

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILBERT LEWIS ELIE,

Defendant-Appellant.

UNPUBLISHED

May 6, 2008

No. 277988

Wayne Circuit Court

LC No. 06-013910-01

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of assault with intent to commit great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ We affirm in part, vacate the order requiring defendant to repay his court-appointed attorney fees, and remand to the trial court to consider defendant's ability to repay attorney fees. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from the shooting of 15-year-old Damon Blunt. Blunt was lying down on a couch in the house he shared with defendant's brother, when defendant entered the house. Defendant, who was carrying a pistol, questioned Blunt about an alleged break in at defendant's home. Defendant appeared agitated and as if he might be under the influence. After a brief foray upstairs to speak with his brother, defendant returned to Blunt. After again questioning Blunt, defendant shot Blunt in the shoulder. After a brief struggle in which Blunt was shot again, he managed to escape the home, run to a friend's home, and call an ambulance. Defendant did not pursue him.

Defendant first argues that the trial court erred by providing the lesser included offense instruction on assault with intent to commit great bodily harm. A lesser offense jury instruction is appropriate only where the requested lesser offense is a necessarily included lesser offense and a rational view of the evidence would support the instruction. *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007); *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). Assault

¹ Defendant was initially charged with assault with intent to commit murder, MCL 750.83, but was convicted on the lesser included offense.

with intent to commit great bodily harm is a necessarily included lesser offense of assault with intent to commit murder. *People v Brown*, 267 Mich App 141, 150-151; 703 NW2d 230 (2005).

In the present case, defendant argues that the trial court erred because a rational view of the evidence would not support an instruction on the lesser offense of assault with intent to commit great bodily harm less than murder. Defendant's defense was that he was not the shooter and had no idea why Blunt had accused him. Defendant maintains that because there was no specific evidence to establish a lesser intent than the intent to kill, the trial court should not have provided the instruction. We disagree.

“Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to establish the element of intent. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Here, a rational view of the evidence supported a finding that defendant intended to cause great bodily harm to Blunt rather than to kill him. Blunt's testimony about the sequence of the incident was scattered, contradictory, and somewhat confusing. If one version of Blunt's testimony is to be believed, defendant shot Blunt only once in the shoulder before a struggle for the gun began that resulted in Blunt's additional injuries.² Defendant did not pursue the wounded Blunt to his friend's home. Blunt testified that defendant told him that defendant intended to kill his brother as well as Blunt; however, defendant did not attack his brother. When coupled with Blunt's testimony concerning defendant's either addled or chemically impaired demeanor, this evidence could have rationally supported a finding that defendant might not have had the requisite intent to murder Blunt, but did specifically intend to cause him great bodily harm. Under the circumstances, we find that the trial court did not commit plain error when it provided the lesser included offense instruction.

Defendant also argues that the trial court erred when it ordered him to pay \$600 in attorney fees without inquiring into his ability to pay. Defendant asserts that pursuant to *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), the trial court was required to at least indicate that it had considered defendant's financial circumstances before assessing attorney fees. Defendant failed to raise this issue below. Thus, we review for plain error affecting defendant's substantial rights. *Id.* at 251.

When requiring a defendant to repay the cost of his court-appointed attorney, a sentencing court must provide some indication that it considered the defendant's ability to pay, “such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report,” or even by simply stating that it considered the defendant's financial status. *Id.* at 254-255. Furthermore, “[t]he amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay.” *Id.* at 255 (emphasis in original). The purpose of requiring the court to consider the defendant's ability to pay is to ensure that “repayment is not required as long as [the defendant] remains

² The testimony was also confusing as to how many times defendant actually shot at Blunt.

indigent.”” *Id.* at 256, quoting *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984). Here, when the court ordered defendant to repay court-appointed attorney fees, it did not discuss defendant’s ability to pay. Thus, the trial court erred.

We affirm defendant’s convictions and sentence, but vacate the trial court’s order requiring defendant to repay his court-appointed attorney fees, and remand for the trial court to consider the attorney fees issue in light of defendant’s ability to pay.³ We do not retain jurisdiction.

/s/ Helene N. White

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski

³ On remand, an evidentiary hearing is not required. The sentencing court can instead rely on updated financial information provided by the probation department. *Dunbar, supra* at 255 n 14.