STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2012
v	No. 303075 Kalamazoo Circuit Court
TIMOTHY CRAIG BOYETT, Defendant-Appellant.	LC No. 2010-000812-FC

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

Defendant Timothy Craig Boyett appeals as of right his jury trial convictions for four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10(1)(a), to 22 to 35 years' imprisonment for each of his first-degree criminal sexual conduct convictions. We affirm.

According to the prosecution's proofs, this case arises out of a sexual assault committed by defendant on the victim, his former girlfriend. The victim and defendant lived together at the time of the assault and were in a dating relationship. The assault started after the victim and defendant argued, and the victim asked defendant to move out. Defendant became upset, and threatened to kill the victim. He proceeded to force the victim into her bedroom where he repeatedly sexually assaulted her.

Defendant first argues that his trial counsel provided ineffective assistance because she failed to offer an insanity defense at trial. A criminal defendant is denied effective assistance of counsel in violation of the Sixth Amendment if counsel's "performance fell below an objective standard of reasonableness, . . . [and] the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Prejudice under *Pickens* requires a showing that "but for counsel's errors, the result of the proceeding would have been different." *Id.* When a defendant alleges ineffective assistance of counsel, he bears the burden to "establish[] the factual predicate for his claim . . . ." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In this case, defendant preserved his claim by moving for remand and requesting an evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). However, this Court denied his request, so our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Defendant argues that his trial counsel was ineffective for failing to have defendant evaluated for an insanity defense and for failing to present an insanity defense at trial. The Presentence Investigation Report (PSIR) reveals that defendant took medications for bipolar disorder and post-traumatic stress disorder. At trial, the victim provided testimony suggesting that defendant had multiple personality disorder and defendant testified that he suffered from an anxiety disorder. However, a defendant does not establish the affirmative defense of insanity by merely establishing that he suffered from a mental illness. *People v Carpenter*, 464 Mich 223, 226; 627 NW2d 276 (2001); MCL 768.21a(1). Rather,

> [a]n individual is legally insane if, as a result of mental illness . . ., or as a result of being mentally retarded . . ., that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity. [MCL 768.21a(1).]

We find that defendant's trial counsel was not objectively unreasonable for failing to seek an insanity defense because the record does not support that such a defense was available to defendant. Indeed, despite defendant's mental illness, there is no indication that he lacked substantial capacity to appreciate the nature and quality of his actions. Thus, defendant failed to establish the factual predicate for his claim. *Hoag*, 460 Mich at 6. Moreover, rather than demonstrating that defendant lacked substantial capacity, the record reveals that defendant actually knew his actions were wrongful. See *People v Jackson*, 245 Mich App 17, 25-26; 627 NW2d 11 (2001). After the sexual assault, defendant covered the victim with a blanket and told her "it is the least that I can do after everything I just put you through." Because insanity was not a viable defense, we will not find trial counsel's performance objectively unreasonable for failing to pursue it at trial. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

As an alternative, defendant argues that trial counsel was ineffective for failing to pursue the defense of pathological intoxication. Pathological intoxication is intoxication that is

> self-induced in the sense that the defendant knew what substance he was taking, but which was 'grossly excessive in degree, given the amount of the intoxication.' . . . [T]he intoxication is involuntary only if the defendant was unaware that he is susceptible to an atypical reaction to the substance taken. [2 LaFave Substantive Criminal Law (2d ed), § 9.5(g), p 56, quoting Model Penal Code § 2.08(5).]

Defendant argues that pathological intoxication is a subset of involuntary intoxication. Involuntary intoxication is an affirmative defense to criminal activity, but only if a defendant's involuntary intoxication put him in a state of mind that was equivalent to legal insanity. *People v Wilkins*, 184 Mich App 443, 448-449; 459 NW2d 57 (1990). Ordinarily, "[i]nvoluntary intoxication is intoxication that is not self-induced and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992). Defendant fails to cite any Michigan law to support his assertion that pathological intoxication, which by

definition requires that intoxication be at least partially self-induced, is a subset of involuntary intoxication, which requires that a defendant does not know that the substance he consumed could cause intoxication. Even assuming that such a defense exists, we find that defendant's trial counsel was not ineffective for failing to present a theory of involuntary intoxication.

Defendant has not demonstrated that he meets the requirements of a pathological intoxication defense. Pathological intoxication requires a defendant to establish two factors: (i) a grossly excessive level of intoxication relative to the amount of alcohol consumed; and (ii) that the defendant did not know that he was susceptible to an atypical reaction to alcohol. 2 LaFave, 56. In this case, the record does not demonstrate either factor. Thus, defendant fails to establish the factual predicate for his claim. *Hoag*, 460 Mich at 6. Defendant testified that he consumed a half pint of whiskey on the night of the sexual assault. The record does not suggest that defendant was more intoxicated from this amount of whiskey than one would expect in a normal person. Moreover, defendant fails to allege, and the record does not support, that defendant was susceptible to an atypical reaction to alcoholic beverages. Therefore, there is no reason to believe that defendant could have successfully pursued this defense, and we will not find that defendant's trial counsel was ineffective for failing to pursue a meritless defense. *Ericksen*, 288 Mich App at 201.

Next, defendant raises several challenges to his sentence, all of which are unpreserved because defendant failed to either object at sentencing or file a motion for resentencing. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). In order to avoid forfeiture under the plain error standard of review, a defendant must demonstrate the existence of an error that was plain, i.e., clear or obvious, and that the error prejudiced defendant. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (Internal quotation omitted).

For defendant's first unpreserved sentencing issue, he alleges that the trial court improperly scored ten points under Offense Variable 4. We disagree. OV 4 permits the trial court to score ten points if a defendant causes "serious psychological injury requiring professional treatment . . . ." MCL 777.34(1)(a). The threshold for scoring ten points under OV 4 is a low one, as the victim's expression of fear is sufficient to support the trial court's scoring decision with regard to the offense variable. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). In making its scoring decision, the trial court may consider all of the evidence on the record. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

We uphold the trial court's scoring decision under OV 4 because the record demonstrates that the victim suffered a serious psychological injury requiring professional treatment. The victim testified that she sought counseling after the sexual assault, and that she lived in "constant fear" in the days following the assault. Thus, there is ample evidence to support the trial court's scoring decision. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009); see also *Apgar*, 264 Mich App at 329.

Next, defendant raises an additional challenge to the trial court's scoring decision on OV 4, and argues that the trial court violated the rule announced by the United States Supreme Court in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We reject this argument as well. In *Blakely*, the United States Supreme Court ruled that any facts that enhance a defendant's maximum sentence must be either admitted by the defendant or found by a jury beyond a reasonable doubt. *Id.* at 303-304. However, in *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006), the Michigan Supreme Court held that Michigan's indeterminate sentencing system is not affected by *Blakely* because a defendant's maximum sentence in Michigan is set by statute and the jury's verdict, and the trial court's findings under offense variables only affect a defendant's minimum sentence.

Defendant next alleges that the trial court failed to take into account mitigating factors such as his mental health history, substance abuse, and family support when it calculated his sentence. Defendant's argument fails. First, the trial court is not required to consider mitigating factors when it sentences a defendant; instead, the trial court may rely on the applicable guidelines range when calculating the sentence. *People v Nunez*, 242 Mich App 610, 617-618; 619 NW2d 550 (2000); *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011). Second, despite defendant's assertions to the contrary, there is no evidence in the record that the trial court failed to consider defendant's alleged mitigating factors, because the record reveals that the trial court reviewed the PSIR. Thus, because defendant's sentence was within the recommended minimum sentence range under the legislative guidelines, we must affirm. *People v Jackson*, 487 Mich 783, 791-792; 790 NW2d 340 (2010); MCL 769.34(10).

Defendant also alleges that the trial court erred by failing to articulate whether its decision to increase defendant's sentence because of his status as a second habitual offender was proportionate to the offense. We disagree.

"A trial court must articulate its reasons for imposing a sentence on the record at the time of sentencing." *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). "The articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *Id.* See also *People v Lawson*, 195 Mich App 76, 78; 489 NW2d 147 (1992) (the trial court's comments are also to be taken in context of the preceding arguments by trial counsel). In this case, the trial court did not expressly state that it was relying on the sentencing guidelines. However, we find that the articulation requirement was satisfied nonetheless, given the context of the arguments made at the sentencing hearing. It was clear that the trial court relied on the guidelines. *Id.* Accordingly, we find that the articulation requirement was satisfied. *Id.* Additionally, we find that defendant's sentence was proportionate to the offense. A defendant's sentence is proportionate to the offense if the sentence is within the guidelines range. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). As noted above, defendant's sentence was within the guidelines range; therefore, it was proportionate to the offense. *Id.*

Defendant raises additional challenge to his sentence; however, these challenges were not properly articulated in his statement of questions presented. Thus, this Court need not consider the issues. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). However,

notwithstanding defendant's failure to properly present the issues, we have reviewed them, and found that they lack merit.

Finally, defendant argues that the trial court erred by ordering him to reimburse the county for his attorney fees. Pursuant to MCL 769.1k(1)(b)(iii), the trial court may impose upon a defendant the expenses of his legal assistance. Defendant cites *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), and argues that the trial court was required to conduct an assessment regarding his ability to pay the fees before imposing them. We do not agree.

In *People v Jackson*, 483 Mich 271, 291; 769 NW2d 630 (2009), the Michigan Supreme Court expressly overruled *Dunbar*, and held that the trial court is not required to assess a defendant's ability to pay such fees as a prerequisite to imposing them. Moreover, *Jackson* also held that the trial court "should not entertain defendants' ability-to-pay-based challenges to the imposition of fees *until enforcement of that imposition has begun*." *Id.* at 292. (Emphasis added). Accordingly, the trial court was not required to assess defendant's ability to pay his attorney fees at the time it imposed the fees. *Id.* at 219-292. Additionally, defendant's challenge to the imposition of fees is premature, because the record indicates that the fees have not yet been enforced. *Id.* at 292.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurt T. Wilder
/s/ Douglas B. Shapiro