S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2009
V	No. 287605 Ionia Circuit Court
JOHNNY BONILLA-MACHADO, Defendant-Appellant.	LC No. 08-013934-FH

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

After a jury trial, defendant Johnny Bonilla-Machado was convicted of two counts of assaulting a prison employee, MCL 750.197c. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of 30 to 90 months' imprisonment for each conviction, but specified that these sentences would be served consecutively to any sentences already being served. Defendant appeals as of right. We affirm the convictions, but remand this case to the trial court for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant, a prisoner housed in the segregation unit of the Bellamy Creek Correctional Facility in Ionia, overflowed his toilet. Using a knotted garment, he then splashed some of that water onto two correctional officers as they respectively made their rounds.

I. Right to Testify

First, defendant argues that he was misinformed concerning his right to testify. Defendant initially showed some inclination to testify in his own defense, but after some discussion with counsel and the trial court, he changed his mind. At trial, defendant was asked whether he wished to testify:

> THE COURT: [D]oes your client want to testify?
>
> [DEFENSE COUNSEL]: That's what I'm trying to find out right now, your Honor.
>
> THE COURT: . . . He should have made his decision before now.
>
> [DEFENSE COUNSEL]: He's going to testify, your Honor.

THE COURT: Would you like to explain his rights to him on the record?

[DEFENSE COUNSEL]: Yes, I would, you Honor. John, it's going to be your choice to take the stand here today?

THE DEFENDANT: Yes.

[DEFENSE COUNSEL]: You understand if you take the stand today anything you say on the stand can be used against you? . . . . Do you understand? You have a right not to take the stand. So are you going to take the stand or not take the stand?

THE DEFENDANT: No.

[DEFENSE COUNSEL]: Your Honor, he's indicated to me he's not going to take the stand. Is that right Johnny? You're not going to take the stand?

THE DEFENDANT: No.

[DEFENSE COUNSEL]: But I've explained to you, if you take the stand, anything you say can be held against you. Do you understand that?

THE DEFENDANT: Yes.

[DEFENSE COUNSEL]: So it's your choice not to take the stand here today?

THE DEFENDANT: I'm not going to go up there.

THE COURT: Mr. Machado, do you want to testify today?

THE DEFENDANT: No.

Defendant argues that his counsel and the trial court overemphasized his right *not* to testify and that any testimony he offered could be used against him. We disagree.

The decision whether to testify is ultimately the defendant's personal decision to make and counsel must respect that decision. See *Rock v Arkansas*, 483 US 44, 52; 107 S Ct 2704; 97 L Ed 2d 37 (1987).[1] In this case, defendant's vacillation on the matter illustrates that he

[1] But see *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000) (where a defendant insisted on testifying, counsel's failure to ensure that the jury fully understood the defendant's account of events did not constitute ineffective assistance, because that account was "so unbelievable that defendant was arguably better off letting the jury speculate about what he was really trying to

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understood that he was at liberty to testify. Further, defense counsel reminded defendant that the choice was his to make. Counsel's additional reminders that any testimony offered could work against him, as well as for him, were in proper discharge of his duty, especially given that taking the stand exposes a defendant to vigorous cross-examination.

Defendant seems to suggest that he was given to understand that his testimony only could be used against him, but any such argument is strained. We decline to interpret reminders that testifying in one's defense can backfire as misinforming a defendant that only negative inferences can be drawn from any testimony offered.

We reject defendant's characterization of the discussion transcribed above as indicative of the trial court and defense counsel either failing to inform defendant of his right to testify or improperly and prejudicially pressuring him to waive that basic right. Because the record shows that defendant decided not to testify after being properly reminded of the hazards of doing so, we reject this claim of error.

II. Maximum Sentences

Next, defendant argues that the trial court failed to exercise its discretion when fixing defendant's maximum sentences. The trial court imposed maximum sentences of 90 months' imprisonment for each conviction, stating, "That's what the statute says it has to be." Apparently his statement refers to an enhancement of the normal five-year maximum in light of defendant's habitual offender status. Defendant protests that the trial court thus demonstrated that it failed to recognize that enhancement of the maximum sentence in habitual offender situations is a matter of discretion. See *People v Turski*, 436 Mich 878; 461 NW2d 366 (1990). Plaintiff confesses error in this regard and recommends a remand for clarification. We accept that recommendation and remand this case for the trial court to either clarify that it understood that it had discretion in the matter or to redetermine the maximum sentences after properly exercising its discretion in the matter.

III. Offense Variables 9 and 13

Next, defendant argues that the court erred in scoring Offense Variable (OV) 9 and OV 13. OV 9 concerns the number of victims. The trial court assessed ten points for that variable, which is the total prescribed where there were "2 to 9 victims who were placed in danger of physical injury . . . ." MCL 777.39(1)(c).

Defendant does not assert that he did not place his victims in danger of physical injury by splashing water from his overflowed toilet on them, but instead points out that, according to the evidence, he so assaulted two different victims nearly one-half hour apart, and argues that for each of the instant crimes there was only a single victim. This argument has merit.

In *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), our Supreme Court reiterated that "offense variable (OV) 9 in the sentencing guidelines cannot be scored using

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say").

uncharged acts that did not occur during the same criminal transaction as the sentencing offense," and elaborated that "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id.* at 121-122 (footnote omitted).

Although the two assaults here at issue occurred fairly close in time, the first was wholly completed before the second began, and each victim was assaulted separately. Under *McGraw* and related authority, the trial court erred in aggregating the victims from those two separate offenses for purposes of scoring OV 9.

The trial court scored ten points for OV 13, which concerns patterns of felonious conduct. Subsection (2)(a) provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction."

Defendant notes that, as indicated in his presentence investigation report, his record of felonious conduct over the past five years, in addition to the instant offenses, consists of one instance of attempted carjacking, one instance of unarmed robbery, and one earlier assault of a prison employee. He argues that these add up to fewer than three crimes against a person or property as statutorily classified. This argument lacks merit.

Carjacking, MCL 750.529a, and unarmed robbery, MCL 750.530, are both classified as crimes against a person. MCL 777.16y. Assault of a prison guard is classified as a crime against public safety. MCL 777.16j. Plaintiff notes that the instant offenses were directed at persons and argues that those offenses are properly counted for purposes of scoring OV 13. We agree. Although MCL 777.16j indicates that assault of a prison guard is a crime against public safety, this offense is *also* a crime against a person because, obviously, a prison guard is a person.

Apparently, the trial court assessed ten points for OV 13 pursuant to MCL 777.43(1)(d), which indicates that ten points is the total prescribed where "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of" certain controlled substance violations not here at issue. However, because defendant committed three crimes against a person, he should be scored 25 points for this variable pursuant to MCL 777.43(1)(c), which requires a score of 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." Accordingly, we direct the trial court to score this variable at 25 points on remand.

IV. Assistance of Counsel

Finally, defendant argues that his counsel was ineffective. "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant argues that his counsel was ineffective for failing to properly advise him concerning his right to testify. Because we have concluded that counsel adequately and accurately informed defendant with respect to his right to testify, this claim of ineffective assistance lacks merit.

Defendant also argues that his counsel was ineffective for failing to challenge the scoring of OV 9 and OV 13. However, because we remand for resentencing, we need not consider this assertion of error further.

Defendant's convictions are affirmed. We remand this case to the trial court for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis