STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2010
v	No. 290942 Muskegon Circuit Court
RICKY LAVENTAE BUCHANAN, Defendant-Appellant.	LC No. 08-056513-FH

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit a felony (extortion), MCL 750.87, and assault with a dangerous weapon, MCL 750.82. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of nine years and six months to 20 years for the assault with intent to commit extortion conviction and four to eight years for the felonious assault conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS

On July 1, 2005, Tiffany Cole and her cousin, Amanda Bissell, spent the night at her brother's apartment. Her brother, James Bissell, along with his girlfriend, lived in an upstairs apartment in a house on Octavious Street in Muskegon. Curtis James lived in the other upstairs apartment, and defendant lived in the downstairs apartment.

The next morning, after James and his girlfriend left the apartment, Tiffany and Amanda went to Curtis's apartment to borrow a telephone. Curtis gave the girls his cellular telephone, and Tiffany called her mother. While the two girls stood in the doorway to James's apartment, defendant came up the stairs and went into Curtis's apartment. Amanda and Tiffany heard defendant tell Curtis to give him his money. Defendant then left.

Tiffany finished speaking with her mom, and the two girls returned Curtis's cellular telephone. According to Amanda, they gave the telephone to Curtis's friend that was in the apartment. As the two girls returned to James's apartment, defendant and another man, Derrick Farmer, came upstairs. Defendant was holding a silver "half sized" baseball bat. Defendant opened the door to Curtis's apartment, and hit Curtis with the bat. Curtis dropped to the floor, but defendant continued to hit him. Amanda testified that defendant hit Curtis with the bat four

or five times, hitting Curtis "[e]verywhere," in the head, shoulder, side, and stomach. While he was hitting Curtis, defendant told Curtis to give him his money and that if Curtis did not pay him, he would either hurt or kill Curtis. Before defendant and Farmer left, defendant told Amanda and Tiffany that if they told anybody what they saw, he would hurt them.

Curtis died later that day. According to the medical examiner, Curtis died of a blunt force head injury. A baseball bat, or any other blunt object, could have caused the injury. The medical examiner also found a bruise on Curtis's right scapula, which he opined was an injury consistent with being struck by a blunt object. The medical examiner could not, however, determine the manner of death. The toxicology report indicated that Curtis used a substantial amount of cocaine before he died, and the medical examiner stated that it was possible that Curtis injured his head after ingesting cocaine and falling into a door handle.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his convictions are not supported by sufficient evidence because there was no evidence from which a rational trier of fact could find that defendant assaulted Curtis. We disagree. In reviewing the sufficiency of the evidence to sustain a conviction, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007).

To be convicted of either assault with intent to commit extortion or felonious assault, one must commit an assault. See MCL 750.87; *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). An assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). A battery is an intentional, unconsented, and harmful or offensive touching of another person. *Id.*

Amanda testified that defendant, on his second trip to Curtis's apartment, hit Curtis with a silver "half-sized" baseball bat four to five times. According to Amanda, defendant hit Curtis "[e]verywhere," including the head. Amanda further testified that defendant, while hitting Curtis, demanded his money and threatened Curtis with physical injury or death if Curtis did not pay him his money. Tiffany also testified that defendant hit Curtis with a bat. The medical examiner testified that Curtis died of blunt force trauma to the head, an injury consistent with being hit by a baseball bat. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant assaulted Curtis. Defendant's convictions are supported by sufficient evidence.

III. OV 3

Defendant argues that the trial court erred in scoring 100 points for offense variable (OV) 3, MCL 777.33, because there was no evidence to support a finding that he killed Curtis. OV 3 was originally scored at 100 points. But, at the sentencing hearing, the prosecutor stated, "It's [defense counsel's] position that OV-3, which is scored 100 points, should score 10 points. I agree." The trial court then corrected the scoring of OV 3 to be 10 points. Accordingly, defendant's argument that 100 points were scored for OV 3 is not supported by the record.

VI. OTHER SENTENCING ISSUES

Defendant raises several other issues regarding his sentences. We review these unpreserved claims of sentencing error for plain error affecting defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

Defendant argues that he is entitled to be resentenced because the trial court sentenced him to the maximum sentences permitted by the habitual offender statute, MCL 769.11, without recognizing that it was not required to impose the allowed maximum sentences. MCL 769.11(1)(a) provides that "the court . . . may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law . . . ." The term "may" is permissive. *People v Brown*, 249 Mich App 382, 386; 642 NW2d 382 (2002). A trial court is presumed to know the law. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). Because nothing in the record indicates that the trial court was unaware of its discretion in setting the maximum sentences, we reject defendant's argument.

Defendant does not contest that his minimum sentence of nine years and six months for his conviction of assault with intent to commit extortion is within the recommended minimum sentence range. Because there was no error in the scoring of the guidelines,[1] we must affirm defendant's sentence unless the trial court relied upon inaccurate information, MCL 769.34; *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003), or committed an error of constitutional magnitude, *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006).

Defendant claims that the trial court did not sentence him on accurate information because, contrary to MCR 6.425(A)(5), the court failed to conduct an assessment of his rehabilitative potential through alcohol, drug, and psychiatric treatment. However, MCR 6.425(A)(5) only requires a probation officer to include in a presentence information report (PSIR) "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report[.]" A PSIR is presumed to be accurate, and the trial court may rely upon the report unless effectively challenged. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). The PSIR for defendant indicated that defendant had no history of mental health problems and that he occasionally used alcohol and drugs. Defendant has made no challenge to the accuracy of the statements in the PSIR. Accordingly, defendant has failed to establish that the trial court relied on inaccurate information in sentencing him.

Defendant claims that his sentence for assault with intent to commit extortion is disproportionate to the offense and the offender and, therefore, constitutes cruel and unusual punishment. "However, a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (internal citations omitted). Defendant offers no

[1] Defendant's claim that the trial court made factual findings in contravention of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is without merit. *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

argument to overcome the presumption of proportionality. There is no constitutional sentencing error. We affirm defendant's sentences.[2]

V. DEFENDANT'S STANDARD 4 BRIEF

In his standard 4 brief, defendant raises issues of ineffective assistance of counsel and prosecutorial misconduct regarding the absence of Bruce Hunter from trial. Hunter was the friend in Curtis's apartment when Amanda and Tiffany returned Curtis's cellular telephone.

A. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant claims that counsel was ineffective for failing to investigate Hunter and to call him as a witness at trial. According to defendant, Hunter would have testified that defendant, on his second visit to Curtis's apartment, did not have a bat and that Curtis was only punched one time by Farmer. Because no *Ginther*[3] hearing has been held on this claim, our review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

Effective assistance of counsel is presumed, and a defendant bears the heavy burden of proving otherwise. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Defendant attached an affidavit from Hunter to his standard 4 brief. However, the affidavit is not a part of the lower court record and, therefore, it may not be considered. *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). The references to Hunter in the lower court record are minimal. The prosecution listed Hunter as a res gestae witness on its witness list, and, at trial, Hunter was identified as the friend who was in Curtis's apartment. Detective Cory Luker testified that Hunter was interviewed during the investigation but that he "simply disappeared" and could not be found for defendant's trial. The lower record contains no indication of what Hunter saw at Curtis's apartment or that defense counsel failed to investigate Hunter. Accordingly, defendant has failed to establish that counsel's performance fell below an objective standard of reasonableness.

We do note that a summary of Hunter's statement to the police is contained in defendant's PSIR. According to the PSIR:

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[2] Because felonious assault is of a lesser crime class than assault with intent to commit extortion, MCL 777.16d, and because defendant received concurrent sentences, the sentencing guidelines do not apply to defendant's sentence for felonious assault. *People v Mack*, 265 Mich App 122, 127-130; 695 NW2d 342 (2005). Defendant makes no argument regarding his felonious assault sentence that is separate from his argument concerning his sentence for assault with intent to commit extortion; therefore, we do not address defendant's sentence for felonious assault.

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

> Hunter stated at approximately 7:30 a.m. that day, someone started knocking on the door and the victim didn't answer it. Whoever was knocking left and returned approximately 15 minutes later. The victim answered it and Hunter advised that he was in the living room and could not see who was at the door, but he heard the conversation and could hear a male subject asking for money owed to him. Hunter advised the subject left, however, a short time later, he heard the door open hard and heard a scuffle by the front door. Hunter advised this time he left the living room and entered the front door area to see the victim on the ground and two black males standing over him yelling at him about the money he owed them. Hunter further stated he saw a bat in the hand of one of the subjects who wore a white T-shirt. Hunter advised he got between this subject and the victim, who was still on the ground, and asked him not to hit him with the bat.

Hunter's statement to the police is inconsistent with his affidavit, in which he averred that Curtis was only punched one time in the head by Farmer, that defendant never had a bat, and that Curtis was never hit with a bat. Decisions regarding whether to call a witness at trial involve matters of trial strategy. *Seals*, 285 Mich App at 21. This Court will not second-guess counsel on matters of trial strategy, nor assess counsel's competence with the benefit of hindsight. *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (1999). Thus, even if Hunter could have been found for trial, given his statement to the police, defendant has failed to establish that counsel's decision not to call Hunter fell below objective standards of reasonableness.

B. PROSECUTORIAL MISCONDUCT

Defendant claims that the prosecutor committed misconduct when he failed to use the subpoena power to produce Hunter at trial. According to defendant, the prosecutor's failure to secure Hunter's presence violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). We review this unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

In *Brady*, 373 US at 87, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To establish a *Brady* violation, a defendant must show that (1) the prosecutor possessed evidence favorable to him, (2) he did not possess the evidence, and he could not have obtained the evidence with reasonable diligence, (3) the prosecution suppressed the favorable evidence, and (4) there is a reasonable probability that, had the evidence been disclosed, the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). Defendant does not claim that the prosecutor suppressed any evidence. Rather, he argues a *Brady* violation based on the prosecution's failure to secure Hunter's presence at trial. Defendant, however, cites no authority for the assertion that *Brady* requires the prosecution to secure a witness's presence at trial. Accordingly, defendant has abandoned his claim. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007).

Regardless, a prosecutor is not required to produce res gestae witnesses at trial. MCL 767.40a; *People v Kevorkian*, 248 Mich App 373, 441; 639 NW2d 291 (2001). A prosecutor is required to provide notice of res gestae witnesses and to give reasonable assistance in locating a

witness if a defendant requests assistance. *Kevorkian*, 248 Mich App 441-442. Defendant makes no assertion that he requested assistance from the prosecutor in locating Hunter for trial.

C. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Defendant argues that he was denied effective assistance of appellate counsel when appellate counsel failed to pursue claims of ineffective assistance of counsel regarding trial counsel's failure to investigate and call Hunter as a witness and to raise a *Brady* violation claim for the prosecutor's failure to produce Hunter at trial. We disagree.

The test for ineffective assistance of appellate counsel is the same test applicable to a claim of ineffective assistance of trial counsel. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). "Hence, defendant must show that his appellate counsel's decision not to raise a claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced his appeal." *Id.* We found no merit to defendant's claims, raised in his standard 4 brief, that trial counsel was ineffective for failing to investigate Hunter and calling him as a witness or that the prosecutor violated *Brady* when he failed to produce Hunter at trial. Because the claims have no merit, appellate counsel's failure to raise claims of ineffective assistance of trial counsel did not prejudice defendant's appeal. Defendant was not denied effective assistance of appellate counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering