STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2009
v	No. 283055 Wayne Circuit Court
STEVEN DEMAR WINSTON, Defendant-Appellant.	LC No. 07-010174-FC

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of torture, MCL 750.85, assault with intent to do great bodily harm less than murder, MCL 750.84, and domestic violence, MCL 750.81(2). He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 15 to 40 years for the torture conviction and 15 to 20 years for the assault conviction, and a jail term of three months for the domestic violence conviction. He appeals as of right. We affirm in part and remand for entry of an amended judgment of sentence.

I. Facts

Defendant's convictions arose from an incident at a home shared by defendant and the victim, who had lived together in a boyfriend-girlfriend relationship for three years. While in bed on April 22, 2007, the victim woke up and found defendant standing over her. Defendant hit the victim with an open hand and with a table leg that had been broken off an end table. He forced the victim to perform oral sex on him and used a butcher knife to cut her hair. He also had the victim cut her fingernails and toenails with a pair of nail clippers. Defendant told the victim that she needed to repent for her sins and called her derogatory names. The victim estimated that defendant's abuse lasted for over four hours. After the victim went to work in the morning, she was taken by ambulance to a hospital for treatment. She made a police report later in the day while at a relative's house.

Defendant presented an insanity defense, but also challenged the victim's credibility and claimed that she gave an exaggerated account of the incident. The trial court found that defendant tortured and assaulted the victim but, upon considering the victim's failure to report that she was forced to perform oral sex to the police or anyone else, determined that the prosecutor failed to prove an additional charge of first-degree criminal sexual conduct beyond a reasonable doubt.

II. Jury Waiver

On appeal, defendant argues that the trial court's denial of his motion to withdraw his previous jury waiver denied him his constitutional right to a jury trial. We disagree.

We review a trial court's denial of a motion to withdraw a jury waiver for an abuse of discretion. *Wagner, supra* at 559. An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

A valid waiver of the constitutional guarantee of the right to a jury trial requires a voluntary, knowing, and intelligent waiver. *People v Mosly*, 259 Mich App 90, 95-96; 672 NW2d 897 (2003). A trial court's compliance with MCR 6.402(B) creates a presumption of a valid waiver. *Id.* at 96. The rule requires that before accepting a jury waiver, a trial court must advise the defendant of the right and "ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court." See *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). Pursuant to MCL 763.3, the prosecutor's consent and the court's approval are also required for a defendant to be tried by the court without a jury. See *People v Kirby*, 440 Mich 485, 495; 487 NW2d 404 (1992) (consent requirements are proper legislative determinations); see also MCR 6.401.

Once the right to a jury trial is validly waived, a defendant has no constitutional right to withdraw the waiver. *State v Morton*, 648 SW2d 642, 643 (Mo App, 1983); *Sharpe v State*, 174 Ind App 652, 658; 369 NE2d 683 (1977). Rather, whether the waiver may be withdrawn is within the discretion of the trial court. *People v Wagner*, 114 Mich App 541, 558-559; 320 NW2d 251 (1982); *Woodson v State*, 501 NE2d 409 (Ind, 1986); *Morton, supra* at 643. "Because of a public policy favoring the orderly process of the administration of justice there are restrictions placed on the withdrawal of such waiver of jury before trial." *People v Serr*, 73 Mich App 19, 29; 250 NW2d 535 (1976).

The record does not support defendant's argument that the trial court denied his motion solely because of its prior reliance on the waiver to reschedule the trial date. To the contrary, as defendant acknowledges, after denying the motion, the trial court proceeded to again reschedule the trial in order to afford defense counsel an opportunity to investigate whether defendant could establish a defense based on lack of criminal responsibility. It is apparent that the trial court also considered defendant's letter expressing his desire to keep his original choice of a jury trial, the prosecutor's position that he was still amenable to a bench trial, and the waiver proceeding itself at which the court found that defendant knowingly and voluntary waived his right to a jury trial. According to the record of the waiver proceeding, defendant had an opportunity to speak with defense counsel before placing his oral waiver on the record and executing the written waiver form. The trial court advised defendant of his right to have a jury decide the case and ascertained, from direct questioning of defendant, that he was not threatened or promised anything for waiving his right to a jury trial.

Considering that the prosecutor was still amenable to a bench trial and defendant's failure to show any cause for withdrawing the waiver other than a change of heart, the trial court's

decision does not fall outside the range of reasonable and principled outcomes. Therefore, the trial court did not abuse its discretion in denying the motion.

III. Insanity Defense

Defendant next challenges the trial court's findings regarding his insanity defense. Defendant argues that he should be granted a new trial or a judgment of not guilty by reason of insanity because the opinion of the prosecutor's expert, Dr. Priya Rao, was insufficient to rebut the opinion of his expert, Dr. Firoza Van Horn, that he was not criminally responsible at the time of the incident. We disagree.

When considering a bench trial verdict, we review a trial court's resolution of questions of law de novo and its findings of fact for clear error. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Legal insanity is an affirmative defense that the defendant has the burden of proving by a preponderance of the evidence. MCL 768.21a(1) and (3); *People v Stephan*, 241 Mich App 482, 489; 616 NW2d 188 (2000). The insanity defense requires proof that the person, as a result of mental illness or being mentally retarded, "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). "Mental illness" is defined in the Mental Health Code, MCL 330.1400(g), as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." See *People v Mette*, 243 Mich App 318, 325; 621 NW2d 713 (2000).

Here, the trial court was presented with testimony from two experts to determine if defendant met his burden of proof. Defendant's expert, Dr. Van Horn, testified that she formed her opinion based on interviews of defendant and family members, an examination of a transcript of the preliminary examination, and a review of the victim's medical records. Dr. Van Horn did not have an opportunity to review defendant's past medical records, but concluded from the history provided by defendant and his mother that defendant suffered from post-traumatic stress disorder, with chronic paranoid ideation, at the time of the incident. Dr. Van Horn also testified about her understanding of the charged incident, as reported to her by defendant, which was that the victim threatened defendant with a knife during an argument and that this caused the situation to become out of control. Dr. Van Horn opined that defendant had an "intense irrational rage at the time of the incident . . . where he believe [sic] that he was in danger."

Dr. Rao's evaluation of defendant preceded Dr. Van Horn's evaluation. Like Dr. Van Horn, Dr. Rao did not have an opportunity to review defendant's medical records, but received information regarding defendant's history and his account of the incident from defendant. Although Dr. Rao testified that she found no reason to doubt defendant's report that he had a past diagnosis of post-traumatic stress disorder, she opined that the incident was not the product of mental illness. Based on what defendant reported regarding his recent history, she found that "[h]e was eating. He wasn't suicidal. He wasn't homicidal. He wasn't depressed. He wasn't . .

. seeking medications. He . . . had friends, he had a relationship, he was a good caretaker of children and had been employed off and on through the year." From what defendant reported about becoming upset with the victim at the time of the incident, Dr. Rao opined that defendant became angry and had a "rage reaction."

In general, apart from its role as the trier of fact at the bench trial, the trial court had a duty under MRE 702 to ensure that the expert opinions, including the underlying data, were reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004). The probative value of an opinion regarding insanity depends on the facts on which it is based. *People v Murphy*, 416 Mich 453, 465; 331 NW2d 152 (1982). Therefore, the facts of the case are relevant in determining if an insanity defense was proven.

The only evidence regarding the circumstances of the charged incident was provided through the victim's testimony. Defendant's statements to the experts were only admissible on issues related to the insanity defense. See MCL 768.20a(5) (defendant's statements to personnel of the center for forensic psychiatry or an independent examiner during an examination "shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense"). "Such evidence is relevant because it places the expert's opinions into a factual context, thereby enabling the trier of fact to determine the weight due to an expert's opinion." *People v Pickens*, 446 Mich 298, 335; 521 NW2d 797 (1994).

Further, it is clear from the record that the trial court did not consider defendant's statements as substantive evidence. In fact, the trial court sustained the prosecutor's objection to defense counsel's attempt to use defendant's statements as substantive evidence of the underlying incident in his closing argument. The trial court rendered its own findings regarding the circumstances of the incident, which were supported by the victim's testimony, before considering the insanity defense and adopting Dr. Rao's opinion that defendant was not mentally ill, but rather acted out of anger at the time of the incident. The court found that defendant "wasn't homicidal, depressed or on medication and seemed to be, to have been leading a normal life at the time of the incident." The trial court was not required to accept Dr. Van Horn's contrary opinion that defendant was mentally ill at the time of the incident. *People v Culpepper*, 59 Mich App 262, 265; 229 NW2d 407 (1975). Therefore, we find no clear error in the trial court's rejection of defendant's insanity defense and there is no basis for a new trial or for entry of a judgment of not guilty by reason of insanity.

IV. Sentencing Issues

Finally, defendant seeks resentencing on the ground that the trial court erred in scoring offense variables seven and eight (OV 7 and OV 8) of the legislative sentencing guidelines for the torture conviction. We find no error in the scoring of OV 7 and OV 8; however, the judgment of sentence does require amendment.

We review de novo the proper interpretation and application of the guidelines as questions of law. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). A trial court has discretion in determining the number of points to be scored, provided that the record evidence adequately supports the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision will be upheld if there is any evidence to support it. *Id.*

MCL 777.37 (aggravated physical abuse) provides a trial court with two scoring choices for OV 7, zero or 50 points, and instructs the court to assign the "points attributable to the one that has the highest number of points." MCL 777.37(1). Fifty points are to be scored 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(1)(a) (emphasis added). Although the scored offense in this case requires evidence of torture, the statute contains no exclusion for torture offenses. We are required to enforce the plain language of the statute. *People v Houston*, 473 Mich 399, 409-410; 702 NW2d 530 (2005). Therefore, the trial court did not err in rejecting defense counsel's argument that OV 7 should be scored at zero points. Had the Legislature intended to exclude torture offenses, it would have provided for the exclusion in the statute.

MCL 777.38(1)(a) (victim asportation or captivity) provides that 15 points should be scored for OV 8 if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Here, the trial court relied on evidence that defendant blockaded the bedroom door after the physical torture to score 15 points for OV 8. The victim testified at trial that defendant pushed an end table door in front of the bedroom door, and that she did not try to move it after defendant fell asleep because she feared that defendant would hear her and wake up. This evidence was sufficient to support the trial court's scoring decision on the basis that the victim was held captive beyond the time necessary to commit the offense. *Hornsby, supra* at 468.

Although not an issue raised by defendant, we note that defendant's sentence of 15 to 20 years for his assault with intent to do great bodily harm less than murder conviction violates MCL 769.34(2)(b), which prohibits a court from imposing a minimum sentence that exceeds 2/3 of the statutory maximum sentence. The statutory maximum sentence for assault with intent to do great bodily harm less than murder is ten years, MCL 750.84, but because defendant was sentenced as a third habitual offender, the court was authorized to increase the statutory maximum to 20 years, twice that authorized for a first conviction, MCL 769.11(1)(a). Thus, the longest minimum sentence defendant could permissibly receive for his assault conviction is 13 years and 4 months. The remedy for this violation is to reduce the minimum sentence to two-thirds the maximum. *People v Thomas*, 447 Mich App 390, 392-394; 523 NW2d 215 (1994). Accordingly, pursuant to MCR 7.216(A)(7), we remand this case for entry of an amended judgment of sentence reflecting a minimum sentence of 13 years and 4 months for defendant's assault with intent to do great bodily harm less than murder conviction.

Affirmed in part and remanded for entry of an amended judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio