

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE MANUEL LOPERENA,

Defendant-Appellant.

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UNPUBLISHED

January 29, 2002

No. 226397

Saginaw Circuit Court

LC No. 99-016930-FC

Before: Sawyer, P.J., and O’Connell and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, and assault with intent to maim, MCL 750.86. The trial court sentenced him to fifteen to thirty years’ imprisonment for the assault with intent to murder conviction and five to ten years’ imprisonment for the assault with intent to maim conviction. Defendant now appeals as of right. We affirm.

Defendant’s convictions arose out of an altercation between himself and his now ex-wife. As she was sitting in her parked car waiting to give the couple’s son a ride from school, defendant entered her car carrying a coffee cup and told her the youth had already left. She eventually drove defendant to a grocery store parking lot and told him he had to get out. He then threw the contents of the coffee cup – later determined to be battery acid – in her face, told her he was going to kill her, and stabbed her in the chest with a butcher knife.

Before trial, defense counsel indicated that he intended to question the victim about her substance abuse problem. He contended that her addiction adversely affected her relationship with their children and the breakdown of that relationship, in turn, was a motivating factor behind the assault. The trial court ruled that defendant could establish that the reason he was upset with the victim was because he thought she was a bad mother, but not that he reached that conclusion based on her drug use. On appeal, defendant first contends that this ruling was erroneous because evidence that the victim’s substance abuse problem provoked the assault was relevant to negate defendant’s specific intent to commit murder. We disagree.

A trial court’s determinations of evidentiary issues are generally reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). There is authority for the proposition that provocation may be relevant in a prosecution for assault with intent to murder because “where provocation is present, if a killing had occurred, the defendant could only have

been convicted of manslaughter. Since defendant could not have been convicted of murder if a killing had occurred, he could not be convicted of assault with intent to commit the crime of murder when the killing did not occur.” *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). However, the provocation necessary to mitigate a homicide to manslaughter must be “adequate,” namely, that which would cause a reasonable person to lose control. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), affirmed 461 Mich 992; 609 NW2d 193 (2000). Here, no reasonable juror could find that the general effect of the victim’s substance abuse problem on her parenting skills was adequate provocation for the assault. Instead, it was at most an explanation for the motive behind the assault. Compare *People v Gjidoda*, 140 Mich App 294, 297-299; 364 NW2d 698 (1985). Where, as a matter of law, no reasonable jury could find that the alleged provocation was adequate, the trial court may exclude evidence of the provocation. *People v Pouncey*, 437 Mich 382, 390; 471 NW2d 346 (1991). Furthermore, contrary to defendant’s claim, the victim’s substance abuse problem was not *res gestae* evidence. The trial court therefore did not abuse its discretion in disallowing the evidence.

Defendant also contends that the trial court abused its discretion by allowing a doctor who was qualified as an expert in emergency medicine to respond to the prosecutor’s question whether the victim’s chest wound would have been life-threatening had it been deeper. Defendant argues that the question was an improper hypothetical based on facts not in evidence. We are satisfied that even if the trial court should have sustained defendant’s objection to the question, the error was harmless. In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In this case, the prosecutor’s question was apparently designed to permit the jury to infer defendant’s intent to kill. There was other evidence from which the jury could infer that intent, however, including the victim’s testimony that defendant told her that he was going to kill her, his use of a butcher knife, and the medical testimony that the stab wound was in close proximity to her heart and left lung. In light of this other evidence, allowing the doctor to answer the question was not outcome determinative.

Affirmed.

/s/ David H. Sawyer  
/s/ Peter D. O. Connell  
/s/ Brian K. Zahra