STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2013
v	No. 306391 Washtenaw Circuit Court
DAVID ANTHONY CAMERON, JR., Defendant-Appellant.	LC No. 11-000123-FH

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of possession of a firearm by a felon (felon in possession), MCL 750.224f, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 8 to 30 years' imprisonment for his felon in possession conviction, 10 years and six months to 30 years' imprisonment for his assault with intent to murder conviction, and two years' imprisonment for his felony-firearm conviction. For the reasons set forth in this opinion, we vacate defendant's conviction for assault with intent to commit murder and remand with instruction to substitute a conviction for assault with intent to do great bodily harm less than murder, MCL 750.84, and for resentencing on that conviction and on his felon in possession conviction. In all other respects, we affirm defendant's convictions and his felony-firearm sentence.

I. FACTS

Defendant's convictions arise out of an assault he committed against the victim, the manager of an apartment complex. Defendant entered the management office with a handgun and assaulted the victim by forcing her up against a wall and pressing the gun into the side of her face. With the gun pressed firmly into her cheek, defendant told the victim to "quit f------ with his people." Defendant was upset because the victim had sent eviction notices to some of his friends. Defendant told the victim that if he came back, he would kill her and her daughter. Defendant then "bashed" the victim's head into the wall and left the office. The victim passed out and woke up on the floor shortly thereafter. She suffered a concussion.

Although she later identified defendant as her attacker, the victim told a 9-1-1 operator and police officers that she did not know her assailant. Eventually, about two weeks after meeting with a composite sketch artist, the victim identified defendant in a police photograph

lineup. At trial, the victim testified that defendant was the man who attacked her and she explained that she initially declined to identify defendant because she was afraid of him. The victim stated that she decided to identify defendant during the photographic array because she was tired of living in fear.

Defendant was later arrested and police searched a home that he owned in Detroit. During the search, police officers discovered two handguns at the house that were admitted at trial. At trial, defendant denied that he owned the guns and denied involvement in the assault.

Defendant waived his right to a jury trial and the trial court convicted defendant as set forth above. Thereafter, defendant moved for a new trial or a *Ginther*[1] hearing and for resentencing. The trial court denied defendant's motion for a new trial or a *Ginther* hearing, granted his motion for resentencing with respect to the felon in possession conviction, then resentenced defendant to 8 to 30 years' imprisonment for that conviction.[2] This appeal ensued.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant contends that there was insufficient evidence to support his assault with intent to commit murder (AWIM) conviction. We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). In reviewing the sufficiency of the evidence, we "view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime." *People v Kissner*, 292 Mich App 526, 533-534; 808 NW2d 522 (2011).

"The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Ericksen*, 288 Mich App at 195-196 (quotation and citation omitted). The only element defendant challenges is whether he had the requisite intent to kill at the time he committed the assault. The requisite intent to kill for purposes of AWIM must be present at the time the defendant commits the assault. See *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005); see also *People v Hunter*, 141 Mich App 225, 234; 367 NW2d 70 (1985) (emphasis added) ("In order to be convicted of assault with intent to commit murder, it must be established beyond a reasonable doubt . . . that *at the time he committed the assault* the defendant intended to kill the complainant . . . .") (Emphasis added).

> The requisite intent may be gleaned from the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally

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

[2] Defendant was originally sentenced to 10 years' and six months to 30 years' imprisonment for his felon in possession conviction.

> adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*Brown*, 267 Mich App at 149 n 5 (quotations and citations omitted).]

In this case, the trial court found defendant guilty of AWIM and it articulated its findings on the record. The court reasoned that defendant committed an assault upon the victim where the evidence showed that defendant pushed the victim into a wall, pressed a gun to her cheek, and rammed the victim's head into a wall, causing a concussion, cuts, and a bloody nose. The court then concluded that the evidence showed defendant had the intent to kill the victim at the time he committed the assault. The court reasoned that defendant's threats to kill the victim and her daughter, and defendant's statements that the next visit would not be "friendly," showed:

> this isn't somebody that's just playing around, this isn't somebody that is merely threatening. This is more than just a mere threat. This is a threat that someone is actively in possession of a firearm, making a direct statement to them by the fact that the next visit will not be a friendly one.

The court concluded, "[t]he only way to logically interpret those statements in the context of all that was occurring within that small office that morning, is that the perpetrator did, in fact, intend to kill."

Having reviewed the record, we conclude that while the evidence showed that defendant assaulted and threatened the victim, it did not prove beyond a reasonable doubt that defendant intended to kill the victim *at the tim*e he committed the assault. Here, in her description of the attack, the victim testified, "[defendant] told me that had been a friendly visit and *the next time* wouldn't be so friendly. That he *would kill* myself and my daughter" (emphasis added). At the time defendant made the threat, the handgun was at his side while earlier it had been in the victim's face. Defendant proceeded to bash the victim's head into a wall, but he did not attempt to fire his weapon or inflict any other fatal injury on the victim. Viewing this evidence in a light most favorable to the prosecution, the evidence supports only that defendant threatened to kill the victim in the *future* if she did not stop evicting his friends. It did not show that defendant intended that his assault result in the victim's death. See *People v Hoffman*, 225 Mich App 103, 106; 570 NW2d 146 (1997) (quotation and citation omitted) ("Intent is the purpose to use a particular means to effect a result.").

The prosecution urges that because defendant bashed the victim's head into a wall, the requisite intent was established. However, to accept this proposition we would have to conclude that defendant slammed the victim's head into a wall with hopes that a fatal injury would result. While evidence that defendant bashed the victim's head into a wall shows that he clearly intended to inflict physical harm upon the victim, it does not support the trial court's finding that defendant specifically intended to inflict a fatal injury upon the victim. The victim testified that defendant pushed her face against a wall while holding a gun to her cheek. Defendant then pulled the victim's head back, threatened her, and then bashed the victim's head against the wall. The victim testified that her nose and forehead took most of the brunt of the hit. The record does not show how far the victim's head traveled, and it does not support the inference that defendant specifically intended to inflict a fatal injury. Instead, the record supports that defendant did not

intend to inflict a fatal injury. Defendant did not pull the trigger of the gun, see *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (finding sufficient intent to kill where the defendant pulled the trigger of the gun several times but no bullets fired), he did not take any other action to inflict a fatal injury, and he did not state that he was going to kill the victim at that moment. Rather, defendant told the victim that this was a "friendly" visit and that "next time" "wouldn't be so friendly," and his threats to kill the victim and her daughter were contingent on the victim's future course of action—i.e. whether she stopped "f------ with" defendant's friends. This evidence shows that defendant attempted to coerce the victim into doing something in the future—i.e. stop evicting his friends—and that inflicting physical harm upon the victim was done in furtherance of defendant's attempt to coerce her. However, it was not proof beyond a reasonable doubt that defendant intended to kill the victim at the time he committed the assault.

In sum, given the future and conditional nature of defendant's threat, and considering the means by which defendant inflicted the assault, we find that the prosecution failed to present sufficient evidence of defendant's intent to kill because it failed to prove beyond a reasonable doubt that defendant intended to kill the victim at the time he assaulted her. *Brown*, 267 Mich App at 147-148; *Hunter*, 141 Mich App at 234.

Having concluded that there was insufficient evidence to support defendant's AWIM conviction, we vacate defendant's conviction and sentence for that offense.[3] However, defendant is not entitled to a new trial; rather, we concur with the prosecutor's position stated in their brief on appeal that remand for entry of a conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, is appropriate.

"The elements of assault with intent to do great bodily harm less than murder 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*." *Brown*, 267 Mich App at 147 (quotation and footnote omitted). "Great bodily harm" is a "serious injury of an aggravated nature." *Id*. (Quotation and citation omitted). Assault with intent to do great bodily harm less than murder is a necessarily-included lesser offense of AWIM because all of the elements of the offense are subsumed in the greater offense of AWIM. *Id*. at 150 ("it is impossible to commit the offense of assault with intent to commit murder without first committing the offense of assault with intent to do great bodily harm less than murder"). This is because "[i]t defies common sense to suggest that a defendant could commit an assault with the intent to kill another person without also intentionally and knowingly inflicting great bodily harm." *Id*.

Our Supreme Court has explained that an appellate court may direct the trial court to enter a conviction on a necessarily-included lesser offense "'when a conviction for a greater offense is reversed on grounds that affect only the greater offense.'" *People v Bearss*, 463 Mich

[3] Given our finding that there was insufficient evidence to sustain defendant's AWIM conviction, we need not address defendant's argument in his Standard 4 brief that the trial court's finding regarding his intent to kill was against the great weight of the evidence.

623, 631; 625 NW2d 10 (2001), quoting *Rutledge v United States*, 517 US 292, 306; 116 S Ct 1241; 134 L Ed 2d 419 (1996). In this case, the trial court found that defendant assaulted the victim and physically injured her by "ramming" her face into a wall, causing a concussion, cuts, and a bloody nose. The court considered the threats defendant made "in the context of all that was occurring" and it concluded that defendant had the intent to kill the victim. While the evidence did not support the trial court's finding with respect to the intent to kill, the evidence supported the trial court's necessarily-included finding that defendant intended to inflict great bodily harm less than murder. As noted, defendant held the victim up against a wall and pushed a gun into her cheek. Defendant then pulled the victim's head back, threatened her, then "bashed" her head into the wall causing the victim to lose consciousness and suffer a concussion. When the victim fell to the floor, defendant walked away, leaving the victim lying on the floor unconscious. This evidence showed beyond a reasonable doubt that defendant assaulted the victim with intent to cause serious injury of an aggravated nature. *Brown*, 267 Mich App at 147.

In sum, because the offense of assault with intent to do great bodily harm less than murder is a necessarily-included lesser offense of AWIM, and because the only grounds for reversal is that defendant lacked the intent to kill, we remand with instruction to enter a conviction of assault with intent to do great bodily harm less than murder. See *id*. at 148 (noting that the two offenses "are distinguishable from each other by the intent required of the actor at the time of the assault;" and that intent to do great bodily harm less than murder, "is less than the specific intent to kill necessary to sustain a conviction of [AWIM]").

B. RIGHT TO A FAIR TRIAL

Defendant waived his right to a jury trial on April 6, 2011. On June 9, 2011, the trial court signed a search warrant permitting a search of defendant's home for, among other things, weapons. Attached to the search warrant was a ten-page affidavit from a detective describing the items sought in the search of defendant's home and other facts establishing probable cause to support issuance of the warrant. The affidavit noted that defendant was alleged to have been the perpetrator of the assault on the victim and it noted defendant's criminal history.

On the first day of trial, defense counsel noted that the trial court signed the search warrant and that the prejudicial information contained within the search warrant could have affected the trial court's ability to remain impartial in deciding the case. Defense counsel alleged that he received the warrant and affidavit five weeks before trial, but did not become aware of the potential issue concerning the trial court's ability to remain impartial until the night before. The trial court stated that it did not have any recollection of the specific information contained in the warrant and it concluded that there was no merit to the issue.

On appeal, defendant contends that the affidavit painted him as a violent drug trafficker and that the information should not have been before the trier of fact. Defendant argues that the affidavit and search warrant amounted to an "ex parte communication" between the trial court and the prosecution that served to deny him his right to a fair and impartial trial. Whether a defendant was denied his due process right to a fair trial presents a question of constitutional law that we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A criminal defendant is entitled to a fair and impartial trial. US Const Am VI; Const 1963, art 1 § 20; *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). "[A] trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption." *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009), rev'd on other grounds 485 Mich 986 (2009). "Absent actual personal bias or prejudice against either a party or the party's attorney, a judge will not be disqualified." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). In a bench trial, we presume that the trial court can ignore inadmissible evidence when rendering its decision. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001) (quotation omitted) ("A judge, unlike a juror, possesses an understanding of the law which allows him to . . . decide a case based solely on the evidence properly admitted at trial.")

Defendant was not denied a fair and impartial trial. Here, defendant effectively waived his right to a jury trial in accord with the requirements of MCR 6.402(B). Moreover, defendant was not denied the right to a fair and impartial trier of fact where, although the trial court viewed the search warrant and accompanying affidavit, defendant cannot overcome the presumption that the trial court was impartial. First, we presume that the trial court ignored the inadmissible evidence contained in the affidavit and decided the case solely on admissible evidence. *Id.* Second, before trial began, the trial court expressly stated that it had no recollection of the information contained in the affidavit. Further, in rendering its verdict, the trial court stated that it considered and reviewed "the exhibits, the arguments by counsel, [and] notes regarding testimony . . . ." Thus, the record reveals that the trial court only considered evidence that was properly admitted. Consequently, defendant fails to overcome the presumption that the trial court was impartial and he is not entitled to relief. See *Wade*, 283 Mich App at 470; *Taylor*, 245 Mich App at 305.

Defendant appears to contend that the prosecution's decision to bring the search warrant and affidavit before the trial court in this bench trial was part of a scheme or plan to expose the trial court to inadmissible evidence and thereby prejudice the trial court against defendant. However, defendant fails to cite any law or facts, beyond his bald assertions, in support of his claim and he has abandoned this aspect of his argument. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.")

C. WAIVER OF JURY TRIAL

Defendant next contends that his jury trial waiver was not knowing and voluntary and that the trial court should have *sua sponte* reaffirmed his jury trial waiver after defense counsel learned that the trial court issued the search warrant.

Generally, we review the validity of a jury waiver for clear error. *Taylor*, 245 Mich App at 305 n 2. However, because defendant failed to preserve this issue for review, he is only entitled to relief if he can demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The accused in a criminal prosecution has the constitutional right to a jury trial under both the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20. However, the accused may waive his right to a jury trial so long as the waiver is knowingly and voluntarily made. *People v Cook*, 285 Mich App 420, 422-423; 776 NW2d 164 (2009).

MCR 6.402(B) sets forth the following requirements to ensure that a jury trial waiver is knowing and voluntary:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Compliance with MCR 6.402(B) creates a presumption that a defendant's jury trial waiver is knowing and voluntary. *Cook*, 285 Mich App at 422-423.

In the case at bar, defendant waived his right to a jury trial after a lengthy colloquy with the trial court. During the colloquy, defendant, as is required by MCR 6.402(B), informed the trial court that he understood his right to a jury trial and that he knowingly and voluntarily relinquished that right. Defendant does not challenge this procedure; instead, he alleges that his jury trial waiver was rendered involuntary in light of the fact that the trial court reviewed the affidavit for the search warrant after defendant waived his right to a jury trial. Defendant contends that the trial court should have *sua sponte* given him the option to withdraw his waiver or should have given him the opportunity to reaffirm his waiver after defendant learned that the trial court reviewed the affidavit and granted the search warrant.

Defendant cannot establish plain error requiring reversal. Defendant first contends that his waiver became involuntary and that he would have sought to withdraw his waiver had he known the trial court was going to view the affidavit that accompanied the search warrant. However, there is no right to withdraw a valid jury waiver. *Cook*, 285 Mich App at 423. Rather, the trial court has discretion to decide whether to withdraw the waiver if the defendant moves to withdraw. *People v Wagner*, 114 Mich App 541, 558-559; 320 NW2d 251 (1982). Defendant contends that he would have withdrawn the waiver because the warrant and accompanying affidavit caused the trial court to harbor bias against him. This would not have been an appropriate reason for withdrawing the waiver because the trial court is presumptively capable of deciding a case solely on admissible evidence. See *Taylor*, 245 Mich App at 305. Moreover, defendant could have moved to withdraw his waiver on the first day of trial but he failed to do so. As such, it is disingenuous for him to argue that he would have moved to withdraw his waiver had he known the trial court was going to view the search warrant affidavit. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) (citation omitted) ("Counsel may not harbor error as an appellate parachute.")

Defendant argues that after he learned the trial court reviewed the affidavit and the search warrant, the trial court should have *sua sponte* given him the opportunity to withdraw his jury waiver or engaged in a colloquy with him to reaffirm his jury waiver. Defendant fails to cite any authority in support of his claim that the trial court had such a duty. Moreover, MCR 6.402 does

not require the trial court to ask a defendant if he or she still wishes to proceed with a bench trial whenever the circumstances in the case change. As such, defendant has failed to show plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

In sum, defendant was not denied a fair and impartial trial and his jury waiver was knowingly and voluntarily made.[4]

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several claims of ineffective assistance of counsel. Because the trial court denied defendant's motion for a *Ginther* hearing, our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *Id*. We review the trial court's findings of fact, if any, for clear error and questions of law de novo. *Id.*

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitution, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); citing *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id*. at 600. Trial counsel's performance is presumed effective, and in order to show that counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's conduct constituted reasonable trial strategy. *Id*.

i. Waiver of Jury Trial/Recusal of Trial Judge

Defendant contends that trial counsel was ineffective for failing to move to recuse the trial judge and in failing to move to withdraw the jury waiver after counsel learned that the trial judge granted the search warrant.

Defendant contends that he is entitled to relief under the test set forth in *Strickland*, 466 US at 692 or under *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Defendant has failed to show that his case falls into any of the three scenarios set forth in *Cronic* where prejudice is presumed and we do not find any of them to be present in the case at bar. Accordingly, we proceed to address defendant's claims under *Strickland*, 466 US at 692. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

[4] Defendant contends that he is entitled to remand for an evidentiary hearing with respect to the jury waiver issue. However, because defendant's substantive arguments lack merit, and because he has failed to demonstrate that a factual record is necessary to facilitate our review of the issues, remand for an evidentiary hearing is not warranted. See MCR 7.211(C)(1)(a)(ii).

Defendant cannot show that counsel was deficient in failing to seek recusal of the trial judge. As previously noted, defendant has failed to overcome the presumption that the trial court was impartial. *Wells*, 238 Mich App at 391. Therefore, any motion to recuse the trial judge would have been futile. See *Ericksen*, 288 Mich App at 201 ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.")

Next, defendant contends that counsel was ineffective for failing to move to withdraw the jury waiver. Defendant cannot overcome the presumption that counsel's performance amounted to sound trial strategy. Given the violent nature of defendant's assault and the close question regarding intent, it was not unreasonable strategy to avoid a jury trial. See *People v Davenport (After Remand)*, 286 Mich App 191, 197-198; 779 NW2d 257 (2009) (counsel's recommendation with respect to waiver of a jury trial is a matter of trial strategy); *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) ("We will not second-guess counsel on matters of trial strategy, nor we will assess counsel's competence with the benefit of hindsight.")

Defendant asserts that counsel was ineffective because he was unprepared to raise an issue regarding the trial court's impartiality. However, counsel raised the issue in the trial court on essentially the same grounds as defendant does now on appeal. As discussed, that argument is devoid of merit and defendant does not articulate what counsel should have done differently. Accordingly, defendant is not entitled to relief. See *Ericksen*, 288 Mich App at 201.

ii. Failure to Challenge Search Warrant

Defendant also alleges that counsel was ineffective for failing to challenge the search warrant that police effectuated on his home.

"A search warrant may only be issued upon a showing of probable cause." *People v Unger*, 278 Mich App 210, 244; 749 NW2d 272 (2008). "Probable cause to issue a search warrant exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the stated place." *Id.* In reviewing whether there was probable cause for the issuance of a search warrant, we ask only "whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).

Defendant cannot show that counsel was ineffective for failing to challenge the search warrant because any challenge would have lacked merit. The warrant indicated that defendant was involved in drug trafficking, that drug traffickers typically used guns and other weapons, that defendant attempted to hide his ownership of the home that was searched, and that police officers had not yet recovered the weapon used in the assault on the victim. In addition, defendant was arrested for the assault on the victim, police conducted surveillance on defendant's home, and the warrant stated that it was likely defendant kept weapons at his home. On this record, we find that the facts giving rise to the warrant were not stale and "a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Id.*; see also *People v McGhee*, 255 Mich App 623, 636; 662 NW2d 777 (2003) ("facts giving rise to a warrant are sufficiently fresh when it can be presumed that the items sought remain on the premises, or that the criminal activity is continuing at the time of the

warrant request"). As such, any challenge to the search warrant would have been futile and defendant is not entitled to relief. *Ericksen*, 288 Mich App at 201.

iii. Strategic Trial Decisions

Defendant next contends that counsel rendered ineffective assistance of counsel with respect to several strategic decisions. Defendant alleges that counsel was ineffective for failing to investigate the victim's background and for failing to investigate and interview potential witnesses, including the apartment building groundskeeper, maintenance man, and unidentified tenants. With regard to trial counsel's failure to investigate the victim, defendant contends that she was terminated from her employment and he alleges that counsel should have used this information to cross-examine and impeach her.

