

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE FIELDS,

Defendant-Appellant.

UNPUBLISHED

July 10, 1998

No. 190322

Recorder's Court

LC No. 95-0063070

Before: Holbrook, Jr., P.J., and Young, Jr. and J.M. Batzer*, JJ.

PER CURIAM.

Defendant appeals as of right from his August 15, 1995, bench trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm at the time of commission or attempted commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to three to ten years for the assault conviction and to a consecutive term of two years for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that he was denied effective assistance of counsel by his trial and first-appointed appellate counsel. We disagree. Because defendant failed to fully preserve this issue for appeal by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors by counsel evident in the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish ineffective assistance of counsel, defendant must prove (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different; and (3) the result of the proceeding was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant argues that his first-appointed trial counsel failed to timely make a post-judgment motion for a new trial based on ineffective assistance of trial counsel and thus defendant was deprived of a hearing on his claim. Following the appointment of substitute appellate counsel, substitute appellate counsel had fifty-six days to file a post-judgment motion for a new trial pursuant to MCR 7.208(B)(1) and MCR 7.212(A)(1)(a)(iii). Since substitute appellate counsel could have sought post-judgment relief, defendant was not prejudiced by the failure of his first-appointed appellate counsel to do so.

Defendant next claims that trial counsel rendered ineffective assistance when she pressured defendant into waiving his right to a jury trial. The record does not support defendant's claim. A review of the record indicates that defendant waived his right to a jury trial in open court and in doing so, defendant affirmatively stated that no one forced or threatened him to waive his right to a jury trial.

Defendant next claims that trial counsel was ineffective because she told him that he could not call the witnesses that he had identified. Again, the record does not support defendant's claim. Even if we were to assume that counsel did inform defendant that certain witnesses could not be called, this would be consistent with a pretrial ruling of the court. In its pretrial ruling, the trial court held that the testimony of the witnesses defense counsel wished to call to establish that "bad blood" existed between complainant and defendant would be more prejudicial than probative. Therefore, defendant has failed to establish ineffective assistance of trial counsel.

Defendant's final claims of ineffective assistance of counsel concern the presentation of an alibi defense. Defendant contends that counsel failed to assist defendant sufficiently so that he would have known to testify and present an alibi defense, and she ignored his claim that he had an alibi defense. When asked if counsel wished to present any other witnesses, counsel declined stating: "Based on your earlier ruling and based on the fact that it does not appear that anything came out during the course of trial which preempts that ruling, we don't have any further witnesses." There is simply nothing in the record to indicate that defendant could have presented any evidence in support of an alibi defense. We hold, therefore, that defendant was not denied effective assistance of appellate or trial counsel.

Defendant's second issue on appeal is that he was convicted based on impermissible hearsay. We disagree. This issue is not preserved for appeal because defendant failed to raise a hearsay objection to the evidence in question. MRE 103(a)(1); *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Nevertheless, we may take notice of plain errors which have affected substantial rights even if not raised before the trial court. MRE 103(d); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Defendant argues that prosecutor Raymond's testimony about defendant's alleged threats was impermissible hearsay because the prosecutor testified about what she was told by the complainant. Although the testimony constituted hearsay, MRE 801(c), reversal is not required because there was other competent testimony to the effect that defendant threatened complainant. *People v Huerl*, 88 Mich App 693, 702; 278 NW2d 721 (1979). Furthermore, the trial court indicated that it did not put great weight upon the threats made by defendant. Finally, the admission of this evidence does not constitute reversible error because this was a bench trial and "[u]nlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible

and inadmissible evidence or statements of counsel.” *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

Defendant’s final issue on appeal is that the trial court abused its discretion by imposing a disproportionate sentence. We disagree. Appellate review of sentencing decisions by the trial court is limited to determining whether an abuse of discretion has occurred. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). An abuse of discretion occurs when the principle of proportionality is violated. The principle of proportionality requires that sentences be proportionate to the “seriousness of the circumstances surrounding the offense and the offender.” *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990); see also *People v Honeyman*, 215 Mich App 687, 697; 546 NW2d 719 (1996).

Defendant received a sentence within the guidelines range. A sentence falling within the recommended range under the sentencing guidelines is presumptively not excessively severe or unfairly disparate because the guidelines range reflects the sentencing norm for that class of offender. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). However, a sentence within the sentencing guidelines can constitute an abuse of discretion in unusual circumstances. *Milbourn*, 435 Mich at 661. On appeal, defendant points to no unusual circumstances which would allow for a departure from the sentencing guidelines. Defendant only points to his lack of education, lack of a criminal record, and the fact that he is a poor black male as factors to be considered in his sentencing. These are not the type of unusual circumstances considered in evaluating whether a sentence within the guidelines range constitutes an abuse of discretion. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). We hold, therefore, that the sentencing court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Donald E. Holbrook, Jr

/s/ Robert P. Young, Jr.

/s/ James M. Batzer