

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADLEY THOMAS PETERSON,

Defendant-Appellant.

UNPUBLISHED

January 31, 1997

No. 188980

Jackson Circuit Court

LC No. 95-072028 FH

Before: Jansen, P.J., and Young and R.I. Cooper,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assaulting a jail custodian, MCL 750.197c; MSA 28.394(3). The maximum penalty for defendant's offense was increased by habitual offender, fourth, MCL 769.12(1)(b); MSA 28.1084(1)(b), and defendant was sentenced to a term of twelve to thirty-six months' imprisonment. Defendant appeals as of right and we affirm.

On March 24, 1995, defendant and eleven other inmates at the Jackson County Jail were being held in the jail gymnasium while their normal area of confinement was under repair. That afternoon, defendant began kicking at the gym doors because corrections officer Deborah Natschke would not comply with his request that she inquire whether he had any visitors. Defendant eventually kicked the doors open, and as Natschke attempted to spray him with pepper spray, he ran down a hallway toward the kitchen. Defendant ultimately obtained the canister of pepper spray, and sprayed corrections officer George Gibbs with it when Gibbs attempted to subdue him. Several officers were needed to restrain defendant and remove him from the area. At trial, defendant testified that he was not attempting to escape, but rather was searching for other guards who would be more sympathetic to his request. He admitted spraying Gibbs in the face with pepper spray, but denied touching Natschke.

Defendant contends that the trial court abused its discretion in requiring that he be shackled during trial. The decision to shackle a defendant is a matter within the discretion of the trial court, and

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

absent an abuse of discretion, we will not interfere with the trial court's decision. *People v Julian*, 171 Mich App 153, 160-161; 429 NW2d 615 (1988). "[A] defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). Given the nature of the charged offenses, we find that the trial court's decision to restrain defendant in order to ensure a peaceful trial was justified in spite of the absence of any indication that defendant would attempt to escape. The trial court minimized the prejudicial effect of defendant's restraints by ensuring that he was not handcuffed when the jury was in the courtroom, and when he elected to testify, by allowing him to be seated at the witness stand when the jury entered the courtroom and remain at the stand until after the jury exited. *People v Williams*, 173 Mich App 312, 314; 433 NW2d 356 (1988); *Julian, supra* at 162.

Defendant next argues that the examining magistrate abused his discretion in binding him over on a charge that he assaulted corrections officer George Gibbs when Gibbs did not testify at the preliminary examination. Defendant failed to preserve this issue by filing a proper motion to quash the information, and consequently, review will be undertaken only if the failure to consider the issue would result in a miscarriage of justice. *People v Fleming*, 185 Mich App 270, 273; 460 NW2d 602 (1990); *People v Miller*, 130 Mich App 116, 118; 342 NW2d 926 (1983). No miscarriage of justice will result from our failure to review in this case because Gibbs' testimony was not necessary to support the bindover decision. *People v Meadows*, 175 Mich App 355, 357-359; 437 NW2d 405 (1989).

Defendant contends that the trial court erred in not eliciting a knowing and voluntary guilty plea to habitual offender, fourth. Contrary to defendant's assertion, the habitual offender statute does not create a substantive crime, but rather, augments the punishment for repeat offenders. *People v Martin*, 209 Mich App 362, 363-364; 531 NW2d 755 (1995). A defendant is not entitled to a jury determination of his underlying convictions for enhancement purposes. *People v Zinn*, 217 Mich App 340, 347; 551 NW2d 704 (1996). In this case, the trial court fulfilled the requirements of the habitual offender sentencing statute when it confirmed the existence of defendant's prior convictions by questioning defendant about them at the sentencing hearing. MCL 769.13(5); MSA 28.1085(5). Accordingly, there was no error.

Finally, defendant contends that he was denied the effective assistance of counsel by trial counsel's decision to concede his guilt to the charge of assaulting Gibbs and entry of a guilty plea on his behalf to habitual offender, fourth. Because defendant failed to preserve this issue by moving for an evidentiary hearing or new trial below, review is foreclosed unless detail of the deficiency is apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Upon review of the record, we conclude that defendant was not denied the effective assistance of counsel by trial counsel's decision to concede guilt on one of the charges in an effort to obtain acquittals on the remaining charges because the trial strategy was reasonable in light of defendant's testimony that he sprayed Gibbs in the face with pepper spray. *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988). Furthermore, contrary to defendant's assertion, trial counsel did not enter a plea for him. Rather, defendant's acknowledgment of the existence of his prior convictions at the sentencing hearing provided

the factual basis for the trial court's decision to enhance his sentence pursuant to the habitual offender statute. MCL 769.12(1)(b); MSA 28.1084(1)(b); MCL 769.13(5); MSA 28.1085(5).

Affirmed.

/s/ Kathleen Jansen
/s/ Robert P. Young, Jr.
/s/ Richard I. Cooper