

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM F. KEMP, JR.,

Defendant-Appellant.

UNPUBLISHED

December 22, 1998

No. 201880

Recorder's Court

LC No. 96-501951

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and was thereafter sentenced to 32 to 180 months' imprisonment as a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant appeals as of right and we affirm.

Defendant first argues that there was insufficient evidence presented at trial to show that he had the specific intent to injure or place the victim in reasonable fear or apprehension of an immediate battery. In reviewing a sufficiency of the evidence claim, this Court must view the evidence in a light most favorable to the prosecution and 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 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *Id.*, p 526.

The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). In this case, evidence of the assault was shown by defendant grabbing the victim and placing a knife to the right side of the victim's throat, and there was evidence that defendant kicked and hit the victim. There was additional testimony that defendant threatened to kill the victim. From defendant's grabbing of the victim and placing the knife to the victim's throat, the jury could have reasonably inferred that defendant intended to injure or place the victim in fear of an immediate battery. Thus, sufficient evidence was presented to establish all the elements of felonious assault beyond a reasonable doubt.

Defendant also argues that he could not have formed the intent to commit felonious assault because he was intoxicated. Although evidence was presented at trial that defendant had been drinking throughout the day of the alleged incident, sufficient evidence was presented that, despite defendant's intoxication, he formed the requisite intent to place the victim in reasonable apprehension of an immediate battery. *People v Strong*, 143 Mich App 442 453; 372 NW2d 335 (1985).

Defendant next argues that the trial court should have sua sponte given an instruction regarding intoxication. At trial, defendant testified that he did not place the knife at the victim's neck. Further, defendant's strategy was to attack the credibility of the victim because there was evidence that the victim was highly intoxicated at the time of the incident. Defendant also attacked the credibility of the prosecution's witnesses by pointing out their biases. However, defendant did not proffer an intoxication defense, nor did he request such an instruction, nor did he object to the trial court's instructions. Thus, this issue is reviewed only to determine whether the failure to give an intoxication defense instruction constituted manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494NW2d 737 (1993).

An instruction regarding the defense of intoxication is proper only if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great to render the defendant incapable of forming the requisite intent. *People v Mills*, 450 Mich 61, 82, 332; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). In the present case, while there was evidence that defendant had consumed beer and rum before the incident, there was no evidence that defendant was actually intoxicated, nor was there evidence that defendant was intoxicated to the point that he was incapable of forming the intent to commit the charged crime. See *id.*, pp 82-83; *People v Gomez*, 229 Mich App 329, 332-333; 581 NW2d 289 (1998). Rather, there was evidence that defendant did indeed form the requisite intent to be convicted of felonious assault.

Accordingly, because defendant did not proffer a defense of intoxication, did not request an instruction on the defense of intoxication, and because the evidence at trial does not support the notion that defendant was too intoxicated to be incapable of forming the intent to commit a felonious assault, there is no manifest injustice where no intoxication instruction was given at trial.

Lastly, defendant argues that trial counsel was ineffective for failing to request an intoxication defense instruction. Because we have already concluded that there was no evidence at trial that defendant was intoxicated to the point where he was incapable of forming the intent to commit a felonious assault, defendant was not prejudiced by trial counsel's decision to not request an intoxication instruction. *People v LaVearn*, 448 Mich 207, 213-216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Moreover, counsel presented a defense consistent with defendant's trial testimony, namely, that defendant claimed that he did not place a knife at the victim's neck, and counsel's strategy was to attack the credibility of the victim and the victim's witnesses. Therefore, trial counsel was not ineffective on this basis.

Affirmed.

/s/ Gary R. McDonald

/s/ Kathleen Jansen

/s/ Michael J. Talbot