STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK M. WRIGHT,

Defendant-Appellant.

UNPUBLISHED
April 1, 1997

No. 192438

Genesee Circuit Court
LC No. 95-053021

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant was charged with assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was convicted, instead, of aggravated assault, MCL 750.81; MSA 28.276, following a jury trial. He was sentenced to 365 days in the county jail, and appeals as of right. We affirm.

On July 20, 1995, the complainant went to a lounge and had approximately four to five beers over a five hour span. As the complainant was approaching his car in a parking lot near the lounge, he observed a group of ten men and a separate group of two men. The complainant believed that a fight between the two groups was imminent. In an attempt to stop the oncoming fight, the complainant walked over to the groups and spoke to them. Defendant, who was a part of the larger group, then hit the complainant in the face and the complainant fell to the ground. The complainant was soon afterward transported to the hospital and treated for his injuries which were life threatening, and included a cerebral contusion and brain swelling.

Defendant first argues that the trial court determined the sentence to be imposed prior to permitting him to allocute, and he was essentially denied his right to allocution. We disagree. Whether defendant was afforded his right of allocution pursuant to MCR 6.425(D)(2)(c) is a question of law which is reviewed de novo on appeal. *People v Connor,* 209 Mich App 419, 423; 531 NW2d 734 (1995).

At sentencing, a trial court must, on the record, give the defendant an opportunity to advise the court of any circumstances that the defendant believes the court should consider in imposing sentence. MCR 6.425(D)(2)(c); *People v Lugo,* 214 Mich App 699, 711; 542 NW2d 921 (1995). Strict compliance with a defendant's right of allocution is required, and the court must specifically ask the defendant separately if he wishes to address the court. *Id.*, 711-712. Allocution should ordinarily come after the court has made its remarks regarding sentencing but before pronouncement of the sentence. *People v Westbrook*, 188 Mich App 615, 617; 470 NW2d 495 (1991). A trial court should avoid forming sentencing decisions until after the defendant has been allowed the opportunity to allocute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

Here, the sentencing court initially noted that any sentence which it imposed would be moot in light of a another judge's imposition of a sentence of one to five years' imprisonment for defendant's probation violation. The trial court then articulated why it believed that jail time was appropriate for the instant offense. Prior to the pronouncement of sentence, the court specifically asked defendant if he had anything to say. Defendant stated, "I have nothing to say." Defense counsel did speak on defendant's behalf. Only after defense counsel's comments did the court pronounce defendant's sentence.

Contrary to defendant's argument, the trial court's statement that, "I guess I don't need all this lecture, because the most I'll do is put him in jail, and that's what I'll do, because it makes sense," does not amount to a finding that the court had predetermined the sentence to be imposed. Defendant's reliance on *People v McNeal*, 150 Mich App 85; 389 NW2d 708 (1985), is misplaced. In *McNeal*, during a conference immediately prior to sentencing, the trial court actually stated that it intended to impose a sentence of 35 to 70 years' imprisonment, and the defendant, nevertheless, expressed his views. Here, the court simply indicated that jail time was appropriate. We conclude that the trial court complied with the requirements of MCR 6.425(D)(2)(c).

Defendant next argues that the trial court erred in failing to give the jury his requested instruction regarding the testimony of the missing witness, Jamie Hawkins. We disagree. Instructions are reviewed in their entirety to determine if reversal is required. *People v Moldenhauer,* 210 Mich App 158, 159; 533 NW2d 9 (1995). Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant's rights. *Id.*

Here, although not raised in its statement of questions presented, defendant appears to imply that the trial court's conclusion that the prosecutor and the police were diligent in their attempt to locate Hawkins. We find that the trial court's determination that the prosecution had shown due diligence in attempting to locate and produce Hawkins was not clearly erroneous and is supported by the record. *People v Lawton*, 196 Mich App 341, 348, 492 NW2d 810 (1992). The test for due diligence is whether good-faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). In this case, Sergeant Tull, the officer in charge of the case, made at least three unsuccessful attempts to contact Hawkins at both his home and place of employment. Tull also spoke with Hawkins' mother, who advised him that Hawkins had gone to Florida and left no indication as to when he would return. Hawkins' mother further informed Tull that she had not spoken to her son and did not know his exact

whereabouts. In addition, the witness was present at the preliminary examination, even though he was not called to testify. There was also evidence that Hawkins' move to Florida was recent. Accordingly, there was no apparent indication that Hawkins would not be available for trial.

Having concluded that the trial court's finding of due diligence was proper, we will address the specific issue raised on appeal. The "missing witness" instruction, CJI2d 5.12, is an appropriate instruction to give where the prosecutor (1) fails without good cause to produce a designated trial witness, *People v Jackson*, 178 Mich App 62, 65-66; 443 NW2d 423 (1989), (2) fails to provide reasonable assistance to the defense in locating and serving an identified witness, or (3) fails to exercise due diligence in discovering and disclosing the identity of res gestae witnesses. *People v DeMeyers*, 183 Mich App 286, 291; 454 NW2d 202 (1990). As previously discussed, the prosecutor did not fail to produce Hawkins' without a good cause. The trial court, therefore, was not required to give CJI2d 5.12. We conclude that the jury instructions, taken as a whole, sufficiently protected defendant's rights.

Lastly, defendant argues that the trial court erred in failing to give the jury defense counsel's requested instruction regarding intoxication as a defense to a specific intent crime. We disagree. The failure to give a requested instruction is error requiring reversal only if the instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense. *Moldenhauer*, *supra* at 159-160.

A defense of intoxication is only proper if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent. *People v Savoie*, 419 Mich 118, 134; 349 NW2d 139 (1984); *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). In the instant case, while there was evidence that defendant had drunk several beers over the course of a couple of hours, there was insufficient evidence that defendant was intoxicated to a point at which he was incapable of forming the intent to commit the charged crime. As noted by both the prosecutor and the trial court, defendant admitted that he knew what he was doing when he hit the complainant.

Moreover, the failure of the trial court to give the requested instruction would not require reversal because it did not impair defendant's ability to present a defense. Defendant's primary defense was self-defense. Defendant claimed that he hit the complainant only because the complainant pushed him and he was concerned that the complainant would strike him. The intoxication instruction would have had no bearing on defendant's self-defense claim. We therefore conclude that the trial court did not err.

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen