

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENNY PETER PEREZ,

Defendant-Appellant.

UNPUBLISHED

August 26, 1997

No. 188597

Bay Circuit Court

LC No. 94-001269-FH

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury of assault with a dangerous weapon, MCL 750.82; MSA 28.277, and assault and battery, MCL 750.81; MSA 28.276. Defendant was sentenced as an habitual offender, MCL 769.12; MSA 28.1084, to ten to fifteen years' imprisonment for the assault with a dangerous weapon conviction, and to ninety days for the assault and battery conviction. We affirm.

Defendant first claims that the jury instructions on the use of deadly force taken from the Michigan Criminal Jury instructions should not have been used because the evidence only supported a finding that defendant used an *appropriate* amount of nondeadly force. Defendant argues that the instruction regarding the use of deadly force left the jury "in a quandary as to how to apply the self-defense instructions as given" where the facts did not support a finding that defendant used deadly force. We disagree. Because defendant did not object to the instructions as given, this Court will not set aside the verdict unless the instructions resulted in a miscarriage of justice. *People v Clark*, 172 Mich App 407, 417; 432 NW2d 726 (1988). MCL 768.29; MSA 28.1052. No miscarriage of justice will result if the verdict in this case is not set aside because the instruction on the use of deadly force was appropriate. The testimony regarding defendant's striking of the victim with a large club and the evidence presented concerning the victim's injuries would have allowed an inference that the natural, probable and foreseeable consequence of such an act was death. *Id.*

Next, defendant argues that the trial court erred in not allowing the introduction of evidence regarding the victim's violent character. We disagree. We find no basis upon which to find that the trial

court abused its discretion in excluding this evidence because defendant did not give the court a valid reason for admitting this particular evidence at the time defendant sought to have it introduced, MRE 103(a)(2), and did not seek to introduce the evidence again after he had identified a legitimate reason for doing so.

Finally, defendant argues that the trial court abused its discretion because his sentence of ten to fifteen years was “three times the high end of the minimum sentence as computed by the guidelines.” This argument is irrelevant because this Court does not consider the sentencing guidelines when determining whether an habitual offender’s sentence is appropriate. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Moreover, after reviewing the circumstances of the offense and the offender, we find no abuse of discretion by the trial court in defendant’s sentence. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), *People v Hansford*, 454 Mich 320, 326; ___ NW2d ___ (1997). Defendant’s sentence was proportionate both as to the offense and the offender. *Id.* Defendant was before the trial court on “approximately”¹ his seventh felony conviction. The trial court noted that “the intervention of the court system during these previous felonies, as far as sentencing goes, has had little or no effect on [defendant’s] involvement in becoming involved in further criminal conduct,” and that defendant’s actions in this case were extremely serious and caused serious injuries which could have been life threatening.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra

¹ At sentencing, the trial court stated that defendant was before the court on “approximately” his seventh felony violation. The “basic information report” is consistent with this statement; however, the judgment of sentence states that defendant was an “Habitual Offender - Sixth Felony Offense.”