

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
November 1, 2012

v

JERRY LEE SAFFELL,  
Defendant-Appellant.

No. 306103  
Berrien Circuit Court  
LC No. 2011-000308-FC

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Before: WILDER, P.J., and O’CONNELL and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and tampering with evidence, MCL 750.483a(6)(a). We affirm.

In the early morning hours of January 23, 2011, defendant stabbed the victim in the abdomen with a knife. Defendant then rinsed off the knife in the nearby kitchen sink and dropped it on the ground. Defendant told the responding officers that he stabbed the victim in self-defense. At trial, defendant testified that he stabbed the victim in self-defense and that he never rinsed off the knife or did anything with it after stabbing the victim.

On appeal, defendant first argues that his trial counsel provided ineffective assistance by failing to have an independent insanity evaluation of defendant performed. Specifically, defendant argues that his trial counsel should have pursued a possible defense of involuntary intoxication under the theory of pathological intoxication. We disagree. “[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). “To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). The “defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Insanity is an affirmative defense that the defendant has the burden of proving by a preponderance of the evidence. *People v Stephan*, 241 Mich App 482, 490-491; 616 NW2d 188 (2000); MCL 768.21a(3).

An individual is legally insane if, as a result of mental illness . . . , 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. [MCL 768.21a(1).]

Involuntary intoxication may support an insanity defense as long as the defendant's involuntary intoxication put him in a state of mind that was equivalent to legal insanity. *People v Wilkins*, 184 Mich App 443, 448-449; 459 NW2d 57 (1990). "Involuntary intoxication is intoxication that is not self-induced and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992) (citation and quotation omitted).

Here, defendant testified at trial that he began drinking beer on the afternoon of January 22, 2011, and that he consumed approximately 12 to 15 cans of beer by the time he stabbed the victim in the early morning hours of January 23, 2011. Defendant does not allege, and the record does not support, that defendant's intoxication, if he was indeed intoxicated at the time in question, was not self-induced. Thus, defendant did not have a viable defense of involuntary intoxication as articulated in *Caulley*. However, defendant argues that he may nonetheless have been involuntarily intoxicated when he stabbed the victim under the concept of pathological intoxication. Pathological intoxication is intoxication that is

self-induced in the sense that the defendant knew what substance he was taking, but which was "grossly excessive in degree, given the amount of the intoxication." . . . [T]he intoxication is involuntary only if the defendant was unaware that he is susceptible to an atypical reaction to the substance taken. [2 LaFave Substantive Criminal Law (2d ed), § 9.5(g), p 56, quoting Model Penal Code § 2.08(5).]

However, defendant fails to cite any Michigan law to support his assertion that pathological intoxication, which by definition requires that intoxication be at least partially self-induced, 2 LaFave at 56, is a subset of involuntary intoxication, which requires that the intoxication not be self-induced, *Caulley*, 197 Mich App at 187. Moreover, even assuming that pathological intoxication constitutes a subset of involuntary intoxication, we find that defendant's trial counsel was not ineffective for failing to pursue such a defense. Defendant has not submitted any offer of proof or affidavit demonstrating that an evaluation would have determined that he suffered from pathological intoxication, which requires a "grossly excessive" level of intoxication relative to the amount of alcohol consumed and that the defendant did not know that he was "susceptible to an atypical reaction to" alcohol. 2 LaFave at 56. On the contrary, the record suggests that defendant was an experienced drinker accustomed to consuming significant amounts of beer and the associated effects. Thus, defendant has not met his "burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *Hoag*, 460 Mich at 6. Thus, there is no reason to believe that a theory of pathological intoxication would have been successful, and we will not find that trial counsel was ineffective for failing to pursue a meritless defense. See *People v Ericksen*, 288 Mich App 192, 201; 793

NW2d 120 (2010) (“Failing to advance a meritless argument . . . does not constitute ineffective assistance of counsel.”).

Defendant also contends that he is entitled to remand for an independent insanity evaluation and an evidentiary hearing regarding trial counsel’s decision not to pursue an involuntary intoxication defense. Given our conclusion that there is no indication defendant could have established a meritorious insanity defense, defendant’s inability to obtain an independent evaluation does not violate his rights and we need not order such an evaluation. Moreover, we previously denied defendant’s motion for an evidentiary hearing, and defendant has not demonstrated any additional facts that would require such a hearing. Thus, defendant is not entitled to an evidentiary hearing. MCR 7.211(C)(1)(a); *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

Defendant next argues that the prosecution failed to present sufficient evidence to sustain his tampering with evidence conviction. We disagree. This Court reviews de novo a sufficiency of the evidence claim. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, 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.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992) amended 441 Mich 1201 (1992). Moreover, “when reviewing claims of insufficient evidence, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict.” *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

To be guilty of tampering with evidence, a defendant must “[k]nowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding.” MCL 750.483a(5)(a). Here, multiple witnesses testified at trial that they saw defendant rinse off the knife in the kitchen sink after the stabbing and that defendant subsequently dropped the knife on the floor and left the house while a 911 call was in progress. The prosecution offered the knife as evidence at trial. Defendant argues on appeal that the foregoing evidence was insufficient to sustain his tampering with evidence conviction because the knife and the blood on it were unnecessary for his conviction, as there was no dispute that defendant stabbed the victim with the knife. However, MCL 750.483a(5)(a), merely prohibits tampering “with evidence to be offered in a . . . future official proceeding,” and defendant does not cite any authority establishing that the evidence must be “necessary” for the defendant’s conviction. Cf. MRE 402 (evidence need only be “relevant” to be admissible). Accordingly, we find that the prosecution presented sufficient evidence to sustain defendant’s conviction of tampering with evidence.

Next, defendant argues that the prosecutor committed misconduct by threatening to enhance the charges against him if he exercised his right to have a preliminary examination. We disagree. “A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights, and 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.” *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010). Under the plain error rule, defendant must show that an obvious error occurred and “that the error

affected the outcome of the lower court proceedings.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A prosecutor violates a defendant’s right to due process when she seeks to punish the defendant “for asserting a protected statutory or constitutional right,” *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996), such as the right to a preliminary examination, *People v McGee*, 258 Mich App 683, 695; 672 NW2d 191 (2003). This type of prosecutorial behavior is called “prosecutorial vindictiveness.” *Ryan*, 451 Mich at 36. However, actual prosecutorial vindictiveness “will be found only where objective evidence of an expressed hostility or threat suggests that the defendant was deliberately penalized for his exercise of a procedural, statutory, or constitutional right.” *Id.* (quotation omitted); *People v Jones*, 252 Mich App 1, 7; 650 NW2d 717 (2002). “The mere threat of additional charges during plea negotiations does not amount to actual vindictiveness where bringing the additional charges is within the prosecutor’s charging discretion.” *Ryan*, 451 Mich at 36. “The prosecution is given broad charging discretion” and may “bring any charges supported by the evidence.” *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Moreover, “it is well established that the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is not sufficient to warrant *presuming* that subsequent changes in the charging decision are vindictive and therefore violative of due process.” *Jones*, 252 Mich App at 8 (emphasis in original).

In this case, at the preliminary examination, the prosecutor notified the trial court that during the course of the parties’ plea negotiations, she had informed defendant of her intent to potentially enhance the charges against him if he did not plead guilty and instead proceeded with the preliminary examination. The evidence adequately supported the prosecution’s charges of assault with intent to murder, assault with intent to do great bodily harm less than murder, and tampering with evidence. Thus, the decision to bring these additional charges was within the prosecutor’s discretion, *Nichols*, 262 Mich App at 415, and defendant fails to show that the prosecutor committed misconduct by bringing these additional charges once defendant did not plead guilty and chose to proceed with the preliminary examination, *Ryan*, 451 Mich at 36.

Additionally, we find defendant’s concomitant claim that his trial counsel was ineffective for failing to object to the alleged prosecutorial misconduct to be meritless. See *Ericksen*, 288 Mich App at 201 (“Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.”). We likewise find defendant’s additional claim that the prosecutor violated his Ninth Amendment rights to be meritless. Defendant asserts that the Ninth Amendment<sup>1</sup> grants a defendant the right to be free of prosecutorial misconduct beyond the Due Process and Equal Protection Clauses of the United States Constitution. However, defendant fails to develop this argument or cite any supporting authority and, thus, has abandoned the argument, and we need not consider it. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). Moreover, given our finding that the prosecutor did not

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<sup>1</sup> “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” US Const Am IX.

commit misconduct, defendant's argument is meritless even assuming that the right to be free of prosecutorial misconduct exists under the Ninth Amendment.

Finally, defendant argues that he is entitled to resentencing on the basis of numerous claims of error. Reviewing each of these alleged errors in turn, we conclude that defendant is not entitled to resentencing.

Defendant first asserts that the trial court improperly assessed offense variable (OV) 4 and OV 19 at ten points each.

This Court's "review of sentencing guidelines calculations is very limited." *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We review defendant's preserved claim of error regarding OV 19 to determine whether the trial court abused its discretion. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"With regard to OV 19, MCL 777.49(c) requires that the sentencing court assess 10 points if '[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]'" *Ericksen*, 288 Mich App at 203, quoting MCL 777.49(c) (brackets in original). The Michigan Supreme Court has made it "clear that interfering with a police officer's attempt to investigate a crime constitutes interference with the administration of justice." *People v Passage*, 277 Mich App 175, 180; 743 NW2d 746 (2007), citing *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004). Here, the evidence supported the finding that defendant interfered with or attempted to interfere with the administration of justice by rinsing off the knife. The circumstances considered in scoring OV 19 are not limited to the sentencing offense itself; events occurring after the completion of the sentencing offense are also properly considered. *People v Smith*, 488 Mich 193, 195; 793 NW2d 666 (2010). Furthermore, OV 19 applies even where the offense itself inherently involves interference with the administration of justice. *People v Underwood*, 278 Mich App 334, 339-340; 750 NW2d 612 (2008). Therefore, the trial court did not abuse its discretion by assessing OV 19 at ten points for each of defendant's sentences.

Because defendant did not object to the scoring of OV 4 at the trial court, we review his challenge to this scoring for plain error affecting substantial rights. *Parker*, 288 Mich App at 509.

A trial court properly scores ten points for OV 4 where it finds that the victim suffered a "serious psychological injury requiring professional treatment." MCL 777.34(1)(a). "[A] sentencing court must assess 10 points under OV 4 if the victim sustained serious psychological injury that may require professional treatment, although treatment need not actually have been sought in order for these points to be assessed." *Ericksen*, 288 Mich App at 202-203, citing MCL 777.34(2). Additionally, "the victim's expression of fearfulness is enough to satisfy [MCL 777.34(1)(a)]." *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). In this case, the victim stated at the sentencing hearing that defendant's actions on

January 23, 2011, impacted him “emotionally, mentally and physically.” Further, testimony at trial established that defendant’s offense caused the victim to fear for his life. Witnesses testified that the victim was bleeding profusely from his stab wound, and one of them testified that she could see the victim’s “insides.” After defendant stabbed the victim, the victim began screaming that he was going to die. The victim told his fiancée at the scene that he loved her and told her not to let him die. The physician who tended to the victim testified that defendant kept screaming and asking if he was going to die. The foregoing testimony was a sufficient factual basis to support the trial court’s finding that the victim suffered a serious psychological injury requiring professional treatment. See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

Furthermore, the trial court may also consider the victim’s demeanor while testifying to determine whether the victim suffered a serious psychological injury. See *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005). In this case, the record indicates that during direct examination, the victim became unable to answer questions about his stabbing, and the trial court ordered a recess, which lasted 25 minutes, to allow the victim to compose himself. This also supported the trial court’s finding that the victim suffered a serious psychological injury. As a result, we conclude that defendant failed to establish any plain error in the scoring of OV 4.