In general, decisions regarding whether to call or question witnesses involve matters of trial strategy that this Court will not second-guess on appeal. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, even assuming the victim was terminated from her employment before trial, and assuming counsel should have known of that fact, defendant fails to articulate how evidence of her termination would have made any difference at trial. Therefore, he cannot show that he was denied the effective assistance of counsel. *Carbin*, 463 Mich at 600.

Similarly, with respect to defendant's claim that counsel failed to investigate and interview witnesses, we note that while defendant identifies certain witnesses his counsel allegedly should have interviewed, he fails to allege, let alone offer proof of, what information would have been produced by these interviews. Therefore, he has failed to show that but for counsel's failure to interview and call the additional witnesses, the result of the proceeding would have been different. *Id*.

Defendant also contends that counsel should have impeached the victim's trial testimony concerning her description of the gun used by defendant with her testimony from the preliminary exam. This argument lacks merit. Contrary to defendant's assertions, the victim's description of the handgun was the same at the preliminary examination as it was at trial. Moreover, trial counsel's decisions regarding how and whether to impeach a witness is a matter of trial strategy that we will not second guess on appeal. *Rockey*, 237 Mich App at 76.

Defendant contends that counsel was deficient with respect to his handling of a recording of the victim's 9-1-1 telephone call that was admitted at trial. Defendant contends that counsel was deficient because he failed to first listen to the recording before it was admitted into evidence. Defendant argues that counsel should have objected to its admission because the recording contained inadmissible hearsay and was inadmissible under MRE 403.

Defendant is not entitled to relief because, even assuming that counsel acted deficiently in failing to review the recording before trial, defendant cannot show that the failure impacted the outcome of the proceeding. *Carbin*, 463 Mich at 600. Contrary to defendant's contention, the victim's statements during the telephone call were admissible under MRE 803(2), the excited utterance exception to the hearsay rule. Further, the recording was not more prejudicial than probative. While the sounds of the victim vomiting may have been unpleasant and could have been prejudicial to a jury, "[d]efendant elected a bench trial; hence it is unlikely that the trier of

fact considered the evidence for anything other than the purpose for which it was offered." *People v Bailey*, 175 Mich App 743, 746; 438 NW2d 344 (1989). In sum, counsel was not ineffective for failing to raise a hearsay objection or for failing to object under MRE 403.

Defendant claims counsel acted deficiently on several other occasions. Defendant contends that counsel failed to move to quash the AWIM charge, failed to conduct an "independent investigation," and failed to prepare defendant to testify at trial. Other than listing these claims in a single paragraph, defendant does not provide any meaningful analysis, citation to the record, or citation to legal authority in support of his argument. He has therefore abandoned them for appellate review. *Kevorkian*, 248 Mich App at 389. Nevertheless, we have reviewed defendant's arguments and conclude that they lack merit.

Next, in a Standard 4 brief, defendant contends that counsel was ineffective for failing to call an expert witness "in police identification procedures, police crime scene procedures, and forensic evidence collection and examination."

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Id*. (quotation omitted). Here, defendant has not shown that counsel's failure to call an expert witness deprived him of a substantial defense. Defendant notes that "there were several discrepancies" in the way the police conducted the photographic array, collected evidence from the crime scene, and "interrogated" witnesses. Defendant alleges that police "contaminated" the crime scene and failed to produce evidence such as fingerprints or DNA evidence. However, defendant merely speculates that an expert witness would have offered favorable testimony in this case regarding the alleged "discrepancies." Therefore, he cannot show that he was deprived of a substantial defense. *Id*. Moreover, even assuming an expert could have offered testimony regarding alleged discrepancies in the police investigation, defendant cannot show that such testimony would have impacted the outcome of the proceeding where a prosecutor "need not negate every reasonable theory consistent with innocence." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant contends that counsel failed to challenge the victim's identification of defendant as her assailant. A review of the record shows that counsel did challenge the victim's identification testimony. Specifically, counsel cross-examined the victim and repeatedly questioned her about her identification testimony. Defendant fails to articulate how counsel could have further challenged the victim's identification testimony and he has failed to show that counsel acted deficiently in cross-examining the victim. *Carbin*, 463 Mich at 600.

Defendant also claims that counsel was in some way deficient because neither he nor his counsel was present at the police photographic array. To the extent defendant contends that counsel should have objected to introduction of evidence of the photograph array on this basis, defendant's argument lacks merit.

A criminal defendant does not have a right to counsel at a pre-custodial photographic lineup unless "the circumstances underlying the investigation and the lineup are 'unusual.'" *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994), citing *People v Kurylczyk*,

443 Mich 289, 302; 505 NW2d 528 (1993). An "unusual" circumstance includes instances "where the witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant." *McKenzie*, 205 Mich App at 471. In this case, the photographic lineup took place before defendant was incarcerated and there were no "unusual" circumstances underlying the investigation and the lineup. In particular, the lineup was not conducted simply to build a case against defendant where the victim had not previously identified defendant as the perpetrator and where police included five other photographs in the lineup of persons whose features were similar to those portrayed in the composite sketch. As such, defendant was not entitled to counsel during the photographic array and counsel was not deficient for failing to object to admission of the lineup. *Ericksen*, 288 Mich App at 201.

Defendant also contends that the victim offered unreliable testimony and he argues that an expert "could have cast doubt" on her testimony. However, an expert may not offer testimony concerning the veracity of a victim because questions regarding witness credibility and the weight of the evidence are reserved for the trier of fact, in this case, the trial court. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Thus, counsel was not deficient in failing to obtain an expert witness for this purpose.

In sum, defendant has failed to show that any of his counsel's strategic trial decisions amounted to the ineffective assistance of counsel. *Carbin*, 463 Mich at 600. We note that with all of his claims of ineffective assistance of counsel, defendant requests an evidentiary hearing. However, given that defendant's arguments are without merit and because he fails to demonstrate that a factual record is necessary for our consideration of the issues, an evidentiary hearing is not warranted. See MCR 7.211(C)(1)(a)(ii); *Ginther*, 390 Mich at 444-445.

E. SENTENCING

Defendant contends that the trial court improperly departed from the sentencing guidelines with respect to his felon in possession conviction. Given that we vacate defendant's AWIM conviction and remand for entry of a conviction of assault with intent to do great bodily harm less than murder, defendant is entitled to resentencing for his felon in possession conviction. Assault with intent to do great bodily harm less than murder is a Class D offense, MCL 777.16d, and it is the highest class offense with respect to defendant's convictions. See MCL 777.16m (felon in possession is a Class E offense); *People v Jonigan*, 265 Mich App 463, 471-472; 696 NW2d 724 (2005) (felony-firearm is not scored under the guidelines). The trial court therefore must score the assault with intent to commit great bodily harm less than murder at resentencing. See *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005) (on sentencing for multiple concurrent convictions, scoring of the sentencing guidelines is appropriate for the highest class felony). Given that defendant's sentence on his Class D offense could impact the trial court's discretion regarding the proportionality of his sentence for the felon in possession conviction, resentencing on both convictions is appropriate.[5] See *id.* at 129 ("We

[5] Defendant contends that resentencing should be before a different judge. However, as discussed, defendant has failed to show any bias on behalf of the trial judge or any grounds that would warrant recusal. Accordingly, he is not entitled to resentencing before a different judge.

question (but do not expressly decide today) whether a sentence for a conviction of the lesser class felony that is not scored under the guidelines . . . could permissibly exceed the sentence imposed on the highest crime class felony and remain proportional.")

III. CONCLUSION

There was insufficient evidence to sustain defendant's conviction for assault with intent to murder and we vacate defendant's conviction and sentence with respect to that offense. On remand, we direct the trial court to enter a conviction of assault with intent to do great bodily harm less than murder. Defendant is entitled to resentencing on his convictions of assault with intent to do great bodily harm less than murder and felon in possession. In all other respects, we affirm defendant's convictions and his felony-firearm sentence.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens