

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE L. PARKER, JR.,

Defendant-Appellant.

UNPUBLISHED

September 21, 2010

No. 290941

Muskegon Circuit Court

LC No. 08-056585-FH

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and unarmed robbery, MCL 750.530. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 9 to 25 years for the assault conviction and 15 to 25 years for the robbery conviction. He was also ordered to pay restitution of \$201,833 for the victim's medical expenses. He appeals as of right. We affirm.

Defendant was convicted of assaulting and robbing his cousin, Darin Sargent. The evidence at trial showed that defendant and Sargent were involved in an altercation earlier on the day of the assault. Later that day, defendant confronted Sargent at a liquor store. The evidence indicated that defendant pushed Sargent outside the liquor store and then struck him in the head, causing him to fall to the ground. Defendant then straddled Sargent while Sargent was lying on the ground and struck him three more times in the head. Sargent received a significant concussion and a fractured jaw that had to be surgically repaired. Sargent testified that he had \$180 in his pants pocket before the assault and that the money was missing when his pants were returned to him at the hospital. Sargent was also missing an earring that he was wearing before the assault. Witnesses observed defendant reach into Sargent's pockets after the assault. A surveillance video also depicted defendant reaching into Sargent's pants pockets, after which he appeared to look in his hands and then leave. Defendant admitted assaulting Sargent, but denied intending to cause great bodily harm. Defendant also denied taking Sargent's money or earring. He claimed that he reached into Sargent's pockets only to determine whether he had a gun, given that Sargent had threatened him during the earlier altercation.

Defendant raises several issues on appeal, both through appointed appellate counsel and in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

I. AMENDMENT OF THE INFORMATION

Defendant first argues through appellate counsel that the prosecutor was impermissibly allowed to amend the information at the preliminary examination to include the unarmed robbery charge. Defendant preserved this issue with respect to his claim that the amendment violated MCL 767.76 and prejudiced his ability to defend against the new charge, inasmuch as he raised these issues in an appropriate motion in the circuit court. However, defendant did not argue below that the amendment violated his right to counsel. Therefore, this latter argument, which is presented in defendant's Standard 4 brief, is not preserved. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (an objection on one ground is insufficient to preserve an appellate attack on a different ground).

A trial court's decision whether to permit an amendment to an information is reviewed for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). Unpreserved claims of error are reviewed for plain error affecting a defendant's substantial rights. *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007).

The constitutional right to due process requires that an accused be sufficiently apprised of the charges against him. *People v Higuera*, 244 Mich App 429, 442; 625 NW2d 444 (2001). Defendant is correct that MCL 767.76 does not permit an amendment that adds a new offense. That statute only permits amendments that cure defects in the statement of an offense that is already sufficiently charged to fairly apprise the accused of its nature. *McGee*, 258 Mich App at 688. However, the amendment was permissible pursuant to MCR 6.112(H).¹ *People v Goecke*, 457 Mich 442, 459-460, 460 n 18; 579 NW2d 868 (1998); *McGee*, 258 Mich App at 690-693. Further, because the unarmed robbery charge was added at the preliminary examination and was supported by evidence at that proceeding, there is no merit to defendant's argument that he was deprived of adequate notice or a sufficient opportunity to defend against the charge at trial. *Id.*; see also *People v Hunt*, 442 Mich 359; 501 NW2d 151 (1993) (holding that the prosecution should have been permitted to amend the information at the conclusion of the preliminary examination by substituting a new charge in place of the original charge where there was sufficient proof of the new charge presented at the examination and the defendant would not incur any unacceptable prejudice). Thus, the circuit court did not err in allowing the amendment.

We also reject defendant's pro se argument that the amendment violated his right to counsel because, at the time he waived his right to counsel at the preliminary examination, he had only been charged with assault with intent to do great bodily harm. The right to counsel is linked to critical stages in a criminal prosecution, not a particular charge. The Sixth Amendment directly guarantees the right to counsel at all critical stages in criminal prosecutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005). A preliminary examination is a critical stage at which a defendant has a right to counsel. *Coleman v Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1970); *Duncan v Michigan*,

¹ MCR 6.112(H) provides that a court "before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant."

284 Mich App 246, 264; 774 NW2d 89 (2009), rev'd on other grounds 784 NW2d 51 (2010). Defendant does not dispute that he validly waived his right to counsel at the preliminary examination. Further, because the unarmed robbery charge was the subject of testimony and evidence at the preliminary examination, and the amendment was based on that evidence, defendant was not entitled to a separate preliminary examination on that charge. Thus, there is no merit to defendant's argument that the amendment violated his right to counsel.

II. SELF-REPRESENTATION

Defendant next argues through appellate counsel that the trial court erred in denying his request to represent himself at trial. We disagree. This Court reviews for clear error a trial court's factual findings regarding a defendant's waiver of counsel. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). Due deference is given to the trial court's ability to assess credibility. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004).

In *Williams*, *id.* at 642-643, the Court explained the requisite procedure when a defendant desires to represent himself, as outlined in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976) and MCR 6.005(D):

[A] trial court must make three findings before granting a defendant's waiver request. First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business.

Consistent with *Anderson*, MCR 6.005(D)(1) governs procedures concerning a defendant's waiver of the right to an attorney. It prohibits a court from granting a defendant's waiver request without first

“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 [MCR 6.005(D)(1).]” [Alteration and omission in original.]

Every reasonable presumption against a waiver must be indulged. *Russell*, 471 Mich at 188.

In this case, the trial court did not clearly err in finding that defendant failed to unequivocally waive his right to counsel. Although defendant informed the trial court in a written letter that he wanted to represent himself, when questioned on the record before trial, he expressed a desire for counsel. He informed the trial court that it was “my wish to have an attorney.” Defendant explained that his principal dissatisfaction with his attorney was that counsel was unwilling to file certain motions that defendant wanted to file. The trial court responded to that concern by permitting defense counsel to submit pro se motions to allow defendant a chance to present his arguments to the court. Because the record demonstrates that defendant did not unequivocally waive his right to counsel, the trial court did not err by denying defendant's request for self-representation.

III. ACCESS TO THE COURT

Defendant argues in his Standard 4 brief that he was denied his constitutional right to aid in his own defense because he was denied access to the jail law library. Because defendant did not raise this issue below, it is unpreserved and our review is limited to plain error affecting his substantial rights. *Hanks*, 276 Mich App at 92. Defendant was represented by counsel at trial. Therefore, the state was under no constitutional obligation to provide defendant with access to a law library. *People v Yeoman*, 218 Mich App 406, 415; 554 NW2d 577 (1996). It is the mere offering of competent legal assistance that satisfies the Sixth and Fourteenth Amendments. *People v Mack*, 190 Mich App 7, 24; 475 NW2d 830 (1991). Thus, there was no constitutional violation and, accordingly, no plain error.

IV. ADMISSIBILITY OF EVIDENCE

Defendant argues through appellate counsel that the trial court improperly precluded him from cross-examining the victim regarding his involvement with drugs, which also affected his constitutional right of confrontation. We review defendant's preserved evidentiary issue to determine whether the trial court abused its discretion by limiting the scope of defendant's cross-examination. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). However, because defendant did not raise his constitutional argument in the trial court, we review that unpreserved issue for plain error affecting defendant's substantial rights. *Hanks*, 276 Mich App at 92.

Defendant argues that evidence of the victim's involvement with drugs was relevant to his credibility. The trial court determined that the probative value of the evidence, if any, was minimal and that the evidence should be excluded under MRE 403 because any probative value would be substantially outweighed by the danger of unfair prejudice. As explained in *Blackston*, 481 Mich at 462:

“Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony” by the trial judge. Assessing probative value against prejudicial effect requires a balancing of several factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence. [Citations omitted.]

In this case, the trial court reasonably was concerned about the possibility of a mini-trial developing concerning whether the victim was involved with drugs and the extent of that involvement, issues that did not directly assist the jury in deciding the principal issues at trial, which were defendant's intent in assaulting the victim and whether defendant took the victim's money. Therefore, the trial court did not abuse its discretion by excluding evidence pertaining to the victim's drug involvement.

Further, the trial court's ruling did not affect defendant's constitutional right of confrontation. Although a defendant has a constitutional right to confront the witnesses against him, that right is not without limits. *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998). A trial court may impose reasonable limits on a defendant's cross-examination based on concerns about prejudice, confusion of the issues, witness harassment, or questioning that is irrelevant or only marginally relevant. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Here, the trial court did not foreclose defendant's right to challenge the victim's credibility, but merely limited it regarding one issue, which was justified under the circumstances. Thus, there was no plain error.

V. PROSECUTORIAL MISCONDUCT

Defendant argues through appellate counsel that the prosecutor's comments during closing and rebuttal arguments denied him a fair trial. Defendant also argues in his Standard 4 brief that the prosecutor improperly questioned him about his decision not to speak to the police during questioning and improperly commented on that silence during closing argument. Because there was no objection to the prosecutor's questions or comments at trial, these claims are not preserved. Accordingly, we review the issues for plain error affecting defendant's substantial rights. *Hanks*, 276 Mich App at 92.

The test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Brown*, 279 Mich App 116; 134; 755 NW2d 664 (2008). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Id.* at 135.

Defendant argues that the prosecutor improperly suggested that defense counsel attempted to mislead the jury by referring to his defense strategy as "tricks." Viewed in context, it is apparent that the prosecutor was responding to defense counsel's statements asking the jury to find defendant guilty of simple assault because defendant admitted committing that crime. Although the prosecutor referred to this defense strategy as a trick, the prosecutor asked the jury to find defendant guilty of the more serious offense based on the evidence. Because the prosecutor's argument was not focused solely on defense counsel, and instead was directed at the evidence, there was no plain error. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003); *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW 2d 354 (1996); *Unger*, 278 Mich App at 236-237. Further, to the extent that the prosecutor's remarks can be considered improper, a timely objection and request for a curative instruction could have eliminated any prejudice. Thus, reversal is not warranted. *Id.* at 235.

We also disagree with defendant's pro se argument that the prosecutor's questioning and comments violated his right to silence. Where a defendant decides to speak and waive his *Miranda* rights, anything he says, or does not say, is admissible until he invokes his right to silence. *People v McReavy*, 436 Mich 197, 217-218; 462 NW2d 1 (1990); see also *People v Shafier*, 483 Mich 205, 212-215; 768 NW2d 305 (2009) (a defendant's silence following arrest and decision to remain silent following the giving of *Miranda* warnings cannot be used against the defendant). In this case, the prosecutor's questions were based on defendant's refusal to

divulge information during police questioning related to the assault, after defendant was advised of and had waived his *Miranda*² rights. Defendant at no point invoked his right to remain silent. See *Berghuis v Thompkins*, __ US __; 130 S Ct 2250, 2260; __ L Ed 2d __ (2010) (a defendant must unambiguously invoke the right to remain silent by affirmatively expressing the desire to remain silent or to not talk to the police). In this circumstance, the prosecutor’s questioning was not improper. Further, because the questions were not improper, the prosecutor was free to comment on this subject during closing argument. *Unger*, 278 Mich App at 236. Thus, there was no plain error.

VI. CONTROL OF COURTROOM

Defendant argues in his Standard 4 brief that he was prejudiced when the trial court allowed an elementary school class to observe a portion of the trial during which the victim’s doctor testified regarding the victim’s injuries. Defendant contends that he was prejudiced because the jury was unduly influenced by the children’s emotional reactions to the evidence and testimony. Defendant did not object to the children’s presence at trial or otherwise raise this issue in the trial court. Therefore, it is not preserved and our review is limited to plain error affecting defendant’s substantial rights. *Hanks*, 276 Mich App at 92. Because it is not apparent from the record that the children reacted inappropriately or that the jury was likely to be influenced by any reaction, a plain error has not been shown.

VII. JURY INSTRUCTIONS

Defendant raises two claims of instructional error in his Standard 4 brief. He contends that the jury was provided with a defective copy of written instructions that omitted the word “intent” in connection with the assault with intent to do great bodily harm charge, and that the trial court failed to instruct the jury on the specific intent necessary to find him guilty of that charge. Because defense counsel affirmatively approved the trial court’s instructions, any error was waived.³ *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009).

VIII. OFFENSE VARIABLE 8

Defendant argues through appellate counsel that the trial court erred in scoring 15 points for offense variable 8 of the sentencing guidelines. We disagree.

The scoring of the sentencing guidelines variables is determined by reference to the record, using the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). “[T]his Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

³ We further note that defendant’s claims are not supported by the record. The written instructions that are contained in the lower court file do not reflect any omission of the word “intent,” and defendant has not submitted any other instructions that he claims were presented to the jury. Further, the record reflects that the trial court instructed the jury that it had to find that defendant specifically intended to injure the victim.

a particular score.” *People v Wacławski*, 286 Mich App 634, 680; 780 NW2d 321 (2009) (citation omitted).

Offense variable 8 addresses victim asportation or captivity. MCL 777.38(1)(a) provides that 15 points should be scored if the “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.” No points are scored if the victim was not asported or held captive. MCL 777.38(1)(b). A 15-point score is appropriate where there is evidence that the victim was taken to a more secluded, private place, away from observation by others, or at least away from others where rescue is less likely. See, e.g., *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009) (moving victim to a place where less likely to be observed), *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004), and *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). In this case, the evidence showed that defendant initially confronted the victim inside a liquor store, where there were other patrons and a clerk nearby. Defendant forcibly pushed the victim outside the store, where he then assaulted him. According to a surveillance video, no one was in the immediate area outside the store. This evidence supports the trial court’s determination that the victim was moved to a place of greater danger when defendant pushed him outside the store, away from the clerk and nearby patrons, making it less likely that someone would observe the assault or intercede. Accordingly, the trial court did not err in scoring 15 points for OV 8.

IX. RESTITUTION

Defendant further argues in his Standard 4 brief that the trial court erred in ordering him to pay restitution without conducting a separate evidentiary hearing and where the restitution order was based in part on the victim’s medical expenses for a head injury that was not proven at trial. We disagree.

We review for an abuse of discretion a trial court’s decision regarding an award of restitution. *People v Cross*, 281 Mich App 737, 739; 760 NW2d 314 (2008). We also review for an abuse of discretion a trial court’s decision whether to hold an evidentiary hearing. *Unger*, 278 Mich App at 216-217.

The Crime Victims’ Rights Act (CVRA), MCL 780.751 *et seq.*, authorizes a sentencing court to order restitution. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). “Restitution encompasses only those losses that are easily ascertained and are a direct result of a defendant’s criminal conduct.” *Id.* Contrary to what defendant argues, the trial court was not limited in awarding restitution only for injuries proven to a jury beyond a reasonable doubt. The CVRA allows restitution for medical bills and expenses incurred by a victim for injuries that arise out of a defendant’s “course of conduct.” MCL 780.766(2), (4)(a), (4)(b), and (8); *People v Byard*, 265 Mich App 510, 512; 696 NW2d 783 (2005). “[C]ourse of conduct” is given broad construction. *People v Gahan*, 456 Mich 264, 271; 571 NW2d 503 (1997). Further, a court properly may award restitution for all losses attributable to a defendant’s illegal scheme that culminated in his conviction, even if some of the losses were not the factual foundation of the charge that resulted in conviction. *Id.* at 270. Any dispute regarding the proper amount or type of restitution shall be resolved by a preponderance of the evidence. MCL 780.767(4).

We disagree with defendant's argument that the evidence failed to show that the victim's second hospitalization, approximately ten days after the victim was released from the hospital following defendant's assault, was unrelated to the initial assault. The evidence showed that the victim sustained a significant concussion and his jaw was broken in several places. Approximately ten days after being released from the hospital, the victim suffered a seizure while in bed and returned to the hospital. The victim stated that he had never had a seizure before, that he had been in bed the entire time between the hospital stays, and that there was no new injury to his head. The trial court did not err in finding by a preponderance of the evidence that the victim's medical expenses associated with the second hospitalization were a direct result of defendant's course of conduct related to the initial assault.

Defendant also argues that his due process rights were violated because he was not given an opportunity to present evidence to rebut the victim's version of events that led to the second hospital visit. MCL 780.767(4) "affords [a] defendant an evidentiary hearing when the amount of restitution is contested." *Gahan*, 456 Mich at 276. In this case, after defendant objected to the restitution amount, the victim was permitted to testify regarding the circumstances that led to his second hospitalization and defendant had the opportunity to cross-examine the victim. The trial court thereafter asked defense counsel if he had anything further regarding restitution and defense counsel stated that he had no further argument. Although defendant asserted that he had a problem with the restitution amount, he did not identify any additional evidence that he wanted to offer. Under the circumstances, defendant failed to show that a separate or more extensive evidentiary hearing was necessary. *Id.* n 16.

X. SUFFICIENCY OF THE EVIDENCE

Defendant argues in his Standard 4 brief that the evidence at trial was insufficient to support his convictions. We disagree. In reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Harrison*, 283 Mich App 374, 377-378; 768 NW2d 98 (2009). "Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). All conflicts in the evidence must be resolved in favor of the prosecution. *Id.*

The elements of assault with intent to do great bodily harm, which is a specific intent crime, are: (1) an attempt or threat with force or violence to do corporal harm to another, and (2) an intent to do great bodily harm less than murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). Intent may be inferred from all the facts and circumstances. *Kanaan*, 278 Mich App at 622. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent is sufficient. *Id.* The elements of unarmed robbery are: "(1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). MCL 750.530(1) provides that "[a] person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of . . . [unarmed robbery]."

In this case, the evidence showed that defendant assaulted the victim following an earlier argument. Defendant was much larger than the victim and the swiftness of the attack gave the victim no chance to defend himself. Defendant struck the victim in the head with enough force to cause the victim to fall to the ground and, while the victim was lying on the ground, defendant stood over the victim and inflicted three more forceful punches. The victim received a significant head concussion and his jaw was broken in several places, requiring it to be immobilized for six weeks, and resulting in permanent facial nerve damage. The evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant assaulted the victim intending to cause great bodily harm.⁴

Further, the victim testified that he had \$180 in his front pants pocket and that the money was missing when his clothes were returned to him at the hospital. Video evidence showed that defendant searched the victim's pants pockets after assaulting him and then looked in his cupped hand before leaving. Viewed in a light most favorable to the prosecution, this evidence was sufficient to allow the jury to find that defendant took the victim's money. The jury was not required to accept defendant's contention that he only searched the victim for a weapon or that other individuals may have taken the victim's money.

Accordingly, the evidence was sufficient to support defendant's convictions.

XI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several claims of ineffective assistance of counsel, both through appellate counsel and in his Standard 4 brief. Although defendant's claim that counsel was ineffective for failing to call witnesses was raised in a motion for a new trial, the trial court decided that issue without conducting a *Ginther*⁵ hearing. Defendant's remaining claims were not raised below. Accordingly, our review of defendant's claims is limited to mistakes apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below objective standards of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A. FAILURE TO PRESENT WITNESSES OR EVIDENCE

Defense counsel has wide discretion with respect to matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "[A] defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). This Court will not

⁴ Defendant's additional argument that it was improper to charge him with assault with intent to do great bodily harm because the arresting police officer charged him with a lesser assault is without merit. "The specific charge to file against a defendant is a decision that rests in the prosecutor's discretion[.]" *Yeoman*, 218 Mich App at 413.

⁵ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Unger*, 278 Mich App at 242-243. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy" *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). The failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the trial's outcome. *Chapo*, 283 Mich App at 371.

1. WITNESS TESTIMONY

Defendant argues through appellate counsel that trial counsel was ineffective for failing to interview and present the testimony of various witnesses who would have testified that when they spoke to the victim after the assault, he did not mention that he was missing his money. On the first day of trial, the parties discussed whether the trial court would allow a parade of defendant's family members to present such testimony. Defense counsel later proposed that he would like to call two witnesses on that subject, which the trial court permitted. Later, defense counsel called the two witnesses, each of whom testified that when they spoke to the victim after the assault, he did not mention any missing money. Thus, the record clearly establishes that defense counsel's decision regarding which witnesses to call on this subject was a matter of trial strategy. Further, because defendant was permitted to call the two witnesses, the failure to call additional witnesses to testify regarding the same subject matter did not deprive defendant of a substantial defense. Therefore, defendant's argument lacks merit.

2. HEARSAY TESTIMONY

Defendant argues in his Standard 4 brief that defense counsel was ineffective for failing to object to the victim's testimony that the only way he knew that defendant had robbed him was because other people had told him. Defendant argues that this testimony was inadmissible hearsay. It is apparent that defense counsel's intent in eliciting the testimony was to ensure that the jury knew that the victim did not see defendant take his money. Counsel's strategy was not objectively unreasonable. Therefore, defendant has failed to show that he was denied the effective assistance of counsel.

3. DEFENSE THEORY

Next, defendant argues in his Standard 4 brief that defense counsel was ineffective for failing to fully present a theory that the victim may have broken his jaw when he fell on the pavement after the assault, rather than during the assault. There was evidence that after the victim was assaulted, he was confused and disoriented, and twice fell while attempting to get to his car. Defendant's argument is based on the faulty premise that his criminal culpability could not be based on any injury that may have occurred during a fall directly after the assault. Under the law, a defendant can be said to have caused any injury that was the result of his assaultive actions and was reasonably foreseeable. See *People v Schaefer*, 473 Mich 418, 435-438, 703 NW2d 774 (2005); see also *People v Feezel*, 486 Mich 184, 195; 783 NW2d 67 (2010) (discussing causation and reasonable foreseeability in the context of criminal liability). In this case, the victim's disorientation, confusion, and lack of balance were reasonably foreseeable consequences of defendant's assaultive conduct. *Schaefer*, 473 Mich at 437-438. Thus, it was

legally irrelevant whether defendant's fist or the pavement actually broke the victim's jaw. Accordingly, defense counsel was not ineffective for failing to suggest that the victim broke his jaw when he fell after the assault. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (counsel is not ineffective for failing to advocate a meritless position).

4. JURY INSTRUCTION

Defendant further argues in his Standard 4 brief that defense counsel was ineffective for failing to request an accident jury instruction. The decision to request or refrain from requesting an instruction is typically a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986). Although defendant denied that he intended to cause great bodily harm, he admitted that he intended to assault the victim. Consistent with defendant's theory, defense counsel requested an instruction on simple assault as an alternative to assault with intent to do great bodily harm. Defendant did not claim that he struck the victim accidentally. Therefore, the evidence did not support an accident instruction and defense counsel was not ineffective for failing to request it.

B. *COBBS*⁶ COMMITMENT

Defendant also argues through appellate counsel that defense counsel was ineffective for failing to adequately explain the sentencing guidelines and the scoring of the guidelines variables, so as to enable defendant to make an informed decision whether to accept the trial court's *Cobbs* commitment. The record indicates that the trial court allowed defendant to confer with defense counsel to decide whether to accept the court's *Cobbs* commitment, but it does not indicate the substance of counsel's advice. Therefore, defendant has failed to establish the factual predicate for this claim that counsel's advice was deficient. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Further, the record indicates that the trial court specifically asked defendant if he understood how the sentencing guidelines worked, noting that defendant had been to prison before, and defendant stated that he understood them. Thus, the record does not factually support defendant's claim that he was unable to make an informed decision whether to accept the trial court's *Cobbs* offer. Accordingly, this ineffective assistance of counsel claim cannot succeed.

C. DEFENDANT'S REMAINING CLAIMS IN HIS STANDARD 4 BRIEF

Defendant raises four additional ineffective assistance of counsel claims, none of which are supported by the record. He contends that defense counsel was ineffective for (1) failing to file a discovery motion for the victim's toxicology report, (2) failing to investigate two prosecution witnesses' criminal histories, (3) failing to use state agency documentation to impeach the victim, and (4) failing to provide effective assistance due to a conflict of interest and bias in favor of the prosecutor and the trial judge. All of these matters are dependent upon facts outside the record for which defendant has failed to provide supporting proof. Because

⁶ *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

defendant has not established the factual predicate for these claims, they cannot succeed. *Hoag*, 460 Mich at 6.

XII. MOTION FOR NEW TRIAL

We lastly address defendant's claim, through appellate counsel, that the trial court erred in denying his motion for a new trial without conducting an evidentiary hearing. We review for an abuse of discretion a trial court's decision whether to hold an evidentiary hearing. *Unger*, 278 Mich App at 216-217.

Although defendant asserts that the trial court abused its discretion by denying his request for a *Ginther* hearing, he fails to connect his request with any specific claim regarding trial counsel's performance. Accordingly, he has abandoned this claim of error. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006) (an issue is deemed abandoned where it is not sufficiently addressed in a brief).

Defendant also moved for a new trial on the ground that the prosecutor improperly coerced the testimony of Carma Cunningham, causing her to provide false and misleading testimony. The motion was supported by Cunningham's affidavit. Cunningham averred that she "was sure" that the victim had money in his pocket after defendant's assault and told that to the prosecutor. She asserted that the prosecutor told her to "forget about" what she knew and suggested that she may have stolen the money herself. According to Cunningham, the prosecutor also reminded her in a threatening way that she was due to be sentenced in an unrelated criminal matter and told her that his office could recommend a jail term, probation, or even request reinstatement of an original felony charge, depending on whether her testimony in this case helped or hurt the prosecution. Cunningham stated that pressure from the prosecutor combined with her anger toward defendant resulted in her biased, reluctant, and misleading testimony. Defendant requested an evidentiary hearing, but the trial court denied his motion without holding an evidentiary hearing.

A new trial may be granted because of misconduct. See MCR 2.611(A)(1)(b). Prosecutor intimidation used to coerce a witness to testify or change his or her testimony amounts to a denial of a defendant's due process rights. See *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). A new trial is appropriate if the intimidation resulted in a defendant being denied a fair and impartial trial. *Id.* Also, a prosecutor may not knowingly use false testimony to obtain a conviction. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). A defendant is entitled to a new trial if there is a reasonable likelihood that false testimony could have affected the judgment of the jury. *Id.*

We decline to remand the case for an evidentiary hearing. Assuming that Cunningham would have testified consistent with her affidavit, we are confident that the jury would not have acquitted defendant of the unarmed robbery charge. We reach this conclusion given the victim's testimony about the disappearance of his money from his pocket, the testimony from witnesses that defendant reached into the victim's pockets after the assault, the surveillance video showing defendant reaching into the victim's pockets and then looking into his cupped hand, the testimony of a witness who assisted the victim after defendant's departure who stated that he saw no one picking money up off the ground or reaching into the victim's pockets, and given the bias

that likely would have been attributed to Cunningham's testimony, considering her five-year relationship with defendant.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Christopher M. Murray