

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD M. KELLEY,

Defendant-Appellant.

UNPUBLISHED

April 13, 1999

No. 205414

Recorder's Court

LC No. 96-002796

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

WHITBECK, P.J. (concurring in part and dissenting in part).

I agree with the majority that defendant is not entitled to relief based on the two issues that he presents on appeal. With regard to the first of these issues, as indicated in the majority opinion, defendant proceeds under the false premise that the prosecution had the duty of proving his sanity beyond a reasonable doubt. In fact, defendant had the burden of proving insanity as an affirmative defense by a preponderance of the evidence. With regard to the second issue, I also agree with the majority that, if one accepts the validity of defendant's conviction of assault with intent to do great bodily harm, his sentence for that crime was not disproportionately severe. However, in the peculiar circumstances of this case, I would sua sponte grant relief to defendant based on the failure of the trial court's factual findings to reasonably support defendant's conviction of assault with intent to do great bodily harm to Sergeant Vincent Finn.

I recognize that the majority may appropriately confine its analysis to the issues actually raised by defendant in his appeal. Nevertheless, this Court "may go beyond the issues raised on appeal and address issues that, in this Court's opinion, justice requires be considered and resolved." *Frericks v Highland Twp*, 228 Mich App 575, 586; 579 NW2d 441 (1998); accord, *Beveridge v Shorecrest Lanes & Lounge Inc*, 204 Mich App 466, 470-471; 516 NW2d 117 (1994).¹

Our adversary system generally depends on the parties to argue the merits of their respective positions. Therefore, I believe that our power to review issues that have not been raised by the parties should be invoked sparingly and cautiously. Nevertheless, this Court should not lose sight of its overarching role of seeking justice under law. I am convinced that the trial court committed reversible error in its fact finding regarding defendant's conviction of assault with intent to do great bodily harm.

Such an error involving findings of fact at a criminal bench trial that do not reasonably support a defendant's conviction is not a technical error, but rather goes to the heart of the integrity of a conviction and is closely tied to a defendant's factual guilt or innocence. In my view, "justice requires," *Frericks, supra*, that relief be granted to defendant in these circumstances.

The trial court convicted defendant of assault with intent to do great bodily harm as a lesser included offense to a charge of assault with intent to commit murder. The trial court stated in its oral findings of fact:

... as to Vincent Finn, the charge of assault with intent to commit murder that requires specific intent, and I do not think that the defendant had formulated an intent to kill the police officer. *I think that he cared for them. I think he certainly was acting in a ridiculous fashion. But I think he cared for them, and I think they cared for him, which they demonstrated; the care they took on not shooting him, not doing anything to impair in any kind of way his life.*

But I think he certainly meant to do what he was doing, and *it could certainly have* resulted in grievous harm to Vincent Finn and/or others.

I would find the defendant guilty in the charge concerning Vincent Finn, guilty of assault with intent to do great bodily harm less than the crime of murder [Emphasis supplied.]

The purpose of the requirement that the trial court articulate the basis for its findings of fact in rendering a verdict at a bench trial is to facilitate appellate review. *People v Johnson (On Reh)*, 208 Mich App 137, 141; 526 NW2d 617 (1994). Factual findings by a trial court are sufficient if they establish that the trial court was aware of the relevant issues and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995).

Assault with intent to do great bodily harm is a specific intent crime that requires in pertinent part "an *intent* to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis supplied). Thus, a defendant's commission of an act without that specific intent – even a reckless and foolish act that poses a substantial risk of actually causing great bodily harm to someone – does not constitute assault with intent to do great bodily harm. *Cf. People v Whitney*, 228 Mich App 230, 254-256; 578 NW2d 329 (1998) (conviction of the crime of intentionally violating the Open Meetings Act requires a showing of specific intent, e.g. that the accused subjectively desire or know that the prohibited result will occur; merely disregarding a highly probable risk of violating the Act is insufficient).

The only reasonably imaginable basis that I can see in the circumstances of this case for finding an *intent* on defendant's part to do great bodily harm to Sergeant Finn would be if defendant intended to do so by firing the gun at Sergeant Finn, intending to hit him with a bullet. However, the trial court's remarks strongly suggest that it may have convicted defendant of assault with intent to do great bodily harm merely because, in firing the gun in the direction of Sergeant Finn, defendant was acting

ridiculously and *could have* caused great bodily harm to Sergeant Finn. The trial court actually stated that it thought defendant cared for the police officers, which would be highly inconsistent with defendant having tried to actually shoot Sergeant Finn. The trial court may therefore have convicted defendant of assault with intent to do great bodily harm even though it regarded defendant as having an intent at the time of the incident inconsistent with this conviction. Thus, the trial court's oral findings of fact regarding defendant's assault with intent to do great bodily harm conviction do *not* establish that it correctly applied the applicable law, *Smith, supra*, but rather raise a serious question regarding whether the trial court did so. I conclude that the trial court's factual findings regarding defendant's conviction of assault with intent to do great bodily harm are inadequate and do not reasonably support that conviction.

"The appropriate remedy for insufficient findings of fact is to remand the case for additional fact-finding." *People v Porter*, 169 Mich App 190, 193; 425 NW2d 514 (1988). Thus, I would remand this case to the trial court for a specific factual finding regarding whether it was convinced beyond a reasonable doubt that defendant shot at Sergeant Finn with the specific intent to hit him with a bullet and thereby inflict great bodily harm on him. I would direct the trial court not to disturb defendant's conviction of assault with intent to do great bodily harm if it found such a specific intent on remand. However, if the trial court were to find that it was not convinced beyond a reasonable doubt that defendant had such a specific intent, then it should vacate defendant's conviction of assault with intent to do great bodily harm and, as appropriate, consider any possible lesser included offenses and resentence defendant.

/s/ William C. Whitbeck

¹ I note that Judge Cavanagh joined in the per curiam opinion in *Beveridge*.