Court of Appeals, State of Michigan

ORDER

People of MI v Joseph Arthur Ketola

Docket No. 284363

LC No. 07-015434-FH

Michael J. Kelly
Presiding Judge

Kirsten Frank Kelly

Douglas B. Shapiro
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued September 29, 2009 is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

NOV 19 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2009
v	No. 284363 Allegan Circuit Court
JOSEPH ARTHUR KETOLA, Defendant-Appellant.	LC No. 07-15434FH

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his conviction and sentencing for first-degree home invasion, MCL 750.110a(2), and aggravated assault, MCL 750.81a. We affirm.

Several of defendant's issues on appeal revolve around a mid-trial amendment of the information. Prior to defendant presenting his case-in-chief, the prosecutor moved to amend the home invasion count. She argued that MCL 750.110a provided for multiple theories of home invasion and that she wished to amend the information from breaking and entering with the intent to commit an assault to breaking and entering a dwelling and committing an assault while present in the dwelling. The prosecution noted that the statute under which defendant was charged permits either theory and that defendant was aware of the evidence regarding the assault from witness testimony at the preliminary examination. The trial court granted the motion. Defendant requested the jury be discharged pursuant to MCL 767.76, which the trial court denied, concluding that the amendment did not significantly change the circumstances.

Defendant argues that the amendment to the information was prejudicial, requiring a new trial. We disagree. We review a trial court's decision to amend an information for abuse of discretion. *People v Keangela McGhee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). Under MCL 767.76, a trial court has the discretion to amend an information before, during, or after a trial so long as the amendment does not prejudice the defendant. *People v Larry McGhee*, 268 Mich App 600, 629; 709 NW2d 595 (2005). A defendant is prejudiced by an amendment to an information if it unfairly surprises the defendant, causes the defendant to have insufficient notice of the charges, or deprives the defendant of a sufficient opportunity to present a defense. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). We find no such prejudice in this case.

It is undisputed that MCL 750.110a provides for conviction in a multitude of circumstances, including both breaking and entering with the intent to commit an assault and commission of an assault within a dwelling after breaking and entering. The amendment to the information did not alter the charging statute and thus there was no surprise as to the statute under which defendant was charged. We do agree with the defense, however, that the particular assault to be proven by the prosecution changed and that this must be considered. As a result of the amendment, the prosecution no longer had to prove that defendant broke into his neighbor's apartment with the intention of assaulting his wife who had retreated there. Instead, the prosecution had to prove that after defendant broke and entered the apartment, he committed an assault against his neighbor who lived there by threatening him with a battery. Nevertheless, no facts were presented during the prosecution's case-in-chief that could have come as a surprise to the defense. Indeed, defendant was always aware of the evidence that he committed an assault after he wrongfully entered his neighbor's apartment. Witness testimony at the preliminary examination stated that after defendant broke into the apartment, he cocked his fist at the resident and said "get the F out of the way." The resident also testified that he "was waiting for [defendant] to hit him" which clearly showed defendant had placed the resident in fear of a battery, thereby committing an assault.

Despite knowing the statute under which he was charged and knowing of the evidence of an assault following entry rather than at the time of entry, defendant argues that the change in theory caused his defense to "bec[o]me no defense at all," as defendant's defense at trial was lack of ability to form an intent to assault. We agree that under MCL 767.76 we must also consider whether the late amendment deprived the defense of its ability to put forward a defense to the new charge.

Defendant asserted at trial that he could not form a specific intent due to the concussion he suffered when he was rendered unconscious for a period during the immediately preceding altercation with his wife in their own apartment. This defense was as effective to the theory under which defendant was ultimately convicted as it was to the theory under which he was originally charged. If the jury had believed that defendant's concussion had left him unable to form an intent, it would have found defendant not guilty under either theory because home invasion first degree is a specific intent crime. CJI2d 25.2a, Use Notes, 2 ("This is a specific intent crime"). To find defendant guilty of home invasion, the jury had to conclude that defendant had the ability to form an intent, regardless of whether the intent to commit an assault was formed prior to breaking and entering or after having broken and entered.[1]

Moreover, even if the mid-trial amendment did deny defendant the ability to present his defense that he lacked the ability to form the intent to assault, there was no prejudice because defendant's failure to comply with the requirements of MCL 768.20a precluded this defense.

[1] In both the opening and closing jury instructions, the jury was instructed on the elements of assault. The jury was twice told that to prove assault, the prosecutor had to prove that defendant "intended to commit a battery on someone in the dwelling or to make someone in the dwelling reasonably fear an immediate battery. An assault cannot happen by accident." The trial court also instructed on the elements of battery.

See *infra* at 8-9. As we do not find prejudice to defendant resulting from the mid-trial amendment, we affirm the trial court's decision not to dismiss the jury.

Defendant next argues that the prosecutor engaged in prosecutorial vindictiveness by amending the information after trial commenced. He asserts that the amendment relieved the prosecutor of its burden to prove every element, thereby violating his due process rights. We conclude that defendant has failed to meet his burden. See *People v Ryan*, 451 Mich 30, 35-36; 545 NW2d 612 (1996). Prosecutorial vindictiveness is punishment of a person for asserting a protected statutory or constitutional right. *Id.* Defendant has failed to explain what constitutional right he was asserting or how the prosecutor's motion to amend the information to conform with the evidence presented at trial constituted punishment. The amendment of the information was proper and the prosecutor still had to prove beyond a reasonable doubt all of the elements of the crime: that defendant broke and entered into the apartment; that while entering or present in that dwelling defendant committed an assault; and that while defendant did so, someone was lawfully present in the apartment. Accordingly, there is no due process violation.

Defendant's final claim of error related to the change in information is defendant's claim that the change of jury instructions resulted in the prosecutor being relieved of proving the element of intent, thereby violating his due process rights. Defendant's claim of a change in jury instructions relates to the fact that before opening statements, the trial court instructed the jury as to defendant's home invasion charge that:

> The defendant is charged with home invasion in the first degree. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. . . . Third, that when the defendant broke and entered the dwelling he intended to commit an assault therein.

whereas when the trial court instructed the jury at the close of trial, the jury instructions provided "Third, that when the defendant entered, was present in, or was leaving the dwelling, he committed the offense of assault." Not only is this issue waived based on defendant's counsel's expressed satisfaction with the instructions, *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004), it is meritless. The instruction for home invasion provided to the jury is exactly what is provided for in CJI2d 25.2a. It clearly required the prosecution to prove every element beyond a reasonable doubt and at no time shifted the burden to defendant and properly advised the jury of the elements of the charged offense per the amended information. There is no error and no due process violation.

Defendant next argues that the trial court improperly scored offense variable (OV) 3 and OV 4 for injury to the victim of the aggravated assault because the scored offense was home invasion, during which no victims were injured. We agree. Under *People v McGraw*, 484 Mich 120; ___ NW2d ___ (2009), the Michigan Supreme Court overruled *People v Cook*, 254 Mich App 635; 658 NW2d 184 (2003) "insofar as [it] stand[s] for the proposition that offense variables can be scored using conduct beyond the sentencing offense," *id.* at 133 n 42, and held that "[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *Id.* at 135.

However, we find defendant is not entitled to resentencing. Defendant is statutorily barred from making this argument on appeal. MCL 769.34(10). In *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004), our Supreme Court interpreted MCL 769.34(10) as follows:

> The first sentence of § 34(10) provides that a sentence that is within the appropriate guidelines sentence range is not appealable unless there was a scoring error or inaccurate information was relied upon. The necessary corollary of this statement is that a sentence that is *outside* the appropriate guidelines sentence range *is* appealable.
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> The second sentence of § 34(10) provides that, even though a sentence that is within the appropriate guidelines sentence range can be appealed if there was a scoring error or inaccurate information was relied upon, it can only be appealed if the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. In other words, the second sentence simply describes how a party must preserve a challenge to a sentence that is within the appropriate guidelines sentence range; it says nothing about a challenge to a sentence that is outside the appropriate guidelines sentence range. [*Id.* at 311 (emphasis in original).]

Defendant meets the first requirement, as we agree that there is a scoring error. However, he failed to raise this issue at sentencing and did not file a motion for resentencing in the trial court or a motion to remand with this Court. Accordingly, so long as defendant's sentence falls "within the appropriate guidelines range," he is precluded from appealing this issue. *Id.*

As presently scored, defendant had prior record variable (PRV) level E and OV level III, making the minimum guidelines range 78 to 260 months.[2] By removing the 20 disputed points, defendant argues that he would fall within the E-II bracket, making his new range 72 to 240 months. Defendant was sentenced to a minimum of 120 months, which clearly falls within the E-II bracket to which defendant asserts he is entitled. Accordingly, MCL 769.34(10) precludes appeal of this issue. *Kimble, supra*.

Defendant attempts to avoid this requirement by arguing that he received ineffective assistance of counsel because his attorney failed to dispute the scoring. We disagree. To show ineffective assistance of counsel, defendant must prove that trial counsel's performance was objectively unreasonable and that he suffered prejudice as a result, in that there is a reasonable probability that the outcome of the trial would have been different but for trial counsel's errors. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Even assuming that this standard applies to scoring errors, defendant has failed to show any prejudice because the sentence he received falls within the E-II grid to which defendant claims he is entitled. Accordingly, his ineffective assistance of counsel claim must fail.

[2] Although the actual range is 78-130, the 130 is increased by 100% to 260 because of defendant's status as a fourth-offense habitual offender. MCL 777.21(3)(c).

Defendant also alleges a Sixth Amendment violation. On the second day of trial, defendant met with his attorney at the Allegan County Jail. Defendant's counsel informed defendant that he had tested positive for benzodiazepam, which is contained in medication taken by defendant's wife, and that that evidence would be utilized in defendant's defense. After the prosecutor rested and prior to defendant presenting his case in chief, the prosecutor made a motion to exclude defendant's defense of involuntary intoxication. She indicated that it had just come to her attention that defendant's counsel intended to argue that defendant's wife had spiked his drinks with valium or GHB and that defendant had no idea it was there or what effect it would have on him. She argued that involuntary intoxication had to follow the insanity rules and regulations and defendant had not complied with them, thereby precluding the evidence. The trial court agreed that involuntary intoxication fell under the insanity statute and granted the motion. Defendant asserts that an officer at the jail provided this information to the prosecutor, in violation of his Sixth Amendment Rights.

Defendant relies on *Shillinger v Hayworth*, 70 F3d 1132, 1142 (CA 10, 1995), in which the Tenth Circuit found per se violations of the Sixth Amendment when a deputy sheriff was present during pretrial sessions between the defendant and his counsel and substantive information from those sessions was communicated to the prosecutors. However, the Sixth Circuit has expressly rejected the per se reasoning in *Shillinger* and adopted a requirement of a showing of "demonstrable prejudice, or substantial threat thereof." *Lakin v Stine*, unpublished opinion of the Sixth Circuit, issued July 13, 2000 (Docket No. 99-1529), quoting *United States v Morrison*, 449 US 361, 365; 101 S Ct 665; 66 L Ed 2d 564 (1981). See also *United States v Steele*, 727 F2d 580, 586 (CA 6, 1984) ("Even where there is intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted."). Thus, for any relief, defendant must show prejudice.[3]

We note that defendant makes multiple factual assertions that are not contained in the record. There is no evidence indicating who provided the prosecutor with the information regarding the defense. The prosecutor simply said that it came "not through [defendant] or his attorney, but actually through outside sources." It could have come from defendant's wife or any number of other individuals. There is not even any evidence that an officer was present during defendant's discussion with his counsel. There is also no evidence for defendant's assertion that his wife admitted to having drugged him. However, even assuming all of defendant's facts to be true, we find no prejudice to defendant.

It is undisputed that defendant did not comply with any of the statutory requirements necessary to assert an insanity defense. See MCL 768.20a(1). Pursuant to MCL 768.21(1), where a defendant has failed to provide the notice required under MCL 768.20a, "the court shall exclude evidence offered by the defendant for the purpose of establishing an alibi or the insanity of the defendant." Here, defendant wished to assert that his wife drugged him, which is an involuntary intoxication defense. In *People v Wilkins*, 184 Mich App 443, 449-450; 459 NW2d 57 (1990), this Court held that "involuntary intoxication is a defense included within the ambit of

[3] Although we are not bound by these federal cases, we nonetheless find them persuasive. *Abela v GMC*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

the insanity defense" and that "[i]t follows therefore that defendant's failure to provide a notice of insanity defense within the time limits prescribed by statute precludes him from offering evidence at trial in support of that defense." Thus, even is the prosecutor had not been given the information and defendant had attempted to present the evidence during his case-in-chief, the trial court would have been mandated to exclude the evidence pursuant to MCL 768.21(1) based on defendant's failure to provide notice of an insanity defense. Thus, the evidence could not have been introduced regardless of whether the prosecutor was improperly advised of the defense, such that defendant suffered no prejudice and is entitled to no relief.

Defendant's arguments that he was denied a defense based on exclusion of expert testimony fail on similar grounds. He argues that the trial court violated his right to present a defense based on the use of the expert's testimony "because it is relevant to this defendant's state of mind," and that the trial court improperly limited his expert's testimony. As previously noted, defendant failed to follow the requirements in order to assert an insanity defense. Defendant argues that the prosecution had notice of the expert testimony, but this is not the same as providing the specific required notice under MCL 768.20a. Thus, all evidence related to involuntary intoxication was properly excluded. Additionally, Michigan has eliminated the diminished capacity defense, replacing it with an "all or nothing insanity defense." *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001). The *Carpenter* Court held that "the Legislature has demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Id.* Accordingly, any evidence which the expert intended to provide related to defendant's ability to form an intent was properly excluded under MCL 768.21(1) based on defendant's failure to provide notice of an insanity defense pursuant to MCL 768.20a(1). As such, it was proper for the trial court to limit the expert's testimony to generalized statements regarding effects of concussions, and not permit statements specifically related to defendant.

Defendant next argues that certain telephone conversations that took place between him and his wife that were recorded would have supported his defense, but because these recordings were destroyed, he was deprived of his right to present a defense. The failure to preserve evidence that may have exonerated a defendant does not constitute a denial of due process absent bad faith on the part of the police. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). We find no error, as the record in this case evidences no bad faith on the part of the police or the prosecution. On December 8, 2007, the inmate phone recording system failed. The jail contacted SBC who sent a technician to the jail on December 10, 2007. The technician worked all day, but was unable to solve the problem. On December 11, 2007, a technician from Dell was brought in and the technician replaced the hard drive and motherboard to the inmate phone recording system. The system was operational on December 12, 2007.

On December 11, 2007, a request was received for recorded inmate calls to and from defendant. On December 12, 2007, when the system was operational again, a member of the jail staff attempted to locate the requested recordings, but could not find them in the computer drive to which such recordings were normally archived. The employee made multiples calls on December 17 and 18 to SBC who had multiple technicians dial into the phone system to attempt to find the archived records. Ultimately, it was determined that the records archived prior to December 11, 2007 we no longer available because the hard drive had been replaced.

On December 26, 2007, the jail employee was requested to track down the malfunctioning hard drive that had been replaced. The employee contacted Dell's customer service and was informed that Dell had received the malfunctioning hard drive on December 13, 2007 and that, pursuant to its internal police, it retained the hard drive for three days, after which it was destroyed.

We note that there is no evidence that even if the hard drive had been retained, any information could have been retrieved. But, even assuming it could, we find no reason to impute the destruction of the hard drive by Dell to the police and prosecution, particularly where it is clear from the record that they worked diligently to try and obtain the requested evidence. Moreover, the mere destruction of evidence, even if intentional, does not require reversal so long as the purpose is not to destroy evidence before trial. *People v Hardaway*, 67 Mich App 82, 87; 240 NW2d 276 (1976). Defendant has not provided any facts evidencing that Dell intentionally destroyed telephonic evidence before trial for that purpose. Reversal is not required.

Finally, because our analysis has revealed no prejudicial errors, defendant's claim of cumulative error also fails. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (2000).

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro