

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HENRY TAYLOR,

Defendant-Appellant.

UNPUBLISHED

October 27, 2009

No. 284983

Tuscola Circuit Court

LC No. 07-010401-FH

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, but acquitted of an alternative count of felonious assault, MCL 750.82. Defendant's conviction arose out of an altercation with Abrien Swires in which defendant struck Swires. Some witnesses testified that defendant used a metal object, possibly a tire iron, while others testified that defendant only used his fist. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 11 to 25 years' imprisonment. He appeals as of right. We affirm defendant's conviction and sentence, but remand for further proceedings with regard to defendant's challenges to the accuracy of the PSIR.

Defendant first argues that the trial court erroneously scored offense variables (OV) 9 and 10. We disagree. Defendant did not object at his sentencing, and his motion for remand did not comply with MCR 7.211(C)(1)(a); this issue is therefore unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007).

We uphold a trial court's scoring decision if it is supported by any evidence. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Ten points are to be scored for OV 9 where there are "2 to 9 victims who were placed in danger of physical injury or death[.]" MCL 777.39(1)(c). A trial court is to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a). Ten points may be scored for OV 10 if a defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). "Exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). Points should be scored under OV 10 only when the victim's vulnerability is readily apparent. *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008).

Defendant initially threatened Swires's girlfriend and began approaching her, causing her to feel that she was in danger; Swires intervened to protect his girlfriend, and that was when defendant assaulted him. This evidence supports a finding that defendant placed Swires's girlfriend in danger of physical injury, making her an additional victim within the meaning of MCL 777.39(2)(a). A trial court's scoring of OV 9 must be based only on the sentencing offense. *People v McGraw*, 484 Mich 120, 133-134; ___ NW2d ___ (2009). But assaulting Swires while Swires was intervening to protect his girlfriend from defendant indicates that the risk of danger of physical injury to Swires's girlfriend was intertwined with the sentencing offense. Accordingly, the trial court did not err in scoring ten points for OV 9.

The record also provides sufficient support for the trial court's finding that defendant exploited Swires's youthfulness. Swires was a 16-year-old teenager at the time of the offense, whereas defendant was almost 30 years old. The evidence showed that defendant used his significant age difference to attempt to intimidate Swires, and then escalated the situation by threatening Swires's girlfriend to provoke Swires. This evidence supports a finding that defendant manipulated Swires based on his youthfulness. Therefore, the trial court did not err in scoring ten points for OV 10.

The remainder of defendant's arguments were brought by defendant in propria persona, in a brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

Defendant argues that the trial court erred in scoring ten points for OV 1 (the victim was touched with a weapon other than a firearm, knife, or harmful substance), MCL 777.31(1)(d), and one point for OV 2 (the offender possessed or used a potentially lethal weapon other than a firearm, knife, explosive device, or harmful substance), MCL 777.32(1)(e). We disagree. The testimony that defendant struck the victim in the head with some kind of metal object, leaving a wound that required five staples, was sufficient to support the trial court's scoring of these offense variables. *Endres, supra*.

Defendant argues that his right to be free from double jeopardy was violated by the submission to the jury of charges of both assault with intent to do great bodily harm less than murder and felonious assault, based on a single assault. We disagree. A double jeopardy issue involves a question of law, which we review de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

The Double Jeopardy Clause includes protection against multiple punishments for the same offense, US Const, Am V; Const 1963, art 1, § 15. *People v Matuszak*, 263 Mich App 42, 49; 687 NW2d 342 (2004). In the absence of a clear legislative intent to impose multiple punishments for the same offense, "multiple offenses may be punished if each offense has an element that the other does not." See *People v McGee*, 280 Mich App 680, 682-683; 761 NW2d 743 (2008). Felonious assault requires the use of a dangerous weapon during an assault, but does not require an intent to cause great bodily harm. *People v Walls*, 265 Mich App 642, 645-646; 697 NW2d 535 (2005). Conversely, assault with intent to do great bodily harm requires that the defendant commit an (1) an assault, (2) with the specific intent to do great bodily harm less than murder, *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), but it does not require the use of a dangerous weapon. Thus, each crime requires proof of an element that the other does not. In any event, the charges were clearly intended to be alternative, and defendant was convicted and sentenced for only a single offense. Under these circumstances, there was no

double jeopardy violation. See *People v Herndon*, 246 Mich App 371, 392; 633 NW2d 376 (2001).

Defendant next argues that the trial court erred in declaring a mistrial at his first trial. We disagree. A trial court's decision to grant a mistrial is reviewed for an abuse of discretion. *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994); *People v Blackburn*, 94 Mich App 711, 714; 290 NW2d 61 (1980).

"A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Here, the trial court declared a mistrial because two jurors believed – albeit possibly erroneously – that the victim spit on them during a lunch break. Only twelve jurors were seated at the time, and defendant did not consent to proceeding with fewer than twelve jurors. The trial court did not abuse its discretion in concluding that a mistrial was manifestly necessary because continuing with all twelve jurors would have made an impartial verdict highly unlikely and dismissing the two jurors would violate defendant's right to a jury of twelve jurors pursuant to MCR 6.410(A). See *People v Echavarria*, 233 Mich App 356, 363; 592 NW2d 737 (1999). Although the trial court did not hold an evidentiary hearing, it did hold a hearing, which is all that was required. From the record, it appears that the hearing memorialized discussions held in chambers, and defendant was amenable to the mistrial. See *People v William McGee*, 469 Mich 956; 670 NW2d 665 (2003). We find no error.

Defendant argues that because his case was originally assigned to Chief Judge Patrick Joslyn, who presided at defendant's first trial, it was improper for visiting Judge Michael Matuzak to preside at his second trial. The record here indicates that Chief Judge Joslyn was temporarily absent and unable to act because he was out of town. Thus, MCR 8.111(C) permitted Chief Judge Joslyn to designate a judge to act temporarily in his absence. Accordingly, there was no error when visiting Judge Matuzak presided at defendant's second trial.

Defendant argues that there was insufficient evidence of his intent to support his conviction of assault with intent to do great bodily harm less than murder. We disagree. The evidence that defendant struck Swires in the head with such force that it caused an injury that required five staples to close Swires's head wound, viewed in a light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant assaulted Swires with "an intent to do serious injury of an aggravated nature." *Brown, supra* at 147. Thus, the evidence was sufficient to support defendant's conviction.

Defendant next argues that the trial court erred by failing to instruct the jury on assault and battery as a lesser offense to assault with intent to do great bodily harm less than murder. We review unpreserved claims of instructional error for plain error affecting substantial rights. *People v Martin*, 271 Mich App 280, 353; 721 NW2d 815 (2006), *aff'd* 482 Mich 851 (2008). An instruction on a necessarily included lesser offense "is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002) (footnote omitted). The disputed factual element that distinguishes the two charges in this case is the intent to do great bodily harm. Given the severity of Swires's injury,

we conclude that the evidence in this case did not rationally support an instruction on misdemeanor assault and battery. Failure to instruct on that offense was not plain error.¹

Defendant next argues that the trial court erred in excluding a demonstrative exhibit that his attorney prepared. We disagree. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

The exhibit was described as a scaffold with a ceiling tile that was designed to resemble a seven-foot high ceiling. Counsel intended to use the exhibit to assist the jury in evaluating the witnesses' testimony describing how defendant allegedly swung a tire iron or object over his head and struck the victim's head. The trial court concluded that the exhibit would not have significantly assisted the jury in understanding the relative height of a common seven-foot ceiling, and there were other less-disruptive ways for counsel to challenge whether defendant could have swung a tire iron overhand in the room where the assault occurred. We do not find that the trial court abused its discretion in concluding that the exhibit's probative value was insufficient to warrant its introduction in light of the likely disruption to proceedings. See *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). Furthermore, the trial court's ruling admitting the exhibit in defendant's first trial is not binding on a second trial after a mistrial. *People v Howard*, 226 Mich App 528, 552; 575 NW2d 16 (1997).

Next, defendant argues that he is entitled to a new trial or resentencing because his trial attorney was ineffective. In particular, defendant argues that trial counsel failed to interview any witnesses before either trial, failed to cross-examine witnesses, failed to present his own medical expert, should have anticipated that the demonstrative exhibit would have been challenged, failed to acquire a complete transcript of his first trial, and failed to advocate proper sentencing scoring. We disagree with all of these assertions.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent from the record. *Matuszak, supra* at 48. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). Defendant has the burden of producing factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

¹ Furthermore, we observe that defense counsel's strategy was to argue to the jury that the most defendant was guilty of was assault and battery, arguing that the jury should not convict defendant of a greater crime merely because it believed that defendant was guilty of something. We are not persuaded that this strategy was unsound.

Defendant fails to identify any witnesses who were allegedly not interviewed or to explain how any alleged insufficient interviewing prejudiced his trial. The record shows that defense counsel *did* cross-examine the prosecution's witnesses, and defendant has not explained how that cross-examination was deficient. Defendant has not explained how it was unsound for trial counsel to challenge the prosecutor's medical expert through cross-examination instead of through another medical expert, particularly given that the nature of the victim's injuries were not a significant issue and the medical expert could not identify what caused the injury beyond blunt force trauma or a non-sharp object. The record shows that defense counsel competently argued for admission of the demonstrative exhibit and that, in its absence, counsel nevertheless explored the relative height of the ceiling in the room where the assault occurred.

Defense counsel did not receive a complete copy of defendant's first trial, but he did request it, as well as a continuance when it was not timely received. Counsel received a transcript of all witness testimony from the first trial before the second trial began. After the second trial, defense counsel received a transcript of the trial court's mistrial ruling at the first trial and used it to seek post-conviction relief. Defense counsel objected to the scoring of OV 1 and OV 2, but not to OV 9 or OV 10. Nevertheless, the trial court overruled the objections regarding OV 1 and OV 2, and as discussed, the court's scoring of all offense variables was proper. Defendant does not articulate what other objections, if any, defense counsel should have made.

We find that defendant has not factually supported his claim of ineffective assistance. See *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). An appellant may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Defendant has not shown that he received ineffective assistance of counsel.

Finally, defendant argues that the trial court erred by failing to correct the presentence investigation report (PSIR) in response to his challenges to the accuracy of the report at sentencing. We agree.

Once a defendant challenges the accuracy of information in the PSIR, the trial court is required to respond to the challenge. *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2008). The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information. *Id.* Because the Department of Corrections uses the PSIR to make decisions regarding a defendant's status, the PSIR must accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained in the report. *Id.* In this case, although the trial court stated that it would disregard certain information describing a similar offense, the trial court did not delete that information from the PSIR; the court also did not respond to other objections raised by defendant. We therefore remand this case to the trial court for the court to address defendant's challenges to the PSIR and to correct the PSIR as appropriate, after which a corrected copy of the PSIR shall be forwarded to the Department of Corrections.

We affirm defendant's conviction and sentence, but remand for further proceedings with regard to defendant's challenges to the accuracy of the PSIR in accordance with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis

/s/ William C. Whitbeck