STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 285962 Berrien Circuit Court
JOSE RENE VALDEZ, Defendant-Appellant.	LC No. 2007-403667-FH

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84; unlawfully driving away an automobile (UDAA), MCL 750.413; and two counts of assault with a dangerous weapon (felonious assault), MCL 750.82. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 10 to 30 years' imprisonment for assault with intent to do great bodily harm less than murder, 76 months to 30 years' imprisonment for UDAA, and 58 months to 180 months' imprisonment for each count of felonious assault. Because defendant was not deprived of the effective assistance of counsel, and has established no error entitling him to resentencing, we affirm.

Defendant first argues that he received ineffective assistance of counsel because defense counsel failed to investigate his mental condition and present an insanity defense. Because defendant did not raise this issue in a motion for a new trial or for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review of this claim is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To prevail on a claim of ineffective assistance of counsel, defendant must show that defense counsel's performance fell below an objective standard of reasonableness, and was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He must overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). However, the failure to present evidence constitutes ineffective assistance of counsel only when it deprives the

defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Here, defendant has provided no evidence, affidavits or documentation to support the claim that he may have been, or had the potential to be, pathologically intoxicated such that he was insane or temporarily insane at the time of the incidents leading to his arrest. He has offered nothing but bald speculation to support his argument that counsel should have investigated this line of defense. Defendant has thus failed to establish the factual predicate for his claim of ineffective assistance of counsel. *Hoag, supra* at 6. Moreover, although defendant was intoxicated at the time of the incident, there is no evidence that his intoxication was involuntary as is required to qualify for the insanity defense. *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992).

Finally, on the record before us, we cannot conclude that counsel's failure to investigate and assert an insanity defense fell below an objective standard of reasonableness. To assert an insanity defense, a defendant must show that as a result of mental illness or mental retardation, as the terms are statutorily defined, that he or she "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a. After the incident, defendant apparently told the victim and his wife that they had better not snitch on him, then fled the area. This conduct strongly suggests that he was aware of and could appreciate the nature and quality or the wrongfulness of his conduct, and could conform to the requirements of the law. The record does not demonstrate that defendant was deprived of a substantial defense.

Next, defendant raises several sentencing issues, arguing that he is entitled to resentencing. We will affirm a defendant's sentence on appeal if it is within the recommended minimum sentence range under the legislative guidelines, absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003).

First, defendant claims that the trial court failed to properly consider mitigating factors when imposing sentence; however, in making this argument, defendant fails to describe the mitigating factors the trial court failed to consider. An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). We do note, however, that defense counsel argued lack of malice and defendant's intoxication at sentencing. Thus, there was an effort to articulate mitigating factors to the trial court.

Second, defendant argues that the trial court erred when it failed to explain why the sentences were proportionate. Defendant specifically argues that the trial court should have considered his familial support, and his addictions to alcohol and cocaine. Defendant was, however, sentenced within the guidelines, and this Court has held that a minimum sentence within the sentencing guidelines is presumed proportional. *People v Powell*, 278 Mich App 318,

323; 750 NW2d 607 (2008).[1] Furthermore, where the trial court relied on the sentencing guidelines, it was under no obligation to further state its reasons for the sentence. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). In any event, we do not find defendant's self-serving statements concerning family support and his addictions to be substantial and compelling such that a downward departure from the guidelines was warranted. MCL 769.34(3).

Third, defendant argues that the trial court erred in failing to conduct an assessment under MCR 6.425(A)(5) to determine defendant's rehabilitative potential. We disagree. The trial court was not required to order an assessment of defendant's rehabilitative potential under MCR 6.425(A)(5). This rule only requires that a presentence report include a defendant's medical and substance abuse history and, if indicated, a current psychological or psychiatric report. In this case, the presentence report included defendant's medical and substance abuse history, and noted that defendant had not been diagnosed with any mental health issues. The presentence report complied with MCR 6.425(A)(5), and no further assessment was required.

Fourth, defendant argues that the trial court's scoring of sentencing guidelines variables violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, *Blakely* is inapplicable to our sentencing scheme because Michigan uses an indeterminate sentencing scheme in which a trial court sets a minimum sentence, but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Accordingly, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* Defendant's sentence being within the range authorized by the jury's verdict, this argument fails.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey

[1] Defendant's argument that his sentence was disproportionate, amounting to unconstitutional cruel and/or unusual punishment in violation of the federal and state constitutions fails for the same reason. "[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *Powell*, *supra* at 323.