

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRIN VIRGIL,

Defendant-Appellant.

UNPUBLISHED

August 24, 2004

No. 247850

Wayne Circuit Court

LC No. 02-011595-01

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant, Darrin Virgil, appeals as of right his conviction following a jury trial of unarmed robbery, MCL 750.530, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to 110 months to 15 years in prison for the robbery conviction, and 80 to 120 months in prison for the assault conviction. We affirm but remand for the ministerial task of correcting the pre-sentence investigation report (PSIR).

I. FACTS

Defendant's convictions stem from an altercation with his estranged wife, Naomi Williams, that occurred September 6, 2002. Defendant and the victim were scheduled to meet with a counselor to resolve issues regarding their pending divorce. When they arrived at the counselor's office, they were told that the counselor was not available. They walked out to the street and began a conversation, during which defendant questioned the victim about whether she was dating someone. The victim denied that she was dating anyone. Defendant grabbed her by the shirt and told her he would beat her and that he did not care about the personal protection order (PPO) she had filed against him.

Defendant then grabbed the victim by the neck and choked and punched her. Defendant punched the victim in the nose and it started to bleed. The victim screamed and kicked and bit defendant in an attempt to stop the beating. The victim fell to the ground, and defendant continued to kick her in the head until she lost consciousness. Defendant took the victim's purse and walked away. The victim was hospitalized as a result of these injuries.

II. APPOINTMENT OF SUBSTITUTE COUNSEL

Defendant asserts that the trial court erred in failing to appoint new counsel because there was a breakdown in the relationship between defendant and his trial attorney. We disagree.

A. Standard of Review

This Court reviews for an abuse of discretion a trial court's decision regarding substitution of counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

B. Analysis

Appointment of substitute counsel is warranted only on good cause shown and where substitution of counsel will not unreasonably disrupt the judicial process. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Good cause exists where a legitimate difference of opinion develops between defendant and appointed counsel regarding a fundamental trial tactic. *People v Williams*, 386 Mich 565; 194 NW2d 337 (1972). A mere allegation that defendant has lost confidence in appointed counsel is not good cause to substitute counsel. *Traylor, supra* at 463. Defendant's allegation that defense counsel did not see things defendant's way is also not good cause. *People v Meyers (On Remand)*, 124 Mich App 148, 165-166; 335 NW2d 189 (1983).

Here, defendant complained, prior to voir dire, that appointed counsel, Julius Curling, was unprepared for trial. Defendant's complaint was based on the fact that Curling was absent from several of defendant's hearings. Other attorneys from the defender's office substituted for Curling at defendant's arraignment and the setting of the trial date. Defendant felt that Curling was inattentive and filed a grievance against him. In response to defendant's concerns, Curling informed the trial court that he was prepared and ready to proceed with the trial. The trial court informed defendant that it was common practice for attorneys to stand in for one another at hearings. The trial court told defendant that he could either represent himself, hire his own attorney, or have Curling represent him. Defendant agreed to allow Curling to represent him.

Defendant's concern that Curling was unprepared does not constitute a legitimate difference of opinion regarding a fundamental trial tactic. See *Williams, supra*. Further, it appears that defendant merely lost confidence in Curling because of perceived inattentiveness, which is not good cause to substitute counsel. See *Traylor, supra* at 463. Thus, the trial court properly declined to substitute counsel in this case.

III. OTHER BAD ACTS

Defendant argues that the trial court erred in allowing the victim to testify that she (1) initially thought that defendant had assaulted her with a blackjack¹ because she knew he owned a blackjack, and, (2) on several previous occasions he had threatened to kill her and cut up her body parts in a "bloodbath." We disagree.

¹ A blackjack is "a short, leather-covered club, consisting of a heavy head on a flexible handle." *Random House Webster's College Dictionary* (1997), 137.

A. Standard of Review

Defendant objected to this evidence as narrative, speculative and irrelevant but did not raise the argument before the trial court that this testimony was improper evidence of prior bad acts under MRE 404(b). An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). We review unpreserved claims for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. Analysis

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of other “bad acts” is admissible under MRE 404(b) if: (1) it is offered for a proper purpose and not to prove the defendant's character or propensity to commit the offense; (2) it is relevant; and (3) the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Here, the victim initially told police that she thought defendant had used a blackjack during the beating. In fact, defendant did not use a blackjack during the offense, and defense counsel attempted to impeach the victim's credibility by showing that she had “lied” to the police about the incident. Thus, the victim's testimony was an attempt to explain that she did not “lie” to the police, but truly believed that defendant had beaten her with a blackjack based upon comments he made to her in the past. Furthermore, evidence of prior bad acts may be used to prove intent. Here, defendant's theory of the case was that he did not intend to inflict great bodily harm upon the victim. However, past threats to kill and dismember the victim are relevant in that they tend to show that defendant intended to harm her. Further, the admission of this testimony was not more prejudicial than probative because the jury had already heard testimony indicating that there were past instances of domestic violence between the victim and defendant and the testimony about the blackjack was highly probative of the victim's truthfulness. Therefore, the admission of this testimony was not plain error.

IV. SENTENCING GUIDELINES: OV 7

Defendant argues that he is entitled to resentencing because his sentence is a departure from the correct guideline range and the trial court erred in scoring fifty points under offense variable (OV) 7 for aggravated physical abuse. We disagree.

A. Standard of Review

We review a trial court's determination of the existence of a sentencing factor for clear error, and scoring decisions supported by any evidence will be upheld. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003), citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

B. Analysis

Pursuant to MCL 777.37(1)(a), OV 7 is to be scored fifty points when a victim was treated with sadism, torture, excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. At sentencing, the trial court commented that he scored fifty points for OV 7 because defendant treated the victim with excessive brutality when he knocked her unconscious in the middle of the street and then stomped on her head. Here, the evidence indicates that defendant continued beating the victim even after she was unconscious. These actions support the trial court's finding that defendant treated the victim with excessive brutality. We affirm defendant's sentence.

V. DEFENDANT'S PRIOR CONVICTIONS

Defendant argues that the trial court erred in sentencing defendant based on defendant's prior convictions in Florida. Defendant contends that the information relied upon by the trial court was inaccurate and was not reflected in the PSIR. We remand for the ministerial task of correcting the PSIR.

A. Standard of Review

The general rule in Michigan is that a defendant may not expressly acquiesce to the court's handling of a matter and then raise it as an error before this Court. *People v Carter*, 462 Mich 206, 213-216; 612 NW2d 144 (2000). Here, defendant agreed with the trial court at sentencing that he had eight prior convictions in Florida. This acquiescence extinguishes any error and precludes defendant from raising the issue on appeal. *Id.* at 208-209.

B. Analysis

In regard to challenges to the contents of the presentence report, MCL 771.14(6) states:

At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

Similarly, MCR 6.425(D)(3) provides:

If any information in the presentence report is challenged, the court must make a finding with respect to the challenge or determination that a finding is

unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenge information into account in sentencing, it must direct the probation officer to

(a) correct, or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

Here, the PSIR states that defendant had three prior convictions in the state of Florida. At sentencing, the prosecutor presented a report from the Florida Department of Corrections which indicates that defendant had eight felony convictions in Florida. The trial court then recalculated the guidelines and sentenced defendant on the basis of those eight prior convictions. Defendant now claims that a remand is necessary because the information regarding the eight prior convictions was inaccurate. However, defendant has provided no offer of proof in support of his assertion that the information regarding the eight prior convictions is inaccurate. The PSIR does indicate that defendant had three prior felonies. However, when asked at sentencing about the report from Florida, defendant admitted to the eight prior convictions. A defendant may not harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Furthermore, defendant asserts that the Florida report contains a warning that the information is not accurate. The report indicates:

The Florida Department of Corrections updates this information regularly, to ensure that it is complete and accurate, however this information can change quickly. Therefore, the information on this site may not reflect the true current location, status, release date, or other information regarding an inmate.

This disclaimer alone is insufficient to call the accuracy of the report, regarding the number of defendant's prior convictions, into question, particularly since defendant admitted to the contents of the report at sentencing. Thus, even if defendant had not waived this issue through his admission at sentencing, the absence of an offer of proof calling the accuracy of the Florida report into question leads us to find that the information relied upon by the trial court was accurate and that there is no need for a remand for an evidentiary hearing and resentencing. Although the trial court corrected the scoring of guidelines to reflect the prior convictions, the PSIR itself was not corrected. Therefore, a remand for the ministerial task of making such a correction is necessary. *People v Russell*, 254 Mich App 11, 22; 656 NW2d 817 (2003).

VI. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that counsel was ineffective in advising defendant not to testify because defendant could be impeached with eight prior convictions when, in fact, defendant had only three prior convictions, and that counsel was ineffective in failing to cross-examine a witness. We disagree.

A. Standard of Review

When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The defendant must make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), unless the details of the alleged deficiency are apparent on the already-existing record, *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 687.

In regard to defense counsel advising defendant not to testify because of his prior convictions, as previously discussed, defendant has failed to provide an offer of proof indicating that the information regarding his eight prior felony convictions is inaccurate. Therefore, there is no reason to believe that defense counsel's advice was, in fact, based on erroneous information.

In regard to the defense counsel's failure to question a witness, defendant has provided no particulars in regard to the type of cross-examination that should have been conducted and how such a cross-examination was likely to have affected the outcome of the proceedings. Without such an explanation or offer of proof, we are not persuaded that a remand is necessary.

Defendant's convictions and sentences are affirmed, but the case is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette