STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 270828 Muskegon Circuit Court
TONY DIMARES MOORE a/k/a TONY DIMORES MOORE, Defendant-Appellant.	LC No. 05-052358-FC

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and a single count of carrying a concealed weapon, MCL 750.227. Defendant was sentenced to concurrent terms of 67 months to 10 years' imprisonment for the assault convictions, and 18 months to 5 years' imprisonment for the carrying a concealed weapon conviction. He appeals as of right. We affirm defendant's convictions and sentences, but remand this matter for correction of the judgment of sentence.

I. Jury Instructions

A. Self-Defense

Defendant first argues that the trial court erred in declining to instruct the jury on self-defense. "Questions of law, including questions concerning the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003); see also *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002) (the circumstances to which self-defense may be applied is a question of law subject to review de novo).

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *Riddle*, *supra*. "When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *Id.* Generally, a person acts in self-defense if that person is free from fault and, under all the circumstances, honestly and reasonably believed that he was in imminent danger of death or great bodily harm and that it was necessary for him to exercise deadly force. *Id.* at 119. "The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, such as by applying nondeadly force or by using an

obvious and safe avenue of retreat." *Id*. A defendant may not claim self-defense where he used excessive force or was the initial aggressor. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

The evidence in this case did not support defendant's requested instruction on self-defense. Initially, we note that defendant was not free from fault in the altercation between himself and victim Torrey Day. *Riddle*, *supra* at 119. To the contrary, the evidence showed that defendant entered the home of his former girlfriend, Adell Banks, and specifically sought out Day in the bedroom of the home while armed with a knife. The evidence presented also did not support a conclusion that defendant had an honest and reasonable belief that he was in imminent danger of death or great bodily harm and that it was necessary for him to exercise deadly force. *Id*. Rather, the evidence showed that if defendant feared for his safety, he could have refrained from going into the bedroom or left the house all together, instead of confronting Day. Finally, even accepting defendant's assertion that he felt threatened by Day and only then pulled out his knife, self-defense instructions were not warranted because defendant used excessive force to repel the physical altercation with Day. *Kemp*, *supra* at 322. Indeed, the evidence showed that defendant stabbed Day multiple times, puncturing Day's lung. Even though Day was younger and physically larger than defendant, this far exceeded the force necessary to defend himself against Day, who was unarmed. For all these reasons, the trial court properly declined to give defendant's requested self-defense instructions.

B. Unanimity

Defendant also argues that the trial court erred in failing to give the jury a specific unanimity instruction with respect to the charge of assault with intent to do great bodily harm to Banks. However, by expressly approving the jury instructions as given, defendant waived the issue on appeal. See, e.g., *People v Carter*, 462 Mich. 206, 215, 612 NW2d 144 (2000). Regardless, we find no merit to defendant's assertion that he was entitled to the special instruction. Indeed, a specific unanimity instruction is required only where "more than one act is presented as evidence of the actus reus of a single criminal offense." *People v Cooks*, 446 Mich 503, 512; 521 NW2d 275 (1994). Here, while the prosecution presented evidence showing that defendant physically assaulted Banks both at her home and in his truck, it is clear from the record that the prosecution did not present defendant's actions at Banks' home as evidence of the actus reus element of the assault charge. To the contrary, the record makes clear that the significantly more brutal assault perpetrated against Banks after leaving the home with defendant in his truck formed the basis for the assault charge levied and argued by the prosecution. Accordingly, a specific unanimity instruction was not required.

II. Effective Assistance of Counsel

Defendant argues in his Standard 4 brief that his trial counsel was ineffective for failing to investigate defense witnesses and certain evidence. To establish these claims, defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceedings would have been different. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). However, because defendant failed to move for a new trial or request an evidentiary hearing before the trial court, our review of these challenges is limited to mistakes apparent on the record. *Id*. at 658-

659. If the record does not support defendant's assertions, he effectively waives the issue. *Id*. at 659.

A. Witnesses

Defendant first alleges that had they been sought out by counsel, at least two witnesses would have testified regarding Day's reputation for violence in the community and for carrying a weapon. Defendant also alleges that other witnesses would have testified that they heard, from an unidentified individual, of a plot between Banks and Day to harm defendant.

The failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which this Court will not second-guess on appeal. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Further, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *Id*. However, defendant fails to provide any proof, by affidavit or other means, showing how the testimony of those witnesses would have contributed to his defense, or that the witnesses would have been willing to testify on his behalf. Further, any testimony would have been hearsay, MRE 801, and defendant has failed to identify any exception allowing its introduction, MRE 802. Accordingly, defendant has failed to establish that he was denied a substantial defense because those witnesses were not called to testify.

B. DNA and Bite Mark Evidence

Defendant next argues that after testing failed to reveal Day's DNA on the knife recovered from defendant's truck, defense counsel should have conducted further investigation to find a second knife, which defendant asserts would have yielded Day's DNA. In support of this claim, defendant posits that Day had his own knife during the altercation in the bedroom, that the knives were mixed up during the struggle, that Day was ultimately stabbed by defendant with his own knife, that the knives were switched again, and that Day fled the scene with his own knife. We do not find that defense counsel was constitutionally ineffective for having failed to investigate this theory. The prosecution's DNA expert testified that it was possible that if the knife had been used to stab other people, their DNA would not be on the knife. The expert also testified that if the knife used to stab Day had been wiped off and then bled on by someone else—in this case, defendant—the expert would likely not be able to detect Day's DNA because the remaining amount would fall below the threshold level for testing. In light of this testimony, and considering the unsupported and highly implausible nature of the theory now posited by defendant, we find that defendant has failed to overcome the presumption that the theory of self-defense presented by defense counsel constituted sound trial strategy. *Dixon*, *supra* at 398. Indeed, there is nothing in the record to suggest "that counsel was 'deficient' in making this choice or that the selection significantly affected the outcome of the trial." *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant also asserts that counsel was ineffective for having failed "to check" the bite wound suffered by him on the night of this incident "to assure that it was done while Banks was on his back." We note, however, that defendant's claim that he received the wound from Banks during the altercation with Day was before the jury. Further, defendant has failed to articulate

what further investigation regarding bite marks would have revealed or otherwise contributed to the defense of these charges. Consequently, he has failed to establish this claim. *Sabin*, *supra*.

C. Prior Convictions

Defendant next argues that defense counsel was ineffective for failing to object to the use of two prior misdemeanor convictions for domestic violence, which formed the basis for defendant's score of 5 points for prior record variable (PRV) 5, MCL 777.55(1)(d). Defendant's argument that the convictions were "too distant and too prejudicial" are irrelevant considerations for sentencing purposes. Indeed, nothing in the plain language of MCL 777.55 restricts the use of a prior misdemeanor conviction on the basis of time or prejudice. Moreover, while MCL 777.50 requires that a defendant's prior convictions be disregarded for purposes of scoring PRV 5 if they precede a ten-year period in which the defendant had no convictions, the record reflects that no prior conviction preceding such a ten-year period was considered by the trial court in scoring PRV 5. It follows that trial counsel was not ineffective in failing to object to the scoring of PRV 5 on this basis. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001) ("[a] trial attorney need not register a meritless objection to act effectively").

Further, while defendant asserts that one of his two convictions was had without the benefit of representation by counsel, we note that there is no constitutional right to counsel in a misdemeanor prosecution where no incarceration is ultimately imposed. See *People v Richert (After Remand)*, 216 Mich App 186, 194; 548 NW2d 924 (1996). Here, the presentence investigation report indicates that the sentence imposed for the conviction in question was "unknown," and defendant has failed to proffer any other evidence to show that the prior conviction was obtained in violation of his constitutional right to counsel. Defendant has thus not shown that it was improper for the trial court to consider this conviction in scoring PRV 5. Cf. *People v Hannan (After Remand)*, 200 Mich App 123, 128; 504 NW2d 189 (1993) (a sentencing court may not consider a defendant's prior convictions obtained in violation of a person's constitutional right to counsel to enhance the defendant's sentence).

III. Sentencing

Defendant next contends that he is entitled to resentencing because the trial court improperly assessed points for offense variables based on facts that he did not admit and which had not been proven beyond a reasonable doubt, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, as defendant concedes, our Supreme Court has held that judicial fact-finding to determine only the minimum sentence of an indeterminate sentence does not violate *Blakely*, which pertains only to sentences imposed beyond the statutory maximum. See *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006).

Defendant further argues, however, that the trial court erred in awarding him credit for only 229 days served in jail before sentencing. On this, we agree. It is well settled that a defendant who is unable to post bond is entitled to credit for all time "served in jail prior to sentencing." MCL 769.11b; see also *People v Seiders*, 262 Mich App 702, 705-706; 686 NW2d 821 (2004). The presentence investigation report prepared in this matter indicates that defendant was taken into custody on October 3, 2005, and was jailed continuously until his sentencing on May 22, 2006. As conceded by the prosecution on appeal, the period of time between these dates entitles to defendant to a credit of 231 days against his sentence.

Accordingly, we affirm defendant's convictions and sentences, but remand for the ministerial task of correcting the judgment of sentence to award defendant credit for 231 days served in jail and transmission of the corrected judgment to the Department of Corrections. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray