

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS MURRAY DANIELS,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 200330

Bay Circuit Court

LC No. 94-001102

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant appeals by leave granted from his jury conviction for assault with intent to murder, MCL 750.83; MSA 28.278. This conviction arose from a confrontation outside a bar in Bay City in which defendant stabbed the complainant in the chest with a pair of scissors. Defendant was sentenced to 100 to 500 months' imprisonment for this conviction, but failed to timely appeal his conviction. He moved for relief from judgment in the trial court, which was denied by the trial judge's successor. Defendant then applied for leave to appeal, which was initially denied, but after defendant moved for rehearing this Court granted his application.

Defendant first claims that the trial court failed to properly instruct the jury on specific intent or the defense of voluntary intoxication. Defendant failed to object to the jury instructions he now challenges on appeal. This claim is therefore not preserved. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). In the absence of a proper objection, claims of instructional error will only be reviewed for manifest injustice. *Id.* at 545.

Jury instructions must be read in their entirety. *People v Dye*, 356 Mich 271, 279; 96 NW2d 788 (1959). As this Court stated in *People v Bender*, 124 Mich App 571, 574-575; 335 NW2d 85 (1983):

Even though instructions may be somewhat imperfect, there is no error if they "fairly presented to the jury the issues to be tried and sufficiently protected the rights of [the] defendant." *People v Kalder*, 284 Mich 235, 241-242; 279 NW2d 493 (1938). No

error results from the omission of an instruction if the charge as a

whole covers the substance of the omitted instruction. *People v Derrick Bradley*, 62 Mich App 39; 233 NW2d 177 (1975); *People v Rocha*, 36 Mich App 132; 193 NW2d 198 (1971).

The trial court instructed the jurors here that to find defendant guilty of assault with intent to murder, they had to find that defendant had the intent to kill the complainant. The court further defined for the jury the various ways in which an assault could be accomplished. Next, the court highlighted again that assault with intent to murder required that the prosecutor prove that defendant had an intent to kill and that a person's intent could be proven by what was said, what was done, and by other facts and circumstances in evidence. Finally, the court admonished the jury that one of the "other facts and circumstances" they should consider in determining the element of intent was whether defendant's mental faculties were overcome by intoxication and thus, whether he "could or did form a particular intent." These instructions were sufficient to "cover the substance of the omitted instruction." *Bender*, *supra* at 575. Therefore defendant, in our judgment, has failed to demonstrate manifest injustice.

Defendant next claims that the comments of a prospective juror during voir dire (to the effect that defendant may have been an individual who had previously broke into her storage locker) tainted the entire jury venire and constituted an error so egregious that defendant was deprived of his right to a fair and impartial jury. Again defendant waived consideration of this claim because he failed to object to the juror's comments at the time they occurred and subsequently expressed satisfaction with the jury panel without having utilized all of his peremptory challenges. *People v Hubbard (After Remand)*, 217 Mich App 459, 466, 467; 552 NW2d 493 (1996); *People v DePlanche*, 183 Mich App 685, 691; 455 NW2d 395 (1990). Since defendant failed to make a proper objection, the issue is not preserved and review may only be for manifest injustice. *Van Dorsten*, *supra* at 544-45.

Defendant presents no evidence to suggest that the entire jury venire was "tainted" by the juror's comments. Any such taint is unlikely, given the prosecutor's statement to the juror (and the rest of the venire) that other individuals had been arrested and charged with that particular crime and that defendant had been misidentified by the juror. Additionally, the trial court's instruction to the jurors that they must decide the case based on the evidence (an instruction that was given both at the beginning and the end of the trial) was sufficient to eliminate any possible prejudice that might have lingered as a result of the juror's comment. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Finally, defendant exercised a peremptory challenge to dismiss the juror from the jury panel. Given that she was not on the jury that decided defendant's guilt or innocence, the likelihood that her concerns affected the jury in any way was minimal. Defendant has thus failed to demonstrate that manifest injustice occurred here as a result of the juror's statement.