Next, we review for plain error defendant’s unpreserved argument that the trial court violated his “constitutional rights” by failing to consider all of the mitigating factors, such as his family support, substance abuse issues, and rehabilitative potential under MCR 6.425(A)(5)<sup>2</sup>, when sentencing him. *Carines*, 460 Mich at 763-764. First, the trial court is not required to consider mitigating factors when sentencing a defendant and may rely on the applicable guidelines range when calculating the sentence. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011); *People v Nunez*, 242 Mich App 610, 617-618; 619 NW2d 550 (2000). Second, the record does not indicate that the trial court failed to consider the alleged mitigating factors; instead, the record reveals that the trial court reviewed the PSIR, which contained information regarding defendant’s family support, substance abuse issues, and rehabilitative potential. And contrary to defendant’s argument, the plain language of MCR 6.425(A)(1)(e) does not require the trial court to order an assessment of defendant’s rehabilitative potential.<sup>3</sup> Accordingly, defendant has failed to demonstrate plain error affecting his substantial rights.

Next, we review for plain error defendant’s unpreserved argument that the trial court imposed upon defendant disproportionate sentences that constituted cruel and unusual punishments. “A sentence that falls within the appropriate sentencing guidelines range is presumptively proportionate.” *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011).

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<sup>2</sup> We note that the current version of the court rules does not contain an (A)(5) provision; we presume counsel is referring to MCR 6.425(A)(1)(e).

<sup>3</sup> Current MCR 6.425(A)(1)(e), which has the same provisions as the previous version of MCR 6.425(A)(5), merely provides that the PSIR is to include “the defendant’s medical history, substance abuse history, if any, and if indicated, a current psychological or psychiatric report.”

Moreover, a proportionate sentence is not a cruel or unusual punishment under the federal or state constitution. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Here, defendant's tampering with evidence conviction fell within the appropriate sentencing guideline range, and defendant's only argument to overcome the presumption of proportionality is that the trial court allegedly failed to consider mitigating factors. As discussed above, the trial court did not improperly fail to consider mitigating factors. Thus, defendant has not overcome the presumption that his tampering with evidence conviction was proportionate and, thus, not cruel or unusual.

With respect to defendant's sentence for assault with intent to do great bodily harm less than murder, the trial court sentenced defendant to 66 months' imprisonment, which was an upward departure of nine months from the guidelines' recommended minimum sentence range. MCL 777.65. "A court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). "A sentencing departure is appropriate when there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history . . . ." *Smith*, 482 Mich at 305 (quotation omitted). Here, the trial court stated on the record its reasons for departing from the sentencing guidelines, and defendant does not challenge the trial court's stated reasons for its upward departure. Rather, defendant's proportionality challenge focuses entirely on the trial court's purported failure to adequately consider mitigating factors. Given that the trial court stated on the record its reasons for departure, which was relatively moderate, and that the trial court did not improperly fail to consider mitigating factors, we find that defendant's sentence for assault with intent to do great bodily harm less than murder was not disproportionate or a cruel or unusual punishment. *Id.*; *Powell*, 278 Mich App at 323-324. It was proportionate to the seriousness of the offense and offender.

We next review for plain error defendant's unpreserved argument that he is entitled to resentencing because the trial court violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We reject this argument as well. In *Blakely*, 542 US at 303-304, the United States Supreme Court held that any facts that enhance a defendant's *maximum* sentence must be either admitted by the defendant or found by a jury beyond a reasonable doubt. However,

"Michigan . . . has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. The maximum is not determined by the trial judge but is set by law. MCL 769.8. The minimum is based on guidelines ranges . . . . The trial judge sets the minimum but can never exceed the maximum . . . . Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment." [*People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).]

Next, we review for plain error defendant's unpreserved argument that his sentence violated his rights under the Ninth Amendment, which he asserts grants a criminal defendant the

right to lawful scoring decisions and a lawfully imposed sentence. However, defendant once again fails to develop his Ninth Amendment claim or cite any supporting authority and, thus, has abandoned the argument and we need not consider it. *Schumacher*, 276 Mich App at 178.

Finally, defendant argues that his trial counsel was ineffective for failing to object to the trial court's incorrect scoring of OV 4 and OV 19 or the trial court's failure to adequately consider mitigating factors. However, as discussed above, the trial court did not err in determining defendant's sentences. Consequently, defendant's trial counsel was not ineffective for failing to pursue meritless arguments. *Ericksen*, 288 Mich App at 201.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Peter D. O'Connell  
/s/ Kirsten Frank Kelly