STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 12, 2009
v	No. 281188 Ingham Circuit Court
DONALD RICHARD BLOWERS, Defendant-Appellant.	LC No. 06-001354-FH

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82.[1] Defendant also appeals his sentence as a second-offense habitual offender, MCL 769.10, to 42 to 180 months for the assault with intent to do great bodily harm less than murder conviction and 32 to 48 months for the felonious assault conviction. We affirm defendant's convictions and sentences, but remand for correction of his presentence investigation report (PSIR).

Defendant first argues that there was insufficient evidence to support his convictions. We disagree. On de novo review, we consider the evidence adduced below in the light most favorable to the prosecution to determine whether a rational trier of fact could find beyond a reasonable doubt that all essential elements of the prosecution's case were proven. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

"Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Assault with the intent to cause great bodily harm less than murder is a specific intent crime. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). Specifically, a defendant must have "intend[ed] to do serious injury of an aggravated nature." *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). "An intent, of course, is a

[1] Defendant was also charged with unlawful imprisonment, MCL 750.349b, and kidnapping, MCL 750.349. The unlawful imprisonment charge was dismissed after the preliminary examination, and defendant was acquitted at trial of kidnapping.

secret of a man's mind, and he can disclose it by declarations or by his actions. And actions sometimes speak louder than words." *People v Quigley*, 217 Mich 213, 217-218; 185 NW 787 (1921). Moreover, "[b]ecause it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2000).

Although there was conflicting evidence testimony about what occurred between defendant and the victim, there was sufficient evidence presented upon which a reasonable inference could be drawn that defendant possessed the requisite intent. The victim testified that defendant repeatedly beat her over the course of a 24-hour period. During one of the beatings, she testified, defendant stretched her face so much that she thought he was going to rip it off. Additionally, she testified that defendant tried to pull off the partial plate that was attached to her teeth and that he also wrapped a belt around her neck and pulled it so hard that she thought her head would explode. She further testified that during this time defendant threatened to kill her several times. In addition to the victim's testimony, the emergency room physician who treated her testified that her injuries were caused by blunt force trauma. Deferring to the jury's superior ability to assess witness credibility, *People v Palmer*, 392 Mich 370, 376; 220 NW2d 393 (1974), this is sufficient evidence from which a rational jury could infer the requisite intent. The fact that defendant did not succeed in seriously injuring the victim does not negate his intent to do so. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992).

"The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injury or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant does not deny that he assaulted the victim or that he intended to injure her or place her in reasonable apprehension of an immediate battery when he did so. Instead, he denies assaulting her with a belt. The victim, however, specifically testified that defendant, indeed, used a belt. Defendant also notes that there was no medical evidence adduced at trial to corroborate her claims of strangulation with a belt. But the physician who treated the victim testified that a person could be strangled yet not be bruised from it. Accordingly, defendant's challenge to his felonious assault conviction fails.

Next, defendant argues that the trial court improperly scored offense variable (OV) 7 and OV 8. We disagree. OV 7 is scored either 0 or 50 points. MCL 777.37(1). To assess 50 points, the trial court must find that the victim was subjected to "sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety [the] victim suffered during the offense." MCL 777.37(1)(a). "Sadism" is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Here, the victim's testimony detailed a 24 hour long, brutal attack. She testified that she was strangled with a belt and repeatedly hit in the head, face, and body; she required hospital treatment. Photographs documented her injuries. The victim testified that she suffered pain from her injuries. At sentencing, she reported that she continued to suffer pain from the injuries for months after the attack. Based on the victim's testimony and the pictures that confirmed her claims, we cannot conclude that the trial court abused its discretion when it assessed 50 points for OV 7.

With respect to OV 8, we initially note an error in the sentencing transcript which indicates that OV 8 was scored at 50 points. The SIR states that OV 8 was scored at 15 points.

Defendant argues that because the jury acquitted him of the kidnapping charge, there was no evidence that the victim was taken or held captive, and thus OV 8 should have been scored at zero points. Points may be assessed for OV 8 only when the sentencing offense is not kidnapping, MCL 777.38(2)(b), and the trial court finds that the victim was either asported to a place or situation of greater danger or held captive beyond the time necessary to commit the offense, MCL 777.38(1)(a). The evidence showed that defendant took the victim from their home to several motels in the Lansing area. The victim testified that she was afraid to leave with defendant because she feared that she would be beaten. She also testified that while in defendant's car and at each motel location, defendant beat her and forced her to stay with him against her will. Based on this evidence, there is sufficient evidence in the record to support the trial court's decision to score OV 8 at 15 points. That defendant was not convicted of kidnapping is not dispositive. Trial courts are not bound by the jury's determination where evidence in the record adequately supports a particular score. *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991).

Defendant next argues that the PSIR does not reflect changes the court agreed to make to the description of the offense provided by the investigating agent. We remand for the ministerial task of making these change to the PSIR. MCL 771.14(6); MCR 6.425(E)(2).

Defendant also argues that he was denied a fair trial due to prosecutorial misconduct. Specifically, defendant argues that because the prosecutor introduced false testimony from the victim that she bailed defendant out of jail and failed to correct it, he was prejudiced. But nowhere in the victim's testimony does she testify to this. Instead, this statement was introduced during the testimony of a police officer. Further, during closing argument, the prosecutor stated the following: "[T]he Defendant and the victim agree on one thing. She did not pick him [up] from jail and bail him out on November 14th." This correction satisfied the prosecutor's duties and effectively cured any prejudice resulting from the testimony. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998).

Defendant also argues that he received ineffective assistance of counsel at trial. Because defendant failed to preserve this issue by moving for a new trial or a *Ginther*[2] evidentiary hearing, our review is limited to mistakes on the existing record.

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. The right to counsel is the right to have counsel effectively assist in the presentation of one's case. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The determination of whether a defendant received effective assistance requires a focus on the assistance actually received. *Id*. at 596. Because effective assistance is presumed, a defendant who challenges his counsel's assistance bears a heavy burden. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To succeed, a defendant must show that (1) trial counsel's actions fell below that of a reasonably competent attorney when objectively viewed, and (2) but for trial counsel's unreasonable conduct, there was a reasonable probability

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

the outcome of the trial would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant raises two arguments in support of his claim he was deprived of effective assistance of counsel. Defendant argues that his trial counsel failed to investigate and produce witnesses on his behalf. Specifically, defendant argues that if his trial counsel had produced the requested witnesses, they would have rebutted the victim's testimony, which, in turn, would have changed the outcome of the trial. But counsel has no obligation to call or interview every possible witness a defendant suggests. *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). Counsel's decisions pertaining to calling witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Here, there is no indication that defense counsel's failure to call witnesses deprived defendant of a substantial defense. Defendant argues that if his witnesses had been called, they would have testified that the victim lied about the extent of her injuries and what they had done together during the time when she alleges the assaults. Even if the witnesses could have testified as defendant claims, there is no indication that their testimony would have resulted in an acquittal. At trial the prosecutor elicited testimony from the victim that she had been less than truthful about the nature of previous assaults. Additionally, defense counsel cross-examined the victim about her various motives to lie about being assaulted and whether she was lying about whether defendant had ever assaulted her. He also attacked the victim's lack of memory and highlighted her alcoholism. Thus, defendant was not deprived of a substantial defense.

Defendant also argues that his trial counsel's failure to procure funds for a private investigator until sixth months after the assaults was objectively unreasonable. In support of his argument, defendant cites several federal circuit court opinions; these opinions are not binding on this Court. *Frazier*, *supra* at 242 n 8. Further, none of the cases defendant cites supports a finding that his trial counsel's failure to procure funds for a private investigator until sixth months after the assaults was objectively unreasonable. Defendant's argument is based on speculation that had his trial counsel investigated earlier he would have uncovered beneficial information. Such speculation cannot sustain a claim of ineffective assistance.

Additionally, defendant argues that his trial counsel's failure to object to the alleged prosecutorial misconduct discussed above deprived him of effective assistance of counsel. As previously discussed, the prosecutor fulfilled his responsibilities by informing the jury of the error in the victim's out-of-court statement, which effectively negated any resulting prejudice.

Defendant's assertion that contrary to MCL 769.11b, he was denied the full benefit of the time he served while awaiting trial has been consistently rejected by this Court. See, e.g., *People v Filip*, 278 Mich App 635, 641-642; 754 NW2d 660 (2008). His claim that the prohibition in MCL 791.238(2) against granting parolees who commit crimes while on parole credit for time served against their new offense violates the Due Process, Equal Protection, and Double Jeopardy Clauses is similarly without merit.

We affirm defendant's convictions and sentences but remand for the ministerial task of correcting defendant's PSIR. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey