STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2010
v	No. 287912 Wayne Circuit Court
TONEY C. LINDSEY, Defendant-Appellant.	LC No. 08-002367-FC

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, and two counts of first-degree criminal sexual conduct ("CSC-I"), MCL 750.520b(1)(f). The trial court sentenced him as a fourth habitual offender, MCL 769.12, to concurrent prison terms of seven to ten years for the assault conviction and 25 to 40 years for each CSC-I conviction. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

I. Jury Instructions

Defendant argues that the trial court erred in instructing the jury that the victim's testimony alone was sufficient to establish the elements of the charged offenses if that testimony proved defendant's guilt beyond a reasonable doubt, and in failing to instruct the jury that he had no duty to retreat in his own home before exercising self-defense. Because defense counsel expressed satisfaction with the instructions as given, he waived review of these claims of instructional error. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Defendant also argues, however, that defense counsel was ineffective for failing to raise these instructional issues.

Defendant bears a heavy burden of overcoming the presumption that his trial counsel was effective. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008). But because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish ineffective assistance of counsel, defendant must show that counsel's deficient performance denied him the Sixth Amendment

right to counsel and must further establish prejudice, i.e., a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

The trial court's instruction regarding the sufficiency of the victim's testimony did not impermissibly create a presumption that her testimony was credible and thus, that defendant was guilty. The court simply informed the jury that the victim's testimony did not need to be corroborated if it proved defendant's guilt beyond a reasonable doubt, which is an accurate statement of the law. *People v Drohan*, 264 Mich App 77, 89; 689 NW2d 750 (2004), aff'd 475 Mich 140 (2006). The court neither commented on the victim's credibility nor suggested that the victim's testimony was credible. Because the instruction was not improper, defense counsel was not ineffective for failing to object. *People v Clark*, 274 Mich App 248, 257-258; 732 NW2d 605 (2007).

Defendant also argues that defense counsel was ineffective for failing to request CJI2d 7.17,[1] which instructs that there is no duty to retreat in one's own home before exercising self-defense. The issue of self-defense was relevant only to the charge of assault with intent to do great bodily harm. Defendant is correct that there is no duty to retreat before exercising self-defense within one's own dwelling. *People v Riddle*, 467 Mich 116, 120; 649 NW2d 30 (2002). However, this exception to the duty to retreat extended only to the assault within defendant's dwelling; it did not extend to defendant's assaultive conduct outside the home. *Id.* at 121, 135. In any event, defendant was not prejudiced by the omission of this instruction as it would have applied to the events that occurred inside his home. Michigan law on self-defense requires that the defendant's force against the victim be necessary under the circumstances as defendant perceived them. See *id.* at 119-120, 127. Here, defendant's vicious attack against the victim was grossly disproportionate to any assault that she inflicted upon him. The victim admitted striking defendant in the face with her hand, but she testified that in return defendant held onto the windowsill and repeatedly kicked her while she lay on the floor. Moreover, the beating that the victim sustained outside the house, to which the no-duty-to-retreat instruction did not apply, was sufficient in itself for the jury to find that defendant assaulted the victim with the intent to do great bodily harm. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). The victim testified that as she lay curled in a ball at the bottom of the steps to the back door, defendant repeatedly kicked her head, face, torso, and legs, resulting in the immediate loss of two teeth, damage to another three teeth, and three cuts to the lip requiring surgical stitching on the inside and out. Under these circumstances, there is no reasonable likelihood that the jury would have acquitted defendant if the trial court had given an instruction on no-duty-to-retreat.

Further, the self-defense instruction was not applicable to the CSC-I charges, which required the jury to determine whether defendant and the victim engaged in consensual sex or whether defendant engaged in sexual penetration accomplished by force. The jury rejected the defense theory that the sex was consensual and instead found that defendant forcibly penetrated the victim. Even if the jury had been instructed on no duty to retreat in relation to the assault charge, it would not have been rational for the jury to conclude that defendant forcibly sexually

[1] Former CJI2d 7.17 is now subsumed within CJI2d 7.16(2).

assaulted the victim, but properly acted in self-defense in defending himself from a physical attack by the victim.

Accordingly, there is no reasonable probability that the result of the trial would have been different had a no-duty-to-retreat instruction been given. Therefore, defendant was not prejudiced by defense counsel's failure to request the instruction.

II. Sentencing

Defendant argues that he is entitled to resentencing because the trial court erred in scoring three offense variables, and also because the court relied on the wrong sentencing guidelines range at sentencing.

This Court reviews a trial court's scoring decision to determine whether the court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). An abuse of discretion occurs when the trial court's "decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

Defendant challenges the trial court's ten-point score for offense variable ("OV") 4. OV 4 requires ten points when the victim suffers serious psychological injury that may require professional treatment. MCL 777.34(1)(a). Ten points is proper "if the serious psychological injury may require professional treatment" and "the fact that treatment has not been sought is not conclusive." MLC 777.34(2). At trial, the victim testified that she feared for her life, and suffered emotionally and mentally from the incident. This testimony is sufficient to support the ten-point score for OV 4. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

Defendant also challenges the trial court's five-point score for OV 10.[2] Five points is appropriate for OV 10 when the offender exploits a vulnerable victim's difference in size or strength, or exploits a victim who was "intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). "Exploit" means to manipulate a victim for selfish or unethical purposes. "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c). The victim's age and susceptibility to an older man's attention rendered her vulnerable within the statutory definition. The evidence also supports a finding that defendant befriended the victim for the purpose of having sexual relations and created a relationship that enabled him to convince her to come to him when he called her name on the night of the incident. The difference in strength between defendant and the victim enabled defendant to overpower the victim and assault her physically and sexually. Although the victim tried to defend herself from each of defendant's crimes, defendant's superior strength rendered her actions ineffective. Therefore, the trial court did not abuse its discretion in scoring OV 10 at five points.

[2] Plaintiff contends that the trial court misspoke and intended to score this variable at ten points. We find no support in the record for this claim.

Defendant also disputes the trial court's ten-point score for OV 12. The court may assess ten points where two contemporaneous criminal acts involving crimes against a person were committed within 24 hours of the sentencing offense and will not result in a separate conviction. MCL 777.42(1)(b) and (2)(a). The evidence indicated that defendant subjected the victim to a series of violent attacks. He forcibly dragged the victim by her coat and t-shirt from the sidewalk to the back door of his house, where he inflicted the worst assault, in both severity and number of resulting injuries, at the back door of his house. The attack at the back door alone was sufficient to support defendant's conviction for assault with intent to do great bodily harm. Defendant thereafter dragged the victim into his kitchen and attacked her again. Each of these assaults in the various locations constituted a battery, which is an intentional, unconsented, and harmful or offensive touching of the person of another or of something closely connected with the person. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). Therefore, the trial court did not abuse its discretion in scoring OV 12 at ten points.

Although we have found no scoring errors, we agree that defendant is entitled to resentencing because the trial court used the wrong sentencing guidelines range to sentence defendant. Defendant's sentencing information report ("SIR") indicates that he received 75 total offense variable points, which would place him in OV level IV (60 – 79 points) of the applicable sentencing grid. MCL 777.62. The sentencing guidelines range for an F-IV offender,[3] as enhanced for a fourth habitual offender, is 171 to 570 months. (See MCL 769.12; MCL 777.21(3)(c).) However, the trial court expressly used a guidelines range of 225 to 750 months, which is the range for a fourth-habitual offender in the F-V cell. Even though defendant's minimum sentence of 300 months falls within the correct guidelines range, because the trial court utilized an incorrect range at sentencing, defendant is entitled to be resentenced. See *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

III. Defendant's Supplemental Brief

In a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant argues that a new trial is required because he elected not to testify at trial in reliance on defense counsel's erroneous advice that the prosecution would be able to impeach him with all 11 of his prior convictions if he testified. We disagree.

As defendant correctly argues, most of his prior convictions do not involve offenses containing an element of dishonesty, false statement, or theft and, accordingly, would not have been admissible for impeachment under MRE 609.[4] However, even if defense counsel advised defendant in the manner alleged, defendant has not established the requisite prejudice.

[3] Defendant received 109 prior record variable points, placing him in PRV level F (75+ points).

[4] The record discloses that defendant has two prior convictions for receiving or concealing stolen property and one for breaking and entering with intent to commit larceny. He also has six drug-related convictions and two firearm-related convictions. We agree that the latter convictions do not qualify for admission under MRE 609(a). *People v Parcha*, 227 Mich App 236, 241; 575 NW2d 316 (1997).

The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel, including a factual basis for finding prejudice. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Although defendant has submitted an affidavit in which he avers that defense counsel advised him that the prosecutor would be able to present all of his prior criminal convictions if he testified, he has not submitted an offer of proof regarding his proposed testimony. The failure to call a witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Even assuming that defense counsel advised defendant in the manner alleged, without an offer of proof of defendant's proposed testimony, there is no basis for concluding that defendant was prejudiced by counsel's allegedly inaccurate advice. Thus, defendant has not established a claim of ineffective assistance of counsel.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro