

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODOLFO OCHOA-RODRIGUEZ,

Defendant-Appellant.

UNPUBLISHED

November 15, 2007

No. 271212

Van Buren Circuit Court

LC No. 05-014917-FC

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.31, assault with intent to do great bodily harm less than murder, MCL 750.84, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to prison terms of 225 months to 40 years for the murder conviction, 4 to 10 years for the assault conviction, and two years for each of the felony-firearm convictions. Defendant appeals as of right. We affirm.

On September 30, 2005, defendant's brother, Andres, died as a result of multiple gunshot wounds. Andres' girlfriend, Mary, suffered a severe beating. Defendant admitted to shooting Andres and beating Mary, but claimed that he acted in the heat of passion. At trial, the trial court instructed the jury using the standard instructions on first-degree murder, MCL 750.316, second-degree murder, MCL 750.31, and voluntary manslaughter, MCL 750.321. During its final instructions, however, the trial court also gave the jury a list of issues to consider in reaching a verdict. With regard to the crimes of second-degree murder and voluntary manslaughter, the trial court listed two issues to be considered:

F. Did the Defendant in causing Andres Ochoa-Rodriguez death . . . either intend to take his life or intend to do great bodily harm to him or knowingly create a very high risk of death or great bodily harm, knowing that death or such harm was the likely result?

Or, G. Did the Defendant in causing Andres Ochoa-Rodriguez death . . . either [intend] to take his life, or [intend] to do great bodily harm to him or knowingly create [a] very high risk of death or great bodily harm knowing that the death or such harm was the likely result and had his thinking disturbed by emotional excitement to the point that an ordinary person might have acted on

impulse without thinking and as a result of such emotional excitement before a reasonable time had passed to calm down and return to reason, killed Andres Ochoa-Rodriguez as [a] result of the emotional excitement[?]

* * *

And if you have . . . reasonable doubt as to issue F, but have no reasonable doubt as to issue G, your verdict shall be guilty of voluntary manslaughter (emphasis added).

Defendant argues that the trial court's non-standard jury instruction was illogical, making it impossible for the jury to return a verdict of voluntary manslaughter. We disagree. Unpreserved claims of instructional error are reviewed for plain error affecting defendant's substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Pursuant to MCR 2.516(D)(4), a trial court may give additional instructions not covered in the standard jury instructions as long as they accurately state the law and are applicable and understandable. *People v Lynn*, 229 Mich App 116, 121; 580 NW2d 472 (1998), rev'd on other grounds 459 Mich 53 (1998). Here, the challenged instruction included the intent element required to find either murder or manslaughter, as well as the mitigating circumstances required to find voluntary manslaughter. See *People v Mendoza*, 468 Mich 527, 535, 540; 664 NW2d 685 (2003). The trial court instructed that the jury could find defendant guilty under either issue F, for second-degree murder, or issue G, for voluntary manslaughter, but not both. The challenged instruction accurately summarized the law in regard to voluntary manslaughter and did not deny defendant a fair trial. *Lynn, supra* at 121.

Moreover, even if the instruction can be perceived as somewhat confusing, defendant cannot establish that the trial court committed outcome-determinative error warranting reversal. In reviewing claims of instructional error, this Court examines the instructions in their entirety, and if the instructions adequately protected the defendant's rights by fairly presenting the issues to the jury, there is no basis for reversal. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006). The defendant bears the burden of establishing error requiring reversal. *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998). The standard instructions given by the trial court clearly stated the elements of second-degree murder and voluntary manslaughter. All of the issues in the case, and the rules applicable to each issue, were clearly presented to the jury.

Alternatively, defendant argues that defense counsel's failure to object to the challenged instruction amounted to ineffective assistance of counsel. On the record before us, we conclude that any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Moreover, in light of the standard instruction on voluntary manslaughter given to the jury, defendant cannot establish that an objection by defense counsel would have changed the outcome of the case. *Id.* Defendant has not established that he was denied the effective assistance of counsel.

Defendant next argues that he is entitled to resentencing. The imposition of a sentence is reviewed for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). If the minimum sentence imposed was within the recommended minimum sentence range under the legislative guidelines, we must affirm, absent an error in the scoring of the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). We review the trial court's factual findings at sentencing for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." See *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). The interpretation of the statutory sentencing guidelines and the legal questions presented by application of the guidelines are subject to de novo review. *Babcock*, *supra* at 269.

Defendant claims that OV 7, MCL 777.37, was improperly scored at 50 points. OV 7 takes into account aggravated physical abuse and can be scored at 50 points if a victim was "treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37. The trial court assessed 50 points against defendant, finding that his attack on Mary was excessively brutal. The testimony at trial indicated that defendant beat Mary repeatedly over the head with the butt of a rifle, that the rifle broke during the beating, that Mary's body was covered in blood after the beating, and that she suffered serious injuries to her head, arms, and hands, requiring multiple surgeries and physical therapy. We have upheld fifty-point scores for OV 7 when a prolonged and severe beating leaves serious lingering effects. See *People v Wilson*, 265 Mich App 386, 396-398; 695 NW2d 351 (2005). The trial court did not clearly err in finding that defendant treated Mary with excessive brutality.

Defendant also argues the trial court improperly scored Offense Variable (OV) 5 because neither Mary nor Mary's son, Darrel Conde, were members of Andy's family. OV 5 should be scored at 15 points if "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). The trial court assessed 15 points based on the psychological injuries suffered by Mary and Darrel. Mary and Darrel referred to Andy as their husband and father, respectively, they lived with Andy at the time of his death, and Mary believed that she and Andy had a common law marriage. Even assuming that Mary and Darrel do not qualify under the statute as Andy's "family," any error in the scoring of OV 5 is harmless. If we remove the 15 points scored under OV 5, defendant's grid scoring would not change and the recommended range remains the same.¹ An erroneous score that would not when corrected result in a different recommended range does not require resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Johnson*, 202 Mich App 281, 290, 292; 508 NW2d 509 (1993).

¹ Reducing the score for OV 5 from 15 to zero leaves defendant with an OV score of 100, which still places defendant in the C-III grid.

Defendant finally claims that the trial court erred by refusing to depart below the recommended minimum sentence range under the legislative guidelines. A trial court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Our Supreme Court has determined this language to mean that there must be an “‘objective and verifiable’ reason that ‘keenly’ or ‘irresistibly’ grabs our attention; is of ‘considerable worth’ in deciding [the appropriate sentence]; and ‘exists only in exceptional cases.’” *Babcock, supra* at 264-265 (citations omitted). At sentencing, the trial court considered defendant’s request for a downward departure, but ultimately found no substantial and compelling reason to depart from the sentencing guidelines range. On appeal, defendant has not shown the existence of any objective and verifiable reasons that should have keenly and irresistibly grabbed the trial court’s attention. No exceptional circumstances warranting a downward departure are evident from the record. Considering that defendant’s sentence was within the sentencing guidelines range, and that he failed to present a substantial and compelling reason for a downward departure, we affirm the sentence imposed by the trial court. *Id.* at 261.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly