

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

MARTELL DEVON JONES,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED
October 18, 2012

No. 306379
Livingston Circuit Court
LC No. 11-019605-FH

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault of a prison employee, MCL 750.197c(1). He was acquitted of a third count. The trial court sentenced defendant as a habitual offender, second offense, MCL 769.10, to concurrent prison terms of 30 months to 7 years and 5 months, which were to run consecutively to the sentence that defendant was serving at the time of the assaults. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm defendant's convictions, but vacate his sentences and remand for resentencing.

I. FACTS

This appeal arises out of an assault by defendant on prison employees. Corrections officers Torey Adamski and Ganui Faronbi work in the intake unit of Woodland Correctional Center, a mental health facility of the Michigan Department of Corrections (MDOC). Inmates from other MDOC facilities arrive at the intake unit after they have been identified as needing mental health treatment. At the intake unit, inmates are evaluated. If an inmate is determined to be mentally ill, the inmate is placed in a treatment program; but, if an inmate is not mentally ill, the inmate is returned to the MDOC facility from where he came. There are two wings of ten cells in the intake unit. Each wing has two surveillance cameras; there is a camera on each side of a wing. No surveillance cameras are found in the cells, except for two cells which are observation cells designated for inmates who require constant monitoring.

Adamski testified that at approximately 3:00 p.m. on June 9, 2010, he and Faronbi escorted defendant from his cell to the "day room." Defendant was "passive aggressive" when taken from his cell, but when he entered the day room, he became aggressive. He cursed and threatened the staff. Defendant was returned to his cell, where he continued to yell threats. But,

as dinner time neared, he calmed down. That evening, dinner was served to the inmates in the intake unit in their cells. It was the job of Adamski and Faronbi to pass out dinner trays to the inmates. Adamski testified that when he and Faronbi arrived at defendant's cell, defendant was relaxed and calm. However, when Adamski opened defendant's cell door, he saw a change in defendant's face. Defendant "went from nice and kind of talkin' . . . to all of a sudden rage in his face." Defendant, with his hands clenched, began doing a boxer's bounce causing Adamski to put up his right hand and tell defendant to get back into his cell. However, defendant said that he wanted to come out of his cell. When told that he would be eating dinner inside his cell, defendant said that he would "kill a mother f**** up in this bitch" and that he was "gonna send one of [them] all to the hospital." Adamski testified that defendant advanced toward him and that defendant's chest came against his hand. Defendant's arms were swinging wildly, and he hit Adamski "two good times" in the jaw with closed fist punches. Adamski applied a "juggler notch," a pressure point to the chest or sternum, to defendant, and was able to push him back into the cell and onto his bed.

Defendant, who was lying on his back on the bed, ignored Adamski's commands to roll over onto his stomach and continued to kick and punch. Adamski testified that he applied pressure points to defendant, but none of them gained compliance from him, he kept resisting him. Adamski "absorbed all the blows" from defendant, and he eventually "muscled" him over onto his stomach.

After defendant was removed his from cell, Adamski returned to the officers station. He got some ice for his jaw, which hurt "a little bit," and wrote some reports. He testified that most injuries he suffered were to his jaw, but he also had a sore wrist, a "little bit of a fat lip," including a little cut on the inside of his mouth with a small amount of bleeding, and some bruising and soreness to his chest and torso.

Adamski testified that the surveillance camera on the opposite side of the wing, which was approximately 60 feet from defendant's cell, captured portions of the incident. According to Adamski, the videotape showed some type of altercation at the door of defendant's cell to his knowledge, there was no surveillance camera that captured what occurred inside defendant's cell.

Faronbi testified that when defendant's cell door was opened to give defendant his dinner, defendant was there by the door, wanting to know why he was not allowed to come outside of his cell to eat. He said that he told defendant that the inmates were eating inside their cells that evening because a new inmate was being processed in the day room. Defendant then began to cuss at Faronbi and Adamski and threatened to send them to the hospital. According to Faronbi, Adamski moved in front of him and put out his hand when defendant tried to push through the doorway. Defendant clenched his fists and hit Adamski's cheek. Faronbi saw blood come out of Adamski's mouth. Adamski held defendant and pushed him onto the bed, however, defendant, lying on his back, tried to get loose. He swung his arms and kicked his legs, disobeying the officers' commands to stop resisting. Then, to gain compliance from defendant, Faronbi applied a pressure point to his nose. The pressure point did not work, defendant punched Faronbi causing his eyeglasses to fly off of his face, and consequently bending them. According to Faronbi, Adamski "muscled" defendant onto his stomach but, he "didn't want to let

go of his hands,” he only let go of his hands to be handcuffed when Faronbi applied the “hypoglossal” pressure point.

A third employee, Philip Welch, testified that while Adamski and Faronbi were passing out dinner trays, he was processing a new inmate to the intake unit in the day room when out of the corner of his eye, he saw Adamski and Faronbi struggling with defendant and then disappear into his cell. Welch went to defendant’s cell to assist Adamski and Faronbi, and when he got there, defendant was on his back on the bed, swinging his fists and kicking his legs—ignoring the commands of Adamski and Faronbi to stop resisting—and threatening to kill them. Welch gained some control of defendant’s legs, but only after getting kicked in the stomach and legs and after “pretty much put[ting] everything [he] had” on his legs. During the struggle, Welch banged his knee on the side of the bed and was off work for four months because of injuries to his back and knee that resulted from his struggle with defendant.

Following deliberations, the jury convicted defendant of assault of a prison employee as to Adamski and Faronbi, it acquitted defendant of assault of a prison employee as to Welch. The trial court sentenced defendant as stated above and this appeal ensued. On appeal, defendant raises numerous issues, none of which merit relief. However, we do find that the prosecutor’s claim on its cross-appeal merits relief.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant first argues that defense counsel was ineffective for failing to secure an independent psychiatric evaluation of defendant and to raise an insanity defense. To establish a claim for ineffective assistance of counsel, a defendant must show that counsel’s performance fell below objective standards of reasonableness and that, but for counsel’s deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). A defendant must overcome the presumption that counsel’s actions were sound trial strategy. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). Because no *Ginther*¹ hearing was held on defendant’s ineffective assistance claim, our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

In this case, defense counsel pursued two defenses; (1) self-defense and (2) fabrication. While an insanity defense would have been inconsistent with those defenses, we recognize that a defendant may advance inconsistent defenses. MCR 2.111(A)(2); *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997). However, at trial, pursuit of inconsistent defenses presents a vast array of difficult issues for trial counsel to overcome. Hence, it is more often that trial counsel adopts a trial strategy that is both effective and consistent. Here, trial counsel argued two consistent defenses: that defendant acted in self-defense, and that defendant was forced to act in self-defense because the victims fabricated defendant’s actions to cover-up their assault on defendant. We find this a sound trial strategy. We are further mindful in so finding that our relevant inquiry “is not whether a defendant’s case might conceivably have been advanced by

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

alternate means,” but whether defense counsel’s errors were so serious that they deprived the defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 582; 640 NW2d 246 (2002). We cannot conclude that by pursuing these two consistent defenses defendant was deprived of a fair trial. Furthermore, trial counsel is afforded broad discretion in the handling of cases, *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994), in part “because many calculated risks may be necessary in order to win difficult cases,” *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272, lv den 482 Mich 1027 (2008). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), lv den 486 Mich 925 (2010). “A court cannot conclude that effective assistance of counsel is denied merely because a certain trial strategy backfired.” *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Here, defendant fails to explain why, in light of the criminal responsibility report, and defense counsel’s decision to assert consistent defenses of fabrication and self-defense, trial counsel’s strategy fell below objective standards of reasonableness. Rather, defendant is requesting this Court, in hindsight, find counsel ineffective for pursuing a trial strategy which did not work. Prior decisions of this Court specifically preclude us from making such a finding. See, *Payne*, 285 Mich App at 190; *Unger*, 278 Mich App at 242. When viewing the trial strategy of trial counsel, we cannot find that defense counsel’s errors were so serious that they deprived the defendant of a fair trial. *LeBlanc*, 465 Mich at 640. Nor can we find that trial counsel’s strategy fell below an objective standard of reasonableness. Accordingly, defendant has failed to establish that he was denied the effective assistance of counsel.²

II. JURY INSTRUCTIONS

Defendant next argues that the trial court erred when it failed to instruct the jury that because the prosecution failed to make reasonable efforts to preserve videotape from a surveillance camera, the jury could infer that the missing videotape would have been favorable to him. However, because defendant expressed satisfaction with the jury instructions, he waived any claim of instructional error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). See also, *People v Kowalski*, 489 Mich 488, 304, n27; 803 NW2d 200(2011), holding that: “Unlike waiver, forfeiture is the ‘failure to make the timely assertion of a right.’” (quotation marks and citation omitted).

Regardless of our finding of waiver of this issue, we have reviewed the claimed error for plain error affecting defendant’s substantial rights, *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001), and find there is no merit to defendant’s claim. A defendant is entitled to an adverse inference instruction regarding the loss of evidence if the prosecutor acted in bad faith in failing to produce the evidence. *People v Davis*, 199 Mich App 502, 515; 503

² Defendant requests that we remand for an evidentiary hearing with instructions that he undergo an independent psychiatric evaluation. However, this Court has already considered and denied defendant’s earlier request for remand, *People v Jones*, unpublished order of the Court of Appeals, entered April 3, 2012 (Docket No. 306379), and we decline to reconsider that decision.

NW2d 457 (1993), overruled on other grounds, *People v Grissom*, 492 Mich 296; ___ NW2d ___(2012). Here, a surveillance camera captured an altercation at defendant's cell door. However, according to Adamski, no surveillance camera captured what occurred inside defendant's cell. Adamski acknowledged that he testified at the preliminary examination that defendant's assault was on videotape. However, he explained that following the preliminary examination he learned that what occurred inside defendant's cell was not captured by any surveillance camera. Accordingly, the record does not support that a videotape existed, and thus, the prosecutor did not act in bad faith in failing to produce it. *Id.* The trial court did not commit plain error in failing to provide an adverse inference instruction where there is no evidence of a missing videotape. *Aldrich*, 246 Mich App at 124-125.

We further reject defendant's claim that trial counsel was ineffective for failing to request an adverse inference instruction. It is not apparent from the record that any videotape was missing; hence we cannot make a finding that trial counsel should have requested a jury instruction when there was no record evidence to support such an instruction. Any objection would have been futile, and trial counsel cannot be held ineffective for failure to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

III. SUFFICIENCY OF THE EVIDENCE

Defendant also argues that his convictions are not supported by sufficient evidence. We review de novo a challenge to the sufficiency of the evidence. *Cline*, 276 Mich App at 642. We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.*

According to defendant, because there was no videotape from a surveillance camera that showed him assaulting Adamski and Faronbi, there is reasonable doubt as to whether he assaulted the two officers. However, because we view the evidence in the light most favorable to the prosecution, *id.*, which includes making all credibility choices in favor of the verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), we accept as credible the testimony of Adamski and Faronbi. There was a videotape of the incident, and that videotape, which was viewed by the jury, showed an altercation near the door to defendant's cell. According to Adamski, no surveillance camera captured what occurred inside defendant's cell, he and Faronbi testified that defendant punched Adamski in the face and that, after he forced defendant onto the bed, defendant ignored the officers' commands to stop resisting and repeatedly swung his arms and kicked his legs at the two officers. Welch further supported the testimony of both Adamski and Faronbi. Accordingly, when the evidence is viewed in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant assaulted the officers. *Cline*, 276 Mich App at 642. We therefore hold that defendant's convictions are supported by sufficient evidence.

IV. SENTENCING

Defendant also claims that the trial court erred in scoring ten points for offense variable (OV) 3, MCL 777.33(1). However, because defendant expressed satisfaction with the scoring of the sentencing guidelines, he waived any claim of scoring error. *Carter*, 462 Mich at 215-216.

Regardless, reviewing the claimed error for plain error affecting defendant's substantial rights, *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007), we find no merit to defendant's claim. OV 3 is to be scored when there is a physical injury to a victim. MCL 777.33(1). Ten points are to be scored if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). The phrase "bodily injury" "encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). The phrase "'requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). A "victim" is any person harmed by the defendant's criminal actions. *People v Laidler*, 491 Mich 339, 348; 817 NW2d 517 (2012).

Although the jury acquitted defendant of assaulting Corrections Officer Phillip Welch, Welch was a "victim" of defendant's assaults on Adamski and Faronbi. Welch, who was kicked in the stomach and legs by defendant when he refused to obey the commands to stop resisting, was harmed by defendant's criminal actions. *Laidler*, 491 Mich at 348. In addition to getting kicked in the stomach and legs by defendant, he also banged Welch's knee on the side of the bed. As previously stated, due to his knee injury, as well as an injury to his back that he sustained as a result of defendant's assaults, Welch was off work for four months. Our review of the record therefore leads us to conclude that Welch suffered a "bodily injury." His injuries were an unwanted physically damaging consequence of defendant's assault. *McDonald*, 293 Mich App at 298. While there was no record evidence that Welch obtained medical treatment for his injuries, the absence of such evidence is not determinative whether Welch suffered "bodily injury requiring medical treatment." MCL 777.33(3). The fact that Welch's injuries forced him off work for four months, permits a finding that medical treatment was required or necessary for the injuries. Accordingly, the trial court did not plainly err in scoring ten points for OV 3. *Odom*, 276 Mich App at 411.

Further, because the trial court's scoring of ten points for OV 3 was proper based on the injuries suffered by Welch, any objection by defense counsel would have been futile. Thus, defense counsel was not ineffective for failure to make a futile objection. *Fike*, 228 Mich App at 182.

Defendant raises numerous other challenges to his sentences. We review these unpreserved claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Because defendant's minimum sentences fall within the recommended minimum sentence range under the legislative guidelines, we must "affirm th[e] sentence[s] and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10).³ Here,

³ We disagree with defendant's assertion that the trial court failed to state how it arrived at defendant's sentences. See *People v Terry*, 224 Mich App 447, 455-456; 569 NW2d 641 (1997) (stating that a trial court must articulate on the record its reasons for imposing a particular sentence). The trial court stated that it was relying on the sentencing guidelines and that it would

defendant argues that the trial court relied on inaccurate and incomplete information when, in violation of MCR 6.425, it failed to conduct an assessment of his rehabilitative potential through intensive alcohol, drug, and psychiatric treatment. However, MCR 6.425(A)(1)(e) only requires a probation officer to include in the presentence investigation report (PSIR) “the defendant’s medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report.” Thus, contrary to defendant’s assertion, the trial court was not required to conduct an assessment of defendant’s rehabilitative potential through treatment. Defendant also argues that the trial court failed to consider mitigating factors, such as his family support and his long and extensive history of mental and physical illnesses, assaultive behavior, and substance abuse. However, the PSIR informed the trial court about defendant’s family, as well as defendant’s medical history, his history of assaultive behavior, and his substance abuse. A PSIR is presumed to be accurate, and it may be relied on by the trial court unless challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant makes no claim that the information contained in the PSIR was inaccurate or incomplete. Accordingly, defendant has failed to show that the trial court relied on inaccurate information.

Defendant makes two constitutional challenges to his sentences. Constitutional challenges are not prohibited by MCL 769.34(10). *People v Conley*, 270 Mich App 301, 316-317; 715 NW2d 377 (2006). First, defendant argues that the trial court engaged in judicial fact finding in contravention of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has definitively held that *Blakely* does not apply to Michigan’s indeterminate sentencing scheme. *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Second, defendant argues that his sentences violate the constitutional provisions against cruel or unusual punishment, US Const, Am VIII; Const 1963, art 1, § 16. “However, a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment.” *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (internal citations omitted). The principal of proportionality requires that a sentence be proportional to the seriousness of the circumstances surrounding the offense and the offender. *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003). Defendant fails to overcome the presumption of proportionality. Accordingly, defendant’s sentences are not unconstitutional. Defendant has not shown that he is entitled to be resentenced.

We also reject defendant’s claim that defense counsel was ineffective for failing to present mitigating evidence to the trial court and for failing to object to the length of his sentences. Because defendant does not identify any mitigating evidence that was not brought to the trial court’s attention, we presume that no mitigating evidence was available. In the absence of any mitigating evidence that should or could have been introduced, we cannot find that trial counsel’s performance fell below an objective standard of reasonableness. In addition, because defendant has failed to establish that the length of his sentences violate any constitutional

impose a sentence “at the top of the guidelines because . . . it’s warranted in light of these circumstances. . . . [T]he correction[s] officers all they want to do is keep order in there and they don’t need to be attacked by anybody.” The articulation requirement was met when the trial court relied on the sentencing guidelines. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

provision, any objection to the sentences would have been futile. Defense counsel was not ineffective for failing to make a futile objection. *Fike*, 228 Mich App at 182.

Defendant next argues that the trial court erred when it ordered him to pay attorney fees without considering his ability to pay. This argument is without merit based on our Supreme Court's opinion in *People v Jackson*, 483 Mich 271, 283; 769 NW2d 630 (2009). In *Jackson*, our Supreme Court held that a defendant does not have a constitutional right to an assessment of his ability to pay before a fee for his court-appointed attorney is imposed. *Id.* at 290. While the Supreme Court acknowledged that a defendant is entitled to an ability-to-pay assessment at some point in time, it held that a trial court need not conduct an assessment of a defendant's ability to pay until the imposition of the fee is enforced and the defendant objects to the enforcement. *Id.* at 292-293. Although defendant claims that *Jackson* was wrongly decided, we are required to follow the decisions of the Supreme Court. *People v Strickland*, 293 Mich App 393, 402; 810 NW2d 660 (2011).

On cross-appeal, plaintiff argues that the trial court erred in scoring zero points, rather than ten points, for prior record variable (PRV) 7, MCL 777.57.⁴ The interpretation and application of the sentencing guidelines presents a legal question that we review de novo. *People v Huston*, 489 Mich 451, 457; 802 NW2d 261 (2011).

PRV 7 scores subsequent or concurrent offenses. MCL 777.57(1). Ten points are to be scored if the offender has one subsequent or concurrent conviction, while zero points are to be scored if the offender has no subsequent or concurrent convictions. MCL 777.57(1). The following instructions are provided for the scoring of PRV 7:

(a) Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed.

* * *

(c) Do not score *a concurrent felony conviction* if a mandatory consecutive sentence or a consecutive sentence imposed under [MCL 333.7401(3)] of the public health code . . . *will result from that conviction*. [MCL 777.57(2) (emphasis added).]

“In this jurisdiction, concurrent sentencing is the norm. A consecutive sentence may be imposed only if specifically authorized by statute.” *People v Williams*, 294 Mich App 461, 473; 811 NW2d 88 (2011) (quotation omitted). By statute, defendant's sentences for his two

⁴ Defendant argues that the trial court properly denied the prosecutor's motion for an adjournment so that she could brief the scoring of PRV 7. However, because plaintiff only claims that the trial court erred in not scoring PRV 7, an issue that was preserved when the prosecutor requested at sentencing that the trial court score ten points for PRV 7, MCL 769.34(10), we do not address defendant's argument.

convictions of assault of a prison employee were to run consecutively to the prison sentence that he was currently serving. MCL 768.7a(1). However, there is no statute that authorizes defendant's sentences for his two concurrent convictions of assault of a prison employee to run consecutively to each other. Accordingly, while defendant's sentences for assault of a prison employee were to run consecutively to defendant's underlying prison sentence, the sentences for assault of a prison employee must run concurrently with each other. See *Williams*, 294 Mich App at 476-477.

Defendant makes no argument that the trial court properly scored PRV 7 at zero points. In fact, defendant concedes that ten points should have been scored for PRV 7, and we agree. Defendant had two concurrent felony convictions: at trial, he was convicted of two counts of assault of a prison employee. No mandatory consecutive sentence would result from either of the concurrent convictions. Rather, the consecutive sentence resulted from defendant's underlying sentence for his prior felony conviction. Accordingly, defendant had one concurrent conviction, and the trial court should have scored ten points for PRV 7. MCL 777.57(1)(b).

An error in scoring the sentencing guidelines requires resentencing if the error altered the appropriate guidelines range. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006). Because the trial court's error in scoring PRV 7 at zero points altered the recommended minimum sentence range, resentencing is required. *Id.* We, therefore, vacate defendant's sentences and remand for resentencing.

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello
/s/ Michael J. Riordan