

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DANIEL OLSEN,

Defendant-Appellant.

UNPUBLISHED

November 20, 2007

No. 271267

Allegan Circuit Court

LC No. 05-014404-FC

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction and sentence for assault with intent to commit murder, MCL 750.83. He was sentenced to 10 to 25 years' imprisonment with credit for 52 days served. We affirm.

Defendant admitted that he stabbed his acquaintance, Andrew Tosh, in the neck and finger during an altercation that took place on a two-track driveway in the woods in Allegan County. Defendant claimed self-defense, arguing that the victim was angry and started to fight. The victim claimed that defendant pulled out a knife while they were both sitting in the parked car and then tried to slash the victim's throat before stabbing the victim in the neck.

Defendant first argues that the trial court erred when it instructed the jury using the standard flight instruction. CJI2d 4.4. Defendant argues that he merely walked away from the scene of the crime and did not flee in the sense the flight instruction requires. Defendant also argues that his counsel was ineffective for failing to object to the flight instruction.

We review the unpreserved instruction error for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Additionally, to establish ineffective assistance of counsel, a defendant must show that (1) his trial counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms and (2) there is a reasonable probability that, but for the deficient performance, the outcome would have been different. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004).

Defendant has a constitutional right to have a properly instructed jury consider the evidence against him. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). This Court reviews jury instructions as a whole to determine whether the defendant's rights were adequately protected by fairly presenting to the jury all the issues to be tried. *People v Martin*,

271 Mich App 280, 337-338; 721 NW2d 815 (2006). An instruction should not be given unless there is evidence to support giving it. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

Defendant is correct that simply walking away from a crime scene after committing a crime is not sufficient evidence of “flight” to justify giving a flight instruction; rather, for “flight” in the legal sense, there must be some evidence that defendant “feared apprehension” when he left the scene. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). Nevertheless, we conclude that the trial court did not err when it gave the flight instruction, and thus, that counsel was not ineffective for failing to object to the instruction. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Flight has been defined as “fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody.” *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Defendant left the scene and ran through the woods after he stabbed the victim. Instead of contacting police for help, he walked and hitchhiked 20 miles to Covert, Michigan. In addition, defendant admitted that he knew he was being investigated for the crime and that police wanted to talk to him, yet he stayed in Van Buren County for thirteen weeks avoiding police until he turned himself in to authorities. His actions support a reasonable inference that he feared apprehension and was running from the police. See *Johnson*, *supra* at 804. The trial court did not abuse its discretion because there was sufficient evidence to support the flight instruction. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Moreover, the instructions as a whole fairly presented the issues to be tried. Defendant did not deny that he ran from the scene or that he avoided police, but claimed he did so because he was afraid. He claimed he stabbed the victim in self-defense and ran because he thought the victim was looking for him. The prosecutor argued that the fact defendant ran was evidence that he had a guilty conscience. The jury was instructed to weigh the competing claims and decide whether defendant ran away, and if he did so, whether he left the scene out of a consciousness of guilt. The jury was also instructed regarding self-defense, and defendant’s counsel argued that defendant’s admission that he ran in fear from the victim supported his claim of self-defense. Thus, the instructions as a whole fairly presented both sides of the issue, and sufficiently protected defendant’s rights. *Martin*, *supra* at 337-338. Counsel’s performance was not deficient, and defendant’s claim that he was deprived of his right to effective assistance of counsel is without merit.

Defendant also argues that the trial court erred when it scored offense variable (OV) 19 and OV 3. Defendant’s claims of error in the scoring of his offense variables are not properly preserved for appeal. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). However, defendant further contends that his trial counsel was ineffective for failing to object to the scoring of these variables. Therefore, we shall review these claims of error in that context. *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). Because defendant’s trial counsel was not required to make a meritless objection, if the trial court properly scored the variables, defendant’s trial counsel cannot be faulted for failing to object to the scoring. *Harmon*, *supra* at 531.

The interpretation and application of the legislative sentencing guidelines is a question of law, which is reviewed de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). A sentencing court's scoring of points under the guidelines is reviewed for an abuse of discretion, and this Court will uphold the score as long as there is some evidence in the record to support that scoring decision. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

MCL 777.49(b) authorizes the trial court to score ten points for OV 19 when the defendant "otherwise interfered with or attempted to interfere with the administration of justice." Defendant argues that he did not interfere with the administration of justice because he left the scene of the crime before police arrived or were aware of the incident. Interference with the administration of justice is not limited to acts that constitute "obstruction of justice." *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). Any acts by a defendant that interfere with law enforcement officers and their investigation of a crime, even if they occur before charges are filed, may be conduct sufficient to support a score for OV 19. *Id.* at 288. Those actions may include deterring a witness from testifying or reporting a crime, *People v Endres*, 269 Mich App 414, 420-421; 711 NW2d 398 (2006); running from police to escape apprehension, *People v Cook*, 254 Mich App 635, 638, 658 NW2d 184 (2003); or providing a false name to investigating officers, *Barbee*, *supra* at 288.

Although defendant did not directly flee from police at the scene, he admittedly ran from the scene and left the county to avoid contact with police, even though he was aware that he was wanted in connection with the assault. Although he did not give a false name, or threaten witnesses, he hindered law enforcement efforts by remaining outside the county for thirteen weeks. The fact that he was unavailable for questioning prevented the timely investigation and prosecution of the crime. Because there is some support for the score in the record, the trial court did not abuse its discretion and counsel's failure to object to the score for OV 19 does not amount to a deficient performance.

The trial court should score 25 points for OV 3 if "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c); *People v Houston*, 473 Mich 399, 402, 407; 702 NW2d 530 (2005). Although there was record evidence that the victim's neck injury did not require extensive medical intervention, the description of the wound was sufficient to support the trial court's conclusion that it was life threatening. Therefore, the trial court did not abuse its discretion in scoring OV 3 at 25 points and defendant's trial counsel was not ineffective for failing to object to that scoring.

Finally, defendant argues that his sentence violated his constitutional rights as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the trial court based its sentence on facts not found by a jury beyond a reasonable doubt. Defendant's argument is without merit. See *People v McCuller*, 479 Mich 672, 689-690; ___ NW2d ___ (2007).

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter