STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2016
v	No. 324954 Oakland Circuit Court
DEANDREW DEONTA JONES, Defendant-Appellant.	LC No. 2014-250976-FH

Before: CAVANAGH, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, assault with a dangerous weapon, MCL 750.82, domestic violence, MCL 750.81(3), assault by strangulation, MCL 750.84(1)(b), aggravated stalking, MCL 750.411i, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 12 to 30 years' imprisonment for the felon-in-possession, assault by strangulation, and aggravated stalking convictions; 10 to 15 years' imprisonment for the felonious assault conviction; time served for the domestic violence conviction; and two years' imprisonment for the felony-firearm convictions with 143 days' credit for time served. Defendant appeals his convictions and sentences as of right. We affirm defendant's convictions, but remand for a determination of whether resentencing is required.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of defendant's attack on his former girlfriend at her home in Pontiac, Michigan during the early morning hours of June 24, 2014. At trial, the victim testified that defendant was jealous of her purported contacts with other men, particularly her actions on social media. According to the victim, defendant showed up outside of her house at around 2:00 a.m. and punched her in the face. Defendant then dragged the victim into the house where he continued to assault her. The victim testified that, in addition to several punches, defendant knocked her into a bathtub, beat her with an extension cord, choked her with his hands, threatened to hit her with a roll of roofing nails, and held a gun up to her head.

The victim's two children also testified that they saw defendant punch their mom. The victim's daughter left during the attack, but the victim's son testified that he saw defendant beat

his mom with an extension cord, choke her, and hold a gun to her head. There was also police testimony that a gun was recovered next to defendant in the bedroom of the victim's house. The jury found defendant guilty of all charged offenses.[1]

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that his defense counsel provided ineffective assistance when she told the jury that defendant's mother would testify, but then failed to request an adjournment when defendant's mother did not appear at the appropriate time. Defendant contends that defense counsel's ineffective assistance deprived him of his constitutional right to present a defense. We disagree.

Generally, whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). We review factual findings for clear error and constitutional determinations de novo. *Id*. When a claim of ineffective assistance of counsel is not properly preserved, as is the case here, our review is limited to mistakes apparent from the record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

To sustain an ineffective assistance claim, a defendant must show that (1) his counsel's performance was objectively unreasonable under prevailing professional norms, and (2) there is a reasonable probability that, absent counsel's error, the result of the proceedings would have been different. *People v Gaines*, 306 Mich App 289, 300; 856 NW2d 222 (2014). We presume that counsel's assistance was effective, and the defendant bears a heavy burden of proving otherwise. *Id*. This Court "will not substitute [its] judgment for that of counsel on matters of trial strategy, nor will [it] use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). A defendant is entitled to have his trial counsel investigate, prepare, and present all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A substantial defense is one that might have made a difference in the outcome of the trial. *Id*.

Defendant relies on his mother's affidavit to support his ineffective assistance claim, in which she avers that she was scheduled to testify at trial, but was unable to attend because she "had an allergic reaction and was hospitalized." Defendant's mother claims that she was present on the night of the incident, but she did not see defendant threaten the victim with a gun or choke her. Rather, according to defendant's mother, the victim became upset after defendant decided to go visit friends down the street, so the victim "followed my son, and was hitting him."

Defendant has established that his mother was hospitalized and could not testify, but he has not proven that counsel failed to adequately investigate her absence. When defendant's

[1] On appeal, defendant filed a motion to remand to further develop a record on his claims of ineffective assistance of counsel, newly discovered evidence, and improper sentencing, which this Court denied. *People v Jones*, unpublished order of the Court of Appeals, entered August 19, 2015 (Docket No. 324954).

mother did not appear at the time allotted for her testimony, the trial court ordered a recess. After looking around the courthouse for defendant's mother, counsel unsuccessfully attempted to contact her by cell phone. Counsel explained to the court that she had talked to defendant's mother on a cell phone the evening before, and the witness knew she was scheduled to testify at 10:30 a.m. the next day. When counsel tried to call defendant's mother on the day of trial, the call went directly to a message stating that the number was not accepting voicemails. Defense counsel then concluded her defense without introducing any witnesses.

Although defense counsel could have sought an adjournment for an indefinite duration, defendant offers no proof that the trial court would have granted such a request. Defendant also offers no evidence regarding how long his mother was purportedly hospitalized, or when she would have been available and willing to testify in court. Considering the above circumstances, we conclude that defense counsel adequately investigated the witness's absence before agreeing to proceed with the trial, and her decision not to request an indefinite adjournment did not amount to deficient performance.

Further, defendant has failed to show that defense counsel's decision to proceed without his mother's testimony was anything other than a deliberate strategic decision. Defense counsel could have reasonably concluded that the value of the witness's testimony was limited due to bias, and therefore opted to focus the jury's attention instead on the inconsistencies between the victim's written statement and her trial testimony, the absence of corroborating testimony from neighbors, the lack of fingerprint evidence, and other defense theories. Without an offer of proof from defense counsel explaining why she did not seek and adjournment, defendant has not overcome the presumption that his counsel's decision to proceed was not based on sound trial strategy. See *Unger*, 278 Mich App at 242-243.

Moreover, even if defense counsel had successfully obtained an adjournment and ultimately secured the witness's testimony, defendant cannot show with a reasonable probability that the outcome of the proceedings would have been different, considering the significant evidence against him. Both of the victim's children testified that they saw defendant punch their mother. The victim's son testified that he saw defendant hit the victim several times, beat her with an extension cord, choke the victim, and hold a gun to her head. The prosecutor introduced evidence of the victim's physical injuries, which were consistent with testimony of the attack. Additionally, a police officer testified that a gun was recovered next to defendant in a bedroom of the victim's house. Considering this evidence, defendant has not established his claim of ineffective assistance.

III. NEWLY DISCOVERED EVIDENCE

Defendant next argues that he is entitled to a new trial on the basis of newly discovered evidence that the victim lied during trial. "[A] motion for a new trial on the basis of newly discovered evidence must first be brought in the trial court in accordance with the Michigan Court Rules." *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Defendant did not file a motion for a new trial in the trial court, so our review is limited to plain error affecting substantial rights. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

"Historically, Michigan courts have been reluctant to grant new trials on the basis of newly discovered evidence." *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012). Such a policy encourages parties "to use care, diligence, and vigilance in securing and presenting evidence." *Id*. (citation and quotation marks omitted). To prove a new trial is warranted due to newly discovered impeachment evidence, a defendant must show that (1) the evidence itself, not merely its materiality, is newly discovered; (2) the newly discovered evidence is not cumulative; (3) the defendant could not, with reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence would make a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). It is not necessary for newly discovered evidence to contradict specific testimony at trial. *Grissom*, 492 Mich at 321. Nonetheless, "newly discovered impeachment evidence ordinarily will not justify the grant of a new trial." *Id*. at 317-318.

Defendant points to his mother's affidavit as being newly discovered impeachment evidence. In the affidavit, defendant's mother states that the victim "admitted to me that she lied at the trial in this case" and that she "told me that she is afraid that if she tells the truth now, she will lose her children." Defendant contends that his mother's testimony would likely result in a different outcome on retrial. Even assuming that the victim's alleged admissions to defendant's mother could suffice as newly discovered evidence, defendant offers no information regarding what the victim might have lied about at trial. In her affidavit, defendant's mother does not state that the victim said she lied about being brutalized by defendant, or about defendant possessing a gun during the attack. Accordingly, the victim's alleged admissions might have only pertained to collateral matters. Defendant has not shown that his mother has exculpatory evidence of a material nature.

Moreover, even if the victim's alleged admissions did relate to a material matter, defendant has no probable chance of acquittal as significant evidence supported his convictions independent of the victim's credibility. Again, both of the victim's children saw defendant punch their mother. The victim's son saw defendant hit the victim, beat her with an extension cord, choke her, and hold a gun to her head. Evidence of the victim's physical injuries corroborated her account of the attack, and a police officer testified that a gun was recovered next to defendant in the victim's house. Considering this evidence, defendant has not shown that the newly discovered evidence would make a different result probable on retrial.

IV. SCORING OF SENTENCING GUIDELINES

Defendant argues that he is entitled to resentencing because the trial court improperly assessed points under offense variables (OVs) 8, 9, and 10. Under the sentencing guidelines, we review a trial court's factual findings for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Factual findings must be supported by a preponderance of the evidence. *Id*. "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute . . . is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

For sentencing purposes, defendant received 60 total prior record variable (PRV) points and 85 total OV points, placing him in PRV Level E (50 to 74 points) and OV Level VI (75 or more points) of the applicable sentencing grid.[2] MCL 777.65. The applicable guidelines range was 38 to 76 months, but because defendant was sentenced as a fourth habitual offender, the upper end of the guidelines range was increased by 100%, resulting in an enhanced minimum guidelines range of 38 to 152 months. MCL 777.21(3)(c).

The trial court assessed 15 points under OV 8 pursuant to MCL 777.38(1)(a), which provides that 15 points should be assessed 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." Evidence at trial revealed that defendant moved the victim from beside the street into her house, a place of greater privacy and access, by grabbing her and pushing her. Accordingly, the trial court properly assessed 15 points under OV 8.

The trial court also assessed 10 points under OV 9 pursuant to MCL 777.39, which provides that 10 points should be assessed if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." Testimony at trial revealed that defendant put the victim and both of her children in danger. Specifically, trial testimony showed that defendant chased the victim's daughter around a car while yelling threats at her. Therefore, the trial court properly assessed 10 points under OV 9.

Finally, the trial court assessed 10 points under OV 10 pursuant to MCL 777.40, which provides that 10 points should be assessed if "[t]he offender exploited . . . a domestic relationship." A dating relationship can qualify as a "domestic relationship" for purposes of OV 10 only if the relationship involved cohabitation. *People v Jamison*, 292 Mich App 440, 447; 807 NW2d 427 (2011). Although there was evidence that defendant and the victim had a prior dating relationship, there was no evidence of cohabitation. Therefore, the trial court erred by assessing 10 points under OV 10. However, the court's error was harmless because a reduction of 10 OV points would not alter defendant's minimum sentencing range. See *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Defendant also argues on appeal that he is entitled to resentencing because the trial court relied on judicially found facts to assess the points under OVs 8, 9, and 10. Defendant did not object to the scoring of the OVs at sentencing on *Apprendi*[3] and *Alleyne*[4] grounds below, so our review is limited to plain error affecting defendant's substantial rights. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015).

In *Lockridge*, our Supreme Court held that Michigan's sentencing guidelines violated the Sixth Amendment to the extent that the guidelines required judicial fact-finding, beyond facts

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[2] The trial court scored the sentencing guidelines for defendant's conviction of assault by strangulation, a Class D crime against a person. MCL 777.16d.

[3] *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

[4] *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

found by the jury or admitted by a defendant, to mandatorily increase a defendant's minimum sentencing range. *Id*. at 364-365. Therefore, the Court held that the guidelines are advisory only, although a trial court must still consider the applicable guidelines range and take it into account when imposing a sentence. *Id*. Pursuant to *Lockridge*, a sentencing court has discretion to consider the recommended minimum sentencing range and fashion a sentence that is reasonable, and need not articulate substantial and compelling reasons for imposing a sentence that departs from the recommended range. *Id*. In cases involving unpreserved claims of error, "all defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Lockridge*, 498 Mich at 395.

In this case, the trial court assessed points under OVs 8, 9, and 10 on the basis of facts that were not admitted by defendant or found by the jury,[5] and defendant was not subject to an upward departure sentence. If the 35 combined points were not assigned under OVs 8, 9, and 10, defendant's OV level would drop from Level VI to Level V, reducing his minimum sentence range under the guidelines from 38 to 152 months to 34 to 134 months. MCL 777.65; MCL 777.21(3)(c). Accordingly, defendant "is entitled to a remand [to] the trial court for that court to determine whether plain error occurred, i.e., whether the court would have imposed the same sentence absent the unconstitutional constraint on its discretion." *Lockridge*, 498 Mich at 399. On remand, the trial court should first allow defendant the opportunity to inform the court that he will not seek resentencing. *Id*. at 398.

We affirm defendant's convictions, but remand for a determination of whether resentencing is required. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael J. Riordan
/s/ Michael F. Gadola

[5] Specifically, asportation of the victim, the presence of additional victims, and whether defendant and the victim had a cohabitating relationship were not matters the jury necessarily considered in rendering its verdict. Likewise, defendant did not testify at trial and did not otherwise admit to the facts underlying the scoring of OVs 8, 9, and 10.