

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON STONE,

Defendant-Appellant.

UNPUBLISHED

April 22, 2004

No. 246344

Eaton Circuit Court

LC No. 02-020282-FC

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with first-degree criminal sexual conduct, MCL 750.520b, and assault with intent to commit great bodily harm less than murder, MCL 750.84. He was convicted by a jury of first-degree CSC and domestic violence, MCL 750.812, and was sentenced as an habitual offender, second offense, MCL 769.10, to prison terms of 180 to 300 months for the CSC conviction and fifty-one days for the domestic violence conviction. He was given credit of fifty-one days. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erroneously submitted the charge of assault with intent to commit great bodily harm to the jury because the prosecution failed to present sufficient evidence of intent to inflict great bodily harm and therefore caused the jury to reach a compromise verdict. Defendant relies on the following holding from *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975), as support for his argument that he suffered unfair prejudice because the jury was allowed to consider the charge of assault with intent to commit murder:

[W]here a jury is permitted consideration of a charge unwarranted by the proofs there is always prejudice because a defendant's chances of acquittal on any valid charge is [sic] substantially decreased by the possibility of a compromise verdict. For this reason it is reversible error for a trial judge to refuse a directed verdict of acquittal on any charge where the prosecution has failed to present evidence from which the jury could find all elements of the crime charged.

Our Supreme Court overruled the *Vail* holding in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998), noting that "*Vail* is premised on the unwarranted assumption that jurors do not follow their instructions not to compromise their views." *Id.* at 485. Because jurors are presumed to follow their instructions, the jurors in the instant case presumably followed their instructions not to compromise their views. *Id.* at 486.

Defendant does not contend that the charge on which he was convicted, domestic assault, was improperly submitted to the jury. As our Supreme Court has stated:

[A] defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." [*Graves, supra* at 486-487.]

Accordingly, defendant is not entitled to relief on his claim that the charge of assault with intent to commit great bodily harm was improperly submitted to the jury. *Id.*

Next, defendant asserts that the trial court abused its discretion by denying defendant's request for a substitute court-appointed attorney that was first brought during voir dire. A trial court's decision regarding substitution of counsel is within the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of that discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

An indigent defendant is constitutionally guaranteed the right to appointed counsel. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). But an indigent defendant "is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced." *Mack, supra* at 14. Rather, appointment of substitute counsel is justified only upon a showing of good cause and where the judicial process will not be unreasonably disrupted by the substitution. *Traylor, supra* at 462. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Traylor, supra* at 462. Disagreements fairly characterized as matters of professional judgment or trial strategy do not justify substitution of counsel. *Traylor, supra* at 463. A defendant's mere allegation that he lacked confidence in trial counsel is insufficient to support a substitution. *Id.*

A review of the record shows that defendant failed to establish good cause to support his request for substitute appointed counsel. While the record reflects defendant's dissatisfaction with the general manner in which defense counsel was handling his case, defendant failed to make any showing that there was a legitimate disagreement with his counsel over fundamental trial tactics. Rather, the record reveals that defendant's dissatisfaction with defense counsel involved no more than alleged communication difficulties and disagreements on certain matters of trial strategy that fall short of establishing good cause for substitution. Further, even if defense counsel did spend little time with defendant, there is no indication that defendant was prejudiced. The record shows that defense counsel presented a cogent and vigorous defense. Indeed, he effectively cross-examined prosecution witnesses and was prepared and competent to represent defendant. There is no indication that communication between defendant and his attorney had ceased. Although defendant asserts that defense counsel's performance was deficient, defendant does not make any argument or give any examples to demonstrate the manner in which counsel's performance was deficient. Because defendant failed to show good cause justifying substitution of counsel, the trial court did not abuse its discretion by denying defendant's request for new counsel.

Third, defendant contends that he was denied the effective assistance of counsel when defense counsel failed to cross-examine the victim about similar false accusations she had made against her former husband. A defendant who claims he has been denied the effective assistance

of counsel must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that counsel's substandard performance substantially prejudiced defendant. *People v Sabin (On Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A defendant must overcome a strong presumption that the assistance of [their] counsel was sound trial strategy. *Id.*

Review of an ineffective assistance of counsel claim is limited to the facts on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). There is no record regarding counsel's reasons for not cross-examining the victim about her alleged prior false accusations against her former husband. It was defendant's responsibility to create a testimonial record in the trial court to support his claim of ineffective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because defendant did not do so, this Court can only speculate about the reasons why defense counsel chose not to cross-examine the victim about the prior accusations. Indeed, defense counsel was aware of the alleged accusations because he made a motion in the trial court to question the former husband about the accusations. The trial court denied the motion, but permitted defense counsel to elicit from the former husband that the victim was not a truthful individual. Thus, it is likely that defense counsel's decision not to cross-examine the victim about the false accusations was trial strategy. *Rockey, supra* at 76. Even if it is assumed that counsel's performance was deficient, the evidence against defendant was so overwhelming that there is not a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Hoag, supra* at 7.

Last, defendant argues that the trial court erred when it scored offense variable (OV) 7 of the sentencing guidelines at fifty points. Defendant's challenge to the scoring of OV 7 was raised below and, therefore, is properly preserved. MCL 769.43(10). A sentencing court has discretion with respect to the scoring of the offense variables, provided that the evidence of record supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Fifty points are scored for OV 7 if the victim "was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(1). Under MCL 777.37, the trial court must score OV 7 as fifty points if the court finds evidence of sadism, which MCL 777.37(3) defines as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." Here, the trial court found that defendant's conduct caused the victim extreme humiliation. Evidence was presented that defendant threw her into a closet and later bit her several times. He put his fingers inside the victim's mouth and tried to push them into her throat. Several times he poked his fingers into the victim's eyes, and choked the victim with both of his hands and nearly caused her to lose consciousness. Defendant stuck his fingers inside of the victim's vagina and began poking and feeling the inside of her vagina. Following the penetration, defendant used his fists and hit the victim in the face several times. The assault occurred for approximately six minutes. The evidence was sufficient to support the trial court's finding that the victim was subjected to a prolonged assault that caused her humiliation. Given that there is evidentiary support in the record for the trial court's finding that the victim was subjected to a prolonged assault that caused her humiliation, the trial court's scoring decision is affirmed.

Defendant sets forth one final argument in a Rule 11 brief. He contends that he was denied the effective assistance of counsel because defense counsel lessened the prosecutor's

burden of proof by telling the jury that defendant was guilty. Because defendant failed to move for a new trial or an evidentiary hearing in the trial court, this Court's review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604- 605; 585 NW2d 27 (1998).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced such that he was denied a fair trial, i.e., there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). Defendant must overcome the presumption that the challenged conduct was sound trial strategy. *Id.*

Defendant's argument that defense counsel conceded that defendant was guilty and that defense counsel failed "to subject the prosecutor's case to a meaningful adversarial testing" takes defense counsel's statements out of context. Defense counsel stated:

You're going to get a laundry list of what are called included offenses. So as you evaluate the testimony you've heard, the picture, the witnesses, the tape, you've got to be thinking what about the included offenses. Is Mr. Stone guilty of one of those or two of those or however many you choose and is there reasonable doubt regarding this CSC-1 charge and for the great bodily harm less than the crime of murder?

Again, I'm not here to argue to you, and I'm not arguing to you, that he's not guilty. He is guilty. This is completely inappropriate. This is a man who thinks his wife's been running around on him, that she spent her week in Muskegon with his kid with another man, who had been drinking out of control, he's in the wrong. The only question is how much is he in the wrong. And that of course is what you're going to decide.

And one of the reasons for closing argument is to try to bring some things that stuck out in the trial to you, to the jury's mind, so you can think about them some more in case you haven't already. And I'd like to point out a few things that struck me and that I'm sure you'll evaluate for what they're worth, and use them to get to the proper finding here . . .

The victim called 911 and reported an assault. The assault on the victim was recorded by 911 and played to the jury. A police officer dispatched to the scene heard the assault occurring and entered the apartment and found defendant standing over the naked victim. Defense counsel's obvious trial strategy was to convince the jury that the victim over exaggerated the extent of the assault and her injuries, and that defendant was not guilty of the charged offense but rather of a lesser offense. It is not ineffective assistance for a defense attorney to admit a defendant's guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Where the evidence clearly points to defendant's guilt, "throwing oneself upon the mercy of the jury" is considered legitimate trial strategy in that "[a]n attorney may well admit guilt of a lesser included offense in hopes that due to his candor the jury will convict of the lesser offense instead of the greater." *People v Schultz*, 85 Mich App 527, 532; 271 NW2d 305 (1978). We will not second-guess trial counsel's strategy on appeal.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald