STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 18, 2000
v	No. 208848 Oakland Circuit Court
PATRICK M. KENNEY, Defendant-Appellant.	LC No. 97-153649-FC

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83; MSA 28.278, and the trial court sentenced him to twelve to thirty years' imprisonment. He appeals as of right, and we affirm.

I. FACTS AND PROCEEDINGS

Defendant's conviction arises from an assault at a party. After defendant and the victim were involved in a fight, defendant threatened to kill or stab the victim. Defendant then left the party, but returned twenty minutes later and stabbed the victim nine times. The victim sustained eight stab wounds to his arms and one three- to four-inch abdominal wound, which pierced his liver and punctured his diaphragm. The trial court instructed the jury on the charged offense of assault with intent to commit murder and the lesser offense of assault with intent to commit great bodily harm.[1] The jury convicted defendant as charged.

II. ANALYSIS

A

Defendant argues that reversal is required because the trial court failed to give preliminary jury instructions pursuant to MCR 6.412(B). Because defendant did not object at trial to the absence of preliminary instructions, this issue is not preserved. To avoid forfeiture of this unpreserved nonconstitutional issue, defendant must demonstrate plain error that was outcome-determinative or error

that falls under the category of cases where prejudice is presumed or reversal is automatic. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.*, 763-764,774, citations and internal quotation marks omitted.

MCR 6.412(B) provides:

> Before beginning the jury selection process, the court should give the prospective jurors appropriate preliminary instructions and must have them sworn.

Defendant cites no authority for the proposition that the failure to give preliminary instructions requires reversal, so the issue is effectively abandoned. *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997). In any event, the record reveals that the trial court adequately appraised the jurors of the concepts of presumption of innocence, burden of proof, and reasonable doubt in its comments and questions to the jurors during the jury selection process. Further, the trial court properly instructed the jury on the burden of proof, presumption of innocence and reasonable doubt in its final instructions before deliberations. Under these circumstances, this unpreserved issue does not warrant reversal.

B

The trial court instructed the jury on the defense of intoxication with respect to the charged offense of assault with intent to commit murder, but failed to give the intoxication instruction with respect to the lesser offense of assault with intent to commit great bodily harm less than murder. Defendant argues that the omission of the intoxication instruction for the lesser offense warrants reversal. He is wrong.

Not only did defendant fail to object to the jury instructions as given, he vigorously opposed the instruction that he now complains should have been given. "[D]efendant may not assign error on appeal to something that his own counsel deemed proper at trial." *People v Barclay*, 208 Mich App 670, 673, 675; 528 NW2d 842 (1995). Furthermore, the jury apparently rejected the intoxication defense when it convicted defendant of the charged offense regardless of the intoxication instruction. Therefore, if the omission of the intoxication instruction for the lesser offense were error, the error would be harmless. *Carines*, *supra*.

C

Defendant contends that he was denied the effective assistance of counsel. We disagree. To establish ineffective assistance of counsel, a defendant must show that (1) trial counsel's performance was below an objective standard of reasonableness according to prevailing professional norms, and (2) that there is a reasonable probability that absent counsel's errors, the outcome of the particular proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Graham*, 219 Mich App 707, 711; 558 NW2d 2 (1996). Effective assistance

of counsel is presumed and defendant bears a heavy burden of proving otherwise. *Stanaway, supra,* 446 Mich 687. The defendant must overcome the strong presumption that counsel used sound trial strategy. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Sawyer*, 221 Mich App 1, 3; 564 NW2d 62 (1997). Unless the trial court holds an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to the facts apparent on the record.

Defendant claims that counsel was ineffective because, in his opening statement, he conceded defendant's guilt as to the lesser offense of assault with intent to commit great bodily harm less than murder. We disagree. Defendant did not dispute that he stabbed the victim. The key issue here was defendant's intent with respect to the stabbing, specifically whether he acted with the specific intent to kill. Defendant has not overcome the presumption that defense counsel's strategy, conceding guilt of a lesser offense, constituted a legitimate trial tactic. See *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994); *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984).

Defendant maintains that that defense counsel was deficient in failing to request instructions for the lesser included offenses of felonious assault or aggravated assault. However, he has failed to overcome the presumption that such a tactic was sound trial strategy. *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986). Furthermore, defendant could not have been prejudiced by this tactic because the jury rejected the lesser offense option and convicted defendant of the greater charged offense of assault with intent to commit murder. See *People v Raper*, 222 Mich App 475, 483-484; 563 NW2d 709 (1997).

Limiting our review to the available record, defendant has not demonstrated that he was deprived of a substantial defense by defense counsel's failure to call either Dr. Watson of the Forensic Center or defendant's mother as witnesses. *People v Hyland*, 212 Mich App 701, 710-711; 538 NW2d 465 (1995), vacated on other grounds 453 Mich 902 (1996); *Barclay, supra*. Nothing in the record indicates that either of these individuals could have aided the defense.

We find no merit to defendant's claim that counsel was ineffective in failing to object to the prosecutor's remarks during closing argument that defendant had stabbed the victim nine times and that, if the victim had not protected himself, he would have died. Testimony at trial indicated that the victim was stabbed nine times, sustaining a serious stab wound to his abdomen and eight wounds to his arms. Thus, there was record evidence supporting the prosecutor's statements. *People v Dinsmore*, 103 Mich App 660; 303 NW2d 857 (1981).

We reject defendant's claim that defense counsel was ineffective by failing to object to certain testimony given by Officer Kutlarz and William Vargo. With regard to the challenged rebuttal testimony by Officer Kutlarz, the record does not suggest, as defendant argues, that Officer Kutlarz "ventured into forbidden areas which may prejudice the defense." See *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). Further, the record indicates that Vargo did not offer an opinion as to whether defendant was "falling down drunk" or merely "buzzed."

D

Defendant argues that his twelve to thirty year sentence is disproportionate under *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). We disagree. The sentence is within the sentencing guidelines recommended minimum sentence range and, therefore, is presumptively valid. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has not presented any "unusual circumstances" to overcome the presumptive validity of his sentence. See *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995). Considering the circumstances surrounding the offense and the offender, defendant's sentence does not violate the principle of proportionality. *Milbourn, supra*; *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995).

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry William Saad

[1] MCL 750.84; MSA 28.278.