STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2003
v	No. 241756 Calhoun Circuit Court
DENNIS ALLEN PENDYGRAFT, Defendant-Appellant.	LC No. 01-004136-FH

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

PER CURIAM.

Defendant appeals from his conviction of assault with intent to do great bodily harm less than murder. MCL 750.84. Defendant was sentenced as a habitual offender to nine to twenty years in prison. We affirm.

Defendant first asserts he was denied due process because neither the prosecution nor his trial counsel called the victim, defendant's ex-wife Michelle Pendygraft, a res gestae witness, to testify at trial. Defendant also asserts his trial counsel was ineffective for failing to call Pendygraft, or at least to request the prosecution's assistance in locating her so that a competent analysis could be made of whether she should have been called as a defense witness.

We first address defendant's claim that his due process rights were violated because the prosecution did not call Pendygraft to testify. This Court has held that a defendant must object at trial or move for an evidentiary hearing or a new trial to preserve the res gestae witness issue for appeal. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Although defendant objected to the trial court's refusal to read CJI2d 5.12, the missing witness instruction, to the jury he admits this issue is unpreserved because he did not state a due process objection, move for an evidentiary hearing, or request a new trial. The plain error rule applies to unpreserved claims of constitutional error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

"A res gestae witness is a person who witnesses 'some event in the continuum of a criminal transaction' and whose testimony will 'aid in developing a full disclosure of the facts.' " *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989), quoting *People v Raskin*, 145 Mich App 526, 530-531; 378 NW2d 535 (1985). In the present case, neither party disputes that Pendygraft, as the victim, is a res gestae witness. "Before its amendment in 1986, [MCL 767.40] was interpreted to require the prosecutor to use due diligence to endorse and produce all

res gestae witnesses." *People v Burwick*, 450 Mich 281, 287; 537 NW2d 813 (1995). However, under the current res gestae witness statute, MCL 767.40a, "[t]he prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *Burwick, supra*, 289.

In the present case, the prosecution listed Pendygraft as a witness on the felony complaint, the information, and the amended information. Moreover, the prosecution's notice of intent to produce did not list Pendygraft as a witness to be produced by the prosecution. At trial, defendant's counsel admitted to these facts and further conceded that the above documents were timely filed. Therefore, under MCL 767.40a and *Burwick*, the prosecution did not commit plain error and, therefore, did not violate defendant's due process rights.

Defendant's ineffective assistance of counsel claim and his contention that he was denied due process of law because his trial counsel did not call Pendygraft to testify are inextricably intertwined. Therefore, we review them together. Defendant has failed to preserve his ineffective assistance of counsel claim because he made neither a motion for a new trial nor a request for an evidentiary hearing prior to appeal. "However, the absence of a motion for new trial or an evidentiary hearing is not fatal to appellate review 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 Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). In the present case, at least with respect to counsel's failure to call Pendygraft as a witness, the record contains sufficient details for this Court to decide this issue.

In order to prevail on his claim of ineffective assistance of counsel, "defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). "Effective assistance of counsel is presumed," and "defendant bears a heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999) (citations omitted). Moreover, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," and "[t]his 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." *Id*., 76-77. Furthermore, "[i]neffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense," which means that it might have made a difference in the outcome of trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996).

In the present case, "because no motion for a new trial or an evidentiary hearing was made, this Court's review of defendant's claim is limited to the present record." *Johnson, supra*, 129-130. At trial, officers testified that Pendygraft was initially uncooperative, initially stated that she did not know who had assaulted her, and only did so later at the hospital. Moreover, on the night she was assaulted, Pendygraft presented false information to the police by stating her name was Cynthia Chevaz, a known alias she has used in the past, and another name, Sylvia, which does not appear to be either her married or maiden name. Police testimony also revealed that Pendygraft had previously been arrested by the responding officers. Moreover, at the May

9, 2002, sentencing hearing, Pendygraft testified "I've been hiding from [defendant] because I wanted to get high. I was high at the time when this happened." Pendygraft also stated "I feel that [defendant] needs intense counseling for drugs, alcohol and abuse." Based on these facts, we conclude that counsel's failure to call Pendygraft as a witness falls within the presumption of trial strategy, as Pendygraft's character for truthfulness may have been attacked under MRE 608.

Defendant also argues that Pendygraft's statements at the sentencing hearing would have affected the outcome of the trial. However, although Pendygraft's statements that defendant was not stalking her and did not drag her into the bushes may have been relevant for the purposes of the trial court's determination of sentence, they would not constitute a substantial defense that "might have made a difference in the outcome of trial." *Hyland*, *supra*, 710. Specifically, they would not have provided defendant with a defense to the charge of assault with intent to do great bodily harm, because they do not negate any of the crime's elements. Moreover, with regards to Pendygraft's statements that she believes she provoked the assault, this Court has held that "the existence of provocation [is] irrelevant to a conviction under [MCL 750.84]." *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). Therefore, we conclude that defendant has not met the heavy burden of rebutting the presumption that his trial counsel was effective, and has not demonstrated plain error.

Defendant next alleges the trial court erred in scoring fifty points for offense variable seven (OV 7), which applies to aggravated physical abuse. "This Court properly reviews a defendant's sentence for an abuse of discretion." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Moreover, in *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) this Court stated:

> A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000); *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Prior to being amended April 1, 2002, MCL 777.37(1)(a) provided that a defendant was to be scored fifty points if "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." In the present case, the trial court's scoring was apparently based on the prosecution's arguments that defendant's actions equated to excessive brutality because, although no weapon was used, Pendygraft "was dragged into bushes and ended up with having over 60 stitches in her face." In his appeal to this Court, defendant argues that the present case does not evince excessive brutality because there was no evidence that a weapon was used, the events lasted only a few minutes, and the assault was not excessive. Although MCL 777.37(2) defines terrorism and sadism, it provides no definition for excessive brutality.

In *People v Libbett*, 251 Mich App 353, 365-366; 650 NW2d 407 (2002), quoting *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999), this Court recognized the principle that the legislative intent of a sentencing statute is to be discerned by examining its plain language, and words must be given their plain and ordinary meaning. Therefore, we note that "brutality" is defined as "the quality of being brutal; cruelty; savagery," *Random House Webster's College*

Dictionary (1997), 169, and "excessive" is defined as "going beyond the usual, necessary, or proper limit or degree; characterized by excess," *id*., 455. Thus, by the plain and ordinary meaning of the statute, excessive brutality requires neither a weapon nor any prolonged period of time.

In the present case, an eyewitness testified at trial that defendant grabbed Pendygraft and dragged her into bushes as she was kicking and trying to get away, that Pendygraft tried to escape and defendant again dragged her into the bushes, and that he later saw defendant drag Pendygraft into a yard two or three houses down that was quite a distance away. Moreover, the officer who found Pendygraft testified that, as he began walking around the area between the houses, he could hear "what sounded like someone striking something with their fist," and that he found Pendygraft underneath a stairwell crying hysterically and "covered with a very large amount of blood" on her face and head.

The doctor who examined Pendygraft after the assault testified that she was uncertain whether she had been struck by an object and stated that fists were used, but had injuries to her head and chest, as well as multiple lacerations and contusions to the face, and stated that she had suffered a brief loss of consciousness. The doctor also testified that defendant's lacerations required forty-two stitches and that one was a six-centimeter-long stellate laceration "involving the subcutaneous tissue" requiring two layers of stitches. The doctor also stated that a CAT scan of the head revealed a depressed nasal fracture, meaning that the nasal bone was broken and depressed inward. Finally, according to the doctor's testimony, Pendygraft spent approximately nine hours in the hospital.

We conclude that defendant's actions of dragging Pendygraft through bushes to a house quite a distance away as she was kicking and trying to get away, coupled with the severity of her injuries, present evidence supporting the judge's initial scoring of fifty points.

Defendant also contends the trial court erred in scoring fifteen points for OV 10 based on a finding of predatory conduct, rather than at ten points as defendant requested at sentencing. MCL 777.40(3)(a) defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization." Defendant argues that the trial court inappropriately held defendant's actions to be predatory conduct, stating defendant was merely trying to speak with Pendygraft while she was walking back and forth. Moreover, defendant points out that Pendygraft herself testified at sentencing that defendant was not stalking her and that she felt she may have provoked the attack. But even if we accept defendant's argument on this point, any error is harmless.

Defendant was sentenced as a third habitual offender to nine to twenty years' imprisonment based on a total offense variable score of 115 points. Even if OV 10 were scored at ten points as defendant requested instead of fifteen, defendant's total offense variable scoring would be 110 points. Assault with intent to do great bodily harm is a class D offense, MCL 777.16d, and level VI, the highest in the offense variable grid for class D offenses, is applied for offense variable scorings of seventy-five or more points, MCL 777.65. Thus, even with a rescoring of OV 10, there would be no change in the guidelines' recommendation. Therefore, the error, if any, was harmless, and defendant's sentence must be affirmed. MCL 769.34(10);

People v Ratkov (After Remand), 201 Mich App 123, 127; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994).

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski