

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 19, 2011

v

RANDALL SCOTT LACHNIET,

Defendant-Appellee.

No. 297836
Kent Circuit Court
LC No. 09-10175-FC

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

In this case, defendant Randall Scott Lachniet appeals as of right from his convictions following a four-day jury trial of armed robbery, MCL 750.529, torture, MCL 750.85, unlawful imprisonment, MCL 750.349b, third-degree fleeing from a police officer, MCL 257.602a, and interfering with electronic communications, MCL 750.540(5)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 60 to 100 years on all offenses, except for interfering with electronic communications, for which he sentenced defendant to 8 to 15 years imprisonment, to be served consecutively. We affirm.

On September 7, 2008 the 80-year-old victim was home alone when defendant appeared at her side door. The victim recognized defendant as one of the men who had done some odd jobs and roofing work at her house a few weeks earlier, and let him in. Defendant asked to use the telephone.

After he hung up the phone, defendant turned around and held a knife up to the victim's throat and demanded that she give him her ATM card. The victim told defendant, "[y]ou are going to have to kill me first." Defendant then kicked her feet out from under her, and repeatedly hit her in the face with a closed fist. The victim bit defendant on his hand. Defendant punched her again, and she struck her head on the ground and lost consciousness. Defendant tied her hands and feet with cords cut from the window shades and from the telephone.

With her hands and feet bound, defendant dragged the victim down to the basement in order to conceal her from neighbors. Defendant left, and after about 30 minutes, the victim was able to free herself from the cords, and go upstairs and outside to get help from a neighbor. Defendant had taken her wallet with her credit cards, as well as her car and cell phone.

Defendant's theory of the case was that he did indeed commit robbery, unlawful imprisonment, fleeing from a police officer, and interfering with an electronic communication. However, he contended at trial that the knife was not present during the assault and robbery, but he merely used it to cut the window shade cords in order to tie up the victim. Also, defendant contended that he only hit the victim because she was biting his finger and he needed to get her to release him. He contended that he did not torture the victim.

As a result of the beating, the victim suffered a broken jaw, broken bones of the maxillary sinuses, extensive soft tissue swelling, hemorrhages in the scalp, and a subdural hematoma. She suffered some hearing loss, facial scarring, cannot chew well because some of her teeth were knocked out, and she has a permanent drool on one side of her mouth.

Defendant's first argument is that the trial court abused its discretion when it denied defendant's motion for a mistrial. We disagree.

We review a trial court's decision regarding a motion for a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236, 791 NW2d 743 (2010). A mistrial should be granted only for an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *Id.*

At trial, defendant's daughter Nina Anttila testified that she had spoken to her father on the date of the attack, and that her caller I.D. showed that he was calling from the victim's home. The prosecutor asked Anttila if she had a close relationship with her father and how often she would see him, to which Anttila replied, "when he would get out of prison." Defense counsel immediately moved for a mistrial, which the trial court denied. The trial court instructed the jury to disregard the statement and that the statement was "not to play any impact in your deliberations in this matter whatsoever." Later, when defendant took the stand in his own defense, he was impeached with his prior convictions for breaking and entering and for two counts of felony larceny.

"As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990); citing *People v Barker*, 161 Mich App 296, 305-306, 307; 409 NW2d 813 (1987). The trial court noted that the looks of shock and surprise on the prosecutors' faces after they heard Anttila's testimony indicated to the trial court that they had not conspired with the witness. Furthermore, it is not necessary "to reverse a conviction where isolated, improper remarks did not cause a miscarriage of justice." *People v Seals*, 285 Mich App 1, 24, 776 NW2d 314 (2009). Not every instance of inappropriate subject matter being mentioned before the jury warrants a mistrial. *People v Griffin*, 235 Mich App 27, 36, 597 NW2d 176 (1999), overruled on other grounds *People v Thompson*, 477 Mich 146, 148, 157-158, 730 NW2d 708 (2007).

In addition, the trial court provided a comprehensive curative instruction to the jury. Because jurors are presumed to follow the instructions given, *People v Rodgers*, 248 Mich App

702, 717; 645 NW2d 294 (2001), the curative instruction alleviated any possible prejudice to defendant. *People v Messenger*, 221 Mich App 171, 180 n 1; 561 NW2d 463 (1997).

Additionally, defendant testified on his own behalf and was impeached with four prior convictions. Although defendant argues that he was forced to testify because of his daughter's statement about his past time in prison, we note that defendant's theory of the case was not that he did not commit most of these crimes, just that he did not use a knife and only punched an 80-year-old woman because she bit him. It is highly doubtful any of the jurors were greatly surprised or influenced by the knowledge that defendant had been convicted of previous crimes and had spent time in prison for them.

Next, defendant argues that trial counsel was ineffective for failing to file the witness list in a timely manner. We disagree.

This issue is preserved only to the extent that mistakes are apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658–659; 620 NW2d 19 (2000). In reviewing a claim of ineffective assistance of counsel, we may not substitute our judgment for that of counsel regarding matters of trial strategy, or assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). We review de novo the ultimate question whether counsel's ineffective assistance deprived a defendant of his constitutional right to counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and law. *Id.* We review for clear error a trial court's findings of fact, if any, regarding the conduct of defense counsel, while we consider de novo questions of constitutional law. *Id.*

Defendant's argument is based entirely on trial counsel's failure to endorse, prior to trial, Dr. Terrence W. Campbell. Dr. Campbell is a PhD, whom defense counsel said would testify "about the physiology of the brain and how memories are stored in the brain." Defense counsel, in response to the prosecutor's objection to the late notice, said he did not anticipate testimony addressing the victim's specific memory, but instead would present "a general sort of medical factual inquiry about the processes and functioning of the brain."

" '[T]he right to counsel is the right to the effective assistance of counsel.' " *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663–664. The defendant must overcome the strong

presumptions that his “counsel’s conduct falls within the wide range of professional assistance,” and that his counsel’s actions represented sound trial strategy. *Strickland*, 466 US at 689. A defense counsel possesses “wide discretion in matters of trial strategy.” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

We conclude that even if trial counsel had filed a timely expert witness list, the results of the trial would not likely have been different had the expert witness been allowed to testify. As plaintiff noted, the expert witness was not planning to talk specifically about the victim’s memory, but about the impact of aging and head trauma on memory. The concept that as people age, their ability to remember changes, and the concept that a head injury can impact memory are both fairly basic and well understood concepts. It is unlikely that having an expert explain those ideas would have much of an impact on the jury in this case give the additional volume of evidence against defendant. Furthermore, trial counsel asked the victim several times about her memory of the events and she was unshakeable and quite confident about what she remembered.

Next, defendant argues that the trial court abused its discretion by refusing to allow defendant’s expert witness to testify where defendant failed to properly disclose the expert under MCL 767.94a(2). We disagree.

This Court reviews a trial court’s decision regarding the appropriate remedy for failure to comply with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

A criminal defendant has a constitutional right to present a defense, but does not have an absolute right to present evidence in support of his or her chosen defense. *People v Hayes*, 421 Mich 271, 278–279; 364 NW2d 635 (1984) (noting that there is no constitutional right to assert an insanity defense). Rather, “an accused must still comply with ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’ “ *Id.* at 279, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Further, courts have upheld preclusion as a sanction for a defendant’s failure to comply with notice and discovery requirements even though the sanction implicated a defendant’s right to present a defense. See *Hayes*, 421 Mich at 283 (stating that the Legislature could constitutionally preclude a defendant from presenting evidence of insanity where the defendant failed to comply with the notice requirements); *Taylor v Illinois*, 484 US 400; 108 S Ct 646; 98 L Ed 2d 798 (1988) (upholding the use of preclusion as a sanction for a defendant’s failure to disclose the identity of a witness); *United States v Nobles*, 422 US 225; 95 S Ct 2160; 45 L Ed 2d 141 (1975).

We conclude that the trial court did not abuse its discretion in precluding the testimony of defendant’s expert witness, where defendant did not comply with MCL 767.94a(2). The proposed witness was a complete surprise to the prosecution. The scientific expertise that the witness was to impart to the jury was not a disputed scientific issue, but rather a matter of common sense. It would have been easy for trial counsel to comply with MCL 767.94a(2). The burden of identifying potential witnesses in advance of trial adds little to the routine demands of trial preparation. *Taylor*, 484 US at 416.

Next, defendant argues that there was insufficient evidence to support his conviction for torture under MCL 750.85(1). We disagree.

This Court reviews challenges to the sufficiency of evidence in criminal trials de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence presented at trial in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399–400; 614 NW2d 78 (2000).

In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a 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, 514–515; 489 NW2d 748, amended 441 Mich 1201 (1992). We do not interfere with the jury’s role of determining the weight of the evidence or the credibility of the witnesses. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A person commits torture if, “with the intent to cause cruel or extreme physical or mental pain and suffering, [he] inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control....” MCL 750.85(1). The defendant attacked an elderly woman. He put a knife to her throat, hit her with an uppercut, and then hit her again breaking her jaw and other facial bones. He tied up her hands, took her to the basement, bound her feet and caused her extreme physical and mental anguish. There is no doubt that defendant’s conviction of torture was supported by powerful evidence. There are photographs of the victim’s face that show her with major bruising, swelling and abrasions to her head, face, and scalp. The victim herself testified about what happened to her, and clearly her version of the story was much more credible than defendant’s version. It is well-settled that, “because it can be difficult to prove a defendant’s state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant’s state of mind, which can be inferred from all the evidence presented.” *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). We conclude that defendant’s torture conviction was supported by sufficient evidence.

Finally, defendant argues by way of a Standard 4 brief that his 60 year minimum sentence violates Michigan’s indeterminate sentencing act because he likely will not be eligible for parole until after his death. We disagree.

Whether a sentence violates Michigan’s indeterminate sentencing act is a question of law that this Court reviews de novo. *People v Cannon*, 481 Mich 152, 156, 749 NW2d 257 (2008). This Court likewise reviews constitutional questions de novo. *LeBlanc*, 465 Mich at 579.

Defendant relies on *People v Moore*, 432 Mich 311, 320–321, 439 NW2d 684 (1989), in which the Supreme Court held that an indeterminate sentence is invalid if it effectively precludes the possibility that the defendant will be eligible for parole during his lifetime. In *Moore*, our

Supreme Court held that it was an abuse of discretion to impose a sentence of 100 to 200 years for second-degree murder, because it would be impossible for the defendant to serve this sentence. However, in *People v Kelly*, 213 Mich App 8, 15–16, 539 NW2d 538 (1995), this Court recognized that our Supreme Court overruled *Moore* in *People v Merriweather*, 447 Mich 799, 527 NW2d 460 (1994).

This Court held that resentencing is not necessarily required when a defendant is sentenced to an indeterminate sentence that is effectively a life term. *Kelly*, 213 Mich App at 15–16. Rather, the principle of proportionality determines the legality of the sentence. *Id.* at 16. The principle of proportionality involves examining both the circumstances of the crime and the offender’s criminal history. *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990). Thus, defendant’s reliance on *Moore* is misplaced. Defendant has failed to overcome the presumption of proportionality and, therefore, has not shown that his sentence is unconstitutionally cruel or unusual.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens