

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 21, 2013

v

HENRY LEVELL JOHNSON,
Defendant-Appellant.

No. 306986
Wayne Circuit Court
LC No. 11-004804-FC

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of voluntary manslaughter, MCL 750.321. The trial court sentenced defendant to serve 57 months to 15 years in prison. For the reasons set forth below, we affirm defendant’s conviction, but vacate his judgment of sentence and remand for a new sentencing hearing.

I. AGGRAVATED ASSAULT

The prosecutor charged defendant with first-degree murder, and the trial court instructed the jury on the lesser offenses of second-degree murder and voluntary manslaughter. Defendant unsuccessfully moved for a new trial on the ground that the trial court should have also instructed the jury on aggravated assault. “A court may grant a new trial ‘on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.’” *People v Orlewicz*, 293 Mich App 96, 100; 809 NW2d 194 (2011), quoting MCR 6.431(B). “A trial court’s decision on a motion for a new trial is reviewed for an abuse of discretion.” *Id.*, citing *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998).

As our Supreme Court explained in *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002), “a trial court, upon request, should instruct the jury regarding any necessarily included lesser offense, or an attempt . . . if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational view of the evidence would support it.” “[T]he failure to instruct the jury regarding such a necessarily lesser included offense is error requiring reversal, and retrial with a properly instructed jury, if, after reviewing the entire cause, the reviewing court is satisfied that the evidence presented at trial ‘clearly’ supported the lesser included instruction.” *Id.*

Regardless whether the elements of aggravated assault are subsumed in murder or manslaughter, *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003), a rational view of the evidence does not support a finding of aggravated assault. *Silver*, 466 Mich at 388. Pursuant to MCL 750.81a(1), aggravated assault is a misdemeanor that applies to “a person who assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder” Here, evidence showed that defendant and two other men approached the victim in a store, punched him, kicked him in the body and head, and stomped on him while he was on the ground. Despite defendant’s argument that negligence by the hospital caused the victim’s death, the evidence overwhelmingly showed that defendant died from massive trauma to his head and resulting complications from his head injuries. Stated simply, the evidence did not support an aggravated assault instruction because the evidence, including the victim’s injuries and defendant’s conduct, clearly showed an intent to inflict great bodily harm or murder. Because the evidence did not support the instruction, the trial court correctly declined to give the instruction and correctly denied defendant’s motion for new trial. *Silver*, 466 Mich at 388.¹

II. ENDORSEMENT OF MEDICAL WITNESS

Defendant argues that the trial court erred when it allowed the late endorsement of a medical witness for the prosecution. We review this claim for an abuse of discretion. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Late endorsement of a witness is allowed by leave of the court at any time for good cause. MCL 767.40a(4); *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). The record reflects that the prosecution sought to call Dr. William Coplin after defense counsel indicated an intent to raise a new theory regarding the cause of the victim’s death. Defendant claimed he was unable to locate a suitable expert witness. The trial court offered to deny the endorsement, to exclude the medical records, and to appoint an expert medical witness to assist the defense, but defense counsel declined these offers. Thus, defendant rejected the very remedy he now claims should have been granted. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) (“Counsel may not harbor error as an appellate

¹ Defendant claims the verdict was against the great weight of the evidence because he raised a question at trial about whether alleged negligence by the hospital caused the victim’s death. Defendant failed to preserve this issue in the trial court, and he has shown no “plain error affecting his substantial rights.” *People v Cameron*, 291 Mich App 599, 618; 806 NW2d 371 (2011). At the hospital, the victim was in a coma from the blunt force trauma inflicted by defendant and others who participated in the assault. The victim developed respiratory distress syndrome and had to be placed on a ventilator. He contracted pneumonia and died at the hospital ten days after the assault. While defendant invited the jury to speculate about the hospital’s conduct, he presented no evidence to show that any action by the hospital caused the victim’s death, nor that the pneumonia was unrelated to the victim’s extensive injuries. Indeed, the medical examiner testified that, no matter what occurred at the hospital, the victim’s death was caused by blunt force trauma to his head and complications arising from that trauma.

parachute.”) The trial court did not abuse its discretion when it allowed Dr. Coplin to testify. Further, defendant fails to explain how or provide legal support to show that the trial court’s handling of the issue constituted error. A party cannot leave it to the appellate court to elaborate his argument and find authority to support it. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Moreover, to the extent defendant now claims that he could not meaningfully confront Dr. Coplin because Dr. Coplin stated he was instructed by Detroit Medical Center lawyers not to answer questions outside the medical records in the case, defendant did not raise this issue in the trial court, he made no attempt to question Dr. Coplin about relevant matters outside the medical records, and he makes no argument about what additional questions he would have asked. Accordingly, he is not entitled to relief on this issue.

III. ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel provided ineffective assistance because he did not find a suitable expert witness to testify regarding the victim’s cause of death. The right to counsel, which is guaranteed by the state and federal constitutions, Const 1963, art 1, § 20; US Const, Am VI, includes the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). We must determine whether the attorney’s performance fell below an objective level of reasonableness and defendant was denied a fair hearing as a result. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A decision whether to call witnesses is presumed to be sound trial strategy, and defendant must, therefore, establish that the failure to call a witness deprived him of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant does not claim that he has located an expert who would testify that medical personnel caused the victim’s death, rather than the severe head injuries inflicted by defendant. Thus, he cannot show that, if defense counsel called an expert on this theory, it would have changed the outcome of the proceedings. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Further, it appears defense counsel acted with sound strategy by convincing the jury that the victim created the situation that led to his death. Indeed, the jury found defendant guilty of only voluntary manslaughter, despite video footage that showed defendant approach and immediately punch the victim to the ground and then stomp on his head. Defendant has failed to establish that trial counsel was ineffective.

IV. OFFENSE VARIABLE SCORING

This Court reviews a trial court’s scoring decisions for an abuse of discretion. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Defendant challenges the trial court’s score of 15 points for offense variable five (OV 5), which is correct if “[s]erious psychological injury requiring professional treatment occurred to a victim’s family.” MCL 777.35(1). To score 15 points, “the fact that treatment has not been sought is not conclusive.” MCL 777.35(2). At sentencing, a member of the victim’s family testified about the emotional and financial hardships the family has suffered because of the murder and the toll it will take on the victim’s children to know that their uncle brutally killed their father. This was sufficient evidence for the trial court to score 15 points for OV 5.

Defendant also challenges the trial court's score of 25 points for OV 6. A court should score 25 points for OV 6 if the defendant had an "unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." MCL 777.36(1)(b). This variable must be scored consistently with the jury's verdict unless the sentencing judge has information not presented to the jury. MCL 777.36(2)(a). Defendant was convicted of voluntary manslaughter which, in essence, is murder occasioned by some sudden and sufficiently violent provocation. *People v Reese*, 491 Mich 127, 152; 815 NW2d 85 (2012). Under OV 6, the Legislature apparently intended that a score for voluntary manslaughter is 10 points, which applies if "[t]he offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life." MCL 777.36(1)(c). The statute goes on to state, however, that 10 points applies "if a killing is intentional within the definition of second-degree murder or *voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent.*" MCL 777.36(2)(b) (emphasis added).

The record did not establish that defendant was suddenly or violently provoked by the victim, nor that the victim was killed in a combative situation. Rather, the record shows that defendant attacked the victim suddenly and without immediate provocation. However, the jury appears to have concluded that the victim harassed defendant's family in the past, and it chose to find defendant guilty of the lesser charge of voluntary manslaughter. While the trial court may have disagreed with the verdict, it failed to cite additional information that was "not presented to the jury" to justify the higher score for OV 6, and this is contrary to the language of the statute. MCL 777.36(2)(a). Accordingly, we must vacate defendant's judgment of sentence and remand for a new sentencing hearing at which the trial court may either change defendant's score for OV 6, or set forth the information it considered in reaching a higher score, but failed to articulate at sentencing.

Defendant's conviction is affirmed. His sentence is vacated, and we remand for a new sentencing hearing and judgment of sentence. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad