

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT WILLIAM PANN,

Defendant-Appellant.

UNPUBLISHED

April 13, 1999

No. 206058

Macomb Circuit Court

LC No. 96-001299 FC

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Defendant was charged with assault with intent to murder, MCL 750.83; MSA 28.278, kidnapping, MCL 750.349; MSA 28.581, felonious driving, MCL 752.191; MSA 28.661, and possession of marijuana, MCL 333.7403(2)(d); MSA 14.157(7403)(2)(d). Following a jury trial, defendant was convicted of the lesser included offense of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and felonious driving. The trial court dismissed the possession charge on defendant's motion for directed verdict, and the jury acquitted defendant of the kidnapping charge. Defendant was sentenced to six to ten years' imprisonment for the assault conviction, and to a concurrent term of sixteen to twenty-four months' imprisonment for the felonious driving conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that the trial court committed error requiring reversal in denying his motion for a change of venue based upon pretrial publicity. Defendant contends that he could not receive a fair and impartial trial due to the strong community prejudice against him that resulted from the significant and inflammatory media coverage naming defendant as the only suspect in the unsolved Bernice Gray case. We initially note that defendant has failed to provide this Court with the transcripts from the September 30, 1996, hearing where the trial court rendered its ruling on the motion or the voir dire proceedings. Failure to provide this Court with the relevant transcripts constitutes a waiver of the issue. MCR 7.210(B)(1)(a); *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). In any event, defendant has not shown that the trial court abused its discretion in denying the motion for a change of venue on the basis of the record before us. Defendant has failed to prove that there was a strong community feeling against him or that the publicity was so extensive and inflammatory that jurors

generally could not remain impartial. *People v Hack*, 219 Mich App 299, 311; 566 NW2d 187 (1996). Defendant has further failed to show that the impaneled jury was actually prejudiced or that there was an atmosphere that created a probability of prejudice. *Id.* To the contrary, the record indicates that the trial court took the necessary precautions to protect the integrity of the proceedings and to ensure that defendant received a fair trial despite any trial publicity. Accordingly, we find that the trial court did not abuse its discretion in denying the motion for a change of venue.

Defendant next argues that the trial court erred in finding the victim unavailable due to lack of memory and in admitting her preliminary examination testimony at trial under MRE 804(b)(1). Defendant contends that the prior testimony was inadmissible because the victim did not testify to a lack of memory of the relevant details of the assault, but simply recanted her prior testimony when she stated that it was exaggerated and not true. We review a trial court's factual findings for clear error. MCR 2.613; *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). In addition, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Hoffman*, 225 Mich App 103, 104; 570 NW2d 146 (1997).

MRE 804(b)(1) allows the admission of a witness' former testimony in a later proceeding where that witness is unavailable to testify and the party against whom the testimony is being offered had the opportunity to cross-examine the witness at that time. *Briseno*, *supra* at 14. A declarant is "unavailable" if the declarant "has a lack of memory of the subject matter of the declarant's statement." MRE 804(a)(3); *People v Williams*, 117 Mich App 505, 509; 324 NW2d 70 (1982).

In the present case, although the victim testified to some details of the incident in question, she also testified that she could not recall with specificity, or could only vaguely remember, other details of the incident. Moreover, when the prosecutor attempted to refresh the victim's memory with her preliminary examination testimony, she repeatedly stated that she was unable to recall, or could only vaguely remember, giving those prior answers. The crucial factor in determining whether prior testimony is admissible due to lack of memory is not simply the unavailability of the witness; rather, it is the witness' ability to recollect the prior recorded statements that controls the decision. *People v Hayward*, 127 Mich App 50, 57-58; 338 NW2d 549 (1993). We find that, under the circumstances here, the victim's partial lack of memory constitutes "unavailability" under the court rule. *Id.*

Furthermore, defendant vigorously and effectively cross-examined the victim at the preliminary examination. Under such circumstances, prior recorded testimony of a witness is considered trustworthy because the witness testified under oath and the opponent had a fair opportunity and proper motive to examine the witness at the earlier proceeding. *Id.* at 56. Finally, although the victim did state on two occasions that she had exaggerated portions of her preliminary examination testimony, defendant's assertion that the victim testified that her entire prior testimony was untrue and, therefore, recanted her prior testimony, is not supported by the record. In this regard, we find defendant's reliance on *People v Dortch*, 84 Mich App 184; 269 NW2d 541 (1978), and *People v White*, 401 Mich 482; 257 NW2d 912 (1977) misplaced. Therefore, we hold that the trial court did not err in finding the victim unavailable due to lack of memory, and did not abuse its discretion in admitting her preliminary examination testimony pursuant to MRE 804(b)(1).

Defendant further contends that the trial court denied him his right to a properly instructed jury when it refused to provide an instruction on the lesser included misdemeanor of aggravated assault. Defendant did not request an instruction on aggravated assault at trial; nor did he object to the instructions given by the court. Therefore, defendant's claim of instructional error has not been preserved for appeal, and we decline to review it. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994); *People v Punga*, 186 Mich App 671, 674; 465 NW2d 53 (1991). In any event, defendant will not suffer manifest injustice because the instruction was not supported by a rational view of the evidence. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987); *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996).

Next, defendant contends that several of the trial court's remarks and rulings demonstrated bias against him, and denied him a fair trial. Defendant did not object to the trial court's allegedly improper conduct, and only some of the allegations now raised on appeal were raised in defendant's motion for a new trial. Therefore, our review of this issue is limited to the allegations that were preserved below, unless manifest injustice would result to defendant. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

First, we find that, contrary to defendant's contention, the trial court did not demonstrate judicial bias in relation to its ruling declaring the victim an unavailable witness by "cueing" the prosecutor to make that motion; nor did the trial court intemperately deny defense counsel's efforts to argue the motion. The record demonstrates that the prosecution first advised the court that the victim might refuse to testify. Moreover, defense counsel was given ample opportunity to respond to the motion, and was only denied the opportunity to further argue it after the court had rendered its ruling. Second, defendant has failed to offer any evidence that the jury was adversely affected as a result of being excused by the trial court at times during the victim's testimony. Third, we find that the trial court did not exhibit bias at defendant's sentencing hearing when it mentioned the case involving the disappearance of Bernice Gray for which defendant was the primary uncharged suspect. The trial court explicitly stated that defendant was presumed innocent of that crime, that it would not consider the Gray allegations in imposing defendant's sentence, and that precautions had been taken to prevent the parties from mentioning the case outside of or during the trial. Accordingly, we find that neither the court's remarks nor its ruling pierced the veil of judicial impartiality or that it unduly influenced the jury. See *Paquette, supra* at 340; *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). With respect to the other instances of alleged misconduct by the trial court, after a thorough review of the record, we find no manifest injustice and decline to consider the merits of those claims.

Next, defendant asserts that he was denied his right to a fair trial by the cumulative effect of the alleged errors. In view of our resolution of the preceding issues, this claim is without merit. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Defendant next contends that his sentence for the assault with intent to do great bodily harm conviction, which exceeded the guidelines' recommended minimum range of two to five years, was disproportionately severe because he did not have a prior criminal record. We review a trial court's sentencing decision for an abuse of discretion. *People v Phillips (On Rehearing)*, 203 Mich App 287, 290; 512 NW2d 62 (1994). A sentence constitutes an abuse of discretion if it violates the principle of

proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The key test of proportionality is not whether the sentence departs from or adheres to the guidelines' recommended range, but whether it appropriately reflects the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 660-661.

After a thorough review of the sentencing transcript, we conclude that defendant's sentence appropriately reflected the seriousness of the offense as well as the trial court's concern for defendant's hostile, impulsive proclivities which were manifested in the present case. The evidence established that defendant sprang up on his wife from the back seat of her car, gripped her neck, and began arguing with her while she was driving. After the victim stopped the car, defendant punched her repeatedly with his fist while telling the victim that he was going to kill her and that she was going to die. When approached by a police officer, defendant fled the scene at a high rate of speed. Furthermore, the sentencing court concluded that although defendant did not have a criminal record, his psychological report, in conjunction with his conduct in the present case, indicate that he "is a time bomb that is set to explode with the slightest degree of provocation." The court noted that there were special circumstances that justified an upward departure of the guidelines by twelve months. We agree. Therefore, we hold that defendant's six-year minimum sentence for assault with intent to do great bodily harm does not violate the principle of proportionality.

Defendant also argues that the trial court improperly based the sentence on its own unsubstantiated opinion concerning a complex area of human psychology when, in noting that the victim did not want defendant to be incarcerated, it took judicial notice of the fact that victims of abuse frequently return to their abusers. However, defendant's claim lacks merit as there is no indication that the trial court relied on this assertion in imposing sentence. When viewed in context, it is evident that the court was merely addressing a letter the victim had submitted to the court indicating that she did not want her husband to be incarcerated. Therefore, contrary to defendant's contention, we find that the court's statement was merely an observation of the circumstances, and not a reason for imposing sentence or exceeding the guidelines.

Lastly, defendant asserts that the trial court improperly considered the issue of the Bernice Gray disappearance in imposing the sentence as evidenced by its remarks to Gray's father during sentencing. However, as previously discussed, defendant's contention is not supported by the record. Prior to sentencing, the court noted that although defendant was allegedly linked to the Gray matter, he was not convicted of the crime, he was "presumed to be innocent of that crime," the court would not consider the matter in sentencing defendant, and the sentence imposed would be based solely on defendant's background and the circumstances of the present case. Therefore, the trial court did not abuse its discretion in imposing defendant's sentence.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Romas S. Gibbs

/s/ Kurtis T. Wilder