STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 5, 2008
v	No. 278185 Wayne Circuit Court
JOSEPH NACKAYA GARVIN, Defendant-Appellant.	LC No. 06-013274-01

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of second-degree home invasion, MCL 750.110a(3), and domestic violence, second offense, MCL 750.81(3). He was sentenced to a prison term of three to 15 years for the home invasion conviction and one year in jail for the domestic violence conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Defendant and Renee Chappell are the parents of Rushante Chappell, age four. Rushante lived with her mother, who is defendant's former girlfriend.

Renee Chappell testified that defendant appeared at her home at approximately 4:00 a.m. on November 3, 2006. He appeared drunk, was beating on the door, and threatened to "tear some stuff up" if Chappell did not let him in, so she opened the door. Defendant slept for two or three hours and then left with Rushante.

When defendant called to say he was bringing Rushante home, Chappell and her friend, Andrea Gooley, were just getting ready to go out. They sat in Gooley's car and waited for defendant to arrive. When defendant drove up, he had Rushante and another child with him. Chappell went to defendant's car to get Rushante. As Chappell was leaning inside defendant's car to unfasten Rushante's seat belt, defendant said something to Chappell about wanting Gooley to leave. She dismissed it and defendant slapped her in the face. Chappell, who was afraid of defendant, left defendant's car and got into her own car and started the engine, which automatically locked the doors. Defendant followed Chappell to her car, trying to open the doors while again threatening to tear something up and pointing at the house. Chappell drove away.

While Chappell was gone, defendant left and then came right back and asked Gooley if she would take Rushante. She agreed. Defendant then got into Gooley's car to talk. While they were talking, Chappell called Gooley to inquire about defendant. Gooley gave the phone to defendant and he and Chappell argued. Defendant left the car, taking the phone with him, and walked to the back of Chappell's house. Gooley got out of her car, heard glass breaking, and then heard the sound of things breaking and being thrown around inside the house.

When Chappell returned home, she found that the back window was broken. It appeared that defendant had thrown an outdoor planter through it, because Chappell found dirt strewn throughout the den. The den and bedroom had been "trashed," the television had been knocked to the floor, broken CDs and DVDs were strewn about the floor, and the refrigerator had been overturned. The damages ran close to $2,000. Chappell and Gooley stated that the house had been neat when they left. Chappell had not given defendant permission to enter.

Defendant testified that he went to Chappell's house around 4:00 a.m. because Chappell had invited him over after work. He denied that he had been drinking or was drunk. When he arrived, the door was unlocked and he walked in. He saw a television and some CDs on the floor. After he slept for a few hours, Chappell agreed to let him take Rushante for the weekend, so he took the child with him when he left.

Defendant denied returning to Chappell's home that day. Rather, after leaving that morning, he picked up his other daughter and eventually took the children to his mother's house. Chappell showed up with Gooley and another man. According to defendant, Chappell argued with him over money and "[s]he hauled off and grabbed me and scratched my neck up." When defendant pushed Chappell away, the man left the car and confronted him. They argued and the man returned to the car. As they drove off, Chappell "was hooting and hollering" that she was going to have defendant jailed.

Defendant claimed that Chappell later called and told him he would be going to jail. Defendant later received a call from a police sergeant, who told him that a charge of parental kidnapping had been made against him and he should come in right away. Defendant refused, but then "got scared" and took Rushante to Chappell's sister and went back to his mother's house. The sergeant called again and defendant went to the police station and explained what was going on. Another officer was dispatched to get Rushante. While defendant was waiting, he could hear Chappell speaking in a back room. After the dispute over Rushante had been cleared up, the sergeant asked defendant about being at Chappell's house. He told the sergeant he had been there for a few hours that morning and described what he saw.

II. Effective Assistance of Counsel

Defendant first argues on appeal that he is entitled to a new trial because defense counsel was ineffective. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Relief is not available unless defendant shows that counsel's representation was

unreasonable and counsel's error affected the outcome of the proceedings. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). Defendant must also overcome a "strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant takes issue with the fact that once counsel was appointed for him, a different attorney appeared at each stage of the proceedings, including the preliminary examination, arraignment, final conference, trial, and sentencing. However, this alone does not warrant relief absent a showing that any one attorney, due to his or her unfamiliarity with the case or lack of preparedness, committed an error that prejudiced defendant. See, e.g., *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005); *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Defendant also contends that counsel was ineffective for agreeing or advising him to waive the preliminary examination before receipt of discovery materials. Assuming without deciding that counsel failed to make an informed decision, defendant cannot show that he was prejudiced. He claims that had counsel obtained discovery materials, she might have recommended to proceed with a preliminary examination. At the examination, counsel would have had the benefit of discovery materials with which to cross-examine Chappell, and might have elicited damaging testimony that could be used for impeachment purposes at trial. However, there is simply nothing in the record to suggest that had Chappell testified at a preliminary examination, she would have testified any differently than she did at trial. Nor is there anything to suggest what damaging testimony she might have offered on cross-examination. Because there is no basis in the record for concluding that a preliminary examination would have produced valuable impeachment evidence that could have affected the outcome of the trial, defendant has failed to establish a right to relief. *Watkins, supra*; *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant next argues that trial counsel was ineffective for not proceeding with a jury trial. We disagree. Issues of professional judgment and trial strategy are entrusted to counsel, *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979), but a defendant has the ultimate authority to make certain fundamental decisions regarding his case, including whether to waive a jury, *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). The record shows that defendant voluntarily waived his right to a jury trial, and there is no claim that counsel gave inadequate or improper advice to defendant regarding that decision. Therefore, defendant has failed to establish that counsel committed any error.

Defendant finally contends that trial counsel was ineffective for failing to call his mother and one or more other witnesses at trial. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). "Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record shows that the attorney who represented defendant at arraignment advised the court that he anticipated calling two or three witnesses for the defense at trial. Trial counsel called defendant, who testified that certain events took place at his mother's house. However, there is nothing in the record to show what testimony his mother or the other unidentified witness(es) might have offered, or how it might have benefited the defense. Therefore, defendant's claim must fail. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002), lv den 469 Mich 861 (2003); *Avant, supra*.

III. Sentence

In his second issue on appeal, defendant argues that his three-year minimum sentence for the home invasion conviction constitutes cruel and unusual punishment. We disagree. The minimum sentence is within the range of 19 to 38 months established by the legislative guidelines. A sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994), and defendant has not overcome the presumption of proportionality in this case. A proportionate sentence is not cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004); *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering