STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LEE HANKS,

Defendant-Appellant.

UNPUBLISHED
June 21, 1996

No. 148384
LC No. 91-006512-FH

Before: O'Connell, P.J., and Sawyer and G.R. Corsiglia,* JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with a dangerous weapon, MCL 750.82; MSA 28.277, and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to an enhanced term of 3-1/3 to 20 years' imprisonment, and now appeals as of right. We remand.

Defendant first argues that there was insufficient evidence to support the habitual offender conviction. We disagree. The fingerprint cards, the certified jury verdict form, and the one judgment of sentence introduced below were, when viewed as a whole and in the light most favorable to the prosecution, sufficient for the trier of fact to find beyond a reasonable doubt that defendant had been convicted of three separate felonies prior to committing the instant offense. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Preuss*, 436 Mich 714, 739; 461 NW2d 703 (1990).

Defendant next argues that trial counsel was ineffective in failing to investigate and present a diminished capacity defense. We disagree. The evidence, including defendant's own testimony, showed that he did not appear to be highly intoxicated from the effects of combining prescription pain killers with alcohol. Counsel was not ineffective in failing to pursue a defense which was not supported by the evidence. *People v Pickens*, 446 Mich 298, 302-303, 312, 314; 521 NW2d 797 (1994); *People v Denton*, 138 Mich App 568, 573; 360 NW2d 245 (1984).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also argues, somewhat inconsistently, that the trial court erred in sua sponte instructing the jury on the intoxication defense. Defendant did not object to this instruction below. He also argues that the trial court erred in refusing to give an instruction on the lesser included misdemeanor of assault and battery. MCL 750.81; MSA 28.276. We disagree on both counts.

Although we believe the evidence did not support the defense theory that defendant was so drunk that he could not form the specific intent required for this offense, we find that defendant suffered no prejudice and therefore no manifest injustice resulted warranting reversal. *People v Hoffman*, 205 Mich App 1, 22; 518 NW2d 817 (1994); see also *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). As to the assault and battery instruction, we find no abuse of discretion because a different misdemeanor instruction was given (and rejected), MCL 750.81a; MSA 28.276(1), and because, given the seriousness of the complainant's injury, the assault and battery instruction was not supported by the evidence. *People v Datema*, 448 Mich 585, 602-603; 533 NW2d 272 (1995); *People v Steele*, 429 Mich 13, 19-21; 412 NW2d 206 (1987).

Defendant next claims he was denied a fair trial by the way the prosecutor cross-examined the defense's expert witness. Defendant did not object below. Because the prosecutor's argument that defendant's expert was a "hired gun" was in fact supported by evidence on the record, we find no manifest injustice warranting reversal. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Chatfield*, 170 Mich App 831, 833-835; 428 NW2d 788 (1988).

Next, defendant argues that he is entitled to resentencing because the sentencing guidelines for the felonious assault conviction were not scored below. Defendant's argument is unsupported by the record. The sentencing transcript indicates that the guidelines were calculated and shown to defense counsel below, and that they recommended a minimum range of six to twenty-four months.

Defendant also argues that his sentence is disproportionate. We again disagree. The trial court considered all the applicable factors and its sentence was proportionate to defendant's record and to the seriousness of his offense; there was no abuse of discretion. *People v Cervantes*, 448 Mich 620, 625-628, 630; 532 NW2d 831 (1995); *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Defendant next argues that the trial court should have deemed him to have raised an insanity defense and should have so instructed the jury because, since he did not know the effects of combining prescription pain medications with alcohol, his intoxication was involuntary. We disagree. As discussed earlier, the evidence did not support the theory, however phrased, that defendant lacked the capacity to form the intent required for this offense.

Defendant next argues that the trial court erred in not sua sponte instructing the jury on the use of deadly force. Because there is no indication that defendant used deadly force against the complainant, such an instruction was unwarranted. *People v Coddington*, 188 Mich 584, 604-605; 470 NW2d 478 (1991).

Next, defendant argues that he was deprived of a fair trial by the prosecution's failure to list as res gestae witnesses the other persons who may have seen the altercation. Defendant filed a motion for a new trial on this issue which is still pending below. We remand for an evidentiary hearing. There were at least five other people, but perhaps as many as twenty, present at the bar during the altercation. They were all res gestae witnesses relevant to defendant's claim of self-defense and should have been listed on the information. See *People v Gunnett*, 182 Mich App 61, 67; 451 NW2d 863 (1990); *People v Abdo*, 81 Mich App 635, 643-644; 265 NW2d 779 (1978). Only five of the bar patrons were listed on the information. To warrant a new trial on remand, defendant must show that the prosecution or the investigating police officers failed to exercise due diligence in identifying the other patrons, if any, and that defendant was prejudiced as a result. *People v DeMeyers*, 183 Mich App 286, 291-294; 454 NW2d 202 (1990); MCL 767.40a(1); MSA 28.980(1)(1).

Defendant also argues that counsel was ineffective as the result of pressure by a federal court judge to finish this trial quickly or be held in contempt. Although counsel was indeed under pressure from a federal tribunal, it was the prosecutor who waived witnesses in an effort to expedite matters. There is no indication that counsel compromised his representation of defendant for the sake of expediency. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel's decision to seek to suppress allegedly exculpatory evidence of defendant's possession of a shotgun was a matter of trial strategy and thus not a ground for reversal. *Id.*

Defendant also argues that the trial judge engaged in ex parte communications with a juror, therefore requiring reversal. After carefully reviewing the record, we find that the challenged communication was, at best, administrative, that it was agreed to by counsel, and that defendant has failed to show any resulting prejudice. *People v France*, 436 Mich 138, 142-144; 461 NW2d 621 (1990).

Lastly, defendant argues that he was deprived of a fair trial by the forty-day delay between the altercation and his arrest. Defendant not only failed to object below, but has failed to show that the prosecutor sought to gain a tactical advantage by the delay, or that defendant was prejudiced as a result. *People v White*, 208 Mich App 126, 134-135; 527 NW2d 34 (1994).

Remanded for an evidentiary hearing on the issue of the res gestae witnesses only. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ George R. Corsiglia