

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT BUZANOWSKI,

Defendant-Appellant.

UNPUBLISHED
December 9, 1997

No. 191843
Recorder's Court
LC No. 95-001042-FH

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

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of firearm during the commission or attempted commission of felony, MCL 750.227b(1); MSA 28.424(2)(1). Defendant was sentenced to five and a half to ten years in prison for assault with intent to do great bodily harm and two years for felony-firearm, the two sentences to run consecutively. We affirm.

Defendant's first issue on appeal is that the trial court erred in denying the motion to suppress the photographic lineup where defendant was in custody. We disagree. Defendant preserved this issue for review by filing a motion to suppress the identification and therefore the trial court's decision to admit the evidence is reviewed for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Complainant had been in a hospital from December 22, 1994, until January 3, 1993, following defendant's alleged assault. When Officer Maxwell came to the hospital with the photographic lineup, he was informed that complainant was going to be released later that day. However, he was further informed that the complainant "was still going to be house ridden due to his wounds. He wasn't going to be able to get out and about." Under these circumstances, we do not believe that the trial court's decision to admit the identification evidence was clearly erroneous. *People v Herndon*, 98 Mich App 668, 671; 296 NW2d 333 (1980).

Defendant's second issue on appeal is that the trial court erred in denying defendant's motion for resentencing because defendant's guidelines were improperly scored. Defendant does not state a cognizable claim in this issue. The guidelines are tools for calculating criminal

sentences and do not convey substantive rights. *People v Potts*, 436 Mich 295, 303; 461 NW2d 647 (1990). Thus, a claim of a miscalculated variable is not by itself a claim of legal error. *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997).

Defendant's third issue on appeal is that his trial counsel was ineffective for failing to investigate or present any alibi witnesses and for advising defendant to admit guilt and show remorse despite his claims of innocence. We disagree. Because defendant failed to fully preserve this issue for our review by moving for a new trial or an evidentiary hearing in the trial court, our review is limited to errors by counsel evident in the existing trial record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Defendant first claims that his trial counsel failed to present an alibi defense and thus was ineffective. Trial counsel's failure to call witnesses only constitutes ineffective assistance of counsel if the failure deprives defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.* Defendant did file a notice of intent to present an alibi defense on October 9, 1995, listing three names; however, the record is entirely silent as to what the testimony of those people would have been. Thus, there is no evidence that defendant was prejudiced or otherwise deprived of a substantial defense.

Defendant next claims that, despite his claim of innocence, he was advised by trial counsel to admit responsibility and show remorse in order to procure a lighter sentence. Since this issue was not completely preserved, our review is limited to the record and the record does not indicate that trial counsel at any time encouraged defendant to behave in such a manner.

Defendant's final issue on appeal is that the trial court erred in imposing a sentence for the assault with intent to commit great bodily harm in excess of the statutory maximum. We disagree. The statutory maximum for this offense is ten years. MCL 750.84; MSA 28.278. Although the trial court stated at sentencing that defendant was being sentenced to five and a half to fifteen years for assault with intent to do great bodily harm, the judgment of sentence states that defendant is sentenced to five and a half years to ten years for that conviction. The oral statement of the trial court is superseded by the court's written judgment because a court ultimately speaks through written judgments and orders rather than oral statements. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). Thus, the trial court's sentence was properly within the statutory limits.

Affirmed.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman