

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 20, 2011

v

DUSTIN ALLEN BOYER,

Defendant-Appellant.

No. 299749
Emmet Circuit Court
LC No. 10-003255-FH

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of interfering with a crime report, MCL 750.483a(2)(b), and assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant to concurrent terms of four to 15 years in prison. We affirm.

Defendant, Roger Alward, Brian Haag, Edward Robinson, Eric Wilson, and Robert Dechape shared cell four at the Emmet County Jail. Alward and Haag argued, and Haag was removed from the cell. Thereafter, Alward wrote a kite to report two crimes that implicated Haag. Defendant repeatedly requested to see what Alward had written, but Alward refused to share the kite. Defendant and Alward began to argue, and the argument escalated into a fight.

At trial, Alward testified that defendant wanted to see what was written in the kite and when Alward did not allow defendant to see it, defendant attacked. Robinson testified that the kite caused the fight. Other testimony indicated that name calling between defendant and Alward caused the fight.

Defendant testified that he was only curious about the kite and the fight resulted from name calling, not the contents of the kite. Defendant testified that he feared Alward and fought in self-defense because he was afraid that Alward would escalate the argument and attack him.

First, defendant argues that the trial court erred in admitting various pieces of hearsay evidence. We disagree.

We review a trial court's decision to admit hearsay under a hearsay exception for an abuse of discretion. *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007). An abuse of discretion occurs when the result falls outside the range of principled outcomes. *People v*

Feezel, 486 Mich 184, 192; 783 NW2d 67 (2010). Erroneously admitted evidence requires reversal if the admission was prejudicial. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

Hearsay is generally inadmissible unless it falls under a hearsay exception. MRE 802; *Stamper*, 480 Mich at 4. Recorded recollection is an exception to the hearsay rule. MRE 803(5); *People v Dinardo*, 290 Mich App 280, 293; 801 NW2d 73 (2010). A document is admissible under MRE 803(5) if it meets three requirements:

(1) [t]he document must pertain to matters about which the declarant once had knowledge; (2) [t]he declarant must now have an insufficient recollection as to such matters; [and] (3) [t]he document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory. [*Dinardo*, 290 Mich App at 293, quoting *People v Daniels*, 192 Mich App 658, 667-668; 482 NW2d 176 (1992) (citation omitted).]

A recorded recollection may be read into evidence but the document itself cannot be admitted as an exhibit unless offered by the adverse party. MRE 803(5).

Defendant argues that the trial court erred in admitting notes taken by Deputy Matelski when he viewed the surveillance tape. We agree that the notes should not have been admitted as an exhibit, but the notes were admissible as a recorded recollection.

Matelski's notes of the surveillance tape were a recorded recollection. Matelski made the notes while he was watching the tape, and he testified that his memory of what occurred on the tape was not as detailed as were his notes. The notes met all the requirements to be a recorded recollection. *Dinardo*, 290 Mich App at 293. However, the notes should have been read into evidence and not admitted as an exhibit by the prosecutor. MRE 803(5).

Summaries of voluminous writings, recordings, or photographs that could not be examined conveniently in court may be admitted. MRE 1006. A summary must meet four requirements to be admissible: (1) the summary must be of voluminous writings, recordings, or photographs that could not be examined conveniently in court; (2) the writings, recordings, or photographs must be admissible evidence; (3) the originals or duplicates of the summarized material must be available for examination or copying by the other parties; (4) the summary must be accurate. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 99; 535 NW2d 529 (1995).

The notes should not have been admitted as an exhibit under MRE 803(5) and did not qualify as a summary under MRE 1006. The notes were not of voluminous recordings but rather were of one recording, and there was no inconvenience in showing the recording in court. Also, defense counsel disputed the accuracy of the notes.

The notes should not have been admitted as an exhibit, but any resulting error was harmless. *McLaughlin*, 258 Mich App at 650. The jury was still able to watch the video, and Matelski was properly permitted to read his notes into evidence. The jury's convictions were supported notwithstanding the admission of the notes.

Defendant also argues that the trial court erred in admitting some witnesses' written statements. We disagree.

Defendant successfully objected to the admission of two written statements. Then, while Robinson was testifying, the prosecutor introduced Robinson's first statement without objection from defense counsel. Failure to object to the admission of evidence waives the right to appellate review unless the admission results in manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Defendant has failed to show how admission of this statement resulted in manifest injustice. Defendant had the opportunity to cross-examine Robinson.

Defendant withdrew the objection to the other written statement and referred to the exhibit during cross-examination. Defendant waived the right to appellate review when defense counsel withdrew the objection and then referred to the exhibit during cross-examination of the witness. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Next, defendant next argues that he was deprived of the effective assistance of counsel. We disagree.

Whether a defendant has been deprived of the effective assistance of counsel is a question of fact and law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). The trial court must review the facts and decide whether those facts constitute a deprivation of effective assistance. The trial court's factual findings are reviewed for clear error, while constitutional questions are reviewed de novo. *Id.* Unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

The defendant has the burden of overcoming the presumption that counsel rendered effective assistance. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). When raising a claim of ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below professional norms, and (2) that but for counsel's ineffectiveness, the ultimate result would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). In addition, the defendant must show that the proceedings were fundamentally unfair or unreliable due to counsel's ineffectiveness. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Defense counsel has wide discretion in trial strategy, including whether to call or question witnesses and what evidence to present. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

First, defendant claims that counsel was ineffective for failing to move for a directed verdict. We disagree.

Defense counsel may move for a directed verdict once the prosecution rests, and the motion will be granted if the evidence is insufficient to support conviction. MCR 6.419(A); *People v Szalma*, 487 Mich 708, 720-721; 790 NW2d 662 (2010). The trial court must consider the evidence in a light most favorable to the prosecution when deciding if the evidence is sufficient. *Id.* at 721. Counsel does not render ineffective assistance by failing to bring a frivolous or meritless motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

The prosecution's theory was that defendant and Alward fought over Alward's kite and that defendant was trying to prevent Alward from turning in the kite. Robinson testified that the fight was over the kite and not phone cards defendant was attempting to obtain, and that name calling between defendant and Alward contributed to but was not the sole cause of the fight. Alward also testified that the kite resulted in the fight.

Sufficient evidence supported defendant's conviction, and a motion for directed verdict would have been denied. Defense counsel was not ineffective for failing to move for directed verdict. *Fike*, 228 Mich App at 182.

Next, defendant asserts that counsel was ineffective for failing to make a record of a key witness' invocation of the Fifth Amendment. Defendant contends that Alward was not present to testify and that outside the jury's presence, Alward's attorney stated that if Alward were to testify he would invoke the Fifth Amendment. Defendant is clearly mistaken as Alward did testify at trial.

Defendant also asserts that counsel erred by failing to request a jury instruction on the cognate lesser included offense of aggravated assault. We disagree.

Aggravated assault is a cognate lesser included offense of assault with intent to do great bodily harm. Requesting an instruction on a cognate lesser included offense is impermissible. *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 321 (2004). Defense counsel was not ineffective for failing to request a lesser included offense instruction. *Fike*, 228 Mich App at 182.

Finally, defendant argues that counsel rendered ineffective assistance by failing to introduce the first written statements of defendant's cellmates. We disagree.

Defendant fails to demonstrate that counsel's decision to not introduce the first statements was anything other than trial strategy. This Court will not second-guess counsel on matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Next, defendant argues that the trial court erred in scoring prior record variable ("PRV") 5, offense variable ("OV") 9, and OV 19. We disagree.

Defendant failed to object during sentencing to the scoring of the guidelines; thus, his claim is unpreserved. Unpreserved claims of sentencing error are reviewed for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003).

The trial court has discretion in determining the score for a particular variable, as long as there is evidence on the record to support the score. *People v James*, 267 Mich App 675, 678; 705 NW2d 724 (2005). An error in the scoring of the guidelines that increases the defendant's sentence is a plain error affecting substantial rights. *People v Brown*, 265 Mich App 60, 66-67; 692 NW2d 717 (2005), rev'd on other grounds 474 Mich 876; 704 NW2d 462 (2005). A scoring error that results in a different guidelines range generally requires resentencing. *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010).

Prior misdemeanor convictions or prior juvenile adjudications are scored under PRV 5. MCL 777.55(1). The scoring of ten points is appropriate when “[t]he offender has 3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications.” MCL 777.55(1)(c). Defendant claims that the presentence investigation report (PSIR) indicates that he had only one scoreable misdemeanor. However, the PSIR indicated that defendant had two convictions of possession of marijuana and one conviction of possession (schedule 5 and LSD) second or subsequent offense. The trial court did not err in scoring PRV 5 at ten points.

Next, defendant asserts that the trial court erred in scoring ten points for OV 9. Ten points should be scored when two to nine victims were placed in danger of physical injury or death. MCL 777.39(1)(c). The sentencing court is to count as a victim each person who is placed in danger of physical injury or death. *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004). Only the sentencing crime is to be considered when scoring any offense variable, unless the specific variable provides otherwise. *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009).

It is unclear why OV 9 was scored at ten points. Defendant does not dispute that there was at least one victim, Alward, but does not acknowledge that anyone else was in danger of physical injury or death. There was testimony that there were four other individuals present in the cell during the fight and testimony that inmate Dechape stepped in between defendant and Alward. It was possible that when Dechape stepped in between defendant and Alward that Dechape could have been drawn into the fight and injured. The trial court did not err in scoring OV 9 at ten points. *James*, 267 Mich App at 678.

The trial court did not err in scoring OV 9 at ten points for each sentencing offense. There were at least two victims, Alward and Dechape, in danger during the assault. The assault occurred while defendant was interfering with Alward’s reporting of a crime; thus, there were two victims in danger during both crimes.

A threat to the security of a penal institution or court is scored under OV 19. MCL 777.49(a) indicates that 25 points should be scored for OV 19 when the defendant’s conduct threatened the security of a penal institution or court. Sufficient evidence supported a score of 25 points for OV 19 for each conviction.

Defendant started a fight in a prison cell that contained four other inmates. The guards were diverted from other areas to respond to the disturbance created by defendant. When a fight occurs within a penal institution there is the risk of escalation, which threatens the stability of the correctional facility. Defendant’s fight clearly threatened the security of the penal institution. Again, the same facts that support both convictions support the scoring of 25 points for each conviction. The trial court did not err in scoring OV 19 at 25 points for each conviction.

Finally, defendant argues that his conviction of interfering with a crime report was against the great weight of the evidence. We disagree.

An unpreserved great weight claim is reviewed for plain error affecting the defendant’s substantial rights. *People v Cameron*, ___ Mich App ___; ___ NW2d ___ (Docket No. 293119, issued January 4, 2011, approved for publication February, 5, 2011, at 9:10 a.m.), slip op at 11.

To avoid forfeiture under plain error the defendant must show: (1) an error, (2) the error must be clear or obvious, (3) the error must have affected substantial rights, such as prejudicing the defendant, and (4) the error resulted in the conviction of an innocent person, or seriously affected the integrity of the justice system. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The jury determines the credibility of the witnesses. *People v Lacalamita*, 286 Mich App 467, 471; 780 NW2d 311 (2009). A new trial will not be granted merely because there was some conflicting testimony, even if the testimony was impeached to some extent. *Id.* at 470-471. Robinson and Alward both testified that the cause of the fight was Alward's kite. Some conflicting testimony indicated that name calling was also a cause of the fight. The jury was entitled to decide whose testimony it believed. There was sufficient evidence to support the jury's conclusion that the kite was the cause of the fight, and that defendant was trying to prevent Alward from reporting a crime. No plain error occurred.

Affirmed.

/s/ Mark J. Cavanagh

/s/ David H. Sawyer

/s/ Patrick M. Meter