STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY PARSONS,

Defendant-Appellant.

UNPUBLISHED
May 23, 1997

No. 188809
Recorder's Court
LC No. 94-011396-FY

Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by the trial court of assault with intent to murder, MCL 750.83; MSA 28.278; three counts of felonious assault, MCL 750.82; MSA 277; malicious destruction of police property, MCL 750.377(b); MSA 28.609(2); and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to terms of ten to twenty years' imprisonment for the assault with intent to murder conviction, two to four years' imprisonment for the felonious assault convictions and one to four years' imprisonment for the malicious destruction of police property conviction. These sentences were imposed concurrently with each other but consecutive to a term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues in propria persona that he was denied a fair trial by the trial court's failure to order a psychiatric evaluation pursuant to MCL 768.20a(2); MSA 28.1043(1)(2) where he filed a notice of intent to assert a diminished capacity defense and the combination of his intoxication and an insulin reaction (defendant claims on appeal that he is a diabetic) rendered him involuntarily intoxicated at the time of his offenses.

This Court has recognized that involuntary intoxication through a combination of alcohol and prescription medication is within the ambit of the insanity defense. *Larrow v Miller*, 216 Mich App 317, 326, n 4; 548 NW2d 704 (1996) (citing *People v Wilkins*, 184 Mich App 443; 459 NW2d 57 [1990]). When a defendant files a notice of his intent to assert an insanity defense, the court shall order the defendant to undergo a psychiatric examination. MCL 768.20a(2); MSA 28.1043(1)(2). The

defense of diminished capacity falls within the codified definition of legal insanity and therefore requires full compliance with MCL 768.20a; MSA 28.1043(1). *People v Denton*, 138 Mich App 568, 571; 360 NW2d 245 (1984).

In this case, however, our review of the record reveals that no evidence was offered at trial that defendant was a diabetic or that an insulin reaction[1] could have effected defendant's mental state at the time of the offenses. More specifically, defendant's theory of defense below was not that he was involuntarily intoxicated, but rather that his temporary voluntary intoxication[2] alone rendered him incapable of forming the necessary specific intent with respect to the charged offenses containing such an element. Voluntary intoxication is a defense to a specific intent crime. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Defendant was able to fully and fairly present his voluntary intoxication defense at trial. Defense counsel explained below that he filed the notice of intent to assert the defense of diminished capacity because he was not clear whether the defense of voluntary intoxication came within the defense of diminished capacity and whether the prosecution was entitled to notice of an intent to claim the defense of voluntary intoxication. However, we note that the notice of insanity defense statute, MCL 768.20a(1); MSA 28.1043(1)(1), does not apply to the defense of voluntary intoxication as negating specific intent. *Wilkins, supra* at 447. Accordingly we conclude that the trial court did not err in failing to order a psychiatric examination where the defense actually asserted by defendant was not subject to MCL 768.20a; MSA 28.1043(1). .

Next, defendant argues in propria persona that counsel was ineffective in his presentation of the defense of diminished capacity. Specifically, defendant contends that counsel erred in failing to submit expert medical testimony concerning the effects of intoxication and diabetes. We disagree. As stated previously, defendant's theory below was voluntary intoxication, not involuntary intoxication. The defense of voluntary intoxication will negate the specific intent element of the crime charged if the degree of intoxication is so great as to render the accused incapable of entertaining the intent. *King, supra*. In this case, evidence was presented at trial that defendant was intoxicated at the time of his offenses. See *People v Mills*, 450 Mich 61, 82; 537 NW2d 409 (1995). Under the circumstances of this case, the defense of voluntary intoxication was a viable defense where the crimes of assault with intent to murder, felonious assault and malicious destruction of police property are specific intent crimes. See *People v Rockwell*, 188 Mich App 405, 411; 470 NW2d 673 (1991); *People v Strong*, 143 Mich App 442, 451-452; 372 NW2d 335 (1985); *People v Richardson*, 118 Mich App 492, 496; 325 NW2d 419 (1982); *People v Culp*, 108 Mich App 452, 458; 310 NW2d 421 (1981). We refuse to find that counsel was ineffective merely because, in hindsight, the defense of voluntary intoxication was unsuccessful and the possibility exists that another defense (involuntary intoxication) might have been asserted. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Finally, defendant argues through his appellate counsel that his "minimum sentence of twelve (12) years" is disproportionate. We disagree. A sentencing court need not consider the length of a consecutive mandatory sentence when setting an indeterminate sentence. *People v Miles*, ___ Mich ___; ___ NW2d ___ (Docket No. 100683, issued 3/6/97), slip op, p 5. Where a defendant receives consecutive sentences and neither sentence exceeds the maximum punishment allowed, the aggregate of

the sentences will not be disproportionate. *Id*. at 4-5. Rather, each sentence is treated separately under the principle of proportionality. *Id*.

In this case, defendant's two-year felony-firearm sentence was a mandatory sentence. Defendant's ten-year minimum sentence for the assault with intent to murder conviction was within the guidelines range and is, therefore, presumed proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). The factors cited by defendant, i.e., his lack of criminal history, and intoxication during and lack of memory of his offenses, are not unusual circumstances that overcome this presumption. *Id*.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ Roman S. Gribbs

[1] The presentence investigation report substantiates defendant's claim of being a diabetic.

[2] An individual who is voluntarily intoxicated does not have grounds for an absolute defense based upon his insanity unless the voluntary continued use of mind-altering substances results in a settled condition of insanity before, during and after the alleged offense. *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992). In this case, although defendant testified that he had drank alcohol for many years and that he has a drinking problem, no evidence was presented or arguments made that defendant's long-term drinking had rendered him insane before, during and after his offenses.