STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 20, 2019
v	No. 344704 Wayne Circuit Court
MICHAEL KENT BROWN, Defendant-Appellant.	LC No. 17-002204-01-FH

Before: BECKERING, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 6 to 20 years' imprisonment. We affirm.

I. BACKGROUND

The victim in this matter, SD, was a neighbor of defendant. They became friends in the summer of 2016, but they never dated. They would occasionally hang out, and SD had once slept on the couch at defendant's apartment when the power was out at her house. They were together on the night of January 28, 2017, when defendant abruptly told SD that "now it [was] time to get naked." SD said no, and defendant proceeded to punch SD repeatedly in the face. She fell to the ground where defendant began to kick her. SD eventually managed to escape from defendant's apartment, and she ran to a nearby friend's house, leaving behind her keys, wallet, cell phone, and pepper spray. After someone called 911, and SD was taken to the hospital, she was diagnosed with fractures to her ribs, vertebrae, right orbital bone, and wrist. Some of those injuries had not healed by the time of defendant's trial.

Immediately after jury selection, defendant's appointed counsel advised the trial court that defendant was dissatisfied with his representation because counsel refused to call certain witnesses. The trial court refused to provide substitute counsel, stating that assigned counsel was experienced and competent, the request was untimely, and the disagreement was over strategy. At trial, defendant testified on his own behalf that SD had attacked him with a hammer during a disagreement. He claimed that he had punched SD in the face to force her to let go of the

hammer. Her other injuries were caused by accidental falls. The jury, however, convicted defendant of AWIGBH. The trial court later sentenced defendant to 6 to 20 years imprisonment, a sentence that was within the minimum sentencing guidelines range, despite a recommendation in the presentence investigation report (PSIR) of probation. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first contends that there was insufficient evidence to convict him of AWIGBH because the prosecution did not exclude the possibility that defendant acted in self-defense beyond a reasonable doubt. We disagree.

"A challenge to the sufficiency of the evidence in a jury trial is reviewed de novo, viewing the evidence in the light most favorable to the prosecution, to determine whether the trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Gaines*, 306 Mich App 289, 296; 856 NW2d 222 (2014). "All conflicts in the evidence must be resolved in favor of the prosecution, and circumstantial evidence and all reasonable inferences drawn therefrom can constitute satisfactory proof of the crime." *People v Solloway*, 316 Mich App 174, 180-181; 891 NW2d 255 (2016) (internal citation omitted). "A jury, and not an appellate court, observes the witnesses and listens to their testimony; therefore, an appellate court must not interfere with the jury's role in assessing the weight of the evidence and the credibility of the witnesses." *People v Mikulen*, 324 Mich App 14, 20; 919 NW2d 454 (2018).

The two elements of AWIGBH are "(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 Blevins*, 314 Mich App 339, 357; 886 NW2d 456 (2016), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (quotation marks omitted). Intent to do great bodily harm is defined as " 'an intent to do serious injury of an aggravated nature.' " *Blevins*, 314 Mich App at 357-358, quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). Minimal circumstantial evidence is necessary to establish a defendant's state of mind or intent, and intent can be inferred from the defendant's actions or from the injuries suffered by the victim. *People v Stevens*, 306 Mich App 620, 629; 858 NW2d 98 (2014).

MCL 780.972 provides that, in certain circumstances, a defendant has a right to take actions to protect himself or herself from force:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

> (b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.
>
> (2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual. [MCL 780.972(1) and (2).]

"Once a defendant raises the issue of self-defense and 'satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist,' the prosecution must 'exclude the possibility' of self-defense beyond a reasonable doubt." *Stevens*, 306 Mich App at 630, quoting *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010).

Although defendant does not dispute that there was sufficient evidence to convict him of AWIGBH, we first note that SD's testimony by itself was sufficient to establish that defendant assaulted her. SD testified that defendant punched her in the face and kicked her repeatedly once she fell to the ground. SD's extensive injuries support a conclusion that she was assaulted. SD also testified that she was afraid that defendant would kill her. That testimony is sufficient to establish that defendant threatened SD with force. *Blevins*, 314 Mich App at 357. Additionally, it can be inferred from the extent and nature of SD's injuries that defendant intended to do "serious injury of an aggravated nature." *Id*. at 357-358 (quotation marks and citation omitted); *Stevens*, 306 Mich App at 629. SD suffered extensive injuries to, among other areas, her ribs, vertebrae, right orbital bone, and wrist. As of trial, approximately six months after the assault, many of her injuries had not yet healed, and her wrist was permanently damaged. When viewing SD's testimony that defendant's actions caused those injuries in the light most favorable to the prosecution, it is clear that there was sufficient evidence to show that defendant intended to do great bodily harm. *Blevins*, 314 Mich App at 357.

Furthermore, SD's testimony and the 911 recordings are sufficient to establish beyond a reasonable doubt that defendant did not act in self-defense. SD testified that defendant attacked her unprovoked. She denied trying to hit defendant with a hammer and testified that defendant grabbed the hammer instead. SD's testimony establishes that she did not attack defendant prior to his assault, so defendant could not have been attempting to protect himself from any harm. When defendant called 911 to complain that SD was stealing from him, he did not mention that SD had attacked him. He also specifically stated that no weapon was present. A recording of the call was played for the jury, and SD could be heard moaning in the background that she wanted to go home, corroborating SD's version of events. That evidence was sufficient to defeat defendant's self-defense claim. The fact that defendant does not believe SD's testimony or provided conflicting testimony is immaterial; the jury determined that SD's testimony was more credible than defendant's, and this Court must not interfere with that determination. *Mikulen*, 325 Mich App at 20.

Therefore, there was sufficient evidence to convict defendant of AWIGBH, and the prosecution adequately excluded the possibility of self-defense beyond a reasonable doubt.

III. SUBSTITUTION OF COUNSEL

In his Standard 4 brief, defendant contends that the trial court abused its discretion in denying defendant's request for substitute counsel because it unreasonably disregarded defendant's contentions that his trial counsel failed to conduct pretrial investigations or present certain witnesses. We disagree.

A trial court's decision to deny substitution of counsel is reviewed for an abuse of discretion. *People v McFall*, 309 Mich App 377, 382; 873 NW2d 112 (2015). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011).

Although an indigent defendant is guaranteed the right to counsel, a defendant is not automatically guaranteed the attorney of his or her choice, and he or she is not entitled to replace appointed counsel merely upon request. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). "A defendant is only entitled to a substitution of appointed counsel when discharge of the first attorney is for good cause and does not disrupt the judicial process." *People v Buie*, 298 Mich App 50, 67; 825 NW2d 361 (2012), quoting *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979) (internal quotation marks omitted). Whether good cause exists is a fact-specific inquiry that depends on the facts of each case. *Buie*, 298 Mich App at 67.

"Good cause may exist when a legitimate difference of opinion develops between a defendant and his appointed counsel as to a fundamental trial tactic, when there is a destruction of communication and a breakdown in the attorney-client relationship, or when counsel shows a lack of diligence or interest." *McFall*, 309 Mich App at 383 (internal quotations and citations omitted). However, a defendant's general unhappiness with or lack of confidence in defense counsel's representation is insufficient to establish good cause by itself. *Strickland*, 293 Mich App at 398; *Traylor*, 245 Mich App at 463. Additionally, "disagreements over defense strategy, including what evidence to present and what arguments to make, are matters of trial strategy, and disagreements with regard to trial strategy or professional judgment do not warrant appointment of substitute counsel." *Strickland*, 293 Mich App at 398. Finally, a trial court generally does not abuse its discretion when it denies a request for substitution of counsel that was made for the first time on the day of trial because substitution of counsel at that point would unreasonably delay or disrupt the judicial process. *Id*. at 399.

The trial court did not abuse its discretion in denying defendant's request for substitution of counsel because defendant has not demonstrated good cause. Defendant argues that the attorney-client relationship broke down over "counsel's failure to conduct any pre-trial investigation, interview witnesses and prepare a sound trial strategy." Defendant mischaracterizes what occurred. The record establishes that counsel contacted one witness specified by defendant, a maintenance man, only to determine that the maintenance man would likely hurt defendant's case rather than help it. Although counsel did not explain why on the record, defendant testified that the maintenance man had told defendant that the police would arrest defendant because of SD's condition. It can reasonably be inferred that the maintenance

man's testimony would not have benefitted defendant's case, as counsel determined. In any event, this is a disagreement over professional judgment and trial strategy, not a legitimate claim that counsel did "nothing."

The record indicates that there may have been another witness defendant wished to have counsel call. Defendant has not clearly identified that person. The prosecutor apparently did know who the other witness was, and stated that the witness was neither an alibi witness nor an eyewitness, so she would object to the witness being called. Defendant also sought the admission of the 911 calls defendant made. It is readily apparent from the record that counsel attempted to obtain those calls, one of which was recovered, admitted, and in fact played for the jury. The record suggests that the other 911 call simply was not available. The record therefore establishes that, contrary to defendant's argument, counsel conducted pretrial investigations and made prudent strategic decisions based on those investigations. Defendant merely disagreed with counsel's decisions, which does not constitute "good cause." Furthermore, as the trial court noted, defendant could have requested substitute counsel at an earlier and less disruptive stage of the proceedings. Under the circumstances, the trial court did not abuse its discretion by refusing to appoint substitute counsel.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant further contends that he was denied effective assistance of counsel because counsel failed to investigate aspects of defendant's story, to present exculpatory evidence, and to put forth a sound trial strategy. We disagree.

"In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing." *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Defendant did not move for a new trial or an evidentiary hearing before the trial court, and this Court denied his motion to remand; therefore, "review is limited to errors apparent on the record." *People v Urban*, 321 Mich App 198, 206; 908 NW2d 564 (2017). We note, however, that after carefully reviewing the record, we remain unpersuaded that there would be any value in remanding for an evidentiary hearing, because it is clear from the record that counsel was not ineffective.

"Whether a defendant was deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Urban*, 321 Mich App at 206-207 (quotation marks and citations omitted). Defendant must demonstrate that "(1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *People v Putman*, 309 Mich App 240, 247-248; 870 NW2d 593 (2015) (quotation marks and citations omitted); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Trial counsel's decisions regarding what evidence to present or to emphasize, what witnesses to call, or what questions to ask are presumed to be matters of trial strategy. *Putman*, 309 Mich App at 248. "This 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." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (quotation marks omitted). A particular trial strategy does not rise to the level of ineffective assistance of counsel for the sole reason that it does not work. *People v Carll*, 322 Mich App 690, 702-703; 915 NW2d 387 (2018). A failure to call a particular witness or present certain evidence only rises to the level of ineffective assistance of counsel if it deprives the defendant of a "substantial defense," that is, a defense that may have reasonably made a difference in the outcome of trial. *People v Jackson*, 313 Mich App 409, 432; 884 NW2d 297 (2015). Likewise, a failure to investigate only constitutes ineffective assistance if the failure results in trial counsel's "ignorance of valuable evidence which would have substantially benefited the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990).

Defendant's contentions do not overcome the strong presumptions that his trial counsel's actions were sound trial strategy and that he received a substantial defense. As discussed above, defendant contends that counsel failed both to investigate his proposed witnesses and to request the 911 calls that defendant made. However, the record reflects that counsel interviewed the maintenance man that defendant wanted to testify, and he requested the 911 calls from the prosecution, which were played at trial. Thus, counsel appears to have performed the investigation that defendant claims counsel omitted. Defendant claims that counsel should have performed various other tasks, such as investigate why the police never responded to his 911 calls or interview other unidentified witnesses; defendant does not explain what beneficial evidence might have been discovered as a result. Defendant has therefore not adequately established the factual predicate for his claim, or, consequently, proven that counsel's alleged failure to investigate either was prejudicial to defendant or fell below an objective standard of reasonableness. *Jackson*, 313 Mich App at 432.

Defendant also contends that he was denied effective assistance of counsel by counsel's failure to call the maintenance man; a witness who defendant claims had potentially exculpatory evidence. However, the record reflects that counsel decided against calling the maintenance man to testify because counsel believed that the testimony would harm defendant's case more than help it. Merely alleging that the maintenance man had exculpatory evidence does not overcome the strong presumption that counsel's actions were sound trial strategy. Consequently, this Court cannot substitute its opinion for that of trial counsel. *Rockey*, 237 Mich App at 76-77. Furthermore, defendant does not explain what the maintenance man's testimony would have been, other than the maintenance man's statement to defendant that the police would arrest him because of SD's condition. That testimony seems more incriminating than exculpatory. Additionally, the prosecution indicated that it would object to calling the maintenance man as a witness, because he was neither an eyewitness nor an alibi witness, and defendant had not provided notice. This casts serious doubt on whether defendant would have succeeded if he had tried to call the maintenance man. Again, defendant has not provided factual support for his claim and therefore has not established that he was deprived of a substantial defense. *Jackson*, 313 Mich App at 432.

Finally, defendant contends that trial counsel was ineffective for failing to advance defendant's theory that he was a victim of SD's alleged efforts to steal defendant's identity. Counsel could reasonably have deemed defendant's theory to be an unsound trial strategy. The outcome of the trial depended heavily on the jury's assessment of credibility. SD suffered

extensive injuries, some of which defendant admitted he caused. To vigorously advance the theory that defendant was the real victim might have been viewed by the jury with sufficient hostility that it would have undermined defendant's credibility. Furthermore, defendant testified that he was a victim of identity theft and he provided a similar statement on the 911 call. Therefore, the jury was in fact apprised of defendant's theory. The facts and evidence indicate that defendant was not deprived of presenting his theory to the jury, and counsel's decision not to emphasize that theory heavily was reasonable. Defendant has not overcome the strong presumption that counsel's actions were sound trial strategy. The decision of what evidence to highlight is a matter of trial strategy, and this Court cannot substitute its judgment for that of trial counsel. Therefore, defendant was not deprived of the effective assistance of counsel.

V. SENTENCING

Finally, defendant contends that his sentence of 6 to 20 years violates the principals of proportionality, reasonableness, and the prohibition against cruel and unusual punishment because substantial evidence supported defendant's self-defense theory at trial. We disagree.

"There are no special steps that a defendant must take to preserve the question whether the sentence was proportional; a defendant properly presents the issue for appeal by providing this Court a copy of the presentence investigation report." *People v Walden*, 319 Mich App 344, 350; 901 NW2d 142 (2017). A copy of the PSIR was provided to this Court. However, to preserve an issue of unconstitutionally cruel or unusual sentences, defendant must have advanced "a claim below that his sentences were unconstitutionally cruel or unusual." *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). Defendant did not do so; therefore, that aspect of his sentencing challenge is unpreserved and reviewed for plain error. *Id*.

This Court reviews de novo any issue of statutory interpretation, including any issues involving the interpretation and application of the legislative sentencing guidelines. *People v Ambrose*, 317 Mich App 556, 560; 895 NW2d 198 (2016). We review whether a sentence is reasonable for an abuse of discretion. *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). The touchstone for reasonableness is whether the sentence is proportionate to the offense and offender, irrespective of whether the sentence is within the sentencing guidelines range. *People v Dixon-Bey*, 321 Mich App 490, 520-521; 909 NW2d 458 (2017). Nevertheless, this Court is only required to review sentences that depart from the recommended statutory guidelines range for reasonableness. *People v Lockridge*, 498 Mich 358, 365; 870 NW2d 502 (2015). "When a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016), citing MCL 769.34(10); see also *People v Jackson*, 320 Mich App 514, 527; 907 NW2d 865 (2017). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

Defendant's minimum sentencing guidelines range was 34 to 134 months, and defendant agreed on record that the scoring of his minimum sentencing guidelines range was correct.

Defendant's minimum sentence was six years (72 months), which was within the minimum sentencing guidelines range. Defendant does not argue that the trial court erroneously calculated his guidelines range, made any errors in scoring, or relied on inaccurate information in imposing its sentence. Our obligation to affirm does not apply to claims of constitutional error, but "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) (citations omitted). "In order to overcome the presumption that the sentence is proportionate, the defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *Bowling*, 299 Mich App at 558.

Defendant asserts that the trial court abused its discretion and lacked any justification for imposing a minimum sentence of six years, but he fails to explain why beyond vague references to "the quality of the evidence presented during his trial and his history," which includes a brain injury, and the fact that he will be in his fifties when he becomes eligible for parole. Defendant does not explain his reasoning, which may constitute abandonment of the issue. See *People v Smith*, 439 Mich 954, 954; 480 NW2d 908 (1992). In any event, "unusual circumstances" generally must be significantly more compelling than those defendant cites here. See *People v Davis*, 250 Mich App 357, 369-370; 649 NW2d 94 (2002) (strong family background, prior work history, no prior drug offenses, and remorse did not overcome presumption); *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995) (young age, lack of criminal record, and ill-devised crime did not constitute unusual circumstances); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994) (employment, absence of criminal history, and minimum culpability were not unusual circumstances that overcame the presumption).

Defendant finally relies on the fact that the PSIR originally recommended a sentence of three years of probation. However, that recommendation was based on an inaccurate sentencing guidelines range of 10 to 23 months, with credit for 148 days already served. The prosecutor pointed out at sentencing that the investigator did not have the benefit of the entirety of the evidence presented at trial. As discussed, defendant does not contend that the final guidelines range of 34 to 134 months, as amended and recalculated at sentencing, is incorrect or based on any inaccuracies. The trial court sentenced defendant within the guidelines range, and defendant has not explained how doing so was improper. Defendant's sentence does not constitute cruel or unusual punishment.

Affirmed.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Amy Ronayne Krause