

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HERBERT HENRY, III.,

Defendant-Appellant.

UNPUBLISHED

June 24, 1997

No. 185544

Van Buren Circuit Court

LC No. 94-9208 FC

Before: Gage, P.J., and Reilly and Hoekstra, JJ.

MEMORANDUM.

In a jury trial in Van Buren Circuit Court, defendant was acquitted of the original charge of assault with intent to commit murder but convicted of assault with intent to commit great bodily harm. The essential facts were undisputed: after verbal argument, defendant attacked his long-time friend with a baseball bat, administering several blows, and also stabbed his friend with a knife. The sole significant contested issue at trial was defendant's intent -- defendant claimed that by virtue of smoking crack cocaine and marijuana and consuming alcohol, he lacked the specific intent necessary for the higher (felony) forms of criminal assault.

On this appeal of right, defendant contends the trial court erred in failing to give the jury a preliminary instruction regarding the evidentiary value of the information, which was read into the record, and in final instructions in omitting standard criminal jury instructions dealing with evidence and credibility. Because there was no objection at trial to the failure to give such instructions nor request for any instructions of this nature, defendant has appended a derivative claim that his trial counsel was ineffective. This case is being decided without oral argument pursuant to MCR 7.214(E).

Although defendant attempts to present his instructional challenges within the context of due process violations, it is clear that the omitted instructions do not concern matters which are the subject of mandatory instruction by virtue of the federal constitution. *Kentucky v Whorton*, 441 US 786; 99 S Ct 2088; 60 L Ed 2d 640 (1979); *Gilmore v Taylor*, 508 US 333; 113 S Ct 2112; 124 L Ed 2d 308, 317-318 (1993). These alleged errors, therefore, fall under the category of unpreserved, nonconstitutional error -- assuming *arguendo* that there was error at all, inasmuch as the criminal jury

instructions are not mandatory in any sense of the term. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). In any event, assuming there was error, to obtain relief on the basis of unpreserved, nonconstitutional error, defendant must establish that the alleged error was determinative of the outcome of the proceedings. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). Defendant has not even attempted to do so, and the record satisfies this Court that no such significant prejudice occurred. To the contrary, since the jury did receive instructions on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt, was instructed to weigh only the evidence it had heard, and was further instructed with regard to pertinent evidentiary principles in relationship to the key issue of intent, defendant was not deprived of a fair trial by any instructional omissions.

In light of defendant's failure to establish any prejudice, his claim of ineffective assistance of counsel is also without merit. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Affirmed.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Joel P. Hoekstra