

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL LEE ROYCE,

Defendant-Appellant.

UNPUBLISHED

May 31, 2002

No. 226113

Marquette Circuit Court

LC No. 99-036212-FH

Before: Griffin, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), and domestic violence, third offense, MCL 750.81(4). He was sentenced to concurrent terms of six to twenty years' imprisonment for the home invasion conviction and 209 days imprisonment for the domestic violence conviction, with credit for time served. Defendant appeals as of right, and we affirm.

Brandi Alto testified that she had ended a long-term relationship with defendant. Defendant encountered Alto as she was leaving a bar with Kevin Hendrickson. After an exchange of words, Alto walked with Hendrickson to his home. At approximately 2:00 a.m., Hendrickson saw defendant on the front porch. Alto and Hendrickson ran into a bedroom. Hendrickson fled out the bedroom window to ask his neighbors to telephone police. Defendant broke into the home and was heard yelling and knocking things over. Alto pushed the headboard of the bed away from the wall and hid there. Defendant broke into the bedroom, but did not see Alto. After he left the bedroom, Alto thought that defendant had left the home. She was on her way to the kitchen to telephone police when she encountered defendant, who hit and kicked her. Alto managed to call for help and told defendant that the police were on their way. When she turned around, defendant was gone. Hendrickson returned to the home and hid in the basement with Alto until police arrived. Defendant testified that he was angry with Hendrickson, who knew of defendant's continuing relationship with Alto. After consuming alcohol at the bar and being encouraged by Hendrickson's girlfriend, defendant went to Hendrickson's home "to kick his ass." He remembered pounding on the front door. Defendant denied kicking down the door, and testified that "the door opened up." Defendant did not recall encountering and assaulting Alto at Hendrickson's home.

Defendant first alleges that the trial court abused its discretion by admitting photographs of Alto taken by police responding to the emergency call.¹ We disagree. We review the admission of photographs into evidence for an abuse of discretion. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). Photographs are not excluded from evidence simply because the witness can orally testify about the information contained in the photographs. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, mod 450 Mich 1212 (1995). The proper inquiry is whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id.* In the present case, we cannot conclude that the decision to admit the photographs was an abuse of discretion. The photographs were an accurate representation of the injuries suffered by Alto following the assault. While defendant indicated that there would be no dispute of Alto's injuries, defendant's stepdaughter testified that she saw Alto the next day with an injury to her lip. Defendant's contention, that this testimony did not warrant rebuttal with the photographs because the stepdaughter did not see Alto that evening, but rather, the next day, is without merit.

Defendant next alleges that resentencing is required because two prior convictions were erroneously included in the scoring of the guidelines and a downward departure from the guidelines was warranted. We disagree. Defendant admitted that even if the two prior convictions were excluded from calculation of the guidelines, the scoring range remained unchanged. When asserted inaccuracies have no determinative effect upon the sentence, any error is harmless and remand for resentencing is not required. *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1992). The factors cited by defendant, lack of recent prior serious convictions and strong family support, do not warrant a downward departure from the guidelines, and the trial court properly sentenced within the guidelines. *People v Babcock*, 244 Mich App 64, 74-76, 79-80; 624 NW2d 479 (2000). Defendant's prior record presents a factor incorporated into the guidelines, *id* at 79, MCL 769.34(3)(b), and the trial court did not conclude that the offender characteristic was given inadequate consideration. Accordingly, defendant's request for resentencing is unwarranted. We note that defendant's assertion that the trial court was required to justify a failure to depart from the guidelines is totally inapt. A trial court does not have to justify a failure to depart from the statutory guidelines, but must set forth substantial and compelling reasons when it does.

Lastly, defendant alleges that trial counsel was ineffective. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Defendant must show that the failure to object to the testimony deprived him of a substantial defense that would have affected the outcome of the proceeding. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999). Defendant must also overcome the presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Decisions regarding

¹ Specifically, defendant objected to photographs identified as "exhibit three." While the exhibits have been provided by the prosecutor on appeal, the exhibits are not numbered. According to the trial transcript, exhibit three consisted of photographs of the crime scene as well as Alto's injuries as photographed by police after the attack. The legal analysis of defendant's brief on appeal only challenges the photographs of the injuries. In any event, we note that the trial court did not abuse its discretion by admitting photographs of the crime scene. The probative value was not substantially outweighed by any unfair prejudice.

the evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant failed to meet the heavy burden of proving ineffective assistance of counsel. The trial court's factual findings were not clearly erroneous. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Affirmed.

/s/ Richard A. Griffin

/s/ Harold Hood

/s/ David H. Sawyer