STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EVERETT L. VINSON,

Defendant-Appellant.

UNPUBLISHED
September 4, 1998

No. 198432
Calhoun Circuit Court
LC No. 95-3526 FC

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278, following a stabbing in which the victim suffered numerous knife wounds. A mistrial was declared following the first trial in which the jury could not reach a verdict, and a second jury trial resulted in his conviction. Defendant was sentenced to 15 to 25 years' imprisonment. Defendant appeals as of right, raising three issues. We affirm.

There is no merit to defendant's claim that the prosecutor failed to present sufficient evidence to support defendant's conviction for assault with intent to murder. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Here, defendant contends that because the prosecution witnesses were not credible, the evidence was therefore insufficient to support the verdict. However, the credibility of the witnesses is irrelevant to the determination of sufficiency. Here, there was eyewitness testimony that defendant went into a silverware drawer after the household was asleep and then stabbed the sleeping victim several times before being restrained by witnesses. This evidence is sufficient to sustain defendant's conviction.

Defendant also contends that despite this evidence, defendant's intoxication negates the specific intent element and that the jury should have been so instructed. A failure to instruct on a point of law is not grounds for setting aside a verdict if the defendant has failed to specifically request the instruction,

MCL 768.29; MSA 28.1052, and manifest injustice will not be found where the alleged error or omission is not outcome determinative. *People v McVay*, 135 Mich App 617, 618; 354 NW2d 281 (1984).

Intoxication is only a defense in cases where "the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent." *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995). Here, there was evidence that defendant had been drinking, but no evidence that defendant was "intoxicated to the point at which he was incapable of forming the intent to commit the crime." *Id*., 83. There was evidence that defendant, who acknowledges on appeal that he is a chronic alcohol user, stopped drinking around midnight. Several hours later, defendant came down the stairs and went into the kitchen silverware drawer for a knife, before stabbing the sleeping victim at about 5:00 a.m. Viewing the evidence in a light most favorable to the prosecution, a rational jury could infer from defendant's actions that he was able to form the requisite intent.

Defendant also argues that he was denied the effective assistance of counsel. We do not agree. To establish a claim of ineffective assistance, defendant must show that counsel's errors were so serious as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant contends that defense counsel was ineffective for failing to assert the defense of intoxication, and for failing to properly advise him of the charges he faced at retrial, leading him to reject a plea offer for a lesser sentence. Defendant did not move for a new trial or an evidentiary hearing, and this Court is limited to the facts that are on the record. Accordingly, defendant's second contention is entirely waived, as there is nothing on the record to indicate that defendant was misinformed of the consequences of rejecting the plea offer. Further, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, *People v Barnett*, 163 Mich App 331; 338; 414 NW2d 378 (1987), and decisions as to what evidence to present are presumed to be a matter of trial strategy. *Mitchell*, *supra*, 163. Based on the facts on record in this case, including defendant's statement to police that he stabbed the victim in self defense, we are not convinced that counsel erred in not submitting an intoxication defense.

Finally, defendant argues that the prosecutor acted improperly during the trial and deprived defendant of a fair trial. Appellate review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We find no miscarriage of justice here. Read as a whole, the prosecutor's remarks do not warrant reversal.

Affirmed.

/s/ William B. Murphy
/s/ Roman S. Gribbs
/s/ Hilda R. Gage