

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JASON MATTHEW MEYER,

Defendant-Appellant.

UNPUBLISHED

November 10, 2011

No. 300025

Saginaw Circuit Court

LC No. 09-032554-FH,

09-032556-FH,

09-032557-FH,

09-032558-FH

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of domestic violence, MCL 750.81(2), two counts of resisting or obstructing a police officer, MCL 750.81d(1), two counts of malicious destruction of property under \$200, MCL 750.377a(1)(d), first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, and aggravated stalking, MCL 750.411i. The trial court sentenced defendant to 93 days' imprisonment for the domestic violence conviction, 1 year imprisonment for the resisting or obstructing a police officer convictions, 93 days' imprisonment for the malicious destruction of property convictions, 7 years and 3 months to 20 years' imprisonment for the first-degree home invasion conviction, 1 year and 6 months to 4 years' imprisonment for the felonious assault conviction, and 2 to 5 years' imprisonment for the aggravated stalking conviction. Because defendant's first-degree home invasion conviction is not against the great weight of the evidence, he was not denied the effective assistance of counsel, the trial court did not abuse its discretion by denying his request for self-representation, and his remaining arguments lack merit, we affirm.

Defendant first argues that his first-degree home invasion conviction is against the great weight of the evidence. We review for an abuse of discretion the denial of a motion for a new trial on the ground that the verdict contravenes the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A trial court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand."

McCray, 245 Mich App at 637. MCL 750.110a(2) sets forth the elements of first-degree home invasion:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

Defendant argues that he did not enter Lawanda Klonowski's home without permission because Alyssa Ashley, his former girlfriend, invited him there to retrieve some of his belongings. It is unclear from Ashley's testimony whether she invited defendant to the home. However, Bryan Anderson, Ashley's boyfriend at the time, testified that defendant entered the home without permission. Anderson and Ashley were in the home, packing for a trip that they were taking together. According to Anderson, defendant walked into the home without knocking or requesting entry. He was carrying a decorative shovel, which he swung at Anderson when Ashley ordered defendant to leave. Because the evidence shows that defendant entered the dwelling without permission, his first-degree home invasion conviction does not contravene the great weight of the evidence.

Next, defendant argues that the trial court erred when it instructed the jury on the elements of first-degree home invasion. A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions must include all elements of the charged offenses and any material defenses and theories supported by the evidence. *Id.* If the instructions, reviewed in their entirety, sufficiently protected the defendant's rights and fairly presented the issues to the jury, reversal is not required. *Id.*

When it instructed the jury on an element of first-degree home invasion, the trial court stated that the prosecutor must prove, "[t]hat when the defendant entered, was present in, or leaving the dwelling, either of the following circumstances existed: He was armed with a dangerous *represent*, and/or another person was lawfully present in the dwelling." (Emphasis added.) Because the instruction as stated in the record is nonsensical, it appears that a transcription error occurred in which the court reporter substituted the word "represent" for "weapon." Further, defense counsel's approval of the instructions waived any challenge on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). In any event, even if the trial court misspoke, reversal is not required because the instructions as a whole fairly presented the issues to be tried and sufficiently protected defendant's rights. *Dobek*, 274 Mich App at 82. The trial court correctly instructed the jury that it could convict defendant if it concluded that another person was lawfully present in the dwelling when defendant entered, and

the evidence showed that two people were lawfully in the home when defendant entered. Moreover, the trial court correctly instructed the jury on the same element in the context of the attempted first-degree home invasion charge against defendant.¹ Accordingly, defendant is entitled to no relief.

Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to object to the joinder of the charges against him. Because no evidentiary hearing was conducted in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). We review de novo the constitutional question whether a defendant was denied his Sixth Amendment right to counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This right encompasses the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance was prejudicial. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). An attorney's performance is deficient if it falls below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Further, counsel's performance is prejudicial if it is reasonably probable that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

The prosecutor charged defendant in five separate informations. The prosecutor argued that judicial economy would be served by joining the charges because they all involved defendant and Ashley and occurred over a 35-day period. Defense counsel agreed, stating, "I've reviewed this with my client, and we have no objection to that[.]" Defendant himself addressed the court immediately thereafter, raising other concerns, and did not disagree with his attorney's statement. Defendant cannot now claim that counsel was ineffective for agreeing to the joinder when he specifically sanctioned it. To the extent that defendant may have agreed to the joinder based on counsel's advice, he fails to show that he was denied the effective assistance of counsel.

Decisions regarding the joinder or severance of trials lie within the trial court's discretion. MCR 6.120(B); *People v Breidenbach*, 489 Mich 1, 14; 798 NW2d 738 (2011). MCR 6.120(B)(1) provides the circumstances in which charges against a single defendant may be joined:

Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

- (a) the same conduct or transaction, or
- (b) a series of connected acts, or

¹ The jury acquitted defendant of that offense.

(c) a series of acts constituting parts of a single scheme or plan.

Here, defendant was charged with 12 offenses² in five separate informations based on events that occurred during four incidents from November 1, 2008, through December 5, 2008. Different law enforcement officers were involved in each incident, and defendant's conduct involved two victims. However, where the offenses charged are so connected as to be substantially part of the same transaction or connected series of facts, the defendant is not prejudiced by the joinder. *People v Williams*, 483 Mich 226, 241; 769 NW2d 605 (2009).

All of the charges against defendant stemmed from his conduct toward Ashley at the end of their relationship. Although the four incidents occurred over 35 days at different locations and involved another man with whom Ashley had a relationship, for purposes of MCR 6.120(B)(1)(b) and (c), the charges were related as a series of connected acts that constituted parts of a single plan to harass and retaliate against Ashley. Because joinder was appropriate, trial counsel's failure to object to the prosecutor's motion for joinder did not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel does not render ineffective assistance by failing to make a meritless objection).

Next, defendant argues that the trial court erred by denying his motion for self-representation. We review for an abuse of discretion a trial court's decision whether to allow a defendant to represent himself. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003). Both the Sixth Amendment to the United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. Included in this right is the right of self-representation, and in Michigan, the right to represent oneself is explicitly recognized by our constitution and by statute. Const 1963, art 1, § 13; MCL 763.1. Before permitting a defendant to waive his right to counsel and represent himself, "a court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004).

Additionally, MCR 6.005(D) provides procedures concerning a defendant's waiver of his right to an attorney. MCR 6.005(D)(1) prohibits a court from granting a defendant's waiver request without first "advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation[.]" Trial courts must substantially comply with the substantive

² Although the prosecutor charged defendant with 12 offenses, the jury convicted him of only eight. The jury acquitted defendant of three offenses, and the trial court dismissed one of the charges during trial.

requirements set forth in MCR 6.005(D) and discussed in *Russell*³ to determine whether a defendant's waiver of counsel is valid. *Russell*, 471 Mich at 191-192.

Here, defendant filed a motion to represent himself, and his attorney filed a motion to withdraw. Although defendant acknowledged that he had filed a motion for self-representation, he nevertheless objected to his attorney's withdrawal, stating, "I just had him stand by my side, because, apparently, I need a – a lawyer by my side just for help" The trial court granted the motion to withdraw and indicated that it would appoint another attorney to represent defendant. The court further stated that because this attorney would be defendant's third attorney, the court would not be inclined to appoint another attorney in the future. Defendant responded, "That's fine with me. All I want is just some help."

At a subsequent pretrial hearing, defendant again asked to represent himself. Noting that defendant was on his third attorney, the trial court stated that it would allow defendant to represent himself "in concert" with his attorney. Thereafter, on the first day of trial, defendant's counsel stated that he favored adjourning trial and remanding the cases for a preliminary examination because he had recently been appointed and was "not as prepared as [he] would like to be." Defendant, however, stated that he wished to proceed with trial that day and trial commenced.

After trial, defendant asserted that the trial court erred by denying his request to represent himself. The trial court reminded defendant that he elected to proceed with trial even though his counsel stated that he was not prepared. Defendant agreed that he did not ask to represent himself at that time and never again raised the issue of self-representation despite his decision to proceed with the trial.

On this record, we conclude that defendant waived his right to self-representation by failing to assert this right at trial and instead electing to proceed with counsel. At a minimum, defendant's request was not unequivocal. *Russell*, 471 Mich at 190. Defendant seemingly retracted his request to represent himself when his second attorney withdrew, and the trial court permitted defendant to act as his own counsel in concert with an appointed attorney. At trial, however, defendant chose to proceed against his attorney's advice that he seek an adjournment and did not express a desire to represent himself at that time. In these circumstances, defendant's request was not unequivocal, and the trial court did not abuse its discretion by denying defendant's request for self-representation. Further, defendant is not entitled to a *Ginther*⁴ hearing based on his attorney's assertion that he was unprepared for trial. Defendant fails to indicate how his attorney's lack of preparation affected the trial such that counsel rendered ineffective assistance. A party "may not merely announce his position and leave it to this Court

³ The requirements discussed in *Russell* were originally set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976). See *Russell*, 471 Mich at 190.

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

to discover and rationalize the basis for his claims[.]” *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

Defendant next argues that his trial counsel provided ineffective assistance when he failed to object to false testimony. Specifically, defendant asserts that his attorney should have objected to Officer Jason Fromholz’s testimony that he believed that a firearm was recovered from defendant’s apartment sometime after the November 1, 2008, incident. Defendant argues that, contrary to the officer’s testimony, no firearm was recovered. Because no *Ginther* hearing was conducted, our review of this issue is limited to mistakes apparent on the record. *Davis*, 250 Mich App at 368.

Significantly, defendant’s counsel elicited the challenged testimony on cross-examination. A party cannot claim error based on a concern to which he contributes by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). In any event, defendant fails to establish prejudice because the jury acquitted him of felonious assault and possession of a firearm during the commission of a felony with respect to the November 1, 2008, incident. Because defense counsel’s failure to object to the testimony was not prejudicial, defendant’s ineffective assistance of counsel claim fails. *Taylor*, 275 Mich App at 186.

Finally, defendant argues that the trial court erred by failing to consider a downward departure from the sentencing guidelines. This Court reviews for an abuse of discretion a trial court’s sentencing decisions. *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). A court may depart from the minimum sentencing guidelines range if it has a substantial and compelling reason for the departure and states the reason on the record. MCL 769.34(3); *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). A substantial and compelling reason is an objective and verifiable reason that keenly or irresistibly grabs the court’s attention, exists only in exceptional cases, and is of considerable worth in determining the length of the sentence. *Babcock*, 469 Mich at 258. A sentence within the legislative sentencing guidelines is presumptively proportionate and valid. *People v Brown*, ___ Mich App ___ ; ___ NW2d ___ (2011) (Docket No. 297728, issued October 20, 2011).

Defendant argues that the trial court should have considered a downward departure based on his employment history, strong family support, and mental health and psychological problems, including attention deficit hyperactivity disorder. None of these reasons keenly or irresistibly grab our attention or exist only in exceptional cases. *Babcock*, 469 Mich at 258. Further, defendant fails to articulate how his guidelines sentence is disproportionate considering his aggressive and persistent conduct intended to harass and intimidate his ex-girlfriend and her new boyfriend. Because defendant’s reasons for departure are not substantial and compelling,

and he fails to establish that his minimum sentence is disproportionate, the trial court did not abuse its discretion by imposing a sentence within the sentencing guidelines range.

Affirmed.

/s/ William C. Whitbeck

/s/ Christopher M. Murray

/s/ Pat M. Donofrio