

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 19, 2014

v

CORY EUGENE SLONE,

Defendant-Appellant.

No. 315026
Wayne Circuit Court
LC No. 12-006290-FC

Before: RIORDAN, P.J., and DONOFRIO and, BOONSTRA JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, and domestic violence, MCL 750.81. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 28 to 50 years' imprisonment for his assault with intent to murder conviction and time served for his domestic violence conviction. We affirm.

I. DISCOVERY OF MEDICAL RECORDS

Defendant contends that he was denied a fair trial and an opportunity to prepare for trial because the trial court failed to provide him and defense counsel with the complainant's medical records before trial. We disagree.

In his brief on appeal, defendant claims that the trial court stated at the November 5, 2012, pretrial conference that it was going to review the medical records and determine what should be done with them, and that "[n]othing more was placed on the record with regard to Defendant's right to the medical records." This is incorrect as conceded at argument by the defense counsel. At the final conference held on December 7, 2012, defense counsel specifically stated that he requested the medical records from the prosecutor and that he "received some of the medical records regarding the location of the injuries and type of injuries" suffered by the complainant. Defense counsel then stated, "I'm going to present a copy of this to my client for his records." Although the trial court saw no reason why defendant would need the medical records for himself, it stated, "it's okay I guess if there is nothing there to be concerned about of a personal nature regarding the complainant here." Because the record indicates that defendant and his counsel were provided a copy of the requested medical records over a month before trial, defendant's argument is factually baseless, and he is not entitled to any relief.

II. PEREMPTORY CHALLENGES

Defendant next contends that his counsel was ineffective for failing to exercise peremptory challenges on five jurors that had past experiences with victims of domestic violence and by conferring with defendant regarding the exercise of peremptory challenges. We disagree.

Whether a person 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.* Because no evidentiary hearing on the matter was held, this Court's review of counsel's performance is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, the defendant must show that "(1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *People v Heft*, 299 Mich App 69, 80-81; 829 NW2d 266 (2012). "The defendant was prejudiced if, but for defense counsel's errors, the result of the proceedings would have been different." *Id.* at 81. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A defendant must also overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Sabin*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Counsel's decisions relating to the selection of jurors generally involve matters of trial strategy, which this Court will normally decline to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). With respect to ineffective assistance of counsel claims and jury selection, this Court, in *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008), stated:

Perhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions. However, as a reviewing court, we "cannot see the jurors or listen to their answers to voir dire questions." For this reason, this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror. [Citations omitted.]

In this case, the statements made by the jurors in question do not suggest that defense counsel was ineffective for failing to remove the jurors from the panel. Jurors Melvin Glazier, James Powell, Curtis Lee, Ariana Meza, and Thomas Hughes all indicated that they had past experiences with victims of domestic violence. Meza knew someone who was a victim of domestic violence, Glazier had a tenant who was a victim of domestic violence, Powell's daughter was in an abusive marriage, Lee's mother was a victim of domestic violence, and Hughes worked with victims of domestic violence in his duties as a paramedic. Despite these past experiences with victims of domestic violence, all of the prospective jurors stated that this would not affect their ability to be fair and impartial. Given that the jurors stated that they could be fair and impartial, there is no basis to second-guess defense counsel's trial strategy.

Moreover, defendant has failed to make a showing that there is a reasonable probability that the result of the trial would have been different had his defense counsel exercised peremptory challenges on these jurors. In addition to the complainant's testimony concerning defendant's attack on her, two eyewitnesses provided testimony that defendant attacked the complainant twice, and defendant's friend testified that defendant admitted that he attempted to kill the complainant. Based on the overwhelming evidence presented in support of the prosecution's case, there is no indication that the peremptory challenges of these jurors would have resulted in a different verdict. Therefore, the failure of defense counsel to exercise peremptory challenges to remove the jurors did not amount to ineffective assistance of counsel.

Additionally, this Court finds no basis for defendant's claim that his counsel was ineffective for conferring with defendant regarding the exercise of peremptory challenges. Before the jury was impaneled, defense counsel informed the trial court that he wanted to put the following statement on the record:

Before we indicated we were satisfied with the jury, I did confer with my client to see if he had any peremptory challenges, particularly with Mr. Lee, who indicated that his mother had been involved in a domestic violence situation, and Mr. Powell, who indicated his daughter had been involved in a domestic violence situation, and also Mr. Hughes, who indicated he worked EMS and that often involved domestic violence.

The record suggests that defense counsel was not leaving the decision concerning the exercise of peremptory challenges to defendant, but merely conferring with defendant regarding his preferences and the possibility of exercising peremptory challenges on the jurors. Moreover, defense counsel questioned prospective jurors throughout voir dire and exercised two peremptory challenges throughout the process. Accordingly, defendant has failed to provide a sufficient basis to prove that counsel's performance was deficient and, even if it was, that the result of the proceedings would have been different.

III. JURY INSTRUCTIONS

Defendant contends that the trial court erred in failing to instruct the jury on the defense of accident and that his counsel was ineffective for failing to request such an instruction. We disagree.

A party must request the instruction or make a specific objection on the record in order to preserve an error in the giving or failure to give jury instructions. MCR 2.516(C); *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004).

When defense counsel provides an affirmative expression of satisfaction with the trial court's jury instructions, any alleged error is waived. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). A review of the record suggests that defense counsel provided an affirmative expression of satisfaction with the jury instructions without making a request for an instruction on the defense of accident. Therefore, any alleged error with respect to the trial court's failure to instruct the jury on the defense of accident is waived, which extinguishes any error. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

In any event, even assuming defendant did not waive any alleged error by the trial court in failing to instruct the jury on the defense of accident, the trial court did not commit plain error. “In order to avoid forfeiture under a plain-error analysis, defendant must establish (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights.” *Id.* at 505. To establish the third element, defendant must generally show outcome determinative prejudice. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Furthermore, reversal for unpreserved matters is warranted only “if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial.” *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

“A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.” *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). The jury instructions “must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence.” *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). “Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

The crime that defendant was charged with, assault with intent to commit murder, is a specific intent crime, which has the following elements: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing a murder. *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999). The accident instruction as a defense to a specific intent crime, CJI2d 7.3a, provides:

The defendant says that [he/she] is not guilty of [*state crime*] because [he/she] did not intend to [*state specific intent required*]. The defendant says that [his/her] conduct was accidental. If the defendant did not intend to [*state specific intent required*], [he/she] is not guilty. The prosecutor must prove beyond a reasonable doubt that the defendant intended to [*state specific intent required*].

In this case, there is no error because the defense of accident was not a “material defense.” Specifically, defendant’s asserted defense at trial was self-defense. Defendant claimed that Carter had assaulted him initially and at least some of her injuries were sustained as a result of self-defense. Therefore, because the jury was instructed on the defense of self-defense, they were instructed on defendant’s material defense. We further note that adding an instruction regarding *accidental* behavior would have contradicted, and arguably neutered, defendant’s prevailing theory of an *intentional* act of self-defense. Accordingly, we perceive no plain error.

Moreover, assuming arguendo that there was instructional error, any error was not outcome determinative. The prosecution presented overwhelming evidence that defendant’s actions were, indeed, intentional and not accidental. The complainant testified that defendant attacked her with the knife multiple times both inside the van and on the street, stabbing her approximately 23 times, including a cut to the throat. Two eye witnesses also observed defendant on top of the complainant in the street, and heard bystanders screaming that he was killing her. They saw defendant leave the complainant bloodied in the street, then return to the scene, get back on top of her, and hit the complainant with a stabbing motion. Additionally, a

friend of defendant received a call from him after the incident, and defendant admitted that he attempted to kill the complainant. Given that the prosecution presented overwhelming evidence that supported the assault with intent to murder charge, defendant would not be entitled to any relief because any instruction on the defense of accident would not have affected the outcome at trial.

Defendant's argument with respect to his ineffective assistance of counsel claim also is without merit. As previously noted, the record suggests that the primary theory of the case advanced by defense counsel was that defendant acted in self-defense. Defense counsel even sought and received a specific instruction on self-defense. During closing arguments, defense counsel focused on the fact that the complainant was upset about defendant breaking up with her and that her injuries were the result of a physical altercation that occurred. Defense counsel also argued that defendant's injuries were consistent with someone attempting to defend themselves. Defendant argues on appeal that "[a] defendant is allowed to raise more than one defense, even if the defenses are inconsistent." While we don't necessarily disagree with that premise, we also note that it is within the sound discretion of trial counsel to choose which defenses to raise. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012); *People v Vaughn*, 128 Mich App 270, 274; 340 NW2d 310 (1983). It is quite clear that choosing to present one defense, as opposed to two contradictory defenses, cannot be said to be unreasonable. See *Vaughn*, 128 Mich App at 274. Presenting a jury with the dubious defense of "it was self-defense, but if it wasn't, I acted accidentally" completely undermines any credibility defendant and defense counsel may have had with the jury. Moreover, even if counsel's performance could be deemed deficient, as discussed above, defendant cannot show that counsel's failure to request a jury instruction on the defense of accident would have changed the outcome at trial. Therefore, defendant's ineffective assistance of counsel claim fails.

IV. AUTHENTICATION OF EVIDENCE

Defendant next contends that the trial court erred in admitting the photographs of the complainant's alleged injuries because they were not properly authenticated. We disagree.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Because defendant failed to object to the admission of the photographs based on a lack of authentication at trial, this issue is unpreserved, and we review it for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

MRE 901(a) provides: "The requirement of authentication or identification as a condition of precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Under MRE 901(b)(1), an example of authentication or identification conforming with the requirements of this rule is testimony from a witness with knowledge that a matter is what it is claimed to be. In this case, before admitting the photographs, the complainant provided testimony that the photographs were taken by her and gave a specific time frame that each photograph had been taken. Contrary to defendant's assertion, the complainant's testimony that she took the photographs and that they depicted her

injuries suffered as a result of the altercation with defendant was sufficient to authenticate the photographs under MRE 901(b)(1). Therefore, defendant has not established any error.

V. SCORING OF OFFENSE VARIABLES

Defendant contends that the trial court erred in scoring offense variables (OV) 3, 5, 7, and 10. We disagree.

To preserve an issue challenging the scoring of the guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range, the challenging party must raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 795-796; 790 NW2d 340 (2010). In this case, defendant raised a challenge to the scoring for OV 3 at sentencing and raised challenges to the scoring of OV 5, OV 7, and OV 10 in his motion to remand before this Court.¹ Therefore, the issue is preserved for appellate review.

Our Supreme Court, in *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), set forth the applicable standard of review for sentencing guidelines scoring, as follows:

Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [Citations omitted.]

Given that the trial court did not make factual determinations for this Court to review on some of the OVs, this Court, by reference to the record, will review whether the scoring of the challenged offense variables are supported by a preponderance of the evidence. See *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008) (“A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence.”)

Defendant contends that the trial court erred in its assessment of 25 points for OV 3. “Offense variable 3 is physical injury to the victim,” and the trial court may assess 25 points when a life threatening or permanent incapacitating injury occurred to the victim. MCL 777.33(1)(c). In assigning 25 points for OV 3, the trial court stated:

[J]ust looking at and recalling the cut that was on her throat and the scar and all that and what was in the record on that one, definitely justifies the 25. In fact, they call this one step away from killing this lady but for maybe the intervention of the particular citizen that lived across the street.

¹ This Court entered an order denying defendant's motion for remand. *People v Slone*, unpublished order of the Court of Appeals, entered May 2, 2014 (Docket No. 315026).

I think it is very life threatening if someone cuts someone's throat the way her throat was cut and slit it. Probably in a matter of another inch or so it probably would have cut the artery there and she would have bled to death.

In this case, evidence was presented that defendant slit the complainant's throat during the altercation, and a picture of the cut on the complainant's throat, which required stitches, was admitted into evidence as an exhibit. Despite defendant's contention that the complainant's injuries were exaggerated, the evidence presented supports the trial court's findings. The multiple stab wounds suffered by the complainant, including a cut to the throat that required stitches, are life threatening injuries within the meaning of the statute. Therefore, the trial court did not err in assessing 25 points for OV 3.

Defendant next contends that the trial court erroneously assessed 15 points for OV 5. "Offense variable 5 is psychological injury to a member of a victim's family," and 15 points are appropriately assigned if "serious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). The trial court may assess 15 points "if the serious psychological injury to the victim's family may require professional treatment, and "[i]n making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.35(2). Although the complainant's son did not testify at the sentencing hearing, the presentence investigation report (PSIR) included the victim's statement, which provided:

My 17 year old son was greatly affected and constantly calls to check up on me. [H]e reported that he would like to say something in Court as well and he has not been the same since this has happened. He will more than likely have to go to therapy in the future. We both have been traumatized by this.

Given that the PSIR provided that the victim's son was greatly affected and traumatized by the incident, and "will more than likely have to go to therapy in the future," the trial court's assessment of 15 points for OV 5 is supported by a preponderance of the evidence.

Next, defendant contends that the trial court erred in assigning 50 points for OV 7. "Offense variable 7 is aggravated physical abuse, and the trial court should assign 50 points when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). "Excessive brutality" is not defined in the statute, but this Court has defined it as requiring savagery or cruelty beyond the usual brutality of the crime. *People v Glenn*, 295 Mich App 529, 533; 814 NW2d 686 (2012), rev'd on other grounds 494 Mich 430 (2013).

Our Supreme Court, in *Hardy*, 494 Mich at 440-441, interpreted the meaning of the phrase "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The Court concluded that it is proper to assign 50 points under OV 7 for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount. *Id.* at 441. The Court explained that a court "must first determine a baseline for the amount of fear and anxiety experienced by a victim of the type of crime or crimes at issue." *Id.* at 442-443. The Court held that in order to make this determination,

a court should consider the severity of the crime, the elements of the offense, and the different ways in which those elements can be satisfied. Then the court should determine, to the extent practicable, the fear or anxiety associated with the minimum conduct necessary to commit the offense. Finally, the court should closely examine the pertinent record evidence, including how the crime was actually committed by the defendant. As noted above, evidence which satisfies an element of an offense need not be disregarded solely for that reason. Instead, all relevant evidence should be closely examined to determine whether the defendant engaged in conduct beyond the minimum necessary to commit the crime, and whether it is more probable than not that such conduct was intended to make the victim's fear or anxiety increase by a considerable amount. [*Id.* at 443 (citations omitted).]

The Court concluded that the relevant inquiries are “(1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount.” *Id.* at 443-444.

A review of the record suggests that a preponderance of the evidence supports the assessment of 50 points for OV 7 because the complainant was treated with excessive brutality and defendant engaged in conduct designed to substantially increase the fear and anxiety the complainant suffered during the offense. The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing a murder. *Abraham*, 234 Mich App at 658. According to the complainant's account of the events, defendant engaged in conduct beyond the minimum required to commit the offense. Defendant stabbed the complainant with the knife in the backseat of the van, and after the complainant escaped and ran down the street, he tackled her and began stabbing her in the face, head, and hands. Then, defendant left and came back to attack the complainant again while she was lying on the ground. Defendant got back out of the van and said, “bitch, you not dead yet.” Defendant then got on top of the complainant again and started stabbing her. These multiple attacks on the complainant with the knife support the findings that the complainant was treated with cruelty that goes beyond that which was required by the offense and that defendant's conduct was intended to make the complainant's fear or anxiety greater by a considerable amount. Therefore, the trial court did not err in assessing 50 points for OV 7.

Defendant next contends that the trial court erred in assessing 10 points for OV 10. “Offense variable 10 is exploitation of a vulnerable victim.” MCL 777.40(1). The trial court may assess 10 points when “[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(c). The mere existence of one or more factors described above does not automatically equate with victim vulnerability. MCL 777.40(b). The term “exploit” means to “manipulate a victim for selfish or unethical purposes,” and “vulnerability” means “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(b)-(c). Both vulnerability and exploitation of the vulnerable victim are required to assess points under the statute. *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008).

In this case, a preponderance of the evidence supports the trial court's assessment of 10 points under OV 10. Although defendant claimed that he and the complainant were not in an exclusive relationship, he did acknowledge that they were more than friends. The complainant also testified that they were in a relationship, and evidence was presented that defendant kept his belongings at the complainant's home and they shared a van together. Thus, the record supports a finding that a domestic relationship existed. With respect to exploiting a domestic relationship, defendant and the complainant broke off their relationship and defendant took his belongings from the complainant's home. Later, the complainant saw defendant walking down the road, and she offered him a ride to the bus stop. It was at this point that defendant began attacking Garner while she was driving and then continued to attack her with a knife both inside the van and outside on the street as she attempted to escape. The domestic relationship was the ultimate basis for the dispute and the reason that defendant attacked the complainant. Accordingly, a preponderance of the evidence supports the assignment of 10 points for OV 10. Moreover, even if the trial court erred in scoring OV 10, such scoring is inconsequential to the propriety or proportionality of defendant's sentence. Subtracting ten points from the total OV scoring will not change the sentencing grid or the recommended sentence range. A change in scoring of this variable does not and will not affect the minimum sentence imposed. *People v Francisco*, 474 Mich 82, 90 n 8; 711 NW2d 44 (2006).

Lastly, defendant contends that his counsel was ineffective for failing to raise the challenges to the scoring of OV 5, OV 7, and OV 10 at sentencing. Because an ineffective assistance claim cannot be premised on the failure to make futile or frivolous objections, and the trial court did not err in scoring the offense variables, trial counsel was not ineffective for failing to object at sentencing. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Therefore, defendant's ineffective assistance of counsel claim is without merit.

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra