STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DeWAYNE SMITH,

Defendant-Appellant.

UNPUBLISHED
March 7, 1997

No. 180194
Roscommon Circuit Court
LC No. 94-002793-FH

Before: Griffin, P.J., and McDonald and C. W. Johnson*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28. 279 and habitual offender-third offense, MCL 769.11; MSA 28.1083. He was sentenced to twenty-five to fifty years' imprisonment for the armed robbery conviction and ten to twenty years' imprisonment for the assault conviction. These sentences reflected enhancement for the habitual offender conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in determining that the nine-month pre-arrest delay did not violate his due process rights because the prosecution did not deliberately cause the delay with the intent to prejudice defendant. We disagree. Prior to 1994, there were two distinct lines of precedent from this Court on the issue of pre-arrest delay. In 1994, this Court determined that the defendant has the burden of proving both substantial prejudice from the delay and that the prosecution caused the delay with the intent to gain a tactical advantage. *People v White*, 208 Mich App 126; 527 NW2d 34 (1994). Defendant failed to meet this burden. Although defendant alleged that Chester Williams could have been an alibi witness had defendant been arrested before William's death in December 1993, defendant's mother and sister were subpoenaed to testify at the trial and could also have provided alibi testimony. Prejudice is not established merely because one potential witness is unavailable where other witnesses are available and the missing witness' testimony would be merely cumulative. *People v Shelson*, 150 Mich App 718; 389 NW2d 159 (1986).

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

Defendant next argues that the trial court abused its discretion in ruling admissible evidence of a photographic lineup conducted without the presence of defense counsel when defendant was in custody in another county on another charge. However, evidence of the photographic lineup was not introduced at trial. Rather, the complainant identified defendant during trial as the person who assaulted him. Defendant also argues the complainant's in-court identification was erroneously admitted absent evidence of an independent basis apart from the photographic lineup identification. However, defendant failed to object on this basis at trial and thus, has failed to preserve the issue. *People v Asevedo*, 217 Mich App 393; 551 NW2d 478 (1996). In any event, there was an independent basis for the in-court identification because the complainant spent several hours with defendant on the night of the assault. Moreover, several witnesses corroborated the complainant's testimony that he was with defendant that night. Consequently, no manifest injustice resulted from the complainant's in-court identification of defendant. *People v Turner*, 213 Mich App 558; 540 NW2d 728 (1995).

Defendant next argues he was denied effective assistance of counsel where his trial attorney failed to object when four allegedly inadmissible hearsay statements were admitted into evidence. First, Trooper Ronald Croskey testified a dispatcher had directed him to a location where there was a "black male subject hitchhiking." Croskey subsequently found a car, which had been abandoned by defendant near that location. Defendant claims his trial counsel should have objected to Croskey testifying that the dispatch informed him a "black male subject" was seen hitchhiking. Second, Ed Thomas testified that when he called the Richfield Township Police Department to see if they were looking for a suspect who had assaulted someone in Houghton Lake, the police said "yeah, they had been looking for him for some time." Third, Thomas also testified he told the police he suspected defendant might be armed and the police told him they did not want to arrest defendant at the location Thomas identified "with kids there." Fourth, Detective Tim Lenhard testified the week before trial a sergeant of the Richfield Township Police Department advised him he had spoken with Mr. Thomas.

Assuming arguendo these statements were inadmissible hearsay, defense counsel's failure to object did not constitute ineffective assistance of counsel because there is no reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Prubat*, 451 Mich 589; 548 NW2d 595 (1996). Several witnesses identified defendant, including the victim. Fingerprint evidence placed him with the victim just prior to the assault. Defendant had blood on his hands and clothes, and several witnesses testified he had bragged about the incident. Thus, even if these statements had been excluded, the extraordinarily strong evidence against defendant would have resulted in his conviction. *Id.*

Defendant next argues that the trial court erred when it instructed the jurors during vior dire that defendant's appearance in the courtroom in prison attire and wearing handcuffs did not create a presumption of guilt. Specifically, defendant contends this instruction invited the jury to consider these factors as some evidence against him. We disagree. Defendant ignores the trial court's contemporaneous statement that "there is no dispute that at this time he is in custody and subject to certain rules of the Roscommon Jail. *So that shouldn't be held against him*" (emphasis added). Read in its entirety, the instruction informs the jury that defendant's attire was not evidence of his guilt.

We find no manifest injustice in this instruction. *People v Head*, 211 Mich App 205; 535 NW2d 563 (1995).

Defendant also argues the trial court erred in failing to give an additional instruction at the close of trial informing the jurors they should not consider the fact that he wore prison garb during the trial as evidence of his guilt. We disagree. The trial court had already instructed the panel in this regard. Additionally, the trial court informed the jurors they must start with a presumption of innocence and the fact that defendant was charged with a crime was not evidence of his guilt. We fail to find manifest injustice here. *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996). Furthermore, we note defendant was offered the opportunity to wear civilian clothes during trial but chose to wear prison attire. Defendant cannot claim error on appeal that was the result of his own actions. *People v Barclay*, 208 Mich App 670; 528 NW2d 842 (1995).

Defendant next argues his habitual offender conviction cannot stand because there was insufficient evidence presented to prove he had previously been twice convicted. We disagree. At defendant's habitual offender trial, defendant's Department of Corrections fingerprint card was admitted into evidence, page two of which shows defendant received two different sentences on June 2, 1987. The logical inference is defendant would not have served two prison terms unless he had had two convictions. Drawing every inference in the prosecution's favor we conclude there was sufficient evidence supporting the finding that defendant had committed the prior offenses. *People v Covington*, 70 Mich App 188; 245 NW2d 558 (1976); *People v Medlyn*, 215 Mich App 338; 544 NW2d 759 (1996).

Defendant argues the Department of Corrections card was not evidence of defendant's prior convictions because (1) no evidence showed it was kept in the regular course of business, (2) no evidence showed how Wilson obtained possession of the card, and (3) no evidence showed the card was certified or sealed by the Department of Corrections to insure its accuracy as a record of a prior conviction. However, these specific arguments focus on the admissibility of the evidence presented rather than the lack thereof. Defendant did not object to the introduction of this evidence at trial and these arguments regarding the admissibility of the evidence are not preserved. *People v Mooney*, 216 Mich App 367; 549 NW2d 65 (1996); MRE 103(a)(1).

Finally, defendant argues the trial court erroneously scored the sentencing guidelines by giving him five points under offense variable 7 (OV 7) and he should therefore be resentenced. We disagree. Several considerations warrant our conclusion. First, although defendant does not argue the victim was vulnerable due to his intoxication, he asserts there was no evidence that he exploited the complainant's intoxicated state. This argument is not preserved. *People v Walker*, 428 Mich 261; 407 NW2d 367 (1987); *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993). Moreover, the evidence showed the complainant was very intoxicated at the time of the assault, and that defendant took the complainant's car and wallet and dumped him on the road while he was incapacitated from the injuries defendant inflicted on him. Thus, there was evidence supporting the conclusion that defendant exploited the victim through a difference in strength or because the victim was intoxicated or unconscious. *People v Hernandez*, 443 Mich 1; 503 NW2d 629

(1993). In any event, defendant was sentenced as an habitual offender. The guidelines need not be referenced where defendant is sentenced as an habitual offender. *People v Haacke*, 217 Mich App 434; 553 NW2d 15 (1996). Notwithstanding, even if defendant had been given zero points under OV 7 as he claims would have been appropriate, his 300-month minimum sentence would still have been within the revised recommended sentence range of 60 to 300 months for the underlying offense. In light of these considerations, even if there was error in scoring OV 7, any such error was harmless. Cf. *People v Johnson*, 202 Mich App 281; 508 NW2d 509 (1993).

Affirmed.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Charles W. Johnson