STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 6, 2005
v	No. 254238 Kalamazoo Circuit Court
HENRY CHARLES LANNING, Defendant-Appellant.	LC No. 02-002068-FC

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction and sentence for armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.529(c), assault with intent to murder, MCL 750.83, first degree home invasion, MCL 750.110(a)(2), larceny in a building, MCL 750.360, the unlawful driving away of a motor vehicle, MCL 750.413, and breaking and entering a vehicle to steal more than $200 and less than $1,000, MCL 750.356(2)(b)(i). Defendant was sentenced as a fourth habitual offender. We affirm.

Defendant first went to the home of Donald York, with Chad Van Dusen, intending to rob York; when York would not come out of his home, defendant and Van Dusen left. Later, within a couple of days, defendant returned alone and assaulted and robbed York. During the course of the assault, which began outside York's home and ended inside York's home, defendant beat York about the head and face with a tree limb, causing a near fatal skull fracture that left York with permanent neurological and psychological impairments.

I

Defendant asserts that he was denied the effective assistance of counsel during plea negotiations and by counsel's failure to present an insanity defense. We disagree. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. Ordinarily, a 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). In the instant matter, however, the trial court was not presented with and did not rule on defendant's claim. Therefore, this Court is left to its own review of the facts contained in the record in evaluating defendant's assertions. *People v Rodriguez,* 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish a

claim of ineffective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different and that counsel's errors rendered the proceedings fundamentally unfair and unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant asserts that during plea negotiations, he asked his trial counsel whether he had been timely charged as a habitual offender and was told that he had not been so charged, and that this information was critical to his determination whether to accept the prosecutor's offer of a plea bargain capping his minimum sentence at twenty-five years, and that had he known that the habitual notice had been filed, he would have accepted the offer. However, when defendant raised this issue at sentencing, his counsel advised the trial court that defendant did not ask whether he was being charged as a habitual offender until trial was underway and that counsel advised that he was so charged.

Although failure to adequately communicate about a plea offer may constitute ineffective assistance of counsel, defendant must prove by a preponderance of the evidence that an offer was made, that his attorney failed to adequately communicate about the offer, and that he would have accepted the offer. *People v Williams*, 171 Mich App 234, 241-242; 429 NW2d 649 (1988). Defendant has not met this burden. In addition to defense counsel's statements to the trial court at sentencing, in letters defendant wrote to his girlfriend, which were introduced at trial, defendant wrote that he was facing a "life case," dispelling the notion that defendant did not realize he was facing a sentence in excess of the twenty-five years he was offered in exchange for his plea. Therefore, based on the record before us, we conclude that defendant's assertion that he received ineffective assistance in connection with plea negotiations lacks merit.

II

Defendant's assertion that he was denied the effective assistance of counsel with regard to the strategic decision not to present an insanity defense also lacks merit. Presentation of an insanity defense would have been entirely inconsistent with defendant's assertions that he was not the perpetrator. While defendant could have presented inconsistent defenses, *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), defense counsel's determination to pursue an innocence defense alone was a matter of professional judgment as to trial strategy, which this Court will not second-guess. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Strong*, 143 Mich App 442, 449, 372 NW2d 335 (1985). Additionally, there is no indication in the record that defendant could have established the requisite elements of an insanity defense. Voluntary intoxication cannot form the basis for an insanity defense, MCL 768.21a(2), and testimony indicated that defendant acted deliberately, with much thought and appreciation for the wrongfulness of his conduct.

III

Defendant argues that the trial court abused its discretion by denying his motions for substitution of counsel. We disagree. This Court has explained that, while an indigent defendant is guaranteed the right to counsel, he is not guaranteed the right to an attorney of his choice; thus, appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between the defendant and his counsel over a fundamental trial tactic. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). The record evidences no legitimate difference of opinion between defendant and his trial counsel. Defendant made several general and unsubstantiated complaints about defense counsel's performance. In each case in which a requested motion had not been filed, or requested questions had not been asked of a witness, defense counsel offered a legitimate basis for his decisions. Thus, defendant failed to establish good cause for substitution and the trial court did not abuse its discretion by denying defendant's motions.

IV

Defendant also argues that the trial court abused its discretion by requiring him to be shackled during trial. We disagree. This Court reviews a trial court's decision to restrain a defendant during trial for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). There was evidence in the record supporting the trial court's determination that defendant posed a flight risk. Further, the trial court sought the least restrictive restraints necessary to ensure defendant could not flee and offered to give curative instructions to the jury, which offer was not pursued by defense counsel. Thus, it was within the trial court's discretion to order defendant restrained. *Id.*

V

Defendant next argues that the trial court erred in denying his motion to suppress his statements to police, which he asserts were obtained as a result of continued questioning after defendant's clear request for an attorney. We disagree. This Court reviews a trial court's determination regarding the voluntariness of a confession de novo; in so doing, this Court will not disturb the trial court's factual findings unless they are clearly erroneous, giving deference to the trial court's superior position to observe the credibility of the witnesses. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

The trial court held an evidentiary hearing, pursuant to *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965), to evaluate defendant's claims. At that hearing, the lead investigator testified that defendant made conflicting statements regarding his desire to speak to an attorney. The officer testified that defendant first said that if the interview was to be about new charges, he wanted to speak to an attorney first, but then said that if he needed a lawyer, he would say so. The officer told defendant he was confused about whether defendant wanted a lawyer, or whether defendant wanted to talk; defendant said that they could talk. The officer then told defendant if he decided he wanted a lawyer, to stand up and the interview would stop. The interview continued; when the officer asked defendant about the assault on York, defendant

stood; the interview ended and he was returned to his cell. Testimony from a number of officers indicated that defendant initiated subsequent contact. In contrast, defendant testified that his request for a lawyer was clear.

As this Court recently explained, in *People v Tierney*, 266 Mich App 687; 703 NW2d 204 (2005):

> A criminal defendant has a constitutional right to counsel during interrogation. When a defendant invokes his right to counsel, police must terminate their interrogation immediately and may not resume questioning until such counsel arrives. However, the defendant's invocation of his right to counsel must be unequivocal. "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." [citations omitted.]

Thus, an ambiguous statement regarding counsel does not require the police to cease questioning or to clarify whether the accused wants counsel. *Davis v US*, 512 US 452; 114 S Ct 2350; 129 L Ed 2d 362, 371 (1994); *People v Granderson*, 212 Mich App 673, 676-678; 538 NW2d 471 (1995). Further, once a defendant invokes his right to counsel, he cannot be interrogated until counsel is made available *unless* he subsequently initiates communication with the police. *People v Anderson (After Remand)*, 446 Mich 392, 402-403; 521 NW2d 538 (1994).

The trial court was faced with conflicting testimony from the officers and from defendant regarding the clarity of defendant's request for counsel and as to the circumstances surrounding defendant's statement. The trial court determined that the testimony of the officers was more credible than defendant's testimony. Given the trial court's opportunity to observe the witnesses, we are not left with a firm and definite conviction that the trial court was mistaken. Further, given that defendant's initial statements regarding counsel were equivocal, that the lead officer established a procedure for defendant to indicate clearly that he wanted to end the interview by standing up, that the officers respected defendant's request to end the interview when defendant stood up, and that defendant initiated subsequent contact with the officers, we conclude that defendant's statement was voluntarily made.

VI

Defendant next argues that the trial court erred in admitting testimony relating to DNA evidence without requiring the DNA expert to establish the reliability of the frequency statistics he used in reaching his conclusion. We disagree. This Court repeatedly has taken judicial notice of the general acceptance of the PCR DNA testing method, which was the method used in this case, in the scientific community. *People v Coy*, 258 Mich App 1, 10-11; 669 NW2d 831 (2003) ("Coy II"); *People v Coy*, 243 Mich App 283, 290-292; 620 NW2d 888 (2000) ("Coy I"); *People v Lee*, 212 Mich App 228, 281-283; 537 NW2d 233 (1995). Further, this Court has determined

that statistical evidence of DNA is generally admissible; this Court continues to reject *Davis-Frye*[1] challenges to statistical analysis of DNA evidence, finding that such arguments are relevant to the weight of such evidence and not its admissibility. *Coy II, supra* at 11. Because the type of testing employed in this case has received general acceptance, and any objection to the statistical analysis would be relevant to the weight of the testimony and not the admissibility, the trial court did not abuse its discretion in admitting the testimony regarding DNA evidence without requiring additional foundational testimony.

VII

Defendant asserts that the trial court abused its discretion in admitting photographs of the victim. We disagree. As our Supreme Court explained in *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995):

> The decision to admit or exclude photographs is within the sole discretion of the trial court. Photographs are not excludable simply because a witness can orally testify about information contained in the photographs. Photographs may also be used to corroborate a witness' testimony. Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. [citations omitted]

Defendant acknowledges that a crucial issue in this case was defendant's intent and that evidence of injury is admissible to show intent. The photographs admitted at trial are factual representations of the injuries suffered by York; they aided the jury in understanding the nature and extent of the injuries inflicted to evaluate defendant's intent. *Id.* at 79. Thus, the trial court did not abuse its discretion in admitting them.

VIII

Defendant also raises several issues regarding sentencing. First, defendant argues that offense variables 4, 5, and 8 were improperly scored. The trial court has discretion in determining the number of points to be scored on each offense variable, provided that there is evidence on the record to adequately support a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court reviews the trial court's scoring decision to determine whether the trial court properly exercised its discretion and whether there is record evidence supporting a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). We find that the record supports the trial court's conclusion that both the victim and the victim's family suffered serious psychological injury that may require treatment,

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[1] As this Court noted in *Coy II, supra* at 9, n 2, "The *Davis-Frye* test requires that novel scientific methods be shown to have gained general acceptance in the scientific community to which it belongs before being admitted as evidence at trial"; it is derived from the holdings of *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955) and *Frye v United States*, 54 App DC 46, 47; 293 F 1013 (1923).

and that defendant transferred the victim to a place of greater danger, by taking him inside the house where it was less likely that he would be seen. Further, even if we were to find that OVs 4, 5, and 8 were scored improperly, defendant's sentence would be unaffected; even scoring those variables at zero, defendant's OV score would remain above that necessary to fall within the same OV level. Thus, any error is harmless and would not entitle defendant to resentencing. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Defendant also argues that the trial court violated his constitutional rights by failing to depart downward from the guidelines recommended minimum sentencing range and thereby imposing sentences that were excessive and constitute cruel and unusual punishment. We disagree. When, as here, the trial court sentences a defendant within the applicable guidelines range, this Court must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10). As discussed above, defendant's sentence is not based on erroneous scoring and defendant makes no assertion that it is based on inaccurate information. Therefore, it must be affirmed. Further, because defendant's sentence is within the guidelines range, it is proportionate, and therefore, defendant's argument that his sentence constitutes cruel and unusual punishment necessarily fails. *McLaughlin, supra*, at 670-671.

Defendant asserts further that his sentence is unconstitutional pursuant to the United States Supreme Court decision in *Blakely v Washington*, 542 US 296, 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the jury verdict did not encompass all the factual findings relied on by the trial court in scoring the sentencing guidelines. However, a majority of our Supreme Court explained in *People v Claypool*, 470 Mich 715, 730, n 14; 684 NW2d 278 (2004), that *Blakely*, which considered whether facts that increase the sentence for a crime beyond a statutorily prescribed maximum must be submitted to a jury, is inapplicable to Michigan's guideline scoring system, which determines recommended minimum sentence ranges.

Finally, defendant argues that he was improperly denied credit against his instant sentences for timed served. We disagree. Because defendant was on parole at the time of the instant offense, any time served before sentencing in the instant matter was to be applied to defendant's prior, paroled-from sentence(s) and not to the instant sentences. *People v Watts*, 186 Mich App 686, 687, 689-691; 464 NW2d 715 (1991).

Affirmed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey