STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 10, 2009
v	No. 284246 Wayne Circuit Court
MARVIN DAVID JENKINS, Defendant-Appellant.	LC No. 07-013351-FC

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] He was sentenced to concurrent prison terms of 16 months to four years for each assault conviction and to a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts

Defendant's convictions arose from allegations that after consuming alcohol and crack cocaine, he assaulted his neighbors, CP and KS, with a shotgun. Defendant admitted firing his shotgun on the day of the incident, but claimed that he fired it up in the air and had no intent to harm anyone. Teenagers CP and KS testified that in the late afternoon of September 2, 2006, they were sitting on KS's front porch when defendant pulled up in a van and said, "Are ya'll boys ready?" Defendant then got out of the van and said, "I'm talking about this," after which he took a sheet off a sawed-off shotgun, pointed the shotgun at CP and KS, pulled the trigger, and "was trying to shoot but the gun jammed." As KS and CP fled to the rear of KS's house, defendant retrieved another shotgun from his vehicle, moved toward them, and "starting shooting" at them. CP and KS went inside KS's house through a rear door and told KS's father, Anthony Powell, that defendant had shot at them. Eventually, Powell, CP, and KS looked out the front door and saw defendant shooting at two female neighbors as they fled. The two women testified that defendant made threatening statements. Powell beckoned the women into his

[1] Defendant was acquitted of additional charges of five counts of assault with intent to commit murder, MCL 750.83.

home. When defendant stopped shooting, he got into his vehicle and drove around the corner, but then returned and parked. He got out of his car armed with a shotgun and pointed the gun at CP and Powell, who were standing in the doorway. CP heard defendant say, "You think I won't shoot?" Defendant then fired one shot from about 25 feet away. Powell was hit in the face by buckshot and glass from his screen door. After defendant returned to his car, the police arrived and arrested him. From defendant's car, the police retrieved two loaded shotguns, ammunition, a six-inch butcher knife, and binoculars.

Defendant testified that after he and his girlfriend argued, he drove to a store and bought half a pint of rum alcohol, which he drank "straight down" as he sat in the car. He then purchased and used crack cocaine. Defendant always carried the sawed-off shotgun for protection, but retrieved the second shotgun from inside his home after using the alcohol and crack cocaine. He testified regarding a conspiracy to assassinate him by organized criminals. He explained that the "conspiracy" to kill him had existed since 1999. He further explained that people often followed him and, on the day of the incident, a man had followed him from the store, so he fired the shotgun up in the air as a warning. Defendant admitted firing one shot in the air toward "the kids," to call their bluff because they were heckling him. He further admitted that he told a female neighbor that "when he counted to three, she'd better run," because he was "upset" and "angry" with the people following him. He did not know the man who was following him, and did not see any of the people involved in the conspiracy outside during the shooting. He admitted that the complainants were not involved in the conspiracy to assassinate him, and he had no problems with any of them. In testifying that he had no intent to kill, defendant explained that he could have easily shot the complainants given his weapon and his distance from them.

II. Refusal to Allow the Defense of Criminal Insanity

Defendant argues that the trial court erred in denying his request to show that his mental illness was a defense that negated his specific intent to commit the crime. We disagree.

A. Background

Before trial, defendant was evaluated for competency at the Department of Community Health Center for Forensic Psychiatry. The evaluator opined that defendant was mentally ill, but was not legally insane, and that defendant was competent to stand trial. On the first day of trial, defense counsel asserted that defendant had "deteriorated," and argued that he was not competent to proceed to trial. He noted that defendant was found mentally ill, but "his inhibitions were lowered by his use of drugs and alcohol." Defense counsel stated that defendant "did not want an independent evaluation." The prosecutor argued that there was no evidence that defendant was insane. The prosecutor noted that defendant had been evaluated and found mentally ill, but not criminally insane, because he was under the influence of voluntarily consumed alcohol and controlled substances. The trial court denied defendant's request, noting that defendant was found competent to stand trial. Defense counsel then requested that the defense be permitted to obtain an expert witness to determine if alcohol use or insanity was involved in this case. The trial court ruled that there was nothing to substantiate an insanity defense and that defendant had waived the issue by refusing further evaluation. However, the court directed the parties to research the issue. When the matter was brought up after jury selection, the prosecutor indicated, "we've resolved the insanity issue. I don't think that the jury can get the defense of insanity

because he hasn't been determined to be insane." The court also ruled that voluntary intoxication is not a defense.

