STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 2, 2010
v	Nos. 290473; 295012 Oakland Circuit Court
MICHAEL FRANK BASSIN, Defendant-Appellant.	LC No. 2008-221501-FC

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

In Docket No. 290473, defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced, as a second habitual offender, MCL 769.10, to 17 ½ to 30 years' imprisonment for each conviction. In Docket No. 295012, following the trial court's grant of defendant's motion for resentencing, defendant appeals as of right the judgment of sentence from his resentencing, where he was sentenced, as a second habitual offender, to 200 months to 30 years' imprisonment for his assault with intent to murder conviction and 100 months to 30 years' imprisonment for his first-degree home invasion conviction. We affirm.

Defendant first argues that the trial court erred by not considering the relevant factors when denying his request to represent himself at trial. Defendant contends that this failure denied him his right of self-representation. We disagree.

Generally we review a trial court's factual findings surrounding a defendant's waiver of his Sixth Amendment right to counsel for clear error. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). However, if the ruling involves an issue of law or constitutional question, review is de novo. *Id*.

Federal and state law guarantees the right of self-representation. *Iowa v Tovar*, 541 US 77, 87-88; 124 S Ct 1379; 158 L Ed 2d 209 (2004); US Const, Am VI; Const 1963, art 1, § 13; see also MCL 763.1. To accept a defendant's request to represent himself, the trial court must substantially comply with the requirements delineated in MCR 6.005(D) and in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). *People v Willing*, 267 Mich App 208, 219-220; 704 NW2d 472 (2005). The trial court must engage in a sufficient inquiry to ensure (1) that the defendant's request is unequivocal; (2) that the request is knowing, intelligent, and voluntary; and (3) that the request will not disrupt, unduly inconvenience, or burden the

court. *Willing*, 267 Mich App at 219-220, citing *Anderson*, 398 Mich at 367-368. In addition, MCR 6.005(D) provides, in pertinent part:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Based on the record, defendant's request to represent himself was not unequivocal. Rather, defendant's request was made in the alternative, expressing his desire for either new counsel or to represent himself. Even though the trial court did not follow the procedural requirements in *Anderson* and MCR 6.005(D), defendant's failure to make an unequivocal request was insufficient to amount to a waiver of his right to counsel. See *Russell*, 471 Mich at 191-192 ("[I]f any irregularities exist in the waiver proceeding, the defendant should continue to be represented by counsel."). Consequently, we conclude that the trial court did not err in denying defendant's request for self-representation because every reasonable presumption should be against waiver, and the requirement that defendant make an unequivocal request was not satisfied. *Id.* at 188.

Next, defendant argues that Detective Keith Spencer's testimony on the victim's credibility improperly usurped the function of the jury and placed the prestige of the police behind the contention that defendant was guilty. We disagree. We review unpreserved claims of evidentiary error for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

"It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). However, a police officer may provide lay opinion testimony regarding topics within his or her personal knowledge and experience. *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), modified and remanded on other grounds 433 Mich 862 (1989).

Contrary to defendant's argument, Spencer did not testify regarding the victim's credibility. Rather, he responded to the prosecutor's question regarding the victim's demeanor. Spencer described the victim as giving competent answers and coming across as confident in what she was saying, despite the fact that she was in the hospital, under the influence of pain medication, and still required stitches. This testimony merely reflects the victim's demeanor and contains no opinion about whether Spencer thought she was credible. Further, the testimony about the victim's demeanor allowed the jury to consider the credibility of what the victim told Spencer. Consequently, Spencer's testimony did not constitute plain error. In addition, the trial court instructed the jury that it was to decide the credibility of each witness and a jury is presumed to have followed instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), so defendant cannot show that Spencer's testimony affected his substantial rights.

Next, defendant argues that testimony about the victim's statements regarding the assault from Officer Jacob Theisen, Officer Donald Scher, and Spencer was improper because it constituted inadmissible hearsay. Defendant contends that the hearsay testimony was not admissible as statements with equivalent circumstantial guarantees of trustworthiness under MRE 803(24) or as prior consistent statements under MRE 801(d)(1)(B). However, regardless of whether the statements were admissible under MRE 803(24) or MRE 801(d)(1)(B), we conclude that the hearsay statements were admissible pursuant to MCL 768.27c. Again, we review unpreserved claims of evidentiary error for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763-764; *Coy*, 258 Mich App at 12.

Prior to trial, the prosecution filed a notice of intent to use hearsay statements made by the victim to Theisen, Scher, and Spencer regarding the assault pursuant to MCL 768.27c. MCL 768.27c specifies that hearsay statements may be admissible at trial in some situations involving offenses of domestic violence, subject to a list of prerequisites. MCL 768.27c states, in relevant part:

> (1) Evidence of a statement by a declarant is admissible if all of the following apply:
>
> (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> (e) The statement was made to a law enforcement officer.
>
> (2) For the purpose of subsection (1)(d), circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:
>
> (a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
>
> (b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
>
> (c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

At trial, Theisen, Scher, and Spencer each testified regarding how the victim described the assault. MCL 768.27c(1)(a). The assault involved domestic violence, which is defined as an offense where the defendant caused or attempts to cause "physical or mental harm to a family or

household member," MCL 768.27c(5)(b)(i), and "family or household member" includes a former spouse, an individual with whom the defendant has resided, and an individual with whom the defendant has a child in common, MCL 768.27c(5)(c). In this case, the victim told Theisen, Scher, and Spencer that her ex-husband, defendant, who was the father of her children and previously resided with her, had committed the assault, thus satisfying the domestic violence requirement under MCL 768.27c(1)(b).

In addition, the victim made the relevant statements to Theisen mere minutes after the assault and then additional statements to Scher and Spencer at the hospital, which was, at the most, within a couple of hours after the assault. Thus, the statements were made near the time of the infliction of physical injury in satisfaction of MCL 768.27c(1)(c). Next, the statements were made under circumstances that would indicate the statements' trustworthiness under MCL 768.27c(1)(d). There was no evidence that the statements were made in contemplation of pending or anticipated litigation in which the victim was interested, and no evidence that the victim had a bias or motive for fabricating the statements. The statements were also corroborated by other evidence such as the victim's head wounds, trails of blood in the house where the assault occurred, and the fact that the bracelet belonging to defendant was recovered from the floor near the front door of the house. MCL 768.27c(2). Lastly, the relevant statements were all made to law enforcement officers, satisfying MCL 768.27c(1)(e). Thus, because the victim's hearsay statements were properly admitted under MCL 768.27c, defendant has failed to establish plain error.

Next, defendant argues that he was denied the effective assistance of counsel by his counsel's failure to object to Spencer's testimony regarding the victim's demeanor and the testimony from Theisen, Scher, and Spencer regarding the victim's statements about the assault. We disagree.

As we previously discussed, Spencer's testimony regarding the victim's demeanor and Theisen's, Scher's and Spencer's testimony regarding the victim's statements about the assault were properly admitted. Therefore, defense counsel's failure to object to this testimony was not unreasonable and counsel is not ineffective for failing to advocate meritless or futile positions. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant also argues that there is insufficient evidence to support his conviction of assault with intent to murder because the evidence does not support that he had the intent to murder. Defendant contends that without evidence of serious injury to the victim and evidence regarding the weight of the club used in the assault, there is merely evidence of assault with intent to do great bodily harm, not assault with intent to murder. We disagree.

We review a challenge to the sufficiency of evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must "'view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.'" *Id.*, quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

When reviewing a sufficiency of evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). It is solely the trier of fact's role to weigh the evidence and judge the credibility of

witnesses. *Wolfe*, 440 Mich at 514. Therefore, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A conviction of assault with intent to commit murder requires proof of the following elements: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotations and citations omitted). Defendant disputes only the mens rea element, that is, whether he possessed the intent to kill. "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to establish a defendant's intent to kill." *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008).

The evidence, viewed in the light most favorable to the prosecution, shows that defendant attacked the victim in her bedroom, striking her between 20 and 25 times with a metal and rubber bludgeon. Defendant struck the victim repeatedly in the head. After the victim's daughter appeared in the doorway, the victim told her to call the police, which caused defendant to chase after the victim's daughter. The victim suffered bruising on her shoulders, neck, arms, hands, and face, as well as two deep lacerations on her head that caused profuse bleeding and required 13 stitches and 13 staples to close. Although defendant did not inflict fatal or even near life-threatening injuries, proof of physical injury is not necessary to establish intent to kill. See *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Based on the nature of the assault in which defendant repeatedly used a bludgeon to strike the victim in the head, and because there is no indication that defendant would have ceased his attack if not for the victim's daughter going to call the police, the evidence was sufficient to permit a rational juror to conclude beyond a reasonable doubt that defendant acted with an intent to kill.

In addition, defendant argues that the flight instruction was improper because of evidence that defendant reported for work the next morning, which shows that he was not attempting to elude the police. Defendant also contends that the flight instruction was confusing and suggested that identification of the perpetrator was not in doubt. We disagree.

We review jury instructions in their entirety to determine if there is error that requires reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). To the extent that defendant argues a violation of due process, this argument is reviewed for plain error affecting defendant's substantial rights because it is unpreserved. *Carines*, 460 Mich at 763-764.

"Instructions that are somewhat imperfect are acceptable, as long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant." *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996), aff'd 460 Mich 55 (1999). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). In addition, to give a particular instruction to the jury, there must be evidence to support it. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).

The trial court gave the following instruction on flight, which was based on CJI2d 4.4, the standard flight instruction:

> There's been some evidence that the defendant ran away after the alleged crime he is accused of committing. This evidence is not to prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear.
>
> However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true, and if true, whether it shows the defendant had a guilty state of mind.

It is "well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). The term "flight" encompasses fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

In this case, there was evidence that defendant fled the scene of the crime. The victim testified that, during the assault, she repeatedly yelled for her daughter to call the police. Defendant ceased his assault only after these repeated requests and defendant's unsuccessful attempt to access the victim's daughter's room. The victim also testified that defendant had his car backed into the driveway so he was able to pull quickly onto the street. This evidence supports a conclusion that defendant fled the scene of the crime to avoid capture by the police. Further, the instruction was based on the standard flight instruction and did not indicate that identification of the perpetrator had been established. Thus, the jury instruction on flight was proper and defendant has failed to show error.

Last, defendant argues that, under MCR 6.425(E)(1)(c), the trial court violated his right to allocution by denying his request to have a friend speak on his behalf at his resentencing. We disagree.

We review a trial court's decision regarding whether to allow someone other than the defendant, the defendant's counsel, the prosecutor, or the victim to address the court at sentencing for an abuse of discretion. See *People v Waclawski*, 286 Mich App 634, 691; 780 NW2d 321 (2009), citing *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994). Also, we review the interpretation of a court rule de novo. *People v Lacalamita*, 286 Mich App 467, 472; 780 NW2d 311 (2009).

Under MCR 6.425(E)(1)(c), the court, on the record, must "give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." The clear language of this court rule does not require the trial court to permit friends of a defendant to speak on the defendant's behalf. Further, the trial court is afforded broad discretion in determining who may speak at sentencing outside of the parties named in MCR 6.425(E)(1)(c). *Albert*, 207 Mich App at 74-75. As the prosecution argues, this Court has held that a trial court does not abuse its discretion or violate a defendant's right to allocution by denying a defendant's friends or family the opportunity to address the court at sentencing. *People v Lawson*, 172 Mich App 498, 500-

501; 432 NW2d 354 (1988). Thus, the trial court did not abuse its discretion in refusing to allow defendant's friend to speak on defendant's behalf at his resentencing.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad