

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN JOHNSON, JR.,

Defendant-Appellant.

UNPUBLISHED

August 3, 2004

No. 246925

Wayne Circuit Court

LC No. 02-012459-01

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with intent to murder, MCL 750.83, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a habitual offender, fourth offense, MCL 769.12, to 25 to 50 years' imprisonment for the assault with intent to murder conviction, 2 to 5 years' imprisonment for the felon in possession conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

The instant case arises from allegations that defendant shot and wounded his former fiancée after his codefendant and current wife handed him a gun. Defendant testified on his own behalf and alleged that he tried to stop the codefendant from firing the gun after their car was surrounded by individuals armed with a knife and baseball bat.

Defendant first alleges that he was denied the effective assistance of counsel. We disagree. Effective assistance of counsel is presumed, and the defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). In order to establish ineffective assistance of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms" and "but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Specifically, defendant alleges that he was denied effective assistance because trial counsel failed to move to sever his trial from that of his codefendant wife, trial counsel waived his right to a jury trial, and trial counsel failed to object to prosecutorial misconduct. Review of the record reveals that trial counsel for defendant and his codefendant wife did not object to the motion to consolidate the trials filed by the prosecutor. Prior to trial, codefendant wife executed

an affidavit absolving defendant of the intentional shooting of his former fiancée. However, at trial, the codefendant wife exercised her right to remain silent and did not testify at trial. Therefore, the trial court refused to admit her affidavit into evidence.¹

Severance of a trial is only required when codefendants present “mutually exclusive” or “irreconcilable” defenses. *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994); see also MCR 6.121(C). There must be a tension so great between the two defenses that a jury would have to believe one defendant at the expense of the other. *Hana, supra*. In the present case, there was no indication that “mutually exclusive” or “irreconcilable” defenses were to be presented. Prior to trial, it was believed that the codefendant wife would absolve defendant of any participation in an intentional shooting. However, at trial, the codefendant wife refused to testify to the circumstances underlying the shooting. Although counsel may or may not have contemplated that there would be a change in circumstances, observations made with the benefit of hindsight cannot form the basis of an ineffective assistance of counsel claim. *People v Hill*, 257 Mich App 126, 139; 667 NW2d 78 (2003).

With regard to the remaining claims of ineffective assistance, defendant failed to meet his burden of proof. *Harmon, supra*. Defendant expressly waived his right to a jury trial, and such a decision is a matter of trial strategy. *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994). Moreover, there is no record evidence to support the contention that trial counsel failed to object to prosecutorial misconduct.² *Harmon, supra*. Even if the prosecutor attempted to admit improper propensity or other acts evidence, the evidence was submitted before a bench trial. A judge, sitting as the trier of fact, possesses an understanding of the law, allowing him to ignore errors and decide a case based solely on evidence properly admitted at trial. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). Accordingly, this challenge to ineffective assistance based on prosecutorial misconduct is without merit.

Lastly, defendant contends that he is entitled to resentencing because offense variable (OV) three was inappropriately scored, and there is no indication in the record that he was

¹ The trial court’s exclusion of this evidence is not an issue raised on appeal. Additionally, the substance of the affidavit can only be gleaned from the trial transcript because the document was not preserved in the lower court record.

² Before the introduction of testimony at trial, the prosecutor stated that there was a stipulation to admit exhibit one. Exhibit one has not been preserved in the lower court record. However, the prosecutor indicated that it was a certified copy of defendant’s conviction for possession with intent to deliver. However, in closing argument, the prosecutor referred to the exhibit, stating that it involved case number 93-7429, a conviction for assault with intent to commit great bodily harm. Defendant’s prior conviction record, as delineated in the presentence investigation report (PSIR), includes both a possession conviction and an assault with intent to commit great bodily harm conviction. However, the felony complaint, delineating the habitual offender fourth offense notice, indicates that the case number 93-7429 is a conviction for assault with intent to do great bodily harm. Moreover, the PSIR provides that case number 93-7429 is for a conviction for assault with intent to commit great bodily harm. Based on the record evidence available, it appears that the prosecutor’s initial reference to a possession offense was erroneous, and closing argument accurately reflected the nature of the exhibit.

afforded the opportunity to review the presentence investigation report (PSIR). We disagree. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 620 NW2d 700 (2002). Where there is any evidence to support a scoring decision, the score will be upheld. *Id.*

OV-3 is to be scored ten points where “bodily injury requiring medical treatment occurred to a victim.” MCL 777.33(1)(d). However, OV-3 is to be scored twenty-five points where “life threatening or permanent incapacitating injury occurred to a victim.” MCL 777.33(1)(c). In the present case, the trial court scored OV-3 twenty-five points. The victim testified that she was shot in the back on the right side and the bullet exited out her left side. The victim further testified that she fell to the ground and passed out. She was taken to the hospital, and photographs of her injuries were presented during the trial. On this record, we cannot conclude that the trial court’s decision was an abuse of discretion. *Hornsby, supra.*³ The challenge to defendant’s review of the PSIR is without merit. *People v Syakovich*, 182 Mich App 85, 90; 452 NW2d 211 (1989).

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

³ Defendant contends that there is no record support for the contention that this was a “life threatening injury” because “life threatening injuries simply do not result in an overnight hospital stay, a next day release, and an immediate visit to the police station for statements and photographs.” Defendant presented no record evidence to support this assertion, and the decision to discharge a patient may be based on economics, rather, than the degree of the injury sustained.