STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2004
v	No. 248161 Kalamazoo Circuit Court
RICHARD ROY VENDEVILLE, Defendant-Appellant.	LC No. 02-000435-FH

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant as an habitual offender, third-offense, MCL 769.11, to twenty to forty years' imprisonment. Defendant appeals as of right, and we affirm.

On the night of April 27, 2002, the victim went to bed after leaving her purse in one of the two vehicles parked in her attached garage, and her wallet in the other. The following morning, the access door to the garage was partially open, the victim's wallet and several items from her purse were missing, and the fence gate leading to the victim's backyard was damaged.

On May 1, 2002, police arrested defendant in connection with another matter after a chase on foot. Defendant had on his person the victim's driver's license and one of her credit cards. Defendant was advised of his *Miranda*[1] rights at the scene of his arrest and, according to several officers, he agreed, and was eager, to talk to the police. When questioned about the break-in, defendant stated that he acted as a lookout while two other men went into the garage and came out with items, and that he held the bag into which the stolen property was placed. Defendant agreed to direct the police to the victim's house. According to the police, defendant gave them directions to the house, pointed it out upon arrival, and acknowledged that the victim's license had been taken from there. Later, the police visited defendant's mother's home. She and defendant's brother voluntarily turned over property of defendant's, including property removed from a car that defendant had been using. The property included various items from the victim's wallet.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant offered the alibi testimony of his mother, who claimed that defendant was at her home between April 27, 2002 and April 29, 2002, but conceded that it was possible that defendant left her house when she was sleeping. Defendant also offered testimony that he was under the influence of drugs and alcohol on a regular basis in April 2002, and that he was delirious and delusional at the end of April 2002. Defendant testified that he did not have a clear recall of being interviewed by the police, that he did not believe he confessed to the crime, and that he identified two others as being involved either to get them in trouble because he was delusional, or to make a deal with the police. Defendant also testified that the items his mother turned over to the police were not his, but rather, were taken from his girlfriend's car, which was used by many persons as a "crack car." Defendant testified that he had no knowledge about the victim's license.

The jury convicted defendant as charged.

I

Defendant first argues that the trial court deprived him of his right to due process by requiring him to wear shackles during trial. Defense counsel moved before trial to have defendant's shackles removed. The trial court denied the motion.

We review a decision to restrain a defendant for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

> Freedom from shackling is an important component of a fair trial. Consequently, the shackling of a defendant during trial is permitted only in extraordinary circumstances. Restraints should be permitted only to prevent the escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial. [*Id.* at 404 (citations omitted).]

A decision to restrain a defendant may be based on information maintained by the Department of Corrections or a county jail. *Id.* at 405. See also *People v Julian*, 171 Mich App 153, 160-162; 429 NW2d 615 (1988). It may be based on a defendant's prior conduct. *Dixon, supra* at 405.

In the instant case, the trial court observed that although defendant was not enough of a threat to courtroom decorum to warrant shackling, defendant was an escape risk and posed a threat of injury to himself and others, and thus ordered that defendant remain in restraints during trial. The trial court's decision was based on testimony provided by Lieutenant Gail Sampsell, assistant commander of the Kalamazoo County Jail, and on other records of defendant's behavior and mental state. Lieutenant Sampsell testified that, from the time of his incarceration, defendant required continuous monitoring. He was initially suicidal. It was later reported that he was planning an escape, and a search revealed that he possessed small metal items, sharpened in the form of weapons. He also tampered with jail doors, took items apart in the jail in order to obtain metal, threatened to hurt jail staff, jammed the locks of his handcuffs, obtained metal from the seats of the transport vehicles, tampered with the vehicle door latches and springs, hid wire in his flip flops, asked a jail trustee to obtain large staples for him, stole ceiling tiles, dismantled a light, exposed jail personnel to the biohazard of his feces and urine, became so unruly during one transport that he had to be resecured and receive an emergency escort back to the jail, and injured himself repeatedly. While defendant's behavior had calmed down somewhat in the weeks

immediately preceding trial, he threatened a jail trustee in March 2003, and had to be escorted by numerous officers to the transport van on April 3, 2003, before his hearing with respect to the use of restraints at trial. Lieutenant Sampsell believed that defendant would have committed an assault on that date if he had not be restrained. Trial began five days later. The forensic reports, which were reviewed by the trial court, revealed that defendant was feigning mental illness and was an escape risk. During one attempted forensic examination, defendant used a pencil as a weapon and tried to stab himself. Later, despite his handcuffs, he managed to urinate on the floor and the table in the interview room.

We conclude the trial court did not abuse its discretion by determining that defendant be restrained at trial. Defendant's institutional misconduct, as detailed in documents and Lieutenant Sampsell's testimony, demonstrates that the court had legitimate concerns regarding defendant's trying to escape or injure others. *Julian, supra* at 161-162,

The trial court attempted to minimize the prejudicial effect of defendant's restraints by having defendant moved outside the presence of the jurors and by providing a drape around the defense table to hide defendant's leg irons. Although the trial court took measures to hide the restraints and minimize prejudice, defendant wanted the jury informed that he was in restraints. The trial court obliged defendant in this regard and gave a cautionary instruction prepared by defendant. Defendant also inquired about the matter during voir dire. Even though the jury was fully aware that defendant was restrained, the trial court continued to minimize the chance that the jury would observe defendant in his restraints. And, because the jury was specifically instructed that the restraints were not evidence and could not be considered as evidence, defendant was not deprived of a fair trial.

II

Defendant next argues that he was deprived of a fair trial by the trial court's permitting the prosecution to inquire about his confessions to sixteen or twenty additional breaking and entering crimes. Defendant argues that the court abused its discretion by admitting this evidence because the prosecution failed to give notice that it intended to offer other-acts evidence under MRE 404(b), and because defendant did not open the door to the testimony.

During opening statement, defense counsel indicated that the jury would hear defendant's statements related to the charged crime. She stated that the statements were not recorded, written, videotaped, signed, or reviewed by defendant, and informed the jury that it could consider these facts when evaluating the confession. She referred to the confession as "a lack of evidence." During trial, the prosecution elicited testimony from Detective-Sergeant Donald Ester that defendant provided details about the charged crime and later directed officers to the victim's address where he pointed out her house in order to verify his statements. The prosecutor did not inquire about defendant's confessions to any other crimes.

On cross-examination, defense counsel questioned Detective Ester about the fact that defendant's statements were not reduced to writing, were not videotaped, and were not otherwise recorded. Defense counsel elicited that defendant was not asked to sign any statement. Defense counsel raised the issue a second time during cross-examination, asking whether Detective Ester took any type of written, audio, or videotape of defendant's statements. When Detective Ester answered in the negative, defense counsel continued to pursue the subject, again inquiring

whether any of the information was reduced to writing in a report that defendant could review or whether defendant was offered any type of report to sign. On redirect, over defendant's objections, the prosecutor was allowed to inquire about the reason that defendant's statements were not reduced to writing. Detective Ester testified that, because of the complexity and number of cases involved, it was impossible to sit down and reduce all of the information to writing. Detective Ester testified that defendant admitted to sixteen or twenty "break-ins" during his interview. Eventually, the trial court directed the prosecutor that the line of inquiry had proceeded far enough and provided the jury with a cautionary instruction, stating that Detective Ester's testimony was to be considered for the limited purpose of explaining why defendant's statements were not written, and not as to the charged offense.

The challenged testimony was relevant to rebut defendant's argument that the fact that his confession was not reduced to writing or otherwise recorded rendered the alleged confession suspect. MRE 402 provides that all relevant evidence is admissible. "Relevant evidence" is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Defendant's confession was of consequence at trial, and Detective Ester's explanation on redirect examination was relevant to rebut the taint cast by defense counsel's questioning.

III

Defendant next argues that the trial court erred in instructing the jury, over his objection, that voluntary intoxication was not a defense. We review de novo a defendant's claim that an erroneous jury instruction was given. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). The determination whether a jury instruction is applicable to the facts of a case lies in the sound discretion of the trial court, and the instructions must be reviewed in their entirety. *Id.* There is no error requiring reversal if, on balance, the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Defendant did not present a formal intoxication defense. However, during the presentation of his case, he offered evidence that he was in the habit of binging on cocaine and alcohol and was generally delusional and paranoid during the time the crime occurred. Because the issue of intoxication was peripherally placed before the jury, the prosecution requested an instruction with respect to voluntary intoxication. Defense counsel objected, arguing that defendant was not asserting an intoxication defense. The trial court instructed:

> Now you have heard some evidence about ingestion of drugs and alcohol. It is not a defense to any crime that the defendant was at that time under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor or drug including a controlled substance. Other substance are [sic] compound or a combination of alcoholic liquor, drug or other substance or compound.

The instruction was based on MCL 768.37, which removes voluntary intoxication as a defense for most crimes. However, it is undisputed that MCL 768.37 is not applicable to defendant's case because the offense preceded the statutes effective date of September 1, 2002. Before September 1, 2002, voluntary intoxication was a defense to specific intent crimes.

People v King, 210 Mich App 425, 427; 534 NW2d 534 (1995). Because first-degree home invasion is a specific intent crime, see *People v Carpenter*, 464 Mich 223, 225; 627 NW2d 276 (2001), the defense could have been pursued by defendant to the extent it was applicable. Although defendant did not pursue the defense, the trial court elected to give the challenged instruction because there was evidence of intoxication on the record. The trial court indicated that it was providing the instruction in its discretion because it wanted to instruct on the law to avoid jury confusion and because the instruction fit the circumstances of the case.

On appeal, defendant argues that the trial court should not have given an instruction on voluntary intoxication because he did not present an intoxication defense and the instruction given did not properly reflect the law applicable to his case. We agree, but conclude that defendant's case was fully and fairly presented to the jury, and reversal is not required. The given instruction, while inaccurately reflecting the applicable law, accurately reflected the facts of the case, specifically that voluntary intoxication was not a defense. Defendant did not pursue a voluntary intoxication defense, and the defense was not supported by the evidence. "A defense of intoxication is only proper if 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, modified on other grounds 450 Mich 1212; 539 NW2d 504 (1995). In this case, there was no specific evidence that, on the night of the crime, defendant was intoxicated at all, much less intoxicated to the point that he was unable to form the necessary intent. Thus, intoxication was, in fact, not a defense in defendant's case. On balance, the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Heikkinen, supra*.

We additionally conclude that, even if the instruction was erroneous, reversal is not required. A preserved nonconstitutional error does not require reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, it is not more probable than not that any instructional error was outcome determinative. The defense of voluntary intoxication was not before the jury for consideration, defendant never argued that he did not have the specific intent to commit the crime, and the evidence against defendant, including his confession, was overwhelming.

IV

Finally, defendant argues that resentencing is required because the trial court erroneously scored offense variable 13 (OV 13), MCL 777.43, and offense variable 16 (OV 16), MCL 777.46, resulting in a sentence outside the appropriately-scored guidelines range. We disagree.

"[P]ursuant to § 34.10 [MCL 769.34(10)], a sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). "However, if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *Id.* at 310-311.

The Sentence Information Report stated a sentencing guidelines range of 99 to 240 months.[2] Thus, defendant's twenty to forty year sentence was within the appropriate guidelines range, and his challenges are appealable only if there was a scoring error or if inaccurate information was relied on in sentencing and if the issues were raised at sentencing, in a motion for resentencing, or in a motion to remand. *Kimble, supra* at 310-311. Defendant raised these challenges in a motion to remand, which was denied.

OV 13, MCL 777.43, is properly scored at twenty-five points where the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). MCL 777.43(2)(a) provides that "*all crimes* within a five year period, *including the sentencing offense*, shall be counted *regardless of whether the offense resulted in a conviction*," (emphasis added). First-degree home invasion, MCL 750.110a(2), the sentencing offense, is categorized as a crime against a person. See MCL 777.16f. In addition, defendant pleaded guilty to attempted resisting or obstructing a peace officer in May 2002. Resisting or obstructing, MCL 750.479, is categorized as a crime against a person. MCL 777.16x. Further, the PSIR made reference to the multiple additional offenses defendant admitted committing. While defendant argues that these offenses were "property" offenses based on the language used in the PSIR, the testimony at trial makes clear that many of the offenses involved homes. Home invasion is an offense against a person. Thus, the court's scoring of OV 13 at twenty-five points based on three crimes against a person was not in error.

Nor is there error apparent in the court's scoring of five points for OV 16, based on the conclusion that the property obtained, damaged, lost, or destroyed has a "value of $1,000 or more but not more than $20,000." MCL 777.46(1)(c). Defendant correctly observes that it was not established that the property stolen or damaged in the instant case had an aggregate value of $1000 or more. However, in scoring OV 16, it was also proper to consider the value of property taken by defendant during uncharged offenses, including breaking and entering offenses, theft offenses, and the unlawful driving away of automobiles, to which defendant confessed. MCL 777.46(2)(a). Although the record does not reveal the aggregate value of the property involved, that is because defendant did not object to the scoring of OV 16 at sentencing and, therefore, it was not necessary to establish the value of the items on the record. Nevertheless, the aggregate value of the property properly considered was most likely far in excess of $1,000, and on the record before us, defendant has not demonstrated a scoring error. Resentencing is not required.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot

[2] We note that the trial court handwrote "99 to 160." This range was incorrect. Under the legislative guidelines, a Class B offense third habitual offender (E-VI) falls under a guidelines range of 99 to 240 months.