

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE LOUIS LARD,

Defendant-Appellant.

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UNPUBLISHED

October 3, 2000

No. 214343

Genesee Circuit Court

LC No. 97-001851-FH

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to twelve to twenty years' imprisonment. Defendant appeals his conviction as of right. We affirm.

First, defendant contends that the prosecution failed to present sufficient evidence of assault with intent to do great bodily harm. Specifically, defendant asserts that there was insufficient evidence to prove he had the intent to inflict great bodily harm. We review de novo the sufficiency of the evidence in a criminal case. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court must determine whether sufficient evidence was presented to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The facts in evidence, including factual conflicts, are viewed in a light most favorable to the prosecution. *Id.* Questions regarding the credibility of witnesses are left to the trier of fact. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), amended 457 Mich 885 (1998).

The term "intent to do great bodily harm less than the crime of murder" is defined as an intent to do serious injury of an aggravated nature. *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). Since it is difficult to prove the defendant's state of mind, minimal circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove intent. *Peña, supra*; *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

In *Peña, supra* at 660, the evidence was found sufficient to prove the defendant's intent to cause great bodily harm where the defendant beat and kicked the victim and the treating emergency room physician testified that the victim's injuries were serious even though treatment was limited to prescribing Tylenol. Here, the victim testified that defendant made threats of serious harm to her. He said he would break her nose, disfigure her face, and pull out her hair, and then he pulled out her hair and struck her multiple times with a hammer. Viewed in a light most favorable to the prosecution, defendant's words and acts are sufficient to support beyond a reasonable doubt the jury's conclusion that defendant intended to cause great bodily harm.

Defendant next claims that he was deprived of his due process rights to a fair trial, to prepare a defense, and to have full discovery because the trial court admitted into evidence a letter allegedly written by defendant and received by the victim an hour before opening arguments were to begin. The trial court's decision whether evidence is admissible should only be reversed where there is a clear abuse of the court's discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor's control. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). Where evidence is not within the prosecutor's control, or where it is disclosed as soon as it becomes available to the prosecutor, suppression of the evidence is not warranted. *People v Elston*, 462 Mich 751; 760; \_\_\_ NW2d \_\_\_ (2000); *People v Young*, 212 Mich App 630, 642; 538 NW2d 456 (1995); *Davis, supra*.

Here, the prosecutor learned of the letter just before opening statements, and immediately disclosed it to opposing counsel. The letter was not discoverable until the prosecutor learned of it, and despite defendant's arguments that the postmark date is the date the letter was available, we cannot see how the letter, if authentic, would be available until it was delivered. The victim authenticated the letter and testified that it was delivered on the same day it was disclosed. Defendant does not dispute the admissibility of the letter but, because it came as a surprise, argues that a continuance should have been granted. However, defendant did not request a continuance. "The longstanding rule of this state is that, in the absence of a request for a continuance, a trial court should assume that a party does not desire a continuance." *Elston, supra*. The trial court did not abuse its discretion in admitting the letter because it was relevant to defendant's state of mind and was not disclosed late through any prosecutorial misconduct.

Third, defendant argues that the jury should have been instructed on the lesser offense of assault and battery. A trial court is given substantial discretion whether to give a lesser misdemeanor instruction and cannot be reversed on appeal absent an abuse of that discretion. *People v Steele*, 429 Mich 13, 22; 412 NW2d 206 (1987). The failure to give an appropriate instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993). A court must instruct on a lesser included misdemeanor where, among other things, the instruction is supported by a rational view of the evidence adduced at trial. *People v Stephens*, 416 Mich 252, 262-263; 330 NW2d 675 (1982); *People v Corbiere*, 220 Mich App 260; 262-263; 559 NW2d 666 (1996). This requires, at the very least, that there be some evidence that would justify a conviction on the lesser offense. *Stephens, supra* at 262.

Here, the trial court concluded that it could not instruct on assault and battery because there was clear proof that the victim had suffered an aggravated injury, and even if this result was not what defendant intended, the evidence showed that it was the result of his intentional acts. Therefore, the least charge that was appropriate to defendant's admitted acts was that of aggravated assault, which the court had already agreed to include at defendant's request. The evidence, rationally viewed, justifies the trial court's ruling; there was no abuse of discretion.

Finally, defendant claims that his sentence was disproportionate. This Court reviews a trial court's sentence imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). The judicial sentencing guidelines do not apply to habitual offenders. *Id.* at 323. A trial court does not abuse its discretion in sentencing an habitual offender within the statutory limits established by the Legislature when the offender's underlying felony, in the context of previous felonies, evinces the defendant's inability to conform his conduct to the laws of society. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000).

Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and of being a third habitual offender, MCL 769.11; MSA 28.1083. The statutory maximum sentence for a conviction of the first offense is ten years; under the third habitual offender statute that amount may be doubled to twenty. The sentence imposed in this case was twelve to twenty years' imprisonment, which is within the statutory limit. The trial court articulated on the record the criteria considered and the reasons for the sentence imposed. *Peña, supra* at 661. It considered the severity and nature of the crime and the circumstances surrounding the criminal behavior. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). We find no abuse of discretion in the trial court's sentencing of defendant.

Affirmed.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Brian K. Zahra