

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS ANTHONY JOHNSON,

Defendant-Appellant.

UNPUBLISHED

May 12, 2011

No. 296459

St. Clair Circuit Court

LC No. 09-001991-FC

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to commit murder, MCL 750.83, unarmed robbery, MCL 750.530, and unlawful imprisonment, MCL 750.349b. The trial court imposed concurrent sentences of imprisonment of 18½ to 30 years for the assault conviction, and 7 to 15 years each for the robbery and unlawful imprisonment convictions. We affirm.

I. FACTS

The prosecution presented evidence that defendant and others, including defendant's then-girlfriend, Colleen Sturdevant, schemed to rob someone, identified the victim, and then drove him to various locations, where they beat him repeatedly and took his clothes and other possessions. At trial, Sturdevant testified that at the last location where the victim was assaulted, defendant stomped on the victim's neck, applying the full weight of his body. Defendant denied standing on the victim's neck. Sturdevant additionally testified that defendant commanded her to retrieve a bottle, which Sturdevant broke and used to cut the victim's neck. Defendant denied ordering Sturdevant to get the bottle. In the days after the assault, defendant sent text messages to his friends that he had killed someone.

II. LIMITATIONS ON CROSS-EXAMINATION

Defendant's first issue on appeal is that the trial court erred when it limited defendant's ability to cross-examine the prosecution's witnesses regarding racial statements made by the victim during the assault. We disagree. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). "A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes." *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007).

A defendant has a constitutional right to confront the witnesses against him. US Const. Am VI; Const 1963, art 1, § 20; *People v Ho*, 231 Mich App 178, 189; 585 NW2d (1998). The right of confrontation affords a defendant the opportunity to cross-examine the witnesses against him. *Id.* However, the right is not unlimited. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). Exposing a witness's "bias, prejudice, or lack of credibility" is a crucial part of the constitutionally protected right of cross-examination, *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996), but the constitutional right of confrontation does not confer a right to impeach the general credibility of a witness, *Canter*, 197 Mich App at 564.

Defendant argues that the trial court erred when it limited his ability to cross-examine the prosecution's witnesses on two occasions. The first instance occurred when defense counsel asked the victim if he remembered telling a police detective that he used "the N word" against his assailants. The witness said no, then defense counsel persisted, "Do you recall telling [the police detective] that you're very prejudice[d] against black persons?" This question drew a prosecution objection on grounds of relevance. Defense counsel stated that the question went to "[t]hose biases . . . [a]s to who did all the hitting." The trial court sustained the objection. Defense counsel then elicited testimony that the victim did not know who first hit him, and drew a negative response from the question, "You don't know who said that, didn't knock you down, white boy, right?"

The second instance occurred during the cross-examination of the police detective. Defense counsel asked the police detective if the victim had told him "that he did something to provoke an assault upon him." The witness answered in the affirmative, and counsel asked him to elaborate:

He told me that during the time that [Sturdevant] and other persons were arguing with him, I know you have money on it, on you, give it to me, and him telling him I don't have money on him. That was argument, that he was talking about. He stated they kept calling one another niggers. So he said that he then began referring to these same people that have been using those words, called them niggers, as well.

So he felt he probably contributed to the assault by using I am going to say the N word, if you will, back against these people that he said were using it so he used it.

Defense counsel later asked the detective about his meeting with the victim in the hospital. Counsel asked, "he . . . indicated to you that he has no doubt whatsoever that his mouth was part of the problem that evening; is that correct?" The witness replied affirmatively. Counsel continued, "In fact he also made . . . a statement to you following that that seemed to confirm his use of the N word?" This drew a renewed objection, in response to which the trial court stated, "I'll allow the testimony to the extent that I have. I don't know there is any need to continue down this path."

Defendant's argument that he was denied his right of confrontation is without merit. The jury learned from the police detective that the victim, a white man, used a racial epithet after hearing defendant and others, who were African-American, use it. According to the police

detective, the victim recognized the potential problems with using this epithet. However, the victim indicated in his testimony that he was not prejudiced against black people. At most, such evidence goes to the victim's general credibility.

Defendant attempts to connect the victim's supposed racism to potential exculpatory evidence, but his argument is speculative. Defendant points out that at trial the victim testified that his memory of the events in question did not include the incident where his throat was cut with a bottle. Defendant implies that the victim might have actually remembered something exculpatory about defendant in that regard but elected to keep quiet because of his racial bias. Defendant provides no evidence to support this theory nor does he demonstrate that the judge or jury would have believed that the victim suppressed or otherwise misrepresented information in any way favorable to defendant because of the victim's bias against African-Americans.

However, the jury did learn of the victim's use of potentially explosive racist language, but it is unclear how actual racism on that witness's part might have caused him to be less than truthful. Defendant has failed to show that the trial court abused its discretion in limiting the extent to which defense counsel could elicit testimony in that regard.

III. ASSISTANCE OF COUNSEL

Defendant next contends that defense counsel was constitutionally ineffective. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Because defendant neither moved the trial court for a new trial on the ground of ineffective assistance of counsel nor for an evidentiary hearing to develop the issue,¹ our review is limited to counsel's mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To demonstrate prejudice, the defendant must show that, but for counsel's poor performance, there is a reasonable probability that the result would have been different and the result of the proceeding was fundamentally unfair or unreliable. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). A trial attorney's decisions concerning "what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy," which will not be second-guessed on appeal. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant argues that defense counsel was ineffective for failing to use the testimony of Mariah Bell, a friend of defendant and Sturdevant, presented at Sturdevant's trial, to impeach

¹ See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Sturdevant's account at defendant's trial that she acted in fear of defendant. In particular, defendant highlights Bell's earlier testimony that Sturdevant never suggested to Bell that defendant forced her to break the bottle or cut the victim's throat with it or that Sturdevant was afraid of defendant. Defendant additionally refers to Bell's earlier testimony that Sturdevant had texted Bell that she and defendant "had picked up a kid from the Speedy Q . . . and that they were getting ready to stick him," and clarified that "stick" meant "rob." Defendant argues that defense counsel "could have impeached [Sturdevant] with [Bell's testimony] and used it to expand his testimony at [defendant's] trial to include the credibility damaging/crushing statement to impeach [Sturdevant] here." Defendant does not specify any of Sturdevant's testimony at defendant's trial that would have been impeached by Bell's prior testimony.

Defense counsel elicited testimony from Sturdevant that she told the police that she acted out of fear of defendant on the night in question. Sturdevant also testified on cross-examination that her statement to the police was the first time she had told anyone that she was afraid of defendant. Defense counsel additionally elicited testimony that Sturdevant previously testified that she was afraid of what defendant might do to her in retaliation if she went to the police. However, Sturdevant did not tell the police detective that she stayed through the course of the assault of the victim because of fear of defendant.

Defense counsel used Sturdevant's earlier statements to impeach any suggestions that she participated in the instant crimes, including the cutting of the victim's throat, out of fear of defendant. In this case, because counsel made use of Sturdevant's earlier statements to rebuff notions that she acted under duress from defendant, it is difficult to see what additional benefit Bell's testimony would have offered defendant at trial. Further, the prosecution's theory of the case was not that defendant forced Sturdevant to act, but instead that they acted in concert.

For these reasons, defendant has failed to show that defense counsel erred in failing to avail herself of certain testimony from Sturdevant's trial, *Rockey*, 237 Mich App at 76, let alone that any error affected the outcome of the trial, *Messenger*, 221 Mich App at 181.

IV. GREAT WEIGHT OF THE EVIDENCE

Defendant posits that the verdict for assault with intent to commit murder is against the great weight of the evidence because there was not enough evidence that defendant intended to kill the victim. We disagree. Defendant asserts that his challenge to his conviction of assault with intent to murder was preserved through a motion to remand, referring to his unsuccessful motion in this Court for a remand to the trial court for purposes of preserving any issues to the extent needed. Defendant cites to no authority that stands for the proposition that a posttrial motion for a remand preserves a challenge based on the great weight of the evidence even though the trial court never had the opportunity to address the issue. We deem this issue unpreserved. See *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. MCL 750.83; *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). The intent to kill may be proven by inference from any facts in evidence. *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999).

“A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). A trial court might disturb a jury verdict where testimony upon which it depended is “patently incredible or defies physical realities,” or where “the witnesses['] testimony has been seriously impeached and the case marked by uncertainties and discrepancies.” *Id.* at 643-644 (internal quotation marks and citations omitted).

In arguing this issue, defendant only attacks the credibility of Sturdevant to argue that the prosecution did not present enough evidence to demonstrate his intent to kill. But “absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility ‘for the . . . jury determination thereof.’” *Id.* at 642, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). Defendant points out that Sturdevant’s account of what happened was inconsistent, and also that she admitted that she was mad at defendant, blamed him, and wanted him to share responsibility for the instant crimes. Although we agree that that witness’s credibility was much at issue, we disagree that the circumstances of her testimony rendered it “patently incredible.” *Lemmon*, 456 Mich at 643.

Sturdevant’s account of defendant’s choking the victim and stomping his throat with the full force of his weight provided the jury with a reasonable basis to conclude that defendant acted with the intent to kill. This is especially so when that evidence is considered along with evidence, which defendant himself did not dispute, that defendant texted friends that he had killed a person after the crime. The intent element of assault with intent to commit murder could thus be satisfied on those bases alone, regardless of defendant’s role in connection with the cutting of the victim’s throat.

Further, even if there was no evidence that defendant was interested in the bottle after he commanded Sturdevant to retrieve it, there was evidence that defendant stood by while Sturdevant cut the victim’s throat. In fact, defendant collaborated with Sturdevant all night in a course of activity and was thus implicated in that last act of violence. His argument that Sturdevant’s testimony was inconsistent does not undermine this evidence of his intent to kill.

For these reasons, the trial court did not commit plain error by declining to disturb *sua sponte* the jury’s verdict of guilty of assault with intent to commit murder.

V. PHOTOGRAPHIC EVIDENCE

Defendant also argues that the trial court erred in admitting gruesome photographs depicting the victim at the final scene of the crimes, and in medical care shortly thereafter. We

disagree. We review a trial court's evidentiary decisions for an abuse of discretion. *Martzke*, 251 Mich App at 286.

“Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions.” *People v Mills*, 450 Mich 61, 76-77; 537 NW2d 909 (1995), quoting 29 Am Jur 2d, Evidence § 787, pp 860-861. However, a jury is entitled to learn the “complete story” of the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Accordingly, photographs offered for a proper evidentiary purpose “[are] not rendered inadmissible because of [their] gruesome details.” *People v Mesik*, 285 Mich App 535, 544; 775 NW2d 857 (2009). That a defendant does not contest the nature of the victim's wounds or the circumstances of how they were inflicted does not render evidence of those matters inadmissible. See *Mills*, 450 Mich at 71. Additionally, the availability of alternative means of presenting the information is not grounds for excluding photographic evidence. See *id.* at 76 (“Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs.”). Photographic evidence of injuries is admissible to prove intent to kill. *Id.* at 71.

The photographs are striking because they show the extensive injuries to the victim and the bleeding from his face. Among the trial court's reasons for denying the motion to exclude them was the court's correct anticipation that the jury instructions concerning the charge of the assault with intent to murder would include, in the alternative, the lesser included offense of assault with intent to do great bodily harm less than murder. The trial court thus concluded that the photographs were admissible to help the jury “distinguish between whether or not this was simply an assault with intent to commit great bodily harm or the person intended to commit the crime of murder.” We agree with the court's reasoning.

Defendant contends that because the extent of the victim's injuries was not in dispute and other evidence well conveyed such information to the jury, the photographs were of little probative value and were substantially outweighed by the danger of unfair prejudice, and they should not have been admitted into evidence. See MRE 403. However, the matter at issue was not that the victim suffered physical harm, but rather defendant's intent in inflicting those injuries. Again, evidence of injuries is relevant to prove violent intent, see *Mills*, 450 Mich at 71, and neither gruesomeness nor that the information shown could be conveyed by other means is a ground for exclusion, *id.* at 76.

Because the photographic evidence directly illustrated the extent and nature of the victim's injuries, it was probative of defendant's intent in inflicting them. Furthermore, the risk of “unfair prejudice” was slight, and certainly did not “substantially outweigh[]” the probative value of the evidence. MRE 403 (emphases added). The trial court did not abuse its discretion in admitting the photographic evidence.

VI. SENTENCING

Defendant's final issue on appeal is that his sentence was invalid because the trial court relied on evidence at sentencing not admitted at trial before the jury. Defendant argues that *Blakely v Washington*, 542 US 296, 313-314; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and

related federal case law, confine a sentencing court to relying on only such facts as have been proven to a jury beyond a reasonable doubt, or admitted by the defendant, for purposes of fashioning a sentence. We have previously rejected this argument and we hereby do so again.

“This Court reviews a sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, to the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.* Constitutional issues present questions of law that are subject to de novo review. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998).

In *Blakely*, the United States Supreme Court held that “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” 542 US at 313 (emphasis in the original). But our Supreme Court has reiterated that “the Michigan system is unaffected by the holding in *Blakely*” *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Defendant’s recourse to *Blakely* is thus unavailing. A sentencing court of this state remains entitled to take into account all the facts and circumstances of the crime, as determined by the court from various sources. See *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000).

Defendant acknowledges that our Supreme Court has rebuffed the argument he raises, and also that this Court is obliged to follow that precedent. But defendant nonetheless “urges this Court to reject the *Drohan* ruling (which his attorney views as wrongly decided) or at a minimum find that the issue is properly preserved for future view.” We decline defendant’s invitation to disregard the dictates of our Supreme Court. See *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002) (“we are required by stare decisis to follow decisions of our Supreme Court”).

Because defendant challenges his minimum sentence for assault with intent to commit murder only on the inapplicable ground that the trial court considered facts from various sources not necessarily presented to the jury, we decline to disturb that result.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly