

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS JAMES ANDERSON,

Defendant-Appellant.

UNPUBLISHED

February 25, 2000

No. 213141

Wexford Circuit Court

LC No. 97-005066 FC

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and resisting and obstructing a police officer, MCL 750.479; 28.747. He was sentenced as a fourth felony habitual offender, MCL 769.12; MSA 28.1084, to twenty-five to fifty years' imprisonment for the assault with intent to commit murder conviction and sixteen to twenty-four months' imprisonment for the resisting and obstructing a police officer conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in admitting evidence regarding a statement given to the police by the victim while she was hospitalized. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). There is no question that evidence of the victim's recorded statement, specifically that defendant was telling her she was "going to die" while slamming her head against the asphalt, was both material and probative. MRE 401.

A determination of relevancy, however, does not alone determine admissibility. *People v Robinson*, 417 Mich 661, 664; 340 NW2d 631 (1983). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909(1995), mod oth issues 450 Mich 1212 (1995). "Unfair prejudice" does not, however, mean "damaging." *Id.* at 75. Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the evidence will be given

undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id.* at 75-76. Assessing probative value against prejudicial effect requires a balancing of factors, including how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion, and whether the fact can be proved another way with fewer harmful collateral effects. *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976).

While the victim's recorded statement was damaging to defendant's case, that alone was insufficient to determine the evidence was more prejudicial than probative. *Mills, supra* at 75. The evidence directly tended to prove the fact in support of which it was offered; namely, that defendant intended to kill the victim. See *Oliphant, supra* at 490. Although other circumstantial evidence was presented demonstrating defendant's intent to kill the victim (e.g., eyewitness testimony concerning the assault; the severity of the victim's injuries), her statement to the police only days after the incident was more compelling to prove defendant's intent. See *Oliphant, supra* at 490. There is no rule requiring the prosecution to use only the least prejudicial evidence per se to establish facts at issue. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). We conclude the probative value of the victim's recorded statement was not substantially outweighed by the danger of unfair prejudice. See MRE 403; *Mills, supra* at 74-75.

Furthermore, a prosecutor may question witnesses on those matters that were raised by the defense on direct examination. *People v Jones*, 73 Mich App 107, 110; 251 NW2d 264 (1976). A defendant cannot be heard to complain regarding questions asked by the prosecution on cross-examination when he himself "opened the door" concerning such evidence in an effort to support his defense. *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988). Our review of the record shows that defendant "opened the door" to the questions placed to his expert witness by plaintiff regarding the victim's statement. Plaintiff's questions were therefore proper.

Defendant's argument that his right to confront the victim regarding her recorded statement was violated is also without merit. The victim made a statement to police soon after the assault but, because of the severity of her head injuries, her memory was affected and she was unable to remember the details of the attack at trial. A witness may be deemed unavailable because of a lack of memory even if she attends trial. MRE 804(a)(3). Admitting the victim's statement as evidence in this case did not violate the Confrontation Clause, US Const, Am V; US Const, Am XIV, because plaintiff established that the victim was "unavailable," her statement bore adequate indicia of reliability, and it fell within the hearsay exceptions of MRE 803(5) and MRE 804(b)(6). See *People v Dhue*, 444 Mich 151, 163; 506 NW2d 505 (1993). Because the evidence was relevant, not more prejudicial than probative, and was properly injected into the trial, we conclude the trial court did not abuse its discretion in permitting its admission.

Defendant next argues that the trial court erred in refusing to instruct the jury on the lesser included misdemeanor offense of aggravated assault. Again, we disagree.

We review a trial court's decision to grant or deny the giving of a lesser included misdemeanor instruction for abuse of discretion. *People v Steele*, 429 Mich 13, 21-22; 412 NW2d 206 (1987); *People v Dabish*, 181 Mich App 469, 474; 450 NW2d 44 (1989).

In determining whether a lesser included misdemeanor should be given, there must first be a proper request. *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982). See also *Steele, supra* at 19; *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). This requires a party to inform the court of exactly on which lesser offenses the party wishes instructions. *Steele, supra* at 19. Second, there must be an appropriate relationship between the charged offense and the requested misdemeanor. *People v Hendricks*, 446 Mich 435, 444-445; 521 NW2d 546 (1994). Third, the requested misdemeanor instruction must be supported by a rational view of the evidence. *Steele, supra* at 20; *People v Ramsdell*, 230 Mich App 386, 403; 585 NW2d 1 (1998). Fourth, if the prosecutor requests the instruction, the defendant must have adequate notice of the misdemeanor charge as one against which he might have to defend. *Steele, supra* at 21; *Dabish, supra* at 473. Fifth, the requested misdemeanor instruction cannot result in injustice or undue confusion. *Steele, supra* at 21-22; *Dabish, supra* at 474.

Our review of the record demonstrates that the third condition for instructing on a lesser included misdemeanor offense was not met. Aggravated assault differs from assault with intent to commit murder and assault with intent to commit great bodily harm in that aggravated assault does not require proof of intent or great bodily injury. MCL 750.83; MSA 28.278; MCL 750.81a; MSA 28.276(1). However, the evidence here demonstrated that defendant intended to kill or at the very least inflict great bodily harm on the victim. Thus, we conclude a rational view of the evidence did not support the offense of aggravated assault. See *Steele, supra* at 20.

Defendant next argues that there was insufficient evidence to convict him because his intoxication prevented him from forming the requisite degree of intent. There is no merit to this claim.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). Intent and premeditation may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Johnson*, 146 Mich App 429, 434; 381 NW2d 740 (1985). A jury verdict will not be overturned unless there is an absence of any direct or circumstantial evidence to prove an essential element of the crime charged. *People v Cyr*, 113 Mich App 213, 223; 317 NW2d 857 (1982).

In the present case, there was sufficient evidence defendant was not so incapacitated that he was unable to formulate the requisite intent. The jury was free to consider all the circumstantial evidence presented at trial, draw any reasonable inferences from this evidence, and conclude that defendant's

intoxication was not so great that he was unable to form the necessary intent. The evidence elicited at trial showed actions on the part of defendant that, taken in a light most favorable to plaintiff's case, could allow a rational jury to convict defendant for assault with intent to commit murder. See *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

Defendant's final argument on appeal is that he received ineffective assistance of counsel when counsel interjected during a plea taking proceeding and when counsel failed to request consideration of a nolo contendere plea. There is no merit to this claim.

We first note that defendant failed to create a testimonial record in the trial court with regard to a claim of ineffective assistance of counsel. Thus, our review is limited to the present record. See *People v Ginther*, 390 Mich 436;443, 212 NW2d 922 (1973); *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998).

Effective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). In reviewing a defendant's claim of ineffective assistance of counsel, we must determine whether counsel's performance was objectively unreasonable and whether the defendant was prejudiced by counsel's defective performance. *Id.* To satisfy the first prong of the test, the defendant must establish that counsel made errors so serious that he or she was not functioning as the counsel guaranteed to the defendant by the Sixth Amendment. *Id.* at 164-165. To satisfy the second prong, the defendant must show that but for counsel's ineffective assistance, there is a reasonable probability that the outcome would have been different. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998).

Our review of the record reveals that it was not defense counsel's interjection during the plea taking proceeding that resulted in the failure of the plea bargain. Rather, it was defendant's apparent inability to recall, after he had been placed under oath, the factual basis for his guilty plea. The trial court refused to accept defendant's plea on that basis and not on any statements made by defense counsel.

Defendant's argument that he received ineffective assistance of counsel because defense counsel did not request consideration of a nolo contendere plea is also without merit. Acceptance of a nolo contendere plea is a matter of grace, not of right. *People v Sammons*, 191 Mich App 351, 369-370; 478 NW2d 901 (1991). The record contains no evidence that plaintiff considered offering a nolo plea. In fact, the prosecutor withdrew the plea originally offered and later moved to increase the primary charge to assault with intent to commit murder. In our view, it is reasonable that if the prosecutor was interested in concluding the case by a nolo contendere plea, he would have made this offer at the time of the plea taking proceeding when it became clear the trial court would not accept defendant's guilty plea.

Affirmed.

/s/ David H. Sawyer

/s/ Roman S. Gibbs
/s/ Gary R. McDonald