On the second day of trial, defense counsel argued that voluntary intoxication negated defendant's specific intent to commit the crime. The trial court ruled that defendant's voluntary consumption of alcohol and crack cocaine prohibited him from using intoxication as a defense. At the close of proofs, defense counsel again indicated that defendant was "deteriorating," argued that he was not competent to assist him at trial, and requested a mistrial and referral back to the forensic center for a competency evaluation. In response, the prosecutor stated:

> Your Honor, this man knows what's going on. This man has assisted his lawyer in giving him details and fact[s] about how certain witnesses testified. He knows who the parties are. He knows their first and last names. He has assisted his lawyer. I've watched him. And it appears that he's given him information to assist with the defense in this case. He is trying to convince this jury that he didn't have the requisite intent. I think all these factors together prove that he's competent. That he knows what he's doing. And that he's looking for a defense in trying to not be found guilty and accountable for what he did.
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> He's competent, your Honor, and his actions in the courtroom with regard to talking to people in this audience, I think are part of his malingering or his attempts to make us believe that he's not. But when he sat in the stand, he testified he recalled those facts, Judge. I think it was evident that he knows and was able to assist his counsel in these proceedings.
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> *The court*: And I totally agree with the prosecution on that issue, and I'm not going to declare a mistrial at this time.

B. Analysis

The test for criminal insanity is set forth in MCL 768.21a(1), which provides, in pertinent part:

> An individual is legally insane if, as a result of mental illness as defined in section 400a of the mental health code,[2] . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness . . . does not otherwise constitute a defense of legal insanity.

"The defendant has the burden of proving the defense of insanity by a preponderance of the evidence." MCL 768.21a(3).

[2] MCL 330.1400(g) defines "mental illness" as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."

A trial court has no discretion to deny a psychiatric examination by the Center for Forensic Psychiatry under MCL 768.20a(2), but a second independent psychological examination is not mandatory. MCL 768.20a(3). Defendant requested, and received, an examination, and was found competent to stand trial. Defendant does not assert any irregularity with the forensic center's evaluation that required the trial court to take action. Further, defendant did not make a good-faith effort to avail himself of the right to present an insanity defense at trial. Defense counsel informed the court that defendant "did not want an independent evaluation." Throughout trial, defendant consistently maintained that he only fired the shotgun up in the air and had no intent to harm anyone; he did not argue that he lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law. Defendant testified coherently, maintained that he had "common sense" and that he was "coherent" at the time of the offenses, and stated that he is "not crazy like they trying -- I'm glad they said you can't use insanity, because I was not crazy." In response to questioning by the prosecutor, defendant maintained that he knew what he was doing and, although what he did was "stupid," he was "not stupid." Defendant explained his actions and that he had no intent to harm anyone; he testified that he "underst[oo]d that [he] had a gun in [his] hand and [he] was shooting up in the air." Even on appeal, defendant has not provided any affidavits or other documentation indicating that he had any medical or psychological condition at the time of the offenses to support that further exploration of insanity was warranted.

With regard to intoxication, defendant relies on a reference in the forensic center evaluation, which defendant has not provided to this Court, that "[b]ut for the consumption of alcohol if [defendant] had been sober at the time [the evaluator] would have found that he was insane." This statement does not provide the basis for a diagnosis of criminal insanity. Additionally, we note that defendant admitted that he had consumed half a pint of alcohol and used crack cocaine immediately before the incident. Voluntary intoxication cannot form the basis for an insanity defense. MCL 768.21a(2). Reversal is unwarranted.

III. Refusal to Instruct on Self-Defense

Defendant further argues that the trial court erred in refusing to instruct the jury on self-defense. We disagree. Although this Court reviews questions of law pertaining to jury instructions de novo, a trial court's decision whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

At trial, defense counsel argued that a self-defense instruction was appropriate because defendant believed that there was a conspiracy to kill him, that his female next-door neighbor was harboring the men involved in the conspiracy, and that he was trying to "scare them off." The trial court denied the request. We agree that defendant's testimony, coupled with the other evidence, effectively precluded a self-defense instruction in this case. A successful claim of self-defense "requires both an honest and reasonable belief that the defendant's life was in imminent danger or that there was a threat of serious bodily harm," *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995), and use of only an amount of force necessary to defend oneself, *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). During his testimony, defendant admitted that the people who allegedly wanted to assassinate him were not outside on

the day of the shooting and that he had no problems with the complainants. Defendant did not testify that he was in fear of imminent danger from the complainants or anyone in their group. None of the complainants had weapons or threatened defendant. In fact, defendant's testimony showed that he was the aggressor. Defendant admitted that he fired his weapon, but claimed that he shot in the air and did not have an intent to kill. The evidence clearly did not support a claim of self-defense. Consequently, the trial court properly declined to instruct the jury on self-defense.

IV. Imposition of Fees, Costs, and Restitution without Considering Ability to Pay

Defendant argues that pursuant to *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), overruled by *People v Jackson*, 483 Mich 271; ___ NW2d ___; 2009 WL 2003216 (2009), the trial court erroneously ordered him to pay $600 in court costs, $60 in victim-rights fees, and $400 in attorney fees without inquiring into his current or future ability to pay. Because defendant failed to challenge the imposition of attorney fees, costs, or restitution below, we review this unpreserved claim for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

The *Dunbar* case cited by defendant has been overruled. In *Jackson*, *supra*, 2009 WL 2003216 at 7, the Supreme Court held that a defendant is not entitled to an ability-to-pay analysis until the imposition of an attorney fee is enforced. Accordingly, the trial court did not err in assessing an attorney fee without conducting an ability-to-pay analysis. See *id*. at 10.

We also decline to remand with respect to court costs or victim-rights restitution. First, we note that defendant cites no authority pertaining to court costs or victim-rights restitution. Also, we note that the trial court has express authority to assess any costs at sentencing pursuant to MCL 769.1k(1)(b)(ii). With regard to the victim-rights assessment, the Crime Victim's Rights Act, MCL 780.766(2), requires a defendant to "make full restitution to any victim of the defendant's course of conduct . . . ." The restitution statute, MCL 780.767(1), provides that "[i]n determining the amount of restitution . . . the court shall consider the amount of the loss sustained by any victim as a result of the offense." A 1997 amendment of MCL 780.767 removed all references to ability to pay as a factor to be considered when determining the amount of restitution. *People v Crigler*, 244 Mich App 420, 428; 625 NW2d 424 (2001). Under the amended statute, the "'amount of the loss sustained' is now the only factor to be considered." *People v Gubachy*, 272 Mich App 706, 711; 728 NW2d 891 (2006), quoting MCL 780.767(1). Defendant has not established a plain error with respect to the trial court's assessment of court costs and restitution.

V. Accuracy of the Presentence Report

Defendant lastly argues that the trial court erred by failing to "entirely delete" inaccurate information from his presentence report. We disagree. At sentencing, defendant challenged the information in the "Evaluation and Plan" section of the report that indicated that he was an "Honorable Discharge from the U.S. Marines in 1982." Defendant explained that he was generally discharged in 1985. In response, the trial court struck the inaccurate information and noted that defendant was "generally" discharged in "1985." These corrections are reflected in the copy of the presentence report that was forwarded to this Court. Thus, the record indicates that the trial court resolved the challenge to the accuracy of the presentence report. *People v*

Uphaus (On Remand), 278 Mich App 174, 182; 748 NW2d 899 (2008). No further action is warranted.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia Diane Stephens