

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY LAMARR COCHRANE,

Defendant-Appellant.

UNPUBLISHED

September 27, 2007

No. 267151

Oakland Circuit Court

LC No. 2005-202149-FC

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of assault with intent to commit murder, MCL 750.83; felonious assault, MCL 750.82; second-degree child abuse, MCL 750.136b(3); discharge of a firearm in a building, MCL 750.234b; four counts of possession of a firearm during the commission of a felony, MCL 750.227b; domestic assault, MCL 750.81(2); and assault and battery, MCL 750.81(1). The trial court sentenced defendant to 30 to 50 years in prison for the assault with intent to commit murder conviction, 17 to 48 months in prison for the felonious assault conviction, 17 to 48 months in prison for the child abuse conviction, 17 to 48 months in prison for the discharge of a firearm in a building conviction, four terms of two years in prison for the felony-firearm convictions, 93 days in jail for the domestic assault conviction, and 93 days in jail for the assault and battery conviction. We affirm.

I. Factual and Procedural Background

A. Factual History

Defendant lived in an apartment in Oak Park with his wife, Julie Cochrane, and their two children.¹ As a result of his service with the United States Army in Desert Storm in 1991, defendant suffered from posttraumatic stress disorder. Defendant had been using Tylenol-3, Tylenol-4, Soma, and illegally obtained Xanax. Between 9:30 and 10:30 a.m. on February 13, 2005, Julie arrived home after working a midnight shift at a post office. Defendant and the children were all in the apartment when Julie arrived. Defendant and Julie got into a lengthy

¹ Julie Cochrane has since divorced defendant and changed her name to Julie Smith.

argument, lasting several hours. Defendant struck Julie and the younger child during the course of the argument. Defendant claimed that, after striking Julie and the younger child, he took some Xanax, Soma, and Tylenol-3. Then defendant sent the older child to the store to purchase cigarettes.

Shortly thereafter, defendant shot Julie, who was seated, seven times with a semi-automatic SK-47 assault rifle. Julie sustained gunshot wounds in her left shoulder, left elbow, right arm, hip, and midsection. Julie was in the hospital until March 9, 2005, when she was transferred to a rehabilitation facility, where she recovered until April 5, 2005. At the time of trial, Julie was waiting until her internal injuries had finished healing before she could undergo shoulder and elbow replacement surgeries. Defendant testified at trial and admitted that he shot Julie, but denied that he intended to kill her. Although defendant claimed he was an expert marksman, he indicated that he did not shoot to kill Julie because he was not focused on what he was doing. Rather, defendant claimed that he had been in a “haze” from the drugs and snapped out of it after he shot her and everything became clear.

After shooting Julie, defendant approached the younger child, who was in his bedroom, pointed the gun at him, and asked him if he had any questions. The younger child shook his head, and defendant turned the gun on himself and fired. Defendant fired two bullets toward his head and one toward his chest, fully aware that the younger child was watching him. At least one of these gunshots actually hit defendant, and he received treatment. One of the bullets went into the ceiling, into an occupied apartment. Defendant admitted at trial that he intentionally fired the rifle in the younger child’s room, knowing that there was an occupied apartment upstairs. In fact, Naomi Ashford, the upstairs neighbor, was sitting in her bedroom studying when the bullet came through the floor and landed in her ceiling. Defendant threw the gun aside and went to help Julie, and the younger child called the police.

Julie told the police that defendant had tried to kill her, and defendant admitted to two police officers that he had shot Julie. The police indicated that blood and body tissue were on the walls, ceiling, and floor throughout the apartment. The police discovered a bullet hole in the ceiling of the younger child’s bedroom and, in the upstairs apartment, they found a matching bullet hole in the floor and located a bullet lodged in the ceiling.

B. Procedural History

Defendant was charged with assault with intent to commit murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84 (as an alternative to the assault with intent to commit murder charge), felony-firearm, MCL 750.227b, domestic assault MCL 750.81(2), and assault and battery, MCL 750.81(1). On May 5, 2005, at the time set for the preliminary examination, defendant conditionally waived his right to a preliminary examination and indicated that he would enter either a guilty or no contest plea. The prosecutor explained that, if defendant failed to do so, either party would be free to request a remand for a preliminary examination. Defense counsel acknowledged that there were additional charges the prosecutor could bring and that there was a benefit to waiving the preliminary examination. The district court found that defendant’s waiver was knowing and voluntary and bound the case over to the circuit court on all five charges. The prosecutor then filed a felony information, identifying the same charges as the felony complaint.

On May 12, 2005, the date scheduled for the arraignment before the circuit court, the prosecutor stated his intent to dismiss the assault with intent to do great bodily harm charge. Defendant was not ready to enter a guilty or no contest plea at that time, and the prosecutor stated that, if he failed to plead as agreed at the next pretrial hearing, the prosecutor intended to request a remand to the district court to add additional charges. At a pretrial hearing on June 2, 2005, defendant explained that he was not willing to enter a guilty or no contest plea and wished to request a preliminary examination. Defense counsel explained that this decision was against his advice. Both parties requested a remand to the district court. The circuit court entered an order remanding the case to the district court for a preliminary examination. The prosecutor filed an amended complaint, adding charges of felonious assault, MCL 750.82, second-degree child abuse, MCL 750.136b(3), discharge of a firearm in a building, MCL 750.234b, and three additional counts of felony-firearm, MCL 750.227b. Following a preliminary examination on June 9, 2005, the district court bound defendant over to the circuit court on all counts. The prosecutor filed a new felony information, identifying the same charges as the amended complaint.

At a subsequent pretrial hearing, defendant waived his right to a jury trial. Under oath, defendant stated that he was 40 years old, was literate, had a 12th grade education, and was able to hear and understand the trial court and his attorney. Defendant agreed that he understood the pending charges, and he assented when asked if he understood that he had the right to a trial by jury of 12 and a unanimous verdict. Defendant stated that he understood the difference between a jury trial and bench trial, specifically, that the judge would be the only decision maker at a bench trial. The circuit court found that defendant had “knowingly, voluntarily and understandingly waived his right to a jury”

II. Prosecutorial Vindictiveness

A. Standard of Review

Defendant argues that he was denied his due process rights by the prosecutor’s vindictiveness in charging additional crimes after defendant opted to request a preliminary examination. We disagree.

Because defendant failed to raise this issue before the trial court, it has not been properly preserved for appellate review, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), and will be reviewed for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was clear or obvious; and (3) the error affected defendant’s substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005).

B. Plea Negotiations

Prosecutorial vindictiveness occurs when a prosecutor violates a criminal defendant’s due process rights by prosecuting him for asserting a protected statutory or constitutional right. *People v Ryan*, 451 Mich 30, 35-36; 545 NW2d 612 (1996); *People v Dewald*, 267 Mich App 365, 384; 705 NW2d 167 (2005). The two types of prosecutorial vindictiveness are presumed vindictiveness and actual vindictiveness, and defendant asserts actual vindictiveness in the

instant case. *Ryan, supra* at 36. Actual vindictiveness occurs when there is objective evidence of an expressed hostility or threat that suggests that the defendant was deliberately punished for the exercise of a protected right. *Id.* However, a prosecutor's mere threat of additional charges during the plea negotiation process does not constitute actual vindictiveness if the additional charges are within the prosecutor's charging discretion. *Id.*

On May 5, 2005, when defendant conditionally waived his right to a preliminary examination, he agreed to enter either a guilty or no contest plea. Defendant was aware that, if he failed to do so, there were additional charges the prosecutor could bring and that there was a benefit to waiving the preliminary examination. On May 12, 2005, defendant was again informed that, if he failed to plead to the charges as agreed, the prosecutor would add additional charges. When defendant insisted on requesting the preliminary examination, it was against the advice of counsel. The record reveals no evidence that the prosecutor expressed any hostility or threats to suggest that defendant was deliberately punished for exercising his right to a preliminary examination and ensuing trial, and the additional charges were in the prosecutor's charging discretion. *Ryan, supra* at 36; *People v Jones*, 252 Mich App 1, 8; 650 NW2d 717 (2002). Therefore, defendant has failed to show that he was denied due process by the additional charges.

III. Ineffective Assistance of Counsel

A. Standard of Review

Defendant also contends that his trial counsel was ineffective in failing to object to the prosecutor's allegedly vindictive actions. We disagree.

Because defendant failed to file a motion for a new trial on these grounds or request a *Ginther*² hearing, defendant's allegation of ineffective assistance of counsel has not been preserved for appellate review, and our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*

B. Counsel's Performance

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Because the prosecutor's conduct was not improper, counsel was not ineffective for failing to object. Defense counsel is not required to make futile objections. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002).

² *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

IV. Jury Trial Waiver

A. Standard of Review

Defendant argues that he was denied due process because his jury trial waiver was not voluntary. We disagree. A trial court's findings regarding the validity of a defendant's waiver of his right to a jury trial are typically reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997), habeas corpus relief granted on other grounds 256 F Supp 2d 723 (2003). However, because defendant failed to raise this issue before the trial court, it has not been properly preserved for appellate review, *Grant, supra* at 546, and will only be reviewed for plain error affecting substantial rights, *Carines, supra* at 761-764.

B. Voluntariness of Waiver

At the outset, we note that this Court denied defendant's motion to remand for an evidentiary hearing regarding this issue. *People v Cochrane*, unpublished order of the Court of Appeals, entered June 4, 2007 (Docket No. 267151). On appeal, defendant submitted an affidavit in which he averred that the only reason he waived his right to a jury trial was because trial counsel had advised him that "the trial court would 'slam [him]' at sentencing if a jury convicted [him], and [he] was afraid to exercise [his] constitutional right to a jury trial." Defendant also submitted a letter from trial counsel to appellate counsel explaining the circumstances surrounding the waiver. Trial counsel asserted that the only reasonable decision defendant made was to waive his right to a jury trial and admitted that he had advised defendant that "wasting the Court's time with a jury trial could increase the Defendant's sentence." However, these documents are not part of the lower court record, and considering them would constitute an improper expansion of the record on appeal. MCR 7.210(A)(1); *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004).

Both the United States and Michigan constitutions guarantee a criminal defendant the right to a jury trial. US Const, Ams VI, XIV; Const 1963, art 1, § 20. MCR 6.401 provides that a criminal defendant may, with the prosecutor's consent and the trial court's approval, waive this right and "be tried before the court without a jury." MCR 6.402(B), which governs the waiver of a jury trial, provides:

Waiver and Record Requirements. Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

If the record establishes that the trial court complied with the court rule, there is a presumption that the waiver was knowing, voluntary, and intelligent. *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003). The record shows that the trial court advised defendant of his right to a jury trial and that defendant understood that to mean a unanimous verdict from a jury of 12 members of the community. Defendant agreed that he understood the pending charges and that giving up his right to a jury trial meant that the judge would be the only decision maker at trial.

Defendant claims that his waiver was not voluntary because trial counsel indicated that the trial court would be less favorable at sentencing if defendant were convicted following a jury trial. In *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998), the defendant similarly argued that his jury trial waiver was not voluntary because it was based on trial counsel's representation that he would receive a harsher sentence if he were convicted following a jury trial. The *Godbold* Court recognized that defense counsel's advice "was based on reality and is neither uncommon nor improper." *Id.* at 513. This Court concluded that a waiver based on such advice was neither involuntary nor coerced; rather, the Court characterized it as "informed." *Id.* at 514. Further, a trial court is not required to inquire about whether a defendant waiving his right to a jury trial was threatened or promised anything in exchange for the waiver. *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). Accordingly, defendant has failed to show that his jury trial waiver was involuntarily made.

V. Sentencing

A. Standard of Review

Defendant argues that the trial court erred when it departed from the statutory sentencing guidelines minimum range because it relied on facts that were not proven beyond a reasonable doubt, in an alleged violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. Because defendant raises this issue for the first time on appeal, it is unpreserved and will be reviewed for plain error affecting substantial rights. *Carines, supra* at 761-764.

B. *Blakely v Washington*

The *Blakely* decision provides that any fact, other than that of a prior conviction, that increases a criminal sentence beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Blakely, supra* at 301, applying *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). The Michigan Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing system. *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006), cert den ___ US ___; 127 S Ct 592; 166 L Ed 2d 440 (2006); *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004); *People v McCuller*, ___ Mich ___; ___ NW2d ___; 2007 WL 2141267 (2007). Because the maximum sentence in Michigan is set by statute – not determined by the trial court – Michigan's sentencing guidelines create a range within which the trial court must impose a minimum sentence, and the trial court's sentence will never exceed the maximum sentence that the jury's verdict authorizes. See *Drohan, supra* at 161. Further, departures from the minimum sentencing guidelines range are not affected by *Blakely*. *Id.* at 162 n 15. In the instant case, the statutory maximum for assault with intent to commit murder is life in prison, and defendant's sentence of 30 to 50 years in prison is less than that maximum. MCL 750.83. Therefore, defendant's argument is misplaced.

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter