

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-111

APRIL TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
	}	
Corey M. Mott	}	DOCKET NO. 620-6-06 FrCr

Trial Judge: Ben Joseph

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a judgment of conviction, based on a jury verdict, of aggravated assault, in violation of 13 V.S.A. § 1024(a)(1). He contends the court committed plain error by failing to define the element of the offense requiring that the defendant act recklessly “under circumstances manifesting extreme indifference to the value of human life.” We affirm.

The record evidence may be summarized as follows. Defendant and the victim had a history of antagonism and prior altercations. On the evening in question, the victim was returning home from work when he heard defendant call his name and taunt him about an earlier fight between them. Defendant then removed his shirt and advanced toward the victim, who noticed that defendant had one hand in his pocket. The last thing that the victim recalled before being struck was defendant removing his hand from his pocket. Several witnesses testified that defendant struck the victim in the face, causing him to fall to the ground, and that defendant then hit the victim in the face with three to four additional blows. Defendant acknowledged that he struck the victim’s head and face with his fist at least four times, but claimed that the victim was the initial aggressor and that the blows were intended to incapacitate the victim who was allegedly choking defendant and attempting to gouge his eye. In a later interview with the police, defendant volunteered, without being asked, that he had not used brass knuckles in the assault.

The doctor who treated the victim testified about the nature of the latter’s facial injuries. He indicated that the victim suffered a massively fractured cheek bone and eye socket. According to the doctor, the bones were so shattered that they were “completely gone,” there was “essentially no bone between the prominence of the cheek and the roots of the teeth.” He explained that the injuries were not the type that would be expected from one or even multiple blows from a fist, but were more typical of an “explosive type force” that would follow an automobile accident. The injuries required surgical reconstruction involving the insertion of a metal plate.

Defendant was charged with aggravated assault by causing serious bodily injury “recklessly under circumstances manifesting extreme indifference to the value of human life,” in violation of 13 V.S.A. § 1024(a)(1).^{*} At the conclusion of the trial, the court instructed, in the language of the statute, that to establish the charged offense the state was required to prove that defendant acted recklessly and “[t]hat he did so under circumstances manifesting extreme indifference to the value of human life.” In conformity with the definition set forth in 13 V.S.A. § 1021(2), the court went on to explain that “serious bodily injury” includes bodily injury which has created a substantial risk of death, substantial loss or impairment of the function of any body member or organ, a substantial impairment of health, or substantial disfigurement. In addition, the court explained that to act “recklessly” was to “consciously ignore[] a known, substantial and unjustifiable risk” that one’s conduct would cause the harm which resulted. As requested by the defense, the court also instructed on the lesser included offense of simple assault, and the law of self-defense. Defendant did not object to the instructions as given or request additional instructions. The jury returned a verdict of guilty on the charge of aggravated assault, and the court later sentenced defendant to a term of five to fifteen years. This appeal followed.

Defendant’s sole claim on appeal is that the court erred in failing to define that portion of the charged offense requiring that he act recklessly “under circumstances manifesting extreme indifference to the value of human life.” Defendant acknowledges that he failed to object to the instructions on this ground or request additional instructions, and that we therefore review the claim solely for plain error. See State v. Doleszny, 2004 VT 9, ¶ 10, 176 Vt. 203 (litigant must raise objections to jury instructions on the record, or Court will review for plain error). Plain error exists only in circumstances where a failure to recognize error would result in a miscarriage of justice or where the error is so grave that it strikes at the very heart of the defendant’s constitutional rights. State v. Carpenter, 170 Vt. 371, 375 (2000).

Although we have not explored to any great extent the meaning of the “extreme indifference” element of aggravated assault, we have explained that, in considering this requirement, “rather than focus on the probability of death resulting, the trier of fact must determine whether the ‘circumstances’ of the attack demonstrate such a blatant disregard for life that one could conclude beyond a reasonable doubt that the defendant intended to inflict substantial bodily injury on the victim.” State v. Joseph, 157 Vt. 651, 652 (1991) (mem.). The “extreme indifference” requirement essentially elevates the required mental state for “recklessly” causing serious bodily injury to a level of intentionality equivalent to that of “knowingly” or “purposely” causing such injury under the statute. See O’Brien v. State, 2002 WY 63, ¶ 16, 45 P.3d 225 (explaining that “extreme indifference” element of aggravated assault was based on Model Penal Code definition, which derived in turn from similar language in homicide section “intended to reflect the judgment that there is a kind of reckless homicide that cannot fairly be distinguished . . . from homicides committed purposely or knowingly”). The “extreme indifference” requirement also distinguishes aggravated assault from simple assault, which requires only reckless conduct. See 13 V.S.A. § 1023; State v. Trombley, 174 Vt. 459, 461 n.3 (2002) (mem.) (explaining that aggravated assault involves a higher degree of culpability than mere reckless conduct).

^{*} This section provides that “[a] person is guilty of aggravated assault if the person: (1) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life.” 13 V.S.A. § 1024(a)(1).

Thus, while the trial court here correctly informed the jury of the state’s burden of proving “extreme indifference,” we agree that the better approach would have been to further refine this element in order to distinguish it from mere recklessness. We are not persuaded, however, that the court’s failure to do so misled the jury or induced it to conflate the requirements for simple and aggravated assault. See State v. Shabazz, 169 Vt. 448, 450 (1999) (in reviewing jury instructions, the relevant inquiry is “whether the instructions as a whole were misleading or inadequate to aid the jury’s deliberations”). As noted, the jury was specifically informed that, to convict of aggravated assault, the reckless infliction of serious bodily injury must rise to the level of extreme indifference to the value of human life, and this requirement was omitted from the subsequent instruction on simple assault. Thus, the two offenses were adequately distinguished. Nor are we persuaded that a more specific definition of “extreme indifference to the value of human life” was essential for the jury to understand the nature of the “circumstances” that would establish such indifference. Indeed, although defendant suggests that the evidence here was insufficient to establish such circumstances, the facts surrounding the assault and the nature of the injuries plainly demonstrate otherwise. While the average mutual affray might not rise to aggravated assault, the circumstances here were far from average; the defendant landed one blow while the victim was upright and at least three or four more while he was down, with such force that the victim’s face bones were virtually shattered into non-existence. Such violence amply supports a finding of extreme indifference to the value of human life. Accordingly, we find no basis to conclude that the instructions as a whole represented an error so grave as to undermine the verdict or strike at the heart of defendant’s fundamental constitutional rights.

Furthermore, any possible error in the court’s instructions was plainly harmless beyond a reasonable doubt in light of defendant’s effective admission that the blows were inflicted intentionally, allegedly in self-defense, to seriously harm the victim in order prevent him from inflicting additional harm to defendant. See Trombley, 174 Vt. at 462 (although trial court erred by instructing on “knowingly” causing serious bodily injury when the defendant was charged with purposely causing such injury, it “was harmless error . . . because defendant’s own assertion of self-defense established that he acted with the purpose of inflicting serious bodily injury”); O’Brien, 2002 WY 63, ¶ 21 (holding that failure to instruct on “extreme indifference” requirement was not plain error where the evidence supported a finding that defendant intentionally and knowingly seriously injured the victim). Accordingly, we find no basis to disturb the judgment.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice