the trial court to make the appropriate corrections to the presentence investigation report, and to forward the corrected report on to the Department of Corrections. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Gary R. McDonald

Judge Young concurs in the result only.

[1] As the trial court was putting his findings on the record, he noted that "[u]nlike a jury, the Court can do an experiment, and I fashioned an object which is three and one-half inches out of a paper clip. I found that if you hold it in your hand, there's still plenty of room protruding to get into the palate."