STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2012
v	No. 305216 Wayne Circuit Court
JOHN ESTER COOPWOOD, Defendant-Appellant.	LC No. 10-011996-FC

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

PER CURIAM.

Defendant appeals as of right his bench-trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and domestic violence, MCL 750.81(2). The trial court sentenced defendant to 6 to 10 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, and to time served for the domestic violence conviction. Because the evidence was sufficient to show that defendant assaulted the victim with the intent to cause her great bodily harm, the trial court did not abuse its discretion by admitting photographs of the victim, defendant was not denied his rights to the effective assistance of counsel, due process, or to confront the witnesses against him, and the trial court properly scored offense variable 13, we affirm.

Defendant's convictions arise out of his assault of Deborah Thurmond, with whom he had a dating relationship. Defendant and Thurmond shared a room together at a boarding house. Carl Walters and Robert Harris, other residents of the boarding house, heard defendant and Thurmond arguing in the early morning hours of August 19, 2010. Walters heard defendant swearing at Thurmond and heard Thurmond crying and saying, "no." Walters also heard a "heavy" noise, like something was thrown against a wall. Walters saw defendant kick a bathroom door after Thurmond had locked herself inside the bathroom. Harris overheard Thurmond twice tell defendant to stop hitting her. As a result of the incident, Thurmond suffered serious injuries, including brain damage, left-side paralysis, and a fractured leg.

Defendant first argues that the evidence was insufficient to establish that he assaulted Thurmond or that he had the specific intent to cause her great bodily harm. We review de novo challenges involving the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We must review the evidence in the light most favorable to the prosecution and "determine whether a rational trier of fact could find that the evidence proved

the essential elements of the crime beyond a reasonable doubt." *People v Railer*, 288 Mich App 213, 216-217; 792 NW2d 776 (2010). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

"The elements of assault with intent to do great bodily harm less than murder are: '(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (footnote and emphasis omitted), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Assault with intent to do great bodily harm less than murder is a specific intent crime. *Brown*, 267 Mich App at 147. "This Court has defined the intent to do great bodily harm as an intent to do serious injury of an aggravated nature." *Id.* (quotation marks and citation omitted).

The prosecutor presented sufficient evidence to establish that defendant assaulted Thurmond and that he intended to cause serious injury of an aggravated nature. Defendant had a history of physically abusing Thurmond, including a prior felonious assault charge involving Thurmond. Thurmond testified that she and defendant got into a fight, and he struck her with her purse. Walters and Harris corroborated Thurmond's testimony. Harris heard Thurmond tell defendant to stop hitting her, and Walters heard defendant swear at Thurmond and heard a noise that sounded like something was being thrown against a wall. Walters also saw defendant kick the bathroom door after Thurmond had locked herself inside the bathroom. The fight lasted for at least an hour. Thurmond was severely injured and was unable to walk at the time that she was admitted to the hospital. She suffered paralysis, a fractured leg, and brain damage and underwent multiple surgeries to remove excess blood from her brain. A few days after the incident, defendant called Thurmond's ex-boyfriend and told him that he "was going to be next." Defendant testified that Thurmond appeared sluggish, was staggering around, and that she had urinated on herself, but he did not call 911 or seek medical attention for her. Thus, reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that defendant assaulted Thurmond with the intent to cause her serious injury and disbelieve defendant's claim that Thurmond's injuries resulted from a fall or from sexual play. The evidence was therefore sufficient to support defendant's assault with intent to do great bodily harm less than murder conviction.

Defendant next argues that the trial court erred by admitting photographs of Thurmond that depicted her injuries. "A decision whether to admit photographs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

"Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403." *Gayheart*, 285 Mich App at 227. Photographs may be used to corroborate witness testimony, and they need not be excluded based on gruesomeness alone. *Id.*

> Photographs may properly be used to corroborate other evidence and are not excludable simply because they are cumulative of a witness's oral testimony. The [fact-finder] is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself. [*Id.* (internal citation omitted).]

The photographs at issue in this case were relevant and probative because they depicted the extent of Thurmond's injuries and tended to establish defendant's intent to cause Thurmond serious bodily harm. The photographs supported Dr. Ahmed Meguid's expert's testimony regarding the extent of the injuries and tended to show that the injuries were not likely caused by sexual play or from falling down, as defendant claimed.

In addition, contrary to defendant's argument, the trial court applied the MRE 403 balancing test in determining whether to admit the photographs. MRE 403 allows relevant evident to be excluded if the danger of unfair prejudice outweighs its probative value. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight . . . or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). The record reflects that the trial court reviewed the photographs and determined that they were not more prejudicial than probative. The trial court also stated that all of the photographs depicted essentially the same thing, but some were taken at close-range while others were taken from farther away. In any event, it is unlikely that the photographs prejudiced the trial court, as the trier of fact. See *People v Bailey*, 175 Mich App 743, 746; 438 NW2d 344 (1989) ("it is unlikely that the trier of fact [in a bench trial] considered the evidence for anything other than the purpose for which it was offered.") Thus, the trial court did not abuse its discretion by admitting the photographs.

Defendant next contends that his trial attorney rendered ineffective assistance of counsel because she failed to properly address defendant's mental illness and refused to question Thurmond about domestic violence involving her former fiancé, Michael Watson. Because defendant failed to preserve this issue for this Court's review by raising it in a motion for a new trial or *Ginther*[1] hearing in the trial court, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

"To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Id*. "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). Further, counsel is not required to argue a meritless position or raise a futile objection. *Ericksen*, 288 Mich App at 201.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant contends that counsel was ineffective for failing to pursue an insanity defense or request a criminal responsibility evaluation. "[A mentally ill defendant] may be found not guilty, guilty but mentally ill, or, if he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, not guilty by reason of insanity." *People v Toma*, 462 Mich 281, 318; 613 NW2d 694 (2000), quoting *People v Smith*, 119 Mich App 91, 95-96; 326 NW2d 434 (1982). The record does not provide any indication that defendant was legally insane at the time that he committed the offenses. At least two mental health workers evaluated defendant, and both determined that he was competent to stand trial. Defendant admitted that one of the doctors did not find anything wrong with him, and the other doctor issued a report stating that defendant was competent to stand trial. Nothing in the record indicates that defendant lacked the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. In addition, if defendant had some form of mental illness short of insanity, this fact would not have aided his defense. A criminal defendant may not "introduce evidence of mental abnormalities short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." *People v Carpenter*, 464 Mich 223, 226; 627 NW2d 276 (2001); see also MCL 768.21a(1). Thus, even if defendant was mentally ill, that fact would not have negated the specific intent necessary to commit assault with intent to do great bodily harm less than murder. Further, any argument that defendant's actions resulted from his mental illness would have been inconsistent with his testimony that he did not assault Thurmond and that she received her injuries either from sexual play or falling down. Accordingly, defendant fails to show that counsel's failure to pursue an insanity defense or request a criminal responsibility evaluation fell below an objective standard of reasonableness or prejudiced his defense. See *Swain*, 288 Mich App at 643. He likewise fails to rebut the presumption that counsel's decisions constituted sound trial strategy. See *Horn*, 279 Mich App at 39.

Defendant also argues that defense counsel was ineffective and that he was prejudiced when counsel refused to confront Thurmond about domestic violence involving Michael Watson, her former fiancé. The record reflects that counsel's decision was a matter of trial strategy. Counsel indicated that she did not believe that the questions that defendant sought to ask were relevant and that she had no basis to believe that Watson was a possible suspect in this case. Indeed, Watson's sister testified that Watson and Thurmond were previously engaged, but that Watson died five years before trial. Therefore, defendant has failed to overcome the presumption that counsel's refusal to question Thurmond about Watson constituted sound trial strategy. See *Horn*, 279 Mich App at 39.

Defendant next argues that he was denied his rights to due process and to confront the witnesses against him when he was facing away from some of the witnesses when they identified him. We review de novo questions of constitutional law, including questions involving the right to confront witnesses. *People v Rose*, 289 Mich App 499, 505; 808 NW2d 301 (2010). "A defendant has the right to be confronted with the witnesses against him or her." *People v Yost*, 278 Mich App 341, 369; 749 NW2d 753 (2008). "The required elements of the Confrontation Clause are: (1) physical presence, (2) an oath, (3) cross-examination, and (4) 'observation of demeanor by the trier of fact. . . .'" *People v Buie*, 285 Mich App 401, 408; 775 NW2d 817 (2009), quoting *Maryland v Craig*, 497 US 836, 846; 110 S Ct 3157; 111 L Ed 2d 666 (1990).

Here, the requirements of the Confrontation Clause were satisfied because the witnesses were physically present with defendant in the courtroom, they were questioned under oath before the trier of fact, and defense counsel cross-examined them. Thus, defendant's right to confront the witnesses against him was not violated. *Buie*, 285 Mich App at 408. Further, we note that it is unclear from the record why defendant was facing away from the witnesses who identified him on the first day of trial. The record merely reflects that, after defendant raised the issue at the beginning of the second day of trial, the trial court instructed defendant to "turn around so that there's a full frontal view" when witnesses identified him. To the extent that defendant intentionally turned his back to the witnesses as they identified him, his claim of error warrants no relief. A defendant "may not benefit from an alleged error that [he] contributed to by plan or negligence." *People v Witherspoon (After Remand)*, 257 Mich App 329, 333; 670 NW2d 434 (2003).

Finally, defendant argues that the trial court improperly scored 25 points for offense variable (OV) 13. We review "a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (quotation marks and citation omitted). A trial court has discretion to determine the number of points to score a particular variable, provided that record evidence adequately supports the score. *People v Jamison*, 292 Mich App 440, 443; 807 NW2d 427 (2011). "[I]f a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). "This Court will uphold a sentencing court's scoring decision if there is any record evidence to support it." *Jamison*, 292 Mich App at 443-444.

MCL 777.43(1)(c) directs a trial court to score 25 points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." "[I]n order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern." *Francisco*, 474 Mich at 87. Further, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a).

The trial court properly scored OV 13 at 25 points. Defendant engaged in a pattern of felonious criminal activity involving 3 or more crimes against a person. The prosecution established that defendant previously pleaded no contest to felonious assault involving Thurmond and that he was convicted in 2008 of felonious assault against another woman. Therefore, the instant case is at least defendant's third crime against a person within a five-year

period. Because the record adequately supports the trial court's scoring decision, defendant is entitled to no relief." See *Jamison*, 292 Mich App at 443-444.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio