STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW BENNIE DUNCAN, a/k/a/ MATHEW BENNIE DUNCAN,

Defendant-Appellant.

UNPUBLISHED
February 18, 1997

No. 167840
Eaton Circuit Court
LC No. 92-000375-FC

Before: McDonald, P.J., and Murphy and M.F. Sapala,* JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of assault with intent to murder, MCL 750.83; MSA 28.278, and two counts of first-degree criminal sexual conduct with accomplices and by force (CSC I), MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii). Defendant received concurrent prison sentences of fifteen to forty years for assault with intent to murder, twenty to forty years on the first CSC I count, and thirty to sixty years on the second CSC I count. Defendant and two companions, Thomas and Cole,[1] attacked a man and woman who were in a parked car, taking turns beating and kicking the male victim, who was immediately rendered unconscious, and repeatedly sexually assaulting the female victim. A third companion, Burgoyne, did not participate in the attack. Defendant appeals by right. We affirm.

I

Defendant first contends that the trial court improperly scored five points for prior record variable (PRV) 6 of the sentencing guidelines, which provides for scoring for a prior relation to the criminal justice system. We disagree. The evidence at sentencing indicated that at the time of the instant offense, defendant had juvenile charges pending against him, but that the charges were being held in abeyance, and defendant's case was being monitored by a probation officer or caseworker, until a final decision was made on how to proceed. Defendant did not contest the fact that there were charges

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

pending, but argued that pending charges do not satisfy the requirements of PRV 6. We disagree. The purpose behind PRV 6 is to provide "for points when the instant offense is committed while the defendant is subject to the criminal justice system." *People v Vonins*, 203 Mich App 173, 176-177; 511 NW2d 706 (1993). Defendant clearly had some type of relationship with the criminal justice system at the time this offense was committed, therefore, a score of zero, based on no relationship with the criminal justice system at the time this offense was committed, would be improper. While defendant's relationship with the criminal justice system may not have been specifically listed in the instructions accompanying PRV 6, we do not consider that list to be exclusive. Because the evidence indicated that defendant had some type of relationship with the criminal justice system at the time of this offense, the trial court did not abuse its discretion in scoring five points for PRV 6.

Defendant next contends that the trial court improperly scored five points for offense variable (OV) 1 of the sentencing guidelines, which provides for scoring for aggravated use of a weapon. However, the record clearly indicates that at least once during the commission of the instant offenses, Cole yelled to Burgoyne, within the female victim's earshot, that the male victim should be shot if he moved. We agree with the trial court that by this statement alone, the presence of a firearm was certainly implied, as contemplated by OV 1.

Defendant also contends that the trial court improperly scored fifteen points for OV 5, which provides for scoring for carrying a victim away or holding a victim captive. We disagree. The record reveals that the victims were both carried away and held captive in their own car by Thomas and Cole, while defendant followed in his car in order to give Thomas and Cole a ride home after the victims were dumped. It is irrelevant that defendant did not drive the car himself or that he did not follow Thomas and Cole all the way to their final destination. MCL 767.39; MSA 28.979.[2]

II

Defendant next contends that his sentences were disproportionate. We disagree. Defendant first argues that the trial court improperly attributed the entire assaultive episode to him, pointing out that the trial court stated that it was its "hunch" that defendant intended to continue his participation, even though defendant did not follow Thomas and Cole all the way to their final destination. However, there is no indication in the record that the trial court considered this "hunch" in sentencing; indeed, the cited statement was not even made during allocution, but instead during the parties' oral argument regarding the scoring of OV 5. In any case, the trial court has broad discretion in the types of information it may properly have considered when imposing defendant's sentences. *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994).

Defendant also argues that the trial court improperly based the two sentences on its conclusion that defendant was a sociopath. We agree with defendant that a sentencing court may not base a sentencing determination on an unsubstantiated personal view of human psychology without some scientific or psychological justification. See *People v McKernan*, 185 Mich App 780-782; 462 NW2d 843 (1990). However, a review of the sentencing record indicates that, while the trial court did indeed inform defendant that it considered him a sociopath, it did so in the context of carefully listing and

evaluating the specific factors it had considered in fashioning defendant's sentences. Unlike the trial court in *McKernan*, the instant trial court did not go on to treat its unsubstantiated psychological conclusion as a separate, independent factor to be considered in fashioning sentences. *Id*. at 782-783.

III

Defendant next contends that there was insufficient evidence presented to support his conviction for assault with intent to murder. We disagree. The evidence presented at trial indicated that defendant participated in the brutal kicking and beating assault of the male victim during which the male victim's blood was flying everywhere as his head "bounced off" the side of the car. Defendant also participated in the sexual assault of the female victim, and followed Thomas and Cole in his car intending at least to give them a ride home from wherever the victims were eventually dumped. The record also indicates that defendant did this even while unsure whether the male victim was already beaten to death or would soon be, and Thomas and Cole eventually dumped the male victim off the side of the road after assaulting him some more, pouring beer on him and claiming to have killed him. Viewing this evidence in the light most favorable to the prosecution, especially given the fact that defendant's assault on the female victim provided a motive to neutralize a potential witness, it is clear that a rational jury could have concluded beyond a reasonable doubt that defendant intended to kill the male victim. See *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996). At the very least, a jury could rationally have concluded that defendant intended to assist Thomas and Cole in the commission of the assault, thereby supporting a conviction of defendant as an aider or abettor. MCL 767.39; MSA 28.979.

IV

Defendant next contends that certain remarks by the trial judge during trial deprived him of a fair trial. Because defendant failed to timely object to the allegedly improper remarks at trial, he has not preserved this issue for appeal, absent manifest injustice. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). After reviewing the remarks in question, we conclude that, although the trial judge's remarks were ill-advised, the overwhelming evidence of defendant's guilt presented at trial was such that no manifest injustice resulted from the remarks.

V

Finally, defendant contends that the trial court abused its discretion when it allowed photographs to be presented at trial depicting the extensive injuries to the male victim. Defendant first argues that the photographs were irrelevant and unfairly prejudicial because they depicted the extent of the male victim's injuries as they were after the entire assaultive episode, including the period after defendant had broken off his participation. However, the record makes clear that the vast majority of the beating suffered by the male victim occurred while defendant was still participating in the assaults. We agree with the trial court that the photographs were therefore certainly less prejudicial than probative of defendant's intent regarding his assault on the male victim. We especially note that the photographs were actually taken after the male victim had been "cleaned up" somewhat. The trial court did not

abuse its discretion when it allowed the photographs to be introduced. *Honeyman*, *supra*, 215 Mich App 696.

Similarly, defendant also argues that the photographs were admitted without proper foundation because there was no testimony that they reflected the male victim's injuries at the time defendant ended his participation in the assaults. However, as noted, the photographs were explicitly offered as depicting the injuries to the male victim as of the time they were taken, i.e., after he had been "cleaned up" the following day.

Affirmed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Michael F. Sapala

[1] Thomas and Cole were prosecuted in separate proceedings. Their cases were consolidated on appeal and their convictions affirmed in *People v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued 4/23/96 (Docket No. 164113).

[2] After starting to follow Thomas and Cole in his own car, defendant broke off the two-vehicle convoy when he noticed both cars were being trailed by an Eaton County sheriff's deputy in a marked patrol vehicle.