

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLEN ALLISON GOLDEN,

Defendant-Appellant.

UNPUBLISHED

May 19, 2009

No. 282604

Kalkaska Circuit Court

LC No. 07-002868-FH

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant Glen Allison Golden was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to 28 to 180 months' imprisonment for his conviction. He appeals as of right. We affirm.

Defendant first argues there was insufficient evidence to prove he had the necessary intent to harm the victim because defendant had no ill will toward the victim and because the victim assaulted defendant first. "A claim of insufficient evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). "Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an [specific] intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The phrase intent to do great bodily harm less than murder is defined as "an intent to do serious injury of an aggravated nature." *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). The intent to do great bodily harm can be inferred by minimal circumstantial evidence "and reasonable inferences drawn therefrom." *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997) mod in part on other grounds 457 Mich 885 (1998); see also *People v Guthrie*, 262 Mich App 416, 419; 686 NW2d 767 (2004).

Testimony at trial established that defendant repeatedly struck the victim in the face and head after the victim was lying on the ground and rendered unconscious. As a result of the attack, the victim suffered marked facial injuries including a broken nose, a black eye, two cuts that required stitches, and excessive swelling to the left orbit region and the left side of his head. There was concern during treatment that the victim suffered intracranial injuries. Given the nature of the beating, the injuries the victim suffered, and the physician assistant's conclusion

that the victim's injuries were a little more severe than those usually sustained in a fight, one could reasonably infer that defendant intended to seriously injure the victim. See *Peña, supra* at 659-660 (holding that there was sufficient evidence to prove the defendant had the necessary intent to do great bodily harm because "[t]here was overwhelming evidence that defendant, along with her cohorts, beat and kicked the victim in the face, head, arms, and chest."). Thus, there was sufficient evidence to enable a rational jury to conclude beyond a reasonable doubt that defendant intended to commit great bodily harm less than murder.

Defendant also argues that the verdict was against the great weight of the evidence. Specifically, defendant contends the victim did not suffer any permanent injuries and, thus, there is no proof defendant actually tried to injure the victim. This Court's review of defendant's unpreserved claim that the verdict was against the great weight of the evidence is limited to plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Although assault with intent to do great bodily harm is a specific intent crime, "[n]o actual physical injury is required for the elements of the crime to be established." *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). Thus, the prosecution was not required to present any evidence of actual injury, let alone that the injuries were severe or permanent, to establish the necessary intent. *Id.* Moreover, "[t]he test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser, supra* at 218-219. The evidence did not preponderate heavily against the verdict, and defendant's argument is meritless.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to request a jury instruction on a lesser offense, specifically, aggravated assault. Because defendant failed to move for a new trial or an evidentiary hearing on this issue, our review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). To prevail on a claim of ineffective assistance of counsel, defendant must prove two components: 1) deficient performance, and 2) prejudice. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Butler*, 193 Mich App 63, 66-67; 483 NW2d 430 (1992). "It is well established that defense counsel is not ineffective for failing to pursue a futile motion." *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008). In this case, requesting an instruction for aggravated assault would have been futile.

A jury instruction is not permitted for a cognate lesser offense. *People v Nyx*, 479 Mich 112, 121; 734 NW2d 548 (2007). "A cognate lesser offense is one that shares elements with the charged offense but contains at least one element not found in the higher offense." *Id.* at 118 n 14. A person is guilty of aggravated assault if the "person . . . assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder . . ." MCL 750.81a(1). As indicated, "[a]ssault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an [specific] intent to do great bodily harm less than murder." *Parcha, supra*. Unlike aggravated assault, the crime of assault with intent to do great bodily harm less than murder does not require proof that the victim was injured. *Harrington, supra*. Because the lesser offense requires proof of injury and the greater offense does not, aggravated assault is a cognate lesser

offense of assault with intent to do great bodily harm. *Nyx, supra* at 118 n 14. Consequently, the law does not permit a jury instruction for aggravated assault. *Id.* at 121; *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002). Counsel was not ineffective for failing to request the instruction.

Defendant also argues the prosecution abused its discretion when it charged defendant with assault with intent to do great bodily harm less than murder because the prosecution was aware defendant did not have the requisite intent. This Court reviews a prosecutor's charging decision for an abuse of power to resolve if the prosecutor acted "contrarily to the Constitution or law." *People v Russell*, 266 Mich App 307, 316; 703 NW2d 107 (2005).

[T]he prosecutor is the chief law enforcement officer of the county and has the right to exercise broad discretion in determining under which of two arguably applicable statutes a prosecution will be instituted. If warranted by the facts, the prosecutor has the discretion to proceed under any applicable statute. This is true even where one applicable offense is a felony and one is a misdemeanor. [*People v Yeoman*, 218 Mich App 406, 414; 554 NW2d 577 (1996) (citations omitted).]

As discussed previously, there was sufficient evidence to prove defendant intended to inflict great bodily harm on the victim. The charge was warranted and supported by the facts, and the prosecution did not abuse its broad discretion when it chose to charge defendant with assault with intent to do great bodily harm instead of aggravated assault. *Id.*

Defendant also argues he is entitled to resentencing because offense variable (OV) 9, MCL 777.39, number of victims, was improperly scored ten points. Specifically, defendant maintains that there was no evidence that more than one victim was placed in danger of injury or loss of life. This Court reviews a trial court's scoring decision for an abuse of discretion to determine if evidence sufficiently supports the particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* (quotation marks and citation omitted). MCL 777.39(1)(c) provides for ten points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death" Even though no one else was injured during the assault, there is evidence in the record that defendant was approaching one witness during a verbal altercation when the victim intervened. Three witnesses were in close proximity of the assault when it was occurring. Two of the witnesses were in danger of injury when they attempted to pull defendant off of the victim while defendant was repeatedly striking the victim in the face. After defendant stopped hitting the victim, at least one witness was kneeling next to the victim rendering assistance when defendant kicked the victim in the head. Because there was evidence to support that at least two people were placed in danger of injury, the trial court did not abuse its discretion when it scored ten points for OV 9. *Id.*

Defendant further argues his sentence was incorrect because the trial court at sentencing stated "Plus, you're on parole. You can't commit a felony while on parole and not go back to prison. Can't be done." Defendant claims this was a misstatement of the law by the trial court because he could have been sentenced to county jail time. Generally, "a defendant is entitled to resentencing where a sentencing court fails to exercise its discretion because of a mistaken belief in the law." *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). But, a trial judge is presumed to know the law. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002).

And, a thorough review of the record reveals that the trial court was merely indicating that it elected to impose a prison sentence because of defendant's actions on parole and his conviction. Because the trial court is presumed to know the law and because the record indicates the trial court was exercising its discretion when it imposed the sentence, we affirm.

Defendant additionally argues that the sentence was not proportional to the offense. A minimum sentence within the sentencing guidelines, as in this case, is presumed proportional. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). See also *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002) (holding that where the sentence is within the statutory guidelines this Court may not consider challenges based exclusively on proportionality).

Finally, with respect to sentencing, defendant argues Michigan's indeterminate sentencing scheme is unconstitutional and that the sentence must be vacated pursuant to the United States Supreme Court decision, *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant's argument disregards the Michigan Supreme Court's binding decision in *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006), which held that the Michigan sentencing system is unaffected by the holding in *Blakely*. We are bound by our Supreme Court's decision. *People v Tims*, 202 Mich App 335, 340; 508 NW2d 175 (1993), rev'd on other grounds 449 Mich 83 (1995).

Defendant also argues on appeal that the trial court indicated to the jury that he believed defendant had the requisite intent to commit the crime. Because defendant failed to preserve this issue, we review the matter to determine if manifest injustice will result from the failure to review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). "A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id.* The record should be reviewed as a whole for evidence of judicial bias against defendant and "[p]ortions of the record should not be taken out of context" to show bias. *Id.* If a trial court's actions pierce the veil of judicial impartiality, reversal is necessary. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

A review of the record reveals that defendant misconstrues the trial court's comments in making his argument. After the jury asked for a better definition of intent to cause great bodily harm and the trial court provided the required instruction, defendant claims that the judge said, "obviously, I believe that," inferring that the judge declared his belief in defendant's guilt. The record reveals, however, that the trial court actually stated:

Let me try to answer this, "when and where does intent take over, in Count No. 1," and I'd like to re-read these elements, if I may. *Hopefully it'll be helpful . . .* And now I'm going to define the phrase great bodily harm. Great bodily harm means a physical injury that could seriously and permanently harm the health or function of the body. So he [defendant] had to have the intent to cause great bodily harm at the time of the assault, *obviously. I believe that—I hope this helps.*" [Emphasis added.]

The context of the trial court's statement indicates that the trial court was simply explaining the elements of the crime. Defendant takes the statement out of context and omits important

punctuation. There is no support in the record that the trial court impermissibly commented on the evidence or on defendant's guilt. Thus, defendant cannot establish that the jury was unduly influenced and that manifest injustice occurred requiring a new trial. *Paquette, supra*; *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987). Additionally, defendant's claim that the trial court should have issued a curative instruction because of its improper comments is meritless, because no improper comments were made.

With respect to judicial impropriety, defendant further contends that the trial court's decision to display defendant's booking photograph to the jury and state that it confirmed the jury's verdict because there was no injury to defendant's lip denied him a fair trial. Although the trial court's decision to present to the jury this photograph that was not introduced into evidence was unorthodox, it occurred after the verdict had been read, the jury had been polled, and all jurors expressed their assent to the verdict. Therefore, defendant is unable to establish that the trial court's conduct unduly influenced the jury's decision and denied defendant a fair trial. *Paquette, supra* at 340-341.

We also disagree with defendant's claim that the trial court indicated its bias when it commented on defendant's parole status during sentencing. A review of the record reveals that the trial court's challenged comment was merely a statement of fact regarding defendant's past criminal behavior and status. Such a statement of fact does not indicate the trial court was biased against defendant. *Id.*; see also *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1992).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Jane M. Beckering