

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY ALFRED JENSEN,

Defendant-Appellant.

UNPUBLISHED

January 22, 2004

No. 244036

Calhoun Circuit Court

LC No. 01-004981-FH

Before: O’Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Defendant appeals of right his conviction following a jury trial for malicious destruction of police property, MCL 750.377b; reckless or wanton use of a firearm, MCL 752.863a;¹ felonious assault, MCL 750.82; and two counts of felony-firearm, MCL 750.227b. We affirm.

When police arrived at defendant’s home in response to his suicide attempt, he shot a patrol car. He later pointed his shotgun at an officer who entered the home. Defendant put the prosecutor on notice that he would assert an insanity defense at trial, but the notice did not name any witnesses who would testify to his insanity. A court-ordered evaluation stated that defendant was not mentally ill according to the legal definition, but conceded that he displayed depression and problems with substance abuse.

Defendant first argues that the trial court erred by denying his request for an independent psychological evaluation. We disagree. We review for abuse of discretion a court’s decision to deny untimely requests for independent evaluations. *People v Smith*, 103 Mich App 209, 211; 303 NW2d 9 (1981). We will not reverse based on a matter within the trial court’s discretion unless the decision lacks factual or legal justification. *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993).

In this case, the court-ordered psychiatric evaluation attributed defendant’s actions to his abuse of drugs and alcohol and not his usual mental condition. It states that defendant’s history

¹ In the trial court’s sentencing order, this count is misclassified as count number three, illegal use of self-defense spray, MCL 750.224d(2). We remand for the ministerial task of correcting this order.

consistently reflects an association between his substance abuse and his erratic behavior and emotions. While the evaluator acknowledged defendant's depression, he did not find any overpowering mental illness. He found defendant oriented, rational, and attentive. Defendant did not suffer from delusions or hallucinations and showed particular awareness when he spontaneously denied any symptoms of schizophrenia in response to questions indirectly related to the disease. Because defendant admitted that he took an entire bottle of psychotropic drugs after drinking several beers, there was strong evidence that defendant's criminal behavior was influenced by controlled substances, not a mental illness. MCL 768.21a. The evaluator also reported a lack of cooperation and potential malingering. Because defendant's initial evaluation plainly showed that defendant could not meet the legal definition of insanity, the trial court did not abuse its discretion when it denied defendant's untimely motion for an independent evaluation.

Defendant next argues that the trial court erred when it refused to allow him to present any lay witnesses or documentation regarding the insanity issue. Defendant did not raise the issue of lay witness testimony until the day of trial, and did not deliver the documentation until a few days before trial. Defendant never supplemented his notification of an insanity defense to include any witnesses who could testify regarding defendant's mental condition, and the documentation had no foundation without a witness. MRE 901(a). Therefore, the trial court properly excluded defendant's witnesses and correctly constrained defense counsel from raising the issue before the jury. MCL 768.21.

Finally, defendant argues that he received ineffective assistance of counsel. He argues that his trial counsel's delay in moving for an independent evaluation and the addition of lay witnesses prevented him from adequately presenting his insanity defense. We disagree. The record reflects that the evaluator took an inordinate amount of time to deliver his findings. Rather than contemporaneously exploring other ways to assert the insanity defense, however, defense counsel chose to wait until the evaluation's results were issued. In light of the report's results, defense counsel could not reasonably list the evaluator on the insanity defense notice and faced a substantial impediment to the defense's success. Given the plain, substantiated findings in the evaluation, defense counsel could only legitimately argue defendant's lack of specific intent through voluntary intoxication. Defense counsel effectively argued this defense at trial.

In light of these facts, it appears that defense counsel's untimely motion for an independent evaluation was more a delay tactic and the creation of an appellate issue than a bona fide attempt to establish an insanity defense. Defense counsel's tardy attempts to use lay witnesses and unsupported documents at trial represent a strategy to create jury doubt without satisfying the legal standards for asserting the insanity defense. Because defendant's insanity defense plainly lacked factual support, trial counsel did not provide ineffective assistance when it tactically and half-heartedly raised the defense but actually relied on a voluntary intoxication defense. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Affirmed, but remanded for the ministerial task of correcting the final judgment of sentence. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray