STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 3, 2001
v	No. 222180 Lapeer Circuit Court
CHAUNCY TERRELL MAHONE, Defendant-Appellant.	LC No. 98-006484-FH

Before: Bandstra, C.J., and White and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of liquor by a prisoner, MCL 800.281(4), and sentenced to 2 to 7½ years as a second habitual offender, MCL 769.10(1)(a). Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to convict him of the charged offense because the prosecutor allegedly offered no proof on the following elements of the statutory definition of "alcoholic liquor" found in MCL 800.281a(a): (1) that the liquid contained at least one-half of one percent of alcohol, and (2) that this liquid was either suitable, or could readily be made suitable, for drinking. We disagree.

A sufficiency of evidence appeal in a criminal case is reviewed de novo as a question of law. *People v Medlyn*, 215 Mich App 338, 340-341; 544 NW2d 759 (1996). This Court must determine whether, viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, although due process requires that the prosecutor prove each element of the alleged crime beyond a reasonable doubt, *People v Eason*, 435 Mich 228, 233, 238; 458 NW2d 17 (1990), the prosecution need not extinguish every reasonable defense argument of innocence in order to meet this burden. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Here, although not specifically mentioned by the prosecution, evidence on the challenged elements of the charged offense was presented to the jurors at trial.

With respect to the requirement that the substance seized from defendant's cell had an alcohol level of at least one-half percent, defendant argues that because there was a ten-day lapse between seizure and testing, the prosecution failed to sufficiently prove that the requisite level of

alcohol existed at the time of his possession. However, although there was a lapse, the officers and toxicologist testified that the liquid mixture seized from defendant's cell was frozen – arresting the fermentation process – for approximately nine of the ten days between seizure and analysis. During the remainder of that time, the mixture was for the most part refrigerated, at least slowing fermentation. Further, the analysis showed an 8 to 10 percent alcohol level. Defense counsel argued that post-seizure fermentation resulted in that alcohol level but, apparently, the jury rejected that argument. Additionally, the presence of a strong smell when the liquid was seized indicates that alcohol was already present. The record does not indicate that insufficient evidence was presented to support a finding that this element was satisfied.

We similarly reject defendant's contention that there was not sufficient evidence to establish that the liquid was, or could readily be made, suitable for drinking. Given the toxicologist's uncontested opinion testimony indicating the presence of ethanol, which she characterized as beverage alcohol, we find defendant's challenge in this regard to be without merit.

Defendant also argues that the trial court erred in failing to instruct the jury on these statutory elements defining "alcoholic liquor." However, defendant did not object to the trial court's failure to encompass this definition into its instructions. Thus, this unpreserved due process challenge to the jury instructions would warrant reversal only if it constituted a plain error that substantially affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). After review of the record, we do not find plain error. If anything, defense counsel's failure to request a specific jury instruction regarding the statutory requirement was likely a matter of considered trial strategy. Testimony regarding the percentage of alcohol in various beverages at trial indicated a range of 3 to 4 percent for various "light" beers, up to approximately 75 percent for hard liquors. Requesting a jury instruction regarding the specific statutory definition of "alcoholic liquor" would have only been to defendant's disadvantage because it would have illustrated that, in contrast to this testimony on other beverages, an alcohol level of only one-half percent would be sufficient to find defendant guilty. Defendant's substantial rights were not prejudiced by the failure to give an instruction which would likely only have worked to his detriment. See, e.g., *People v Weathersby*, 204 Mich App 98, 107-108; 514 NW2d 493 (1994).

Defendant next alleges that the trial court should have granted his request for an instruction on attempt. Again we disagree. An attempt is a cognate offense, not a necessarily included offense of the substantive crime. *People v Jones*, 443 Mich 88, 103, n 21; 504 NW2d 158 (1993). Accordingly, a trial court "is not required to instruct the jury on attempt without regard to the evidence or the defense presented or argued." *People v Adams*, 416 Mich 53, 56; 330 NW2d 634 (1982). A necessary component of an attempt offense is that defendant intended to do an act or bring about consequences which would amount to a crime. *Jones*, *supra* at 100. There was no evidence or argument presented here regarding defendant's intent; the statute under which defendant was charged imposes strict liability for possession of contraband without regard to a prisoner's intent. See MCL 800.281(4). Because there was no evidence or argument regarding the intent element of the attempt offense, the trial court did not err in denying an instruction on that cognate offense. As to the level of alcohol required, given the smell when the

liquid was seized, the refrigeration and then freezing of the liquid, and the 8 to 10 percent alcohol level when tested, the court was not obliged to instruct on attempt.

Next, defendant claims that the state police officer's destruction of the original pop bottles containing the alcohol was a denial of due process. Although defendant briefly questioned the officer about the whereabouts of the original bottles at issue, he did not object to their absence on the record. An evidentiary issue must be objected to at trial to be preserved for appeal. MRE 103; *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Accordingly, we review this unpreserved issue under the plain error standard. *Carines*, *supra* at 764.

In challenging the officer's destruction of the original bottles, defendant asserts that these bottles were significant because the absence of his fingerprints on them may have shown that he did not "possess" those items as required by the statute. However, the jury could have concluded that defendant possessed the illegal substance found on his assigned desk, with or without fingerprints. Thus, because the bottles were not materially exculpatory, defendant is required to show that the police acted in bad faith to prevail on this issue. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); see also, *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). We do not conclude that the police acted in bad faith. The state police officer testified that the bottles were found in defendant's area of control, that they tested positively for alcohol, and asserted that proof of those elements was all that was considered necessary for a conviction. Nothing suggests the bottles were discarded to undermine the defense or that the police even considered them to be relevant evidence on any contested issue that might arise in this case.

Finally, defendant claims his sentence was disproportionate to the offense. Again we disagree. Defendant's minimum sentence of two years falls within the guidelines range and is thus presumptively proportionate. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Although a sentence within the guidelines range can conceivably violate proportionality in "unusual circumstances," *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990), the factors cited by defendant on appeal, i.e., his lack of an extensive criminal history and minimum culpability, are not unusual circumstances that overcome the presumption. *Id*. at 636; *People v Daniel*, 207 Mich App 47, 54; 524 NW2d 830 (1994).

In any event, notwithstanding that at the time of the instant offense defendant was serving a sentence for his role in a robbery which resulted in the death of a store manager, defendant has received eight misconduct tickets during the two years since his incarceration. This history alone represents a valid basis for the sentence given in this matter. *Milbourn*, *supra* at 635-636. Although the 7½ year maximum sentence imposed by the trial court is greater than the five year maximum generally permitted under MCL 800.285(1), it is within the permissible range for a second habitual offender. See MCL 769.10(1)(a). Moreover, defendant's sentence is similar to that given for the same offense in both *People v Norman*, 176 Mich App 271, 272; 438 NW2d 895 (1989) and *People v Rau*, 174 Mich App 339, 344-345; 436 NW2d 409 (1989). See *People*

v Weathington, 183 Mich App 360, 364-365; 454 NW2d 215 (1990). Accordingly, we find that the trial court did not abuse its discretion when rendering sentence in this matter.

We affirm.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Jeffrey G. Collins