STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FLOYD EDWARD ELLIOTT,

Defendant-Appellant.

UNPUBLISHED
March 21, 1997

No. 176749
Huron Circuit Court
LC No. 94-003639-FC

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and two counts of breaking and entering an occupied dwelling with intent to commit a larceny therein, MCL 750.110; MSA 28.305. Defendant was sentenced to concurrent terms of twenty to forty years' imprisonment for the murder conviction and six to fifteen years' imprisonment for each breaking and entering conviction. Defendant appeals as of right. We affirm.

On appeal, defendant first claims that the medical evidence fell short of establishing that his conduct proximately caused the victim's death. We disagree. In abolishing the common law "year and a day" rule, our Supreme Court did "not relieve the prosecution of its duty to prove all of the elements of the crime, including proximate cause, beyond a reasonable doubt." *People v Stevenson*, 416 Mich 383, 389-390, 394; 331 NW2d 143 (1982). However, a decedent's intervening act will break an established chain of causation only if it constitutes the sole cause of death. *People v Bailey*, 451 Mich 657, 677; 549 NW2d 325, amended on reh 453 Mich 1204 (1996); *People v Webb*, 163 Mich App 462, 464-465 ; 415 NW2d 9 (1987).

In the present case, the victim had no trouble eating or swallowing and was not prone to spitting up or choking on food before defendant attacked her and broke her jaw. Later, when the victim rejected the nasal gastric tube used to feed her while her jaw was wired shut, she experienced trouble swallowing, began vomiting, and suffered choking spells. Ultimately, the victim asphyxiated after choking on her own vomit. The victim's physician, Dr. Tae Hong Chung, testified that the victim died of

brain death, asphyxia, aspiration pneumonia (pneumonia caused by food particles in the respiratory tract); dysphagia (difficulty swallowing), and bulbar disorder (neurological disorder relating to the inability to swallow). Dr. Chung opined these fatal disorders could have been related to the victim's difficulty adapting to the alternative feeding measures necessitated by her broken jaw.

Given these circumstances, the question of proximate cause was properly left to the jury. See, generally, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Creith*, 151 Mich App 217, 228; 390 NW2d 234 (1986). Even assuming the victim complicated her condition by removing the nasal feeding tube, such complications are reasonably viewed as directly related to the pain and suffering caused by defendant's brutal attack. See *People v Harding,* 443 Mich 693 741-742; 506 NW2d 482 (1993); *People v McKenzie,* 206 Mich App 425, 431; 522 NW2d 661 (1994); see also *Bailey, supra* at 677.

Defendant further claims that he was denied the effective assistance of counsel. However, there was no evidentiary hearing on this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), our Supreme Court adopted the federal standard for determining whether a defendant has been denied effective assistance of counsel as set forth in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Pickens, supra* at 312, citing *Strickland, supra* at 691-692; see *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996); *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Eloby*, *supra* at 476; see *Unites States v Cronic,* 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Defendant must also overcome the presumption that the challenged action is sound trial strategy. *People v Reed,* 449 Mich 375, 384; 535 NW2d 496 (1995); *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994).

We hold that defendant has failed to meet his burden of establishing that defense counsel made a serious error that affected the result of trial. *People v LaVearn,* 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994). First, after a thorough review of the record, it appears that defendant's strategy was to present himself as more credible than Leroy Boyer (an accomplice in the breaking and enterings who testified that defendant committed the beating) by conveying the impression that defendant had "come clean" by forthrightly admitting all that he had done. Because the complained of testimony could have bolstered defendant's credibility by making his trial testimony appear consistent with what he told others before trial, we conclude that defense counsel acted strategically in not objecting to the evidence of defendant's other bad acts. *Reed, supra* at 384.

Second, defendant cannot establish the requisite level of prejudice in his trial counsel's failure to object to the alleged hearsay statement because the statement did not identify defendant. *Pickens, supra* at 312. Third, while defense counsel's decision not to request a manslaughter instruction appears

strategic, the instruction was nevertheless unwarranted because the evidence against defendant does not suggest "something less than an intent to do great bodily harm, an intent to kill, or the wanton and wilful disregard of its natural consequences." *People v Datema*, 448 Mich 585, 606; 533 NW2d 272 (1995). Fourth, in light of the strong evidence against defendant, counsel was not ineffective for failing to move for a directed verdict. Counsel is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Next, defendant asserts that the trial court erred in refusing to instruct the jury that intent to commit the underlying felony does not establish the state of mind for felony murder. *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980). However, because the jury convicted defendant of second-degree murder and breaking and entering, not first-degree murder, the error, if any, in the trial court's felony murder instruction is harmless. Moreover, reviewing the jury instructions as a whole, we conclude the trial court fairly presented the issues to the jury and sufficiently protected defendant's rights. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). *People v Hughey*, 186 Mich App 585, 594; 464 NW2d 914 (1990).

Defendant also asserts that the cumulative effect of the errors at trial resulted in an unfair trial. In view of our resolution of the preceding issues, this claim is without merit.

Finally, defendant argues that he is entitled to resentencing. We disagree. First, defendant contends that the trial court incorrectly calculated his sentencing score. However, because the sentence imposed does not depart from the sentencing recommendations that would result from the corrected score, we conclude that the error, if any, is harmless. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996); *People v Williams*, 191 Mich App 269, 279-280; 477 NW2d 877 (1991). Additionally, Boyer's testimony that, despite his reservations, defendant persuaded him to break into the first of two houses is evidence supporting the trial court's conclusion that defendant led another in criminal activity. See, generally, *People v Hernandez*, 443 Mich 1, 16-17; 503 NW2d 629 (1993); *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994); *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992).

Second, defendant claims that his sentence is disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). However, defendant's sentence is within the sentencing guidelines' range. Therefore, his sentence is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Cutchall*, 200 Mich App 396, 410; 504 NW2d 666 (1993). Defendant has failed to rebut the presumption of proportionality. In view of defendant's unprovoked, brutal, fatal beating of an unsuspecting, defenseless elderly woman who was alone in her home, defendant's lack of a criminal background does not constitute an unusual circumstance overcoming the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994); see *People v Granderson*, 212 Mich App 673, 681; 538 NW2d 471 (1995). As Judge Knoblock stated at sentencing, defendant's conduct was "absolutely despicable behavior, inexcusable, unjustified, and absolutely has to be severely punished."

Based on our conclusion that defendant's sentence is proportionate to the offense and the offender, we find that defendant's sentence does not constitute cruel and unusual punishment. See

People v Williams (After Remand), 198 Mich App 537, 543; 499 NW2d 404 (1993). Moreover, defendant cites no authority to support and has therefore abandoned his claim that his sentence is "disparate from other sentences for similar crimes under similar circumstances." *In re Powers*, 208 Mich App 582, 588; 528 NW2d 799 (1995).

Affirmed.

/s/ Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra