

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL PERCY DUNHAM,

Defendant-Appellant.

UNPUBLISHED

July 25, 1997

No. 188703

Clinton Circuit Court

LC No. 94-005637 FH

Before: Gribbs, PJ., and Sawyer and Young, JJ.

PER CURIAM.

Defendant was found guilty but mentally ill by a jury of absconding on bond, MCL 750.199a; MSA 28.396(1), and subsequently pled guilty to habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to four to eight years' imprisonment to be served consecutive to the sentence he was presently serving. Defendant now appeals as of right. We affirm defendant's conviction and sentence but remand for clerical correction of the judgment of sentence.

Defendant was scheduled for trial on a charge of first-degree criminal sexual conduct. The day before that trial, defendant worked at his usual job. He then contacted his girlfriend, had her pack some things and asked her to drive to southern Michigan. Eventually, defendant ended up in Eugene, Oregon. On the day of the criminal sexual conduct trial, defendant's attorney appeared but defendant did not. A bench warrant was issued, defendant was extradited from Oregon, and the instant charge resulted.

Defendant argues that the trial court abused its discretion when it allowed the prosecutor to introduce evidence that the absconding charge arose from defendant's failure to appear for the first-degree criminal sexual conduct trial. Defendant argues that this evidence of other acts was more prejudicial than probative. We disagree. An essential element of the crime of absconding on bond is that the defendant absconded "from a criminal proceeding wherein a felony was charged." *People v Litteral*, 75 Mich App 38, 42; 254 NW2d 643 (1977). In addition, the nature of the underlying charge was relevant to a noncharacter issue. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). In light of the relatively little emphasis the nature of the underlying felony received in this trial, it was not more prejudicial than probative. MRE 403.

Defendant also argues that the trial court erred in refusing to give a special instruction that the prosecutor must prove that defendant recklessly neglected or disregarded a known obligation to appear and must prove that defendant was apprised of the felony trial date. The trial court did not err. The requested instruction would be appropriate for forfeit on bond which requires only a passive action by the defendant. *People v Rorke*, 80 Mich App 476; 264 NW2d 30 (1978). Here, however, defendant was charged with absconding on bond which does not require specific intent, *People v Demers*, 195 Mich App 205, 208; 489 NW2d 173 (1992), and does not have a notice element. *Litteral, supra*. The trial court's instruction fairly presented the issues to be tried and sufficiently protected the rights of the defendant. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

Defendant claims that the district court abused its discretion when it bound defendant over for trial because there was insufficient evidence that he had notice of the missed trial date. As stated above, notice is not an element of absconding on bond. However, even if it were, there was sufficient evidence presented to bind defendant over. *People v Woods*, 200 Mich App 283, 287-288; 504 NW2d 24 (1993).

Defendant argues that the trial court erred when it denied his motion to suppress a statement he made to a police officer on the way to his arraignment. We disagree. Although defendant was certainly in custody at the time he made the statement, there is no evidence of any interrogation that elicited defendant's statement. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995).

Defendant next argues that his sentence violates the principle of proportionality and that it constitutes cruel and/or unusual punishment. After reviewing the record, we are persuaded that defendant's sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Inasmuch as defendant's sentence is proportionate to the crime and to defendant's circumstances, it is not cruel or unusual punishment. *People v Williams (Aft Rem)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Defendant further argues that he was denied the effective assistance of counsel when his trial counsel failed to ensure the appearance of defendant's attorney for the criminal sexual conduct trial or failed to request a continuance until he could be presented. At a hearing on defendant's motion for new trial wherein this attorney was questioned, it was determined that the attorney would add nothing to defendant's case that was not cumulative and would hurt defendant on the issue of notice. As a result, defendant has failed to show that counsel's performance was so prejudicial as to deprive him of a fair trial. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Defendant argues that his conviction of absconding on bond should be reversed because it is against the great weight of the evidence. The trial court did not abuse its discretion in denying defendant's motion for new trial on this issue. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). In this regard, defendant argues that it was against the great weight of the evidence to find that defendant had notice of the criminal sexual conduct trial date. We disagree. In addition to defendant's statement to the police officer that he knew the trial date, there was circumstantial evidence in support of

a finding that he knew the date of that trial. Defendant also argues that the jury's verdict is against the great weight of the evidence because it did not find him not guilty by reason of insanity. The experts conflicted on this issue. Therefore, it was properly left for the jury to decide. *People v Ross*, 145 Mich App 483, 493; 378 NW2d 517 (1985).

Defendant argues that the trial court abused its discretion when it refused to grant a continuance to secure the appearance of defendant's criminal sexual conduct case attorney. Inasmuch as defendant never requested a continuance, the trial court did not abuse its discretion in not granting one. *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995).

Finally, defendant argues that this matter should be remanded for resentencing because the trial court was operating under a misunderstanding of the habitual offender statute. We agree that the trial court misunderstood the revised statute, MCL 769.13; MSA 28.1085. However, resentencing is not required. The habitual offender statute, as revised, makes it clear that it is solely a sentence enhancement statute and not a separate criminal offense. *People v Zinn*, 217 Mich App 340, 345-347; 551 NW2d 704 (1996). Therefore, defendant's judgment of sentence should not reflect a conviction under MCL 769.11; MSA 28.1083. On remand, the trial court is instructed to direct correction of the judgment of sentence to reflect only the conviction of absconding on bond. Although the trial court may have been unclear on the revised sentencing enhancement process, it clearly understood the sentencing ramifications of MCL 769.11; MSA 28.1083. As a result, resentencing is not required.

Defendant's conviction and sentence are affirmed but the matter is remanded for clerical correction of the judgment of sentence to remove defendant's purported conviction as an habitual offender, MCL 769.11; MSA 28.1038. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.