

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARC VINCENT YADEN,

Defendant-Appellant.

UNPUBLISHED

February 25, 2000

No. 210481

Macomb Circuit Court

LC No. 96-002775-FC

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was acquitted of assault with intent to murder, MCL 750.83; MSA 28.278, but found guilty of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced to a term of four to ten years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion and denied him due process when it refused to allow him to elicit expert testimony from the victim, who was a medical doctor. We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). Constitutional questions are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

Contrary to what defendant argues, the trial court did not prevent him from presenting a defense and, therefore, did not violate his right to due process. Defendant was not prohibited from calling his own expert witness with regard to the matter in question. Further, the Michigan Rules of Evidence contemplate that expert testimony is to be voluntary, not compelled, and also provide the trial court with the authority to "exercise reasonable control over the mode and order of interrogating witnesses . . . so as to . . . protect witnesses from harassment or undue embarrassment." See MRE 706(a); MRE 611(a)(3). The trial court did not abuse its discretion in limiting defendant's questioning of the victim.

Defendant next argues that the prosecutor excessively objected at trial, which thereby deprived him of a fair trial. We disagree. Because defendant may not leave it to this Court to search for a factual basis to support his general claim of pervasive error, *People v Norman*, 184 Mich App 255, 260; 457

NW2d 136 (1990), we have reviewed only the specific instances of alleged misconduct identified by defendant. The referenced objections and comments were either overruled, not objected to, or received an appropriate curative instruction. *People v Bahoda*, 448 Mich 261, 281, 285; 531 NW2d 659 (1995). Viewed in context, we conclude that defendant has failed to show conduct sufficiently serious to deprive him of a fair trial. *Id.* at 266-267.

Next, defendant argues that the trial court abused its discretion in admitting the statement of a missing witness under the excited utterance exception to the hearsay rule, MRE 803(2). We disagree. The record demonstrates that the statement related to the charged assault, which was a startling event, and was made shortly after the assault occurred, while the witness was still under the excitement of the assault. MRE 803(2); *Smith, supra* at 550-552. In any event, the only portion of the statement not admitted by defendant concerned the number of times that defendant allegedly hit or kicked the victim. Apart from the witness' statement, the jury could rationally conclude from other evidence on the record that multiple blows were inflicted. Further, even if the jury believed defendant's claim that he hit the victim only once, it could still rationally conclude, given the severity of the injuries, that defendant intended to cause the victim great bodily harm. See *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Thus, even if the statement was improperly admitted as an excited utterance, defendant has failed to show that it is more probable than not that a different outcome would have resulted without the alleged error. *People v Lukity*, 460 Mich 484, 495-497; 596 NW2d 607 (1999). Therefore, appellate relief is not warranted.

Lastly, defendant argues that his sentence is disproportionate under *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree. We review the trial court's sentence to determine if the court abused its discretion by imposing a sentence that is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

Defendant's four year minimum sentence is within the sentencing guidelines' recommended minimum sentence range and, therefore, is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Upon considering the circumstances of this case, including defendant's substance abuse history, the unprovoked and extremely violent nature of defendant's assault, and the severity of the victim's injuries, we conclude that defendant's sentence does not violate the principle of proportionality. *Milbourn, supra*; *People v Granderson*, 212 Mich App 673, 680-681; 538 NW2d 471 (1995).

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens