STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY JOSEPH MISIAK,

Defendant-Appellant.

UNPUBLISHED
March 4, 1997

No. 186021
Huron County
LC No. 94-003704-FH

Before: Taylor, P.J., and McDonald and C. J. Sindt,* JJ.

PER CURIAM.

Defendant appeals as of by right from his jury conviction of first-degree home invasion (home invasion I), MCL 750.110a(2); MSA 28.305a(2). Defendant was sentenced to ten to forty years in prison as a third-time habitual offender. MCL 769.11(1)(a); MSA 28.1083(1)(a). We affirm.

Defendant broke into a house while its owner was away but was confronted by the homeowner upon returning to the house while defendant was still inside. At one point, while the homeowner was pointing a gun at defendant while waiting for police to arrive after dialing 911, defendant rushed him with both hands, and the two struggled for the gun. The homeowner eventually retained control of the gun, and defendant was arrested by the police shortly thereafter. At trial, defendant claimed that he had been drinking heavily at a local bar immediately before the incident, that he entered the complainant's house thinking it was his aunt's house, and that he had no intent to commit any crime.

I

Defendant first argues that the prosecution improperly cross-examined him regarding his failure to make any explanatory statement to the police immediately following the incident. Defendant argues that the prosecution's eliciting of such testimony violated his right to be free from self-incrimination. We disagree.

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

We note first that defendant failed to preserve this issue for appeal, having failed to timely object below. In any case, the constitutional right to be free from self-incrimination only applies when a person is subject to police interrogation while in custody or deprived of his freedom of action in a significant way. *People v Schollaert*, 194 Mich App 158, 165; 486 NW2d 312 (1992). Here, defendant admitted that he was not even questioned by the police. Thus, when such constitutional concerns do not apply, a defendant may be properly impeached by his silence "where it would have been natural and expected under the circumstances for the defendant to have asserted the fact or story he relates during trial." *People v Alexander*, 188 Mich App 96, 103; 469 NW2d 10 (1991). We have reviewed the testimony in question, and it is clear that the prosecution was properly reviewing various significant aspects of defendant's direct testimony, both as it conflicted with the complainant's testimony and as it tended to cast doubt on other assertions of defendant (e.g., that he was extremely drunk). In other words, the prosecution's questioning of defendant was intended to impeach defendant as contemplated in *Alexander*, *supra*. Similarly, the prosecution's remarks in closing argument indicate an intent to draw a distinction between defendant's claim of intoxication made during trial and his failure to so claim at the time of his arrest. Defendant was not denied a fair trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

II

Defendant further argues that the trial court improperly denied his motion for a forensic evaluation of his criminal responsibility or competency to stand trial. We disagree. We initially note that the only basis offered by defendant in support of his motion for such evaluations was his alleged history of problem drinking and propensity for blackouts. However, to the extent defendant's motion was for an evaluation for criminal responsibility (insanity), such basis was inapposite, since voluntary intoxication may not support an insanity defense. MCL 768.21a(2); MSA 28.1044(1)(2).

Further, to the extent defendant's motion was for a competency evaluation, there was no evidence that defendant was intoxicated or suffering from blackouts during his trial and, thus, no reason to presume these problems would have affected his competency to stand trial. We also reject defendant's contention that the trial court denied his motion solely in the interest of judicial expedience simply because defendant first raised the issue on the morning of trial. Indeed, the trial court indicated several times that the basis for its ruling was defendant's failure to make any affirmative showing of incompetence. MCR 6.125; see *People v Stripling*, 70 Mich App 271, 276-277; 245 NW2d 713 (1976). As such, the trial court properly denied defendant's motion, and we accordingly find no abuse of the court's discretion. *People v Farmer*, 53 Mich App 133, 135; 218 NW2d 836 (1974).

III

Defendant next contends that he was denied the effective assistance of counsel in several respects. We disagree.

In order to prevail on such a claim, defendant must show that his counsel's performance fell below an objective standard of reasonableness, that but for such error the result of the proceeding

would have been different, and that such result was fundamentally unfair in any case. *People v Poole*, 218 Mich App 702, 718; ___ NW2d ___ (1996). Furthermore, when a defendant fails to make a testimonial record upon a motion for a new trial or an evidentiary hearing, our review is limited to the trial record, *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995), and we evaluate such claims while avoiding the "distorting effects of hindsight." *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

A

Defendant first argues that his trial counsel should have filed pretrial motions for criminal responsibility and competency evaluations. However, as noted above, nothing in the record indicates that defendant was ever incompetent to stand trial. Furthermore, although the trial court denied defendant's eventual motion for a criminal responsibility evaluation as untimely,[1] we have already noted that voluntary intoxication may not have supported an insanity defense in this case. Therefore, defendant's trial counsel's failure to move for such evaluations before trial was not error.

Defendant next argues that his trial counsel should have obtained the recording of the complainant's 911 call, asserting that it could have been used to impeach the complainant. However, there is nothing in the record to indicate that the 911 recording showed that the complainant had been untruthful. Indeed, on the record, it is equally probable that the 911 recording would have completely corroborated the complainant's testimony; therefore, defendant has not established that his trial counsel was ineffective for failing to secure it.

B

Defendant next argues that he was denied the effective assistance of counsel owing to his trial counsel's ineffectiveness in pursuing defendant's theory that his intoxication on the night in question prevented him from forming the specific intent necessary to commit the crime of home invasion I.

Defendant first specifically asserts that his trial counsel ineffectively examined witnesses on the subject of defendant's intoxication. However, a careful review of the trial testimony reveals that defendant's trial counsel elicited cross-examination testimony from the responding law enforcement officers indicating that defendant may well have been intoxicated without appearing so, as well as direct testimony from defendant regarding the types and large amounts of alcohol defendant consumed that night. Moreover, defendant's testimony indicated that his memory of the events in question was clouded by drunkenness. Defense counsel thus elicited evidence from which the jury could have concluded that defendant could not have formed the specific intent necessary to commit home invasion I, and it cannot be said that defendant's trial counsel was ineffective in his examination of witnesses.

Defendant next asserts that his trial counsel failed to cross-examine the complainant regarding defendant's purported drunkenness. However, there is no indication whatsoever in the record that the complainant would have bolstered defendant's intoxication theory in any way, and it is equally probable that the complainant's testimony on this subject would have had the opposite effect. Similarly, defendant points out that his trial counsel did not pursue witnesses who had observed defendant

drinking at the bar; again, however, the record reveals nothing to indicate that any such witnesses would have testified in any way favorable to defendant. Defendant has not established that his trial counsel ineffectively pursued defendant's intoxication theory.

C

Defendant next argues that his trial counsel should have objected to the prosecution's cross-examination of defendant regarding defendant's failure to make an explanatory statement to police upon his arrest. However, given our previous determination that there was nothing improper about the scope of the prosecution's cross-examination, it cannot be said that defendant's trial counsel's failure to object thereto was error.

D

Finally, defendant argues that the attorney who represented him at sentencing failed to point out "mitigating factors" to the trial court at defendant's sentencing hearing. According to defendant, such factors were "that no one was assaulted, hurt, [and] no weapon discharged" during the instant crime. However, such would not have been "mitigating" factors. Indeed, had such circumstances occurred, defendant presumably would have been charged accordingly, i.e., with assault, assault GBH, attempted murder, etc. The fact that defendant did not commit a greater or another crime cannot serve to mitigate his sentence for the crime of which he was in fact appropriately convicted. Thus, it cannot be said that defendant's sentencing counsel was ineffective for failing to so argue.

IV

Defendant next contends that the trial court erred when it refused to give defendant's requested special instruction, i.e., "Intent to commit larceny cannot be presumed solely from proof of breaking and entering." See *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). The *Uhl* Court also pointed out that, while a presumption of specific intent cannot arise *solely* from proof of breaking and entering, "intent may reasonably be inferred from the nature, time and place of defendant's acts before and during the breaking and entering." *Uhl*, *supra* at 220. Our review of the trial court's instructions to the jury reveals that they included all elements of the charged offense and did not exclude material issues, defenses and theories for which there was supporting evidence. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). There was no error.

V

Defendant next contends that the trial court abused its discretion at sentencing. We find no abuse.

We first note that the sentencing guidelines do not apply to habitual offenders, nor may they be considered in any way whatsoever on appeal of such a sentence. *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996). The trial court specifically noted defendant's lack of rehabilitative prospects, the violent and potentially deadly nature of the instant offense, defendant's prior

assaultive behavior, the need to protect society from such behavior, and the fact that defendant committed the instant crime while on parole for a previous felony. We find no abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). Finally, defendant contends that he is entitled to resentencing because the trial court allegedly failed to recognize its sentencing discretion. We disagree. It is evident from the record that the trial court recognize that it had discretion in sentencing, i.e., the court listened to the parties' positions regarding sentencing and thoroughly set forth its reasoning for the sentence it imposed.

Affirmed.

/s/ Clifford W. Taylor
/s/ Gary R. McDonald
/s/ Conrad J. Sindt

[1] A defendant must give written notice of his intent to present an insanity defense within thirty days before trial. MCL 768.20a(1); MSA 28.1043(1)(1).