STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THERMON ATKINS, JR.,

Defendant-Appellant.

UNPUBLISHED
December 28, 2001

No. 225809
Genesee Circuit Court
LC No. 99-005096-FH

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for assault with intent to do great bodily harm less than murder, MCL 750.84, following a jury trial in which the jury was unable to agree on a verdict on the charge that defendant also committed assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 76 to 240 months' imprisonment. We affirm.

Defendant first argues that the trial court erred in granting a prosecution motion in limine to bar any reference to the victim working as a prostitute at the time of her encounter with defendant leading to the charges against him. Defendant, however, in his statement of this issue, does not state with precise accuracy what the trial court ruled, and the imprecision is fatal to this assignment of error. The record indicates that the trial court, after hearing argument from the prosecutor and defense counsel, ruled that defendant could explore whether the victim was working as a prostitute at the time of the encounter, and prohibited him only from bringing up before the jury that she had acted as a prostitute with others on other occasions. The trial court discussed this resolution of the issue with both the prosecutor and defense counsel, and both agreed to this resolution. By agreeing to this resolution, defendant affirmatively waived any objection to it. By affirmatively waiving any objection, defendant extinguished any arguable error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Defendant next asserts that the trial court erred in not sustaining his objection to a flight instruction because the testimony at trial did not support that instruction. There was, however, evidence in the record that the perpetrator of the crime did flee the scene, making it a jury question whether flight occurred. The court did not tell the jury that flight had occurred; rather, it told the jury the inferences that it was permitted to draw if it found that flight did occur. In so doing, the court properly observed the rule that a court ought not to take fact questions away from the jury. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich

884 (1992). The trial court also properly gave the jury a general instruction that the jury was the sole trier of fact issues, that the court was not attempting to signal how it thought such issues should be resolved by the jury, and that if the jury thought it knew the judge's personal opinion on any fact issues, it was to ignore that opinion. Having considered the jury instructions in their entirety, we find no error requiring reversal. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996). Even if the instructions were somewhat imperfect, they did not fail to present the issues to be tried to the jury fairly and fail to protect the rights of defendant. *Id.* Thus, the trial court did not abuse its discretion in instructing the jury on flight. *Id.*

Next defendant argues that his trial counsel was ineffective, and that his constitutional right to counsel was thereby violated. Defendant enumerates five specific omissions by trial counsel the he asserts constituted ineffective assistance. We note first that there was no *Ginther*[1] hearing in this case, so we are limited to consideration of those claims of ineffective assistance of counsel "where the details relating to the alleged deficiencies of the defendant's trial counsel are sufficiently contained in the record to permit this Court to reach and decide the issue." *People v Kenneth Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985).

Two of the claimed omissions alleged to have constituted ineffective assistance, counsel's alleged failure to pursue certain investigative leads and his failure to introduce tapes of a report of the crime to emergency dispatchers, which allegedly would have revealed inconsistencies in the testimony of certain prosecution witnesses, are not supported by the record, and therefore may not be considered on appeal. *Id.* at 129-130.

Defendant also claims that counsel was ineffective because he failed to object when a police officer testified that at first it appeared that there was blood on defendant's boots. More specifically, defendant claims that counsel was ineffective for allowing a police officer to give hearsay testimony that the initial local police department tests indicated that there was blood on the boots, but that later and more sophisticated tests by the state police crime laboratory indicated that the boots did not have blood on them. It seems clear that the reason why defense counsel did not object to the hearsay testimony was because this testimony was helpful to defendant. This testimony indicated the absence of evidence connecting defendant to the crime. To the extent that there is any significance to the testimony about the local police department's initial finding, the suggestion to the jury would have been that the local investigators were less than competent, which hardly prejudiced defendant. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999).

Defendant further claims that counsel was ineffective because he failed to question the police regarding why they did not seek a search warrant or voluntary consent to obtain other pairs of defendant's boots to search for blood on them. According to defendant, failure to pursue this line of questioning permitted to stand unrefuted the prosecution's inference that the boots involved were either cleaned or there was another pair. However, defense counsel presumably did not undertake this line of questioning both because he did not want to risk eliciting an answer that might have been harmful to defendant and because he did not want to suggest to the jury that, notwithstanding the negative test results, defendant might have had other boots on which

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

blood could have been found. Defendant has not overcome the presumption that counsel's act or omission was trial strategy, nor has he shown that the alleged error negatively impacted the outcome of the case. *Id.* at 6; *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Neither complaint regarding defense counsel's handling of the police testimony at trial provides a ground for finding counsel to have been ineffective.

Finally, with respect to ineffective assistance of counsel, defendant argues that defense counsel never argued to the jury that defendant was made the "scapegoat" for a beating the victim received from someone else, such as, defendant suggests, her "pimp." This assertion is contrary to the facts. This is precisely what defense counsel did argue, although he chose to refer to the hypothetical actual perpetrator as a "business manager" rather than a "pimp." Because the record indicates that counsel did not commit the omission defendant alleges, this argument has no basis.

Defendant also challenges the proportionality of his sentence. Under MCL 769.34(1), this crime, committed on October 15, 1999, is controlled by the statutory sentencing guidelines. Accordingly, under MCL 769.34(10), we have no discretion to reduce a sentence that is within the guidelines, unless there was an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence. A party may not contend on appeal that there was an error in scoring the guidelines or that inaccurate information was relied upon unless that party raised the issue either "at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." *Id*. No such error in scoring or reliance on inaccurate information has been alleged or shown; we cannot, therefore, consider defendant's challenge to his sentence.

Affirmed.

/s/ William B. Murphy
/s/ Janet T. Neff
/s/ Joel P. Hoekstra