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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2012
v GLYNN MILLS, Defendant-Appellant.	No. 303870 Wayne Circuit Court LC No. 10-009305-FC

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and assault with intent to commit great bodily harm less than murder, MCL 750.84. He was sentenced to concurrent sentences of 30 to 50 years' imprisonment for the second-degree murder conviction and 4 ½ to 10 years' imprisonment for the assault with intent to commit great bodily harm less than murder conviction. He appeals as of right. We affirm.

I. SENTENCING

Defendant argues that he is entitled to resentencing because the trial court erred in the scoring of Offense Variable (OV) 5 and OV 10. We disagree.

A trial court's scoring of offense variables is reviewed under an abuse of discretion standard. *People v Earl*, ___Mich App ___; ___ NW2d___ (2012), WL 2330198, slip op p 3. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006). The trial court's findings of fact are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799, cert den 555 US 1015; 129 S Ct 574; 172 L Ed 2d 435 (2008). A scoring decision is not clearly erroneous if the record contains any evidence in support of the decision. *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). Offense variables are determined by reference to the record, using the standard of the preponderance of the evidence. *Osantowski*, 481 Mich at 111. The court may rely on reasonable inferences from the record. *Earl*, slip op p 3.

OV 5 addresses "psychological injury to a member of a victim's family." MCL 777.35(1). MCL 777.35(2) provides for an OV 5 score of 15 points "if the serious psychological

injury to the victim's family may require professional treatment." At sentencing, the court scored OV 5 at 15 points. We find no error in this scoring. At sentencing, the prosecutor told the court that the victim's daughters would require psychological treatment as a result of their father's death. The record reflects that the victim's daughters were present in the courtroom, that the prosecutor had spoken to them "at some length," that they were so "incredibly distraught" that they "[did] not wish to address" the court, and that they instead had "asked [the prosecutor] to address [the court] on their behalf." The prosecutor did so, stating (in response to a defense challenge to the requested scoring of OV 5) that the brutal slaying of Mr. Tucker by someone who had been his long-time friend was "just horrible" and "just unforgivable," and "has been an event which really has damaged the survivors incredibly." It was under those circumstances that the prosecutor indicated that he was "entirely comfortable asking the Court for fifteen points on the psychological issues . . . ."

This evidence is sufficient to support the scoring of OV 5 relative to the victim's daughters' serious psychological injury. OV 5 does not require testimony from the victim's family.[1] Furthermore, the facts presented at trial support a finding that there was serious psychological injury. The victim knew defendant for many years, and was his close friend. It requires little inference from the factual record to conclude that it was traumatic for the victim's daughters to hear of his brutal death by the hand of a close friend. That conclusion also is supported by the statements of the prosecutor, speaking at the request of the daughters, at sentencing. The record contains evidence to support scoring OV 5 at 15 points, and we therefore affirm the trial court's score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009), see also *Lockett*, 295 Mich App at 182.

Under OV 10, a court must assess 15 points if predatory conduct was involved, 10 points if the defendant exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or abused his authority status, and five points if the defendant exploited a victim by his difference in size or strength, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious. MCL 777.40(1). At sentencing, the court scored OV 10 at 10 points. On appeal, defendant and the prosecutor agree that the court erred in scoring OV

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[1] We have previously held that such a statement by the prosecutor at sentencing is sufficient to support a scoring of 15 points for OV 5. *People v Royster*, unpublished opinion of the Court of Appeals, issued January 8, 2009 (Docket No. 280676) (unpublished op at 3-4) ("At defendant's sentencing, the prosecutor advised the trial court that the victim's aunt requires psychological treatment as a result of the victim's death. This evidence was sufficient to allow the trial court to assign fifteen points under OV 5 because it was evidence of serious psychological injury to the victim's family.") Pursuant to MCR 7.215(C)(1), an unpublished opinion has no precedential value. However, we may follow an unpublished opinion if we find its reasoning persuasive. *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 42 n 10; 761 NW2d 151 (2008). We find the reasoning of *Royster* persuasive here, and note that our Supreme Court denied leave to appeal in *Royster*, stating that the Court was "not persuaded that the questions presented should be reviewed by this Court." *People v Royster*, 483 Mich 1111; 766 NW2d 839 (2009).

10, and that OV 10 should have been scored at five points because the victim was asleep at the time defendant attacked. However, reducing OV 10 to five points does not result in a different sentence range. A defendant is entitled to resentencing on the basis of a guidelines scoring error only if the error altered the recommended minimum sentence range. *People v Phelps*, 288 Mich App 123, 136; 791 NW2d 732 (2010). Because defendant's minimum sentence range would not change if the error was corrected, defendant is not entitled to resentencing.[2]

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant, in his *pro se* brief, argues that his trial counsel was ineffective because he failed to obtain DNA testing on the alleged murder weapon, failed to investigate the lack of DNA testing, and failed to introduce at trial the fact that police did not perform DNA testing. We disagree.

A claim of ineffective assistance of counsel is preserved for appeal by a timely motion for a new trial or an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). In this case, there was no motion for a new trial or an evidentiary hearing. Therefore, this issue is not preserved and our review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Johnson*, 293 Mich App at 90 (internal quotation marks and citation omitted). A trial court's factual findings are reviewed for clear error, and constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). The defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. *Id.* at 290.

Defendant's trial counsel was not ineffective for failing to investigate the lack of DNA testing on the alleged murder weapon. A police officer discovered a bat in the trunk of defendant's car after defendant's arrest. The officer testified at trial that there was blood spattering on the bat and dried blood in the trunk of defendant's car. At trial, two eyewitnesses identified the bat found by the officer as the bat that defendant used to commit the murder and assault. Defendant argues that the blood should have been tested for DNA evidence. The police did not owe defendant a duty to perform DNA testing on the blood found on the bat or in the trunk. See *People v Anstey*, 476 Mich 436, 461; 719 NW2d 579 (2006) ("[P]olice have no constitutional duty to assist a defendant in developing potentially exculpatory evidence.").

[2] Given our resolution of this issue, we also conclude that counsel was not ineffective for failing to challenge the scoring of OV 10, as the result of the proceedings would not have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Because police did not owe defendant a duty to conduct DNA testing, defendant's trial counsel did not need to make a futile request that DNA testing be completed. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Therefore, defendant's trial counsel's performance did not fall below an objective standard of reasonableness.

Defendant's trial counsel was also not ineffective for failing to obtain independent DNA testing on the bat or trunk. "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one which might have made a difference in the outcome of the trial." *Id*. (citation omitted). DNA evidence from the bat and the trunk would not have made a difference in the outcome of trial because there was other evidence that linked defendant to the crime. Two eyewitnesses testified that defendant frequently carried a bat in the trunk of his car, and that they saw defendant retrieve the bat from his trunk and attack two individuals with the bat. Even if the blood on the bat or in the trunk was not that of the victims, a jury could still have found defendant guilty based on the testimony from the eyewitnesses. Defendant cannot demonstrate that his counsel's failure to obtain DNA testing on the bat or trunk was outcome determinative. *Armstrong*, 490 Mich at 289-290.

Additionally, defendant claims that his trial counsel was ineffective for failing to introduce to the jury the fact that no DNA testing was completed. Defendant's counsel in fact raised the issue during cross-examination of the officer who discovered the bat and during closing argument. During cross-examination, defendant's trial counsel asked the officer that found the bat if DNA testing was ever done, but the officer did not know. During closing argument, defendant's trial counsel argued that defendant's guilt was not proven beyond a reasonable doubt, and cited the lack of DNA testing to support his contention. Defendant's allegation is thus simply erroneous.

In sum, defendant cannot show that his trial counsel's performance fell below an objective standard of reasonableness, or that, but for counsel's error, the result of the proceedings would have been different. DNA evidence in this case, even if exculpatory, would not have been outcome determinative in light of the other evidence that linked defendant to the crime.

Affirmed.

/s/ Donald S. Owens
/s/ Mark T. Boonstra