Defendant next claims that the evidence was insufficient to establish that he intended to kill the complainant. This Court reviews claims of insufficient evidence de novo using the standard summarized in *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992):

[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.

Here, defendant had initiated a confrontation with the complainant earlier in the evening. He subsequently renewed this confrontation, claiming that the complainant had been responsible for having him thrown out of a bar. Defendant specifically stated that that he was going to kill the complainant, and after he had stabbed him in the chest defendant stated that the complainant was “gonna die.” Defendant initially had his hands in his pockets, but he withdrew them immediately before the assault. It was at this point that the complainant’s companion observed the blades of a pair of scissors protruding from defendant’s fist. The jury could thus infer that defendant had removed the scissors from his pocket. Arming himself with a dangerous weapon prior to committing an assault evidences an aggressive intent consistent with an intent to kill. Defendant further fled from the scene after committing the assault and attempted to dispose of the weapon he had used in the assault when the police apprehended him. See *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995)(evidence of flight is admissible to indicate consciousness of guilt).

Defendant focuses on the damage actually inflicted and, because it proved to be relatively minimal, asks this Court to conclude that he did not possess the intent to kill. However, the focus of the charged crime is on the intent with which a defendant acts, not on the results of his acts. Clearly, the more deadly the assault, the easier it is to conclude that the intent behind the assault was murderous. However, an “unsuccessful” assault does not absolve a defendant who otherwise exhibits an intent to kill. Considered in a light most favorable to the prosecution, the evidence presented by the prosecution was sufficient to establish the requisite intent to kill.

Defendant next claims that his sentence was disproportionate. This Court reviews this claim to determine if the trial court abused its discretion by imposing a sentence that was not proportionate to the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The trial court imposed a minimum sentence that was within the sentencing guidelines range and was, in fact, at the bottom end of the range. Sentences within the sentencing guidelines range are presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). In order to overcome this presumption, a defendant must present sufficient mitigating factors to establish that the trial court abused its discretion. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant notes that he has no prior felony convictions and no juvenile record. He also claims that he has struggled most of his adult life with alcoholism. These factors are not sufficiently unusual to overcome the presumption that a sentence at the low end of the sentencing guidelines recommended range was proportionate. Defendant had three prior misdemeanor convictions, one for drug possession, one for a property damage offense, and a final incident involving convictions for retail fraud and assault and battery. Defendant has an admitted history of substance abuse. He has tried on numerous occasions to attend programs for substance abuse, but has consistently either failed to complete these programs or has relapsed shortly after completing them. Defendant has a spotty and inconsistent employment record. With respect to the present incident, defendant provoked the confrontation and then utilized a dangerous weapon in a potentially deadly attack. Under the circumstances, we cannot say that the trial court abused its sentencing discretion or that the sentence imposed was disproportionate.

Defendant next contends that his sentence constitutes cruel and unusual punishment. In *People v Terry*, 224 Mich App 447, 456; 469 NW2d 641 (1997), this Court stated:

[A] proportionate sentence is not cruel or unusual. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Because defendant's sentence is proportionate, his claim must fail.

Because this Court has concluded that defendant's sentence is proportionate, there is no basis upon which to consider defendant's constitutional claim.

Defendant next claims that he was denied a fair trial by the trial court's comments in front of the jury concerning the manner in which defendant's counsel was cross-examining a witness. Defendant did not object to the trial court's comments below. He has therefore failed to preserve this issue for review. MRE 614(c); *People v Sardy*, 216 Mich App 111, 117-18; 549 NW2d 23 (1996). Review of this issue can only be for manifest injustice. *Van Dorsten, supra*, at 544-45. To determine whether there was error, this Court reviews the trial court's comments to determine "whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996); *People v Davis*, 216 Mich App 47, 49-52; 549 NW2d 1 (1996).

The trial court here did not act in a manner that suggested partiality and its comments could not have influenced the jury to the detriment of defendant's case. The trial court's comments make it clear that the court correctly believed there was a problem with the form of defendant's cross-examination. The trial court has both the right and the responsibility "to limit the introduction of evidence and the arguments of counsel to relevant and material matters, MCL 768.29; MSA 28.1052, and to assure that all parties that come before it receive a fair trial." *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996); MRE 611(a). The record indicates that the trial court's only concern was that counsel not attempt to suggest that the witness had made prior inconsistent statements when the preliminary examination transcript showed that he had not. Considered in the context of the case and in light of the overwhelming (and essentially undisputed) evidence that defendant stabbed the victim with a pair of scissors, even if the trial court's comments constituted error, this error could not be said to have constituted manifest injustice.

Defendant next argues that the cumulative effect of the claimed errors requires reversal of his conviction. Determination of the effect of cumulative error by an appellate court requires an independent assessment of the total impact of any errors found during appellate review. "Although one error in a case may not necessarily provide the basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to reversible error." *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984). "In making this determination, only actual errors are aggregated to determine their cumulative effect." *People v Bahoda, supra* at 292 n64. Defendant has failed to establish error with respect to any of the claims he presents on appeal. Therefore, the cumulative effect of these unsubstantiated claims cannot establish error requiring reversal. *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Defendant next claims that he was denied a fair trial when he was forced to appear before the jury in his jail clothing. Defendant failed to make a timely due process objection to wearing jail clothing on the first day of trial. When he did lodge a generalized “denial of constitutional rights” objection on the second day, defendant was already dressed in civilian clothing. Accordingly, he has failed to preserve this issue. *People v Shaw*, 381 Mich 467, 474-75; 164 NW2d 7 (1969). Moreover, defendant fails to engage in any legal analysis regarding this claim. “[B]ecause defendant does not argue the merits of this issue in his brief, we consider this issue abandoned.” *People v Canter*, 197 Mich App 550, 565; 496 NW2d 336 (1992). We note, however, that if defendant had not desired to wear jail clothing during the jury voir dire, he was presented with the opportunity to request a continuance to permit him to obtain other clothing. Instead of doing this, defendant asked to proceed with the trial and have the court admonish the jury that it was not to consider defendant’s clothing. The trial court gave such an instruction. Defendant cannot request one course of action in the trial court and then claim on appeal that the trial court committed error because it followed defendant’s request. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Further, at the time the matter was first brought up, the trial court (which was in the best position to view defendant) stated that the jury probably could not see anything except defendant’s shirt and that there was nothing about the appearance of the clothing that would indicate that defendant was in jail. See *People v Harris*, 201 Mich App 147, 151-2; 505 NW2d 889 (1993). Finally, even if the jury could discern that defendant was being held in jail, defendant has failed to explain how that knowledge caused him unfair prejudice. During the course of the trial, the jury learned that defendant had been arrested by the police and lodged in jail. That he was still in jail at the time of trial could not have been much of a surprise and could not have prejudiced defendant more than the evidence presented against him at trial already had. Accordingly, defendant has failed to establish error requiring reversal.

Defendant finally claims that his trial counsel failed to provide effective assistance because he failed to make a timely objection to the fact that defendant was wearing jail clothes, failed to timely object to the comments made during voir dire by a prospective juror, failed to move for a directed verdict, and failed to object to the jury instructions on specific intent and on voluntary intoxication. Defendant did not move for a new trial or for a remand so this Court’s review is limited to facts apparent on the record. *People v Fike*, 228 Mich App 178, 181; ___ NW2d ___ (1998). This legal issue is reviewed de novo on appeal applying the test in *People v Pickens*, 446 Mich 298, 302-03; 521 NW2d 797 (1994): “ a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial . . . ” This Court has separately considered each allegation of ineffective assistance above and found no error. Defendant has therefore failed to carry his burden of demonstrating deficient performance and prejudice. *Id.*

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Richard A. Bandstra
/s/ Stephen J. Markman