STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY P. BROWN,

Defendant-Appellant.

UNPUBLISHED
January 17, 1997

No. 183886
Oakland Circuit Court
LC No. 94-134910

Before: Markman, P.J., and O'Connell and D. J. Kelly,* JJ.

PER CURIAM.

Defendant was charged with one count of felonious assault, MCL 750.82; MSA 28.277 and one count of aggravated domestic assault. MCL 750.81a(2); MSA 28.276(1)(2). A jury convicted him of aggravated domestic assault, but was unable to reach a unanimous verdict with respect to the felonious assault. As a result, the court declared a mistrial as to the felonious assault charge. Following a second jury trial, defendant was convicted of felonious assault. Subsequently, the trial court found defendant guilty of being an habitual offender, fourth offense. MCL 769.12; MSA 28.1084. The court sentenced defendant to a prison term of 1 year with respect to the aggravated domestic assault conviction, vacated its original sentence for the felonious assault conviction and, because of defendant's status as an habitual offender, imposed a sentence of 3½to 6 years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant's convictions arose out of events which occurred at an adult bookstore during the night of July 27, 1994, and into the early morning hours of July 28, 1994. On that night, defendant visited the bookstore and argued with Sandra Bender, his ex-girlfriend, regarding some money she allegedly owed him. Eventually, one of the customers in the store, Larry Mathews, intervened. Defendant told Mathews that he had a gun, and then punched Bender in the face. Bender ran into the back of the store to hide in a storage room, and defendant exited the store. Defendant returned to the store with a gun. He followed Kathy Blackwell, another employee of the store, up the stairs and confronted her. He demanded to know where Bender was hiding, and when Blackwell responded that she did not know, defendant threatened her, saying "Tell me where she's at or I'll blow your mother f--

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

---- head off." When the police responded to the 911 call, defendant was no longer present at the scene. The police interviewed Bender, Blackwell, Mathews, and another customer who saw defendant with the gun, Christopher Ward.

At his first trial, defendant raised an objection to the manner in which the police investigated the scene. Defendant moved to dismiss the charges against him because the police failed to exercise due diligence in identifying all the res gestae witnesses. Defendant argued that witnesses had testified that there were other customers present in the store during the incident. The trial court heard arguments on the issue at that point, but reserved its ruling on the motion. The trial court held a hearing on the issue prior to defendant's second trial and ruled that the police officers exercised due diligence in identifying the res gestae witnesses.

Defendant's first argument is, essentially, because there were other customers present in the bookstore on the night of the crime who were not interviewed by the police, his convictions should be vacated and this Court should remand the case for a new trial. Defendant contends that the failure to interview these other customers was a violation of the res gestae statue, MCL 767.40a(1); MSA 28.980(1) (i) and an infringement of his constitutional right to due process.

MCL 767.40a(1); MSA 28.980(1)(i) imposes an obligation on the prosecutor to attach to the information a list of all res gestae witnesses known to the prosecution and investigating officers. However, the statute does not require the prosecution to produce or identify unknown people who are allegedly witnesses to a crime. *People v Burwick*, 450 Mich 281, 287-289; 522 NW2d 631 (1995). The "other customers" that defendant alleges were res gestae witnesses have never been named or identified, and were not endorsed as res gestae witnesses on the information. Although defendant orally requested assistance in locating these people at the due diligence hearing, he was unable to provide the prosecution with their names. Therefore, the res gestae statute was not violated.

Furthermore, defendant's due process argument is misplaced. Defendant cites a rule which applies to the preservation of physical evidence, which is not at issue in this case.

Next, defendant argues that the trial court erred when it reserved ruling on his motion to dismiss at the first trial. We disagree. Defendant did not make his motion until the middle of the first trial. The trial court held a full hearing on the motion after trial. Because the result was unfavorable to him, there is no indication that he was prejudiced by the seven-day delay between his motion and the trial court's ruling. Therefore, defendant's argument has no merit.

Defendant also contends that the trial court erred by denying his motion for a new trial on the felonious assault charge because the jury's verdict was against the great weight of the evidence. On this issue, defendant first argues that the great weight of the evidence went against a finding that Blackwell saw a gun. Although defendant presented a witness who testified that Blackwell told a police officer on the night of the crime that she did not see a gun, Blackwell herself testified at trial that defendant had a gun. It was proper for the jury to resolve this discrepancy which this Court will not disturb. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). Defendant also argues that the great

weight of the evidence showed that Blackwell was not placed in fear of an immediate battery by defendant. Defendant points to Blackwell's testimony and argues that because she testified that she was afraid of the gun, she was not afraid of him. Despite defendant's attempt to separate himself from the gun, it is clear from Blackwell's testimony that his actions placed her in fear of an immediate battery, which is sufficient to satisfy the requisite element of felonious assault. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Moreover, the jury could infer from defendant's threatening words and actions that defendant intended to injure Blackwell when he assaulted her with a gun. *Id*. Therefore, we find that the trial court did not abuse its discretion by denying defendant's motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).

Next, defendant argues that the trial court erred by denying his motion for a mistrial after the prosecutor elicited testimony from him on cross-examination that he was currently incarcerated. Defendant contends that when the jury learned of his incarceration, it impinged upon his presumption of innocence. Defendant had already testified on direct examination that he had prior convictions and that he had spent time in prison. Furthermore, the evidence against defendant for the aggravated domestic violence charge was overwhelming, especially where he admitted that he struck Bender with his fist. In light of these circumstances, we find that defendant was not denied a fair trial when the prosecutor elicited this testimony. Therefore, the denial of the motion was not an abuse of discretion. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990).

Finally, the defendant challenges his sentence on two grounds. First, he argues that the trial court improperly considered his failure to admit guilt when imposing sentence. However, the record demonstrates that the comment made by the court was a response to defendant's statements during allocution that he had not received a fair trial. Therefore, we find that it was not a factor in the court's sentencing decision. Furthermore, the comment indicated that the trial court believed defendant had committed perjury and did not go to defendant's failure to admit guilt, which is proper. *People v Adams*, 430 Mich 679; 425 NW2d 437 (1988).

Finally, defendant argues that his sentence of 3½to 15 years for being an habitual offender, fourth offense was not proportionate. However, we find that the sentence was proportionate to the serious offense for which defendant was convicted and to defendant himself, who has demonstrated little respect for the law by the fact that he was on probation at the time of this offense and had six prior felony convictions. *People v Gatewood* (*On Remand*), 216 Mich App 559, 560; 550 NW2d 265 (1996); *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Because the sentence was proportionate to the offense and the offender, we find no abuse of discretion. *People v Yeoman*, 218 Mich App 406, 419; ___ NW2d ___ (1996).

Affirmed.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Daniel J. Kelly