STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL STEVENSON,

Defendant-Appellant.

UNPUBLISHED
November 1, 1996

No. 173613
LC No. 92-118014-FC

Before: Corrigan, P.J., and Taylor and D.A. Johnston,* JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of first-degree premeditated murder, MCL 750.316; MSA 25.548, four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and seven counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to concurrent terms of life imprisonment without parole on the murder conviction, thirty-five to sixty years' imprisonment on each CSC I conviction and five to ten years' imprisonment on the assault conviction. The concurrent terms were imposed consecutively to the two-year sentences on the felony-firearm convictions. We affirm.

This case arises from defendant Michael Stevenson's anguish over the break-up of his three year relationship with his ex-girlfriend. Following the break-up, defendant had harassed his ex-girlfriend, followed her, and kicked at the door to her house.

Before daybreak on February 16, 1992, defendant entered his ex-girlfriend's home with a loaded gun and extra ammunition. Defendant found his ex-girlfriend and Maxwell Kinney, whom his ex-girlfriend had just begun dating, watching television. Defendant ordered the pair to move to another room and then pushed his ex-girlfriend's mother, who had multiple sclerosis, to the floor. Defendant shot Kinney several times, killing him. Defendant then sexually assaulted his ex-girlfriend at gunpoint. Defendant forced his ex-girlfriend onto a bed with her mother and her baby (defendant's son), and

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

sexually assaulted her at gunpoint again. During the third penetration, defendant shot his ex-girlfriend in the shoulder, ascertained that he had not killed her, and sexually assaulted her a fourth time.

Defendant later began to read a Bible and apparently became remorseful. Defendant telephoned his mother and told his ex-girlfriend that he planned to kill himself and asked her to get him some pills. She gave defendant pills that her mother took for her multiple sclerosis condition. When defendant fell asleep, his ex-girlfriend called the police, who arrested defendant.

Defendant first asserts that the prosecution failed to meet its burden of proving that he was not insane at the time of the charged offenses. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Turner*, 213 Mich App 558, 565; 540 NW2d 728 (1995).

MCL 768.21a(1), (3); MSA 28.1044(1)(1), (3) was amended, effective October 1, 1994, to provide that insanity is an affirmative defense that a defendant must prove by a preponderance of the evidence. At the time of defendant's trial in January and February 1994, however, the prosecution had to prove defendant's sanity beyond a reasonable doubt once defendant had offered any evidence of insanity. *People v Denton*, 138 Mich App 568, 571; 360 NW2d 245 (1984).

Dr. Gerald Shiener, a defense psychiatrist, asserted that defendant was insane at and near the time of the charged offenses because he was under the direct influence of his mother's prescription medication. At the time of defendant's trial, MCL 768.21a(2); MSA 28.1044(1)(2) provided that a person under the influence of voluntarily consumed controlled substances would not thereby be deemed to have been legally insane. A successful insanity defense could be asserted, however, "if the voluntary continued use of mind-altering substances results in a settled condition of insanity before, during, and after the alleged offense." *People v Caulley*, 197 Mich App 177, 187 n 3; 494 NW2d 853 (1992). Dr. Shiener's testimony did not suggest that defendant suffered from a settled condition of insanity. Further, the jury reasonably could have concluded that Dr. Arthur Marroquin's testimony opining that defendant was not insane rebutted Dr. Shiener's testimony. Accordingly, the evidence was sufficient for the jury to conclude beyond a reasonable doubt that defendant was sane at the time of the offenses.

Defendant also argues that the prosecution failed to prove that he was not suffering from diminished capacity due to drug intoxication from his mother's prescription medication. First, voluntary intoxication is not a defense to CSC I, which is a general intent crime. *People v Cash*, 419 Mich 230, 241 n 7; 351 NW2d 822 (1984); *People v Langworthy*, 416 Mich 630, 642-645; 331 NW2d 171 (1982). With regard to the other offenses, the jury could have reasonably viewed as unpersuasive Dr. Shiener's opinion that defendant was intoxicated, particularly since Shiener admitted that he did not know what medicine defendant had allegedly taken or the quantity defendant consumed. Defendant had told Dr. Shiener only that he took "a handful of pills." Moreover, the jury could have rejected defendant's mother's claim that some of her prescription medicine was missing after the incident, especially since she had little idea of the number pills in the prescription bottles she had brought to court. Dr. Marroquin also testified that a drug screen of defendant did not show that he consumed any

medicine other than that consumed at the scene of the offenses. Accordingly, the evidence supported a finding that voluntary intoxication had not prevented defendant from forming the specific intent necessary to commit first-degree murder or assault with intent to do great bodily harm less than murder.

Because he failed to preserve the issue, defendant has forfeited appellate review of the argument that the verdicts were against the great weight of the evidence. *People v Hughey*, 186 Mich App 585, 594; 464 NW2d 914 (1990). In any event, substantial evidence supported the verdict and permitted the jury to reject the defense.

Defendant next argues that the court erred in allowing Dr. Marroquin to testify regarding defendant's statements because he did not administer *Miranda*[1] warnings. Defendant did not preserve this issue below. Nonetheless, Dr. Marroquin had no duty to furnish *Miranda* warnings. Dr. Marroquin worked for the Center for Forensic Psychiatry and examined defendant under court order. He is not a police officer and did not collaborate with the police or the prosecution in the investigation. He had no incentive to make findings about defendant's mental state that were biased in favor of the prosecution or defense. He did not act in concert with the police or the prosecution in examining defendant. For these reasons, he was not obliged to administer warnings. *People v Anderson*, 209 Mich App 527, 530-535; 531 NW2d 780 (1995).

Defendant next asserts in conclusory fashion that defense counsel denied him effective assistance by failing to object to Dr. Marroquin's testimony. Defendant has abandoned this issue by failing to argue its merits. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Defendant next contends that the trial court should not have imposed a higher maximum sentence on the CSC convictions than the sentence initially recommended by the probation department because the probation department's recommended sentence of thirty to forty years violated *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). Defendant claims the court should have imposed a minimum sentence lower than thirty years.[2] We find no error. First, defendant's thirty-five to sixty year sentences for CSC I complied with *Tanner*'s requirement because the minimum sentence did not exceed two-thirds of the maximum sentence. *Id.* at 690. Second, the probation officer's sentencing recommendation lacks binding force. Defendant was sentenced only once. Thus, the court did not violate *Tanner*. Defendant has established no legal error regarding his CSC I sentences.

Next, defendant challenges Dr. Marroquin's testimony that he did not believe that defendant had revealed the whole truth. Defendant may not assign error on appeal to the admission of this testimony because defense counsel elicited the testimony. *People v McCurdy*, 185 Mich App 503, 507; 462 NW2d 775 (1990).

Defendant next argues that retrial after the mistrial violated his right to be free from double jeopardy. At defendant's request, the court granted a mistrial because a police officer testified about defendant's refusal to make a statement. Because defendant requested the mistrial and he has not asserted that it was a product of *intentional* prosecutor misconduct, retrial did not violate double

jeopardy. *Oregon v Kennedy*, 456 US 667, 679; 102 S Ct 2083; 72 L Ed 2d 416 (1982); *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988); *People v Gaval*, 202 Mich App 51, 53-54; 507 NW2d 786 (1993).

Finally, defendant argues that the trial court erred by failing *sua sponte* to instruct the jury on lesser offenses of CSC I and assault with intent to do great bodily harm. We disagree. Except with regard to a first-degree murder charge, a trial court is not required to instruct the jury on lesser included offenses absent a request. *People v Beach*, 429 Mich 450, 482; 418 NW2d 861 (1988); *People v Johnnie Johnson*, 409 Mich 552, 562; 297 NW2d 115 (1980). See also, MCL 768.29; MSA 28.1052. Defendant further argues that he was denied effective assistance because his counsel failed to request these instructions. This Court will not substitute its judgment on matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Counsel's decision not to seek jury instructions on lesser offenses fell within the realm of reasonable trial strategy. Admitting what the evidence strongly demonstrates while denying other elements or crimes is not an erroneous trial tactic. *People v Wise*, 134 Mich App 82, 98-99; 351 NW2d 255 (1984). Counsel well may have sought to enhance defendant's credibility with the jury by not disputing that defendant committed the acts, while arguing that defendant was insane and not criminally responsible.

Affirmed.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Both parties incorrectly state in their briefs that the trial court sentenced defendant to thirty to sixty years' imprisonment on the CSC I convictions. The court actually sentenced defendant to thirty-five to sixty years' imprisonment on those convictions.