

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL HERBERT GAUTHIER,

Defendant-Appellant.

UNPUBLISHED

October 28, 2010

No. 292157

Ontonagon Circuit Court

LC No. 2008-000048-FH

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83. He was sentenced to serve a prison term of 15 to 30 years. Defendant appeals as of right. We affirm.

During the early morning hours of July 13, 2008, defendant and complainant engaged in an altercation after returning home from an evening of frequenting various bars. Complainant testified that during this altercation, defendant alternated between holding his hand over her mouth and nose, placing his hands around her throat, and placing a pillow over her face. Complainant testified that she “went into a blackness” on multiple occasions and that defendant repeatedly stated that he was going to kill her.

Defendant first argues that he was denied the effective assistance of counsel because trial counsel failed to preserve or investigate an insanity defense based on mental illness or involuntary intoxication. We disagree.

Preliminarily, defendant did not preserve this claim by filing a motion for a new trial or requesting an evidentiary hearing. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Thus, the issue is unpreserved. Accordingly, our review is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and law, which matters are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the basic principles applicable to a claim of ineffective assistance of counsel, stating:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that he made a good faith effort to avail himself of the right to present that defense and that the defense was substantial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A substantial defense is one that might affect a trial’s outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant argues that he was denied effective assistance because counsel failed to have him evaluated by a medical professional to determine whether he could present an insanity or temporary insanity defense based on mental illness or involuntary intoxication. A person is legally insane if, “as a result of mental illness . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.” MCL 768.21a(1). “[M]ental illness . . . does not otherwise constitute a defense of legal insanity.” *Id.* Defendant has not argued that his alleged mental illness or intoxication issues resulted in the lack of capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law, as required by MCL 768.21a. Defendant has also failed to provide any support for his contention that he may suffer from a mental illness. He argues that the nature of the charged offense, coupled with his domestic abuse history, suggests a likelihood that he suffers from a mental disease that may rise to the level of insanity. However, defendant cites no authority to support his contention that a history of domestic abuse is indicative of a mental illness that results in cognitive or volitional dysfunction for purposes of the insanity defense. When a party fails to provide citation to appropriate authority or policy, the issue is deemed abandoned. MCR 7.212(C)(7); *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Defendant also argues that an inference can be drawn that he was under the influence of alcohol at the time of the offense. However, voluntary intoxication cannot form the basis for an insanity defense. MCL 768.21a(2); *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992). To the extent defendant argues that pathological intoxication may be considered involuntary intoxication, the record does not support that defendant himself would qualify.

Because there is no basis for concluding that an insanity defense was a substantial defense, defendant cannot establish his claim for ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (defense counsel is not required to advocate a meritless position).

Defendant next argues that the trial court's denial of his motion to excuse a prospective juror for cause violated his constitutional rights. The prospective juror, a former corrections officer, indicated that if he were facing criminal charges he would probably not want a juror such as himself. However, he acknowledged that there are probably some innocent people in prison, indicated that his opinion toward defendants may have changed for the better since his retirement, agreed that he would not take any bias against a criminal defendant into consideration when defendant testified, and affirmed that a defendant enjoys a presumption of innocence and that the prosecutor would have to prove his case before defendant could be convicted. Defendant exercised a peremptory challenge when his challenge for cause failed.

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const Am VI; Const 1963, art 1 § 20; *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). However, generally a party must exhaust all peremptory challenges or refuse to express satisfaction with the jury empaneled in order to preserve an issue related to jury selection. *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). Moreover, "[a] four-part test is used to determine whether an error in refusing a challenge for cause merits reversal. There must be a clear and independent showing on the record that: (1) the court improperly denied a challenge for cause; (2) the aggrieved party exhausted all peremptory challenges; (3) the party demonstrated the desire to excuse another subsequently summoned juror; and (4) the juror whom the party wished later to excuse was objectionable." *People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995) (internal citation omitted). Here, defendant used only three of twelve available peremptory challenges and the prospective juror was excused pursuant to one of those challenges. Thus, defendant never came close to exhausting all of his peremptory challenges. Even if he had used all of the available peremptory challenges, reversal would still not be warranted. When the prospective juror's statements are reviewed as a whole, it does not appear that he held a bias against defendant or that he had a state of mind that would prevent a just verdict. Where a juror indicates that he can set aside a prior opinion and remain fair and impartial, he may remain on the jury. *People v Jendrzewski*, 455 Mich 495, 515-516; 566 NW2d 530 (1997).

Defendant also argues that the trial court improperly admitted the testimony of his ex-wife. She testified that her relationship with defendant had included occurrences of domestic violence, including one occasion where three of her ribs were broken and another occasion where defendant had hit her in the head with a pistol. We note that defendant preserved this issue by raising it below. See *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2006). While a court's ruling to admit or exclude evidence is reviewed for an abuse of discretion, underlying questions of law, such as the applicability of a statute that impacts the evidentiary ruling, are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Generally, MRE 404(b)(1) prohibits the admission of evidence of “other crimes, wrongs, or acts” when used to “prove the character of a person in order to show action in conformity therewith.” However, our Legislature has enacted MCL 768.27b, which allows for the introduction of evidence of other acts of domestic violence committed by the defendant for any relevant purpose when the defendant is accused of an offense involving domestic violence, so long as “the evidence is not otherwise excluded under [MRE] 403.” MRE 403 provides for the exclusion of otherwise relevant evidence when “its probative value is substantially outweighed by the danger of unfair prejudice.”

Defendant argues that the testimony should have been excluded under MRE 403. However, defendant fails to adequately support this argument. He asserts that the disputed evidence was “highly prejudicial and was not probative or relevant to prove any elements of the charged offense” and that the “probative value was outweighed by the danger of unfair prejudice.” Yet, defendant does not explain why this is the case. ““An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims.”” *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted). Moreover, we hold that MRE 403 was not a bar to admitting the evidence, where defendant’s position at trial was that he was acting in self-defense, and where the challenged evidence can be viewed as calling into question the self-defense claim given that it shows defendant’s history of engaging in domestic abuse. All relevant evidence is inherently prejudicial to some extent, and it is only *unfairly* prejudicial evidence that may warrant preclusion. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994). The probative value of the evidence, i.e., showing defendant’s propensity to commit domestic abuse and thereby diminishing his credibility as to the self-defense assertion, was not *substantially* outweighed by the danger of *unfair* prejudice.

Our finding above necessarily leads us to defendant’s next argument that the contested testimony was barred because it constituted propensity evidence. This argument cannot succeed because MCL 768.27b plainly states that evidence can be admitted under the statute for “any purpose,” so long as it is relevant and comports with MRE 403. MCL 768.27b(1). A defendant’s propensity to commit certain kinds of acts is one such permissible purpose. *People v Railer*, __ Mich App __; __ NW2d __, issued April 20, 2010 (Docket No. 291817), slip op at 4 (statute permits “evidence of prior domestic violence in order to show a defendant’s character or propensity to commit the same act”); *People v Schultz*, 278 Mich App 776, 779; 754 NW2d 925 (2008); *People v Pattison*, 276 Mich App 613, 620-621; 741 NW2d 558 (2007). The *Pattison* panel, however, cautioned courts “to take seriously their responsibility” to analyze MRE 403 as part of the statutory analysis. *Id.* at 621. Again, defendant fails to adequately argue MRE 403, and we find that MRE 403 does not support exclusion of the evidence.

We decline to address defendant’s argument that the disputed evidence was inadmissible based on MRE 404(b). The evidence was not admitted pursuant to MRE 404(b), but instead was properly admitted under MCL 768.27b(1). See *Railer*, slip op at 4. We also decline to address defendant’s argument that the instructions to the jury regarding this evidence were inadequate. Defendant failed to preserve this issue by requesting additional instruction. Also, he waived any claim of error by expressing satisfaction with the instructions given to the jury. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant lastly argues that he is entitled to resentencing. He asserts that the trial court failed to consider mitigating factors, failed to consider his rehabilitative potential, that the

sentence imposed constituted cruel and unusual punishment, and that the principle announced in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), was violated. Because defendant failed to bring any of these issues to the trial court's attention during sentencing, we review them for plain error affecting substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). Further, a sentence imposed within the statutory guidelines range, as was the case here, must generally be affirmed unless the trial court erred in calculating the guidelines range or relied on inaccurate information in determining the sentence. MCL 769.34(10).

Regarding the claim pertaining to mitigating factors, defendant claims that the trial court did not consider strong family support, remorsefulness, or the possibility of a mental disease or defect. These claims are without merit. There is no support in the record for defendant's assertion that he has strong family support. Defendant's assertion that he is entitled to resentencing due to the trial court's failure to consider his remorse rely on citation to federal cases and federal sentencing guidelines. Neither constitutes binding authority on this Court. Likewise, defendant's claim regarding a possible mental disease or defect is of no merit where, as discussed in more detail above, defendant has failed to provide support for his contention that he may suffer from a mental illness. Thus, there is no evidence that the trial court failed to consider relevant mitigating evidence. See *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000). Coextensively, defendant's claim of ineffective assistance of counsel related to this issue must also fail. See *Snider*, 239 Mich App at 425.

We also reject defendant's argument that he is entitled to resentencing because the trial court failed to articulate how it arrived at the sentence. "A trial court must articulate its reasons for imposing a sentence on the record at the time of sentencing." *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). "The articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *Id.* at 313. While the trial court did not expressly rely on the guidelines when imposing the sentence in the instant case, a review of the record demonstrates that the trial court impliedly relied on the guidelines. In addition, the trial court's comments regarding defendant's continued fixation on complainant as well as his past history of abuse serve as articulation for the basis of defendant's sentence.

Defendant next argues that he is entitled to resentencing because the trial court relied on incomplete information. Defendant specifically argues that the trial court should have conducted an assessment under MCR 6.425(A)(5) of his rehabilitative potential through intensive alcohol, drug, and psychiatric treatment. However, MCR 6.425(A)(5) mandates this type of report only "if indicated." In the instant case, a review of the record demonstrates that a psychological or psychiatric report was not required.

Defendant also argues that he is entitled to resentencing because his sentence was based on inaccurate information. However, a presentence investigation report is presumed to be accurate, and a trial court may rely upon the report unless effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant did not challenge the accuracy of the report at the sentencing hearing and does not do so on appeal. Thus, this argument is without merit.

In addition, defendant argues that the sentence imposed amounts to cruel and unusual punishment. See US Const, AM VIII; Const 1963, art 1, § 16. A defendant's claim that his sentence violates constitutional principles is not subject to the limitation on review set forth in MCL 769.34(10). *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). However, a sentence within the guidelines range is presumptively proportionate, and a sentence that is presumptively proportionate is not cruel or unusual punishment. *Id.* Defendant's minimum sentence, while at the top end of the recommended guidelines range, was nevertheless within the range. Accordingly, this claim too must fail.

Finally, defendant relies on *Blakely* and its progeny in arguing that the trial court engaged in impermissible fact-finding and based his sentence on facts that had not been proven beyond a reasonable doubt to a jury. However, our Supreme Court has clearly and consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). This Court is bound to follow the decisions of our Supreme Court. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Therefore, defendant's claim that his sentence constitutes a *Blakely* violation must fail.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly