

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CAREY HELMAR DUNN,

Defendant-Appellant.

UNPUBLISHED

April 14, 1998

No. 198881

Oakland Circuit Court

LC No. 95-141971-FC

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to four to ten years' imprisonment. The court then vacated that sentence and sentenced defendant, as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to four to fifteen years' imprisonment. Defendant now appeals as of right. We affirm defendant's conviction, but remand for resentencing.

Defendant first argues on appeal that he was denied the effective assistance of counsel. We disagree. To establish whether a defendant's right to effective assistance of counsel has been so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation was so prejudicial as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant claims that his trial counsel was ineffective for failing to request a jury instruction of intoxication. There is no merit to this claim. Although there was evidence that defendant had consumed alcohol prior to the assault, there was no evidence that defendant was actually intoxicated at the time of the assault or was intoxicated to the point where he was incapable of forming the intent to commit the assault. Defendant denied that he was drunk at the time of the incident or that alcohol had any effect on his judgment. Police officers testified that defendant did not have difficulty understanding or following

directions, and that he did not have trouble with his movements or walking. In addition, both the officers and a paramedic testified that nothing in defendant's attitude indicated that he had been drinking. Defendant's trial counsel was not ineffective for failing to ask for an instruction that was not supported by the evidence. *People v Mills*, 450 Mich 61, 82; 537 NW2d 909, mod 450 Mich 1212 (1995); *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Defendant also contends that trial counsel was ineffective by failing to request an independent forensic exam when the one forensic report indicated that he suffered from depression, seizures and had contemplated suicide. We disagree. A psychologist who examined defendant and his medical records testified that defendant was not presently mentally ill and that although defendant had been diagnosed as depressed the summer prior to the incident and may have been depressed at the time she examined him, it did not impair his ability to cooperate and defend himself. Defendant's trial counsel did not fall below an objective standard of reasonableness in not requesting another forensic examination when the results of the first one and the testimony elicited at trial did not show diminished capacity.

Defendant also argues that his trial counsel was ineffective for failing to object to testimony by a police evidence technician that the blood spatters in the condominium were consistent with the prosecution's theory, when the technician admitted that he was not an expert. We disagree. Decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). Here, during cross-examination, defendant's trial counsel elicited the admission from the technician that his training only "touched" on the examination of blood spattering and that he was not an expert in blood spattering. In addition, defendant's trial counsel obtained testimony from the technician which supported defendant's case. Defense counsel's decision to allow the technician to testify regarding the blood spattering on direct and then to instill doubt in the minds of the jury regarding the accuracy of the technician's opinions regarding blood splattering and to elicit testimony favorable to defendant was a matter of trial strategy which this Court will not second guess.

Defendant also argues on appeal that due process was violated when the trial court failed to instruct the jury on the defense of intoxication. We disagree. As discussed previously, a jury instruction regarding intoxication was not supported by the record. There was no testimony that defendant was actually intoxicated to the point where he was incapable of forming the intent to commit an assault with the intent to commit great bodily harm less than murder. A trial court need not give requested instructions that are not sustained by the evidence. *Piper, supra* at 648. Moreover, an instruction on intoxication would have been contrary to both defendant's testimony and his theory of the case.

Next, defendant argues that the jury's verdict was against the great weight of the evidence because the complainant's testimony was inconsistent. We disagree. The discrepancies in complainant's testimony go solely to the credibility of the complainant's testimony and should be left for the jury. Resolving credibility questions is the exclusive province of the jury even where the trial court could have reached a different result. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

It was undisputed that complainant was injured. Complainant testified that defendant caused her injuries and that during the assault defendant told her that, although he loved her, he would have to kill her. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant also argues that there was not sufficient evidence to support the jury's verdict. Viewing the evidence in the light most favorable to the prosecution, it is clear that sufficient evidence was presented for a rational trier of fact to find the essential elements of assault with the intent to commit great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995).

Finally, defendant argues that the trial court erred when it increased his sentence pursuant to the habitual offender information which was filed ten months after the arraignment. We agree.

The issue regarding whether the notice of filing an habitual offender charge was timely is a question of law. This Court reviews questions of law de novo. *People v Conner*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

A prosecutor who knows a defendant has prior convictions must proceed promptly, if at all, against the person as an habitual offender. *People v Ellis*, 224 Mich App 752, 754; 569 NW2d 917 (1997). MCL 769.13(1); MSA 28.1085(1), establishes a bright-line test for determining whether the supplemental information was filed promptly. *People v Bollinger*, 224 Mich App 491; 569 NW2d 646 (1997). MCL 769.13(1); MSA 28.1085(1) states:

(1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

In this case, defendant waived arraignment on November 17, 1995. The notice seeking sentence enhancement was filed on September 16, 1996, with no explanation of the delay in filing. In its answer in opposition to defendant's motion for resentencing/correction of error, the only excuse for the untimeliness of the notice was an unsupported statement that the prosecution needed "to locate and verify the prior convictions where defendant utilized an alias." The prosecution does not indicate when it first became aware of the prior conviction.

This Court finds that the prosecution should have been aware of the prior conviction as early as October 20, 1995. On that date, a bond recommendation was filed which indicated that defendant, under the name of Bernard Darden, was on probation for receiving and concealing stolen property over \$100, in Records Court, docket no. 92-4244. Therefore, we find that the prosecutor failed to timely file an habitual offender charge and should be precluded from pursuing the charge. Defendant should be resentenced for the underlying conviction.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Roman S. Gibbs

/s/ Mark J. Cavanagh

/s/ Henry William Saad