

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EPIFANIO CABRERA RIVAS, JR.,

Defendant-Appellant.

UNPUBLISHED

May 15, 2008

No. 276592

Wayne Circuit Court

LC No. 05-012256-01

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 16 to 32 years' imprisonment for the assault with intent to murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

Defendant first argues that the trial court erred when it prevented defendant counsel from explaining the elements of the insanity defense during voir dire. This court reviews a trial court's handling of voir dire for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The purpose of voir dire is to assure a criminal defendant is afforded an impartial jury by examining the jurors to rationally discover potential bias and prejudice. *Tyburski, supra* at 618. A defendant does not have a right to have his attorney conduct voir dire, nor does the court have to ask questions of the jurors posed by counsel. *Id.* at 619. "It is imperative, in securing the rights of the parties to an impartial jury, for the court to allow the elicitation of enough information so that the court itself can make an independent determination of a juror's ability to be impartial." *Id.* at 620.

The trial court began voir dire by explaining the burden of proof in an insanity case to the jurors, noting that defendant must establish his insanity by a preponderance of the evidence. The court did not define insanity. The potential jurors were then asked whether there was a history of mental illness in their families. Both attorneys were then permitted to ask more probative

questions. The jurors were asked as a group and individually whether they had any bias regarding the insanity defense and whether they could be fair to a defendant utilizing the defense. Upon confronting a potential juror who indicated he did have a bias against the insanity defense because it is used too often, defense counsel provided the potential jurors with statistical evidence demonstrating the rare nature of the defense. Jurors were also asked specifically about their feelings on schizophrenics and whether they have the ability to tell right from wrong. They were asked whether they had exposure to psychology classes in educational institutions. Potential jurors who indicated possible bias towards the defense were removed, in some instances for cause and in other instances through peremptory challenges.

Defendant has failed to persuade this Court that his counsel was prevented from discovering potential bias in jurors. It is unclear how an explanation of the legal definition of insanity, a mental illness that either prevents an individual from conforming his behavior to the requirements of the law or prevents him from appreciating the wrongfulness of his conduct, would have revealed a bias that the already probative questions failed to detect. The potential jurors were informed that criminal insanity would be at issue in the case. They were asked specifically about a schizophrenic's ability to tell right from wrong. In certain instances, potential jurors indicated that they could not be fair and were removed from the pool. Defendant has not informed this Court of any significant difference in the outcome or his strategy had the court allowed him to provide the definition and elements of insanity. As such, defendant cannot establish that the trial court abused its discretion.

Defendant next contends the trial court erred in scoring 25 points for offense variable (OV) 6. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). In scoring a particular offense variable, a trial court's determination need only be supported by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006).

As provided by MCL 777.36, OV 6 states that 25 points should be scored where "The offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." In the present case, defendant was found guilty but mentally ill of assault with intent to commit murder. In order to support a conviction for assault with intent to commit murder, the prosecution must establish "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

As provided by MCL 768.36, a finding of guilty but mentally ill is proper where a jury determines:

- (a) The defendant is guilty beyond a reasonable doubt of an offense.
- (b) The defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of that offense.

(c) The defendant has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.

Therefore, a finding of guilty but mentally ill does not negate the intent requirement of assault with intent to murder. The jury could not have found defendant guilty of the charged offense unless it determined that all of the elements of the offense were proven beyond a reasonable doubt. The jury's verdict thus reflects its determination that, while defendant was mentally ill, he assaulted the victim with an intent to kill. Defendant has not challenged the jury's verdict on appeal. As a result, it naturally follows that OV 6 was properly scored at 25 points, a score that reflects the intent to kill the jury determined defendant possessed.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Stephen L. Borrello