

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BILLY JO SALISBURY,

Defendant-Appellee.

UNPUBLISHED

June 17, 1997

No. 186312

Isabella Circuit Court

LC No. 94-007100-FC

AMENDED

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury of felonious assault, MCL 750.82; MSA 28.277. We affirm.

Defendant was originally charged with armed robbery, first-degree retail fraud, and felonious assault; the armed robbery and first-degree retail fraud charges were dismissed because the prosecutor violated the discovery order. The charges arose from an attempted robbery of a Wal-Mart store. In particular, the felonious assault charge arose from the fact that defendant swung a knife at Wal-Mart store security personnel.

Defendant first argues that the trial court erred by failing to dismiss all his charges on the basis of a discovery order violation because all the charges derived from the same continuing criminal conduct. We disagree. The prosecutor violated the discovery order by not providing defense counsel with a police report that stated that the recovered stolen merchandise did not have defendant's fingerprints on it. Since the fact that none of defendant's fingerprints were found on the stolen merchandise does not make it more or less probable that defendant assaulted the Wal-Mart security officer, the trial court did not abuse its discretion by not dismissing the assault charge. *People v Carter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992).

Defendant next argues that because of cumulative errors, his conviction should be reversed. We disagree. Defendant was arraigned and charged and his preliminary examination was done under an incorrect name. However, the trial court amended all relevant documents to reflect his correct name. Regarding the magistrate's improper questioning of defendant, the trial court suppressed all of

defendant's statements in connection with the questioning. Regarding the failure of the police to fingerprint defendant, the trial court ordered the police to fingerprint defendant. Regarding defendant's lack of a speedy trial claim, the delay was due to defense counsel. Regarding defendant's argument that he was not present at critical stages in the proceedings against him, any error was due to defense counsel's failure to seek a writ of habeas corpus. Additionally, the final pretrial and the hearing on a motion to add a witness -- the proceedings at which defendant was not present -- were not critical stages because defendant did not need to be present in order to decide the motions. Regarding defendant's argument that the photographic lineup procedures were improper in that he did not know the identity of the other persons in the lineup, the prosecutor provided defendant with the information prior to trial. Because defendant has failed to establish that he was prejudiced by any of these errors, we will not find that manifest injustice occurred such that reversal is warranted. *People v Grant*, 445 Mich 535, 544; 520 NW2d 123 (1994); MCL 769.26; MSA 28.1096.

Defendant next argues that the trial court improperly coerced him into pleading guilty on the habitual offender charge by denying him the right to a new jury for his habitual offender trial. This Court does not have jurisdiction over this issue, as appeals from guilty pleas are by leave only, and defendant failed to file for leave to appeal. MCL 770.3(e); MSA 28.1100(e). A review of the issue shows, however, that the trial court applied the balancing test of *People v Schram*, 98 Mich App 292; 296 NW2d 840 (1980), overruled in part on other grounds sub nom *People v Carpentier*, 446 Mich 19, 33; 521 NW2d 195 (1994), and properly concluded that a new jury for defendant's habitual offender trial was unwarranted. We find no abuse of discretion.

Finally, defendant argues that he should be resentenced because his sentence was disproportionate, citing *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. Sentencing guidelines do not apply to habitual offenders. *People v Hansford (After Remand)*, ___ Mich ___; ___ NW2d ___ (Docket No. 104770, rel'd 5/13/97), slip op p 3. Defendant's sentence was within the statutory limits allowable for this conviction. Considering defendant's prior record of nine felony and two misdemeanor convictions, as well as the facts surrounding the instant felonious assault, we find his sentence was proportionate to the offense and this offender. *Milbourn, supra*. Consequently, we find no abuse of discretion on the part of the sentencing court. *Hansford, supra*, slip op p 3.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor