STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2014
v	No. 310330 Wayne Circuit Court
NAKILA KANYATTA KING, Defendant-Appellant.	LC No. 11-012848-FH

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right her bench-trial conviction of second-degree murder, MCL 750.317, for which she was sentenced to 15 to 30 years in prison. We affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that her trial attorney was ineffective because counsel did not seek to admit expert testimony on the subject of battered-woman syndrome. Defendant also argues that trial counsel was ineffective for failing to introduce witness testimony that, she claims, would have bolstered her allegations that the victim abused her prior to the incident that resulted in the victim's death. Finally, defendant argues that trial counsel was ineffective for failing to introduce her medical records and not seeking a psychological evaluation for her. We disagree.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance fell below an objective standard of reasonableness in light of prevailing professional norms, and (2) that but for the attorney's deficient performance, a different outcome was reasonably probable. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "Under this test, counsel is presumed effective . . . ." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "A defendant pressing an ineffective assistance claim must overcome a strong presumption that counsel's tactics constituted sound trial strategy." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). A defendant must establish the factual predicate for his or her claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

In the present case, defendant offers no affidavits or other proof concerning how a potential expert witness would have testified. Instead, defendant only speculates regarding what a potential expert witness on the subject of battered-woman syndrome might have stated.

Because defendant offers no proof that an expert would have testified favorably if called by the defense, defendant has not established the factual predicate for her claim of ineffective assistance of counsel. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defendant has not shown that she received ineffective assistance of counsel because she cannot demonstrate that the result of the proceedings would have been different had an expert witness testified. See *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

In support of her argument, defendant cites authority holding that expert witness testimony regarding battered-woman syndrome is admissible for some purposes. See *People v Christel*, 449 Mich 578, 579-580; 537 NW2d 194 (1995); *People v Wilson*, 194 Mich App 599, 603-604; 487 NW2d 822 (1992). However, "'[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy,' which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), quoting *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The mere fact that trial counsel did not seek to admit all evidence that may have been admissible is insufficient to overcome the "strong presumption that counsel engaged in sound trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant's assertion that counsel was ineffective for failing to call character witnesses regarding the victim's reputation for violence is also without merit. Defendant asserts that additional character witnesses would have established reasonable doubt, but that trial counsel did not investigate the case thoroughly and these witnesses were never presented. "'[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004) (citation omitted). Trial counsel interviewed defendant prior to her trial, but defendant does not appear to have mentioned these witnesses to her attorney. Trial counsel can hardly be faulted for failing to call witnesses that he did not know existed, particularly when defendant had the opportunity to bring the witnesses to trial counsel's attention. In addition, counsel elicited testimony from defendant describing the specific instances of abuse she suffered at the victim's hands. The prosecutor did not refute this testimony. Even if trial counsel's investigation was less than complete, defendant has not shown that counsel's strategic choices were unreasonable. Trial counsel presented evidence on the subject through defendant's direct testimony, obviating the need for additional witnesses. Defendant is not entitled to relief on this issue.

In addition, defendant has not shown that calling these witnesses would have changed the outcome of the trial. "[T]he failure to present cumulative testimony can amount to ineffective assistance of counsel under some circumstances . . . ." *People v Carbin*, 463 Mich 590, 603; 623 NW2d 884 (2001). However, the failure to call supporting witnesses is not an inherent denial of effective assistance of counsel. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Defendant testified regarding the specific instances of abuse that occurred between defendant and the victim. The prosecutor did not refute defendant's testimony. The purported testimony of these witnesses would only have reiterated, in a very general sense, facts that defendant had already testified to with specificity. The trial court acknowledged defendant's testimony on the subject in its factual findings. Regardless, the trial court found that the facts did not support self-

defense or the lesser crime of voluntary manslaughter. Defendant has not demonstrated what additional value the testimony of these witnesses would have provided.

Defendant argues that trial counsel's failure to present an expert witness and character witnesses deprived her of the opportunity to raise the defense of self-defense. However, the record shows that trial counsel did pursue a self-defense theory. Counsel elicited testimony from defendant, wherein defendant testified that her actions were in response to the victim punching her in the face and knocking her to the ground. Counsel also elicited testimony regarding specific instances of abuse, the victim's temperament on the day of his death, and his drug use. Counsel went on to elicit testimony regarding the effect of those drugs on the victim's temperament. Defendant was given the opportunity to describe the abuse she suffered. In closing argument, trial counsel argued that defendant had acted in self-defense, pointing to the victim's past abuse of defendant, the victim's drug use, the potential effect of those drugs on his temperament, and his behavior on the day of the incident. On the facts before us, we cannot conclude that defendant was deprived of her defense of self-defense.

Defendant further argues that defense counsel should have moved for a psychological evaluation of defendant and should have investigated her medical records and recent adjustments of her medications. However, defendant does not discuss the issue further, providing no reason why defense counsel should have done so; nor does defendant explain how the outcome of the trial would have been different with this evidence. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his [or her] position.'" *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Defendant is not entitled to relief because she has not established that the outcome of her trial likely would have been different had the evidence been presented.

II. ALLEGED SENTENCING ERRORS

Defendant argues that she is entitled to resentencing because the trial court erroneously assessed 25 points rather than 10 points for offense variable (OV) 6, MCL 777.36. Defendant also argues that she is entitled to resentencing because the trial court relied on incorrect information when it sentenced her. Finally, defendant asserts that trial counsel was ineffective for failing to object to these alleged errors. We disagree.

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

The trial court may assess 25 points for OV 6 when "[t]he offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." MCL 777.36(1)(b). A score of 10 points is appropriate when "[t]he offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm . . . ." MCL 777.36(1)(c).

The trial court determined that defendant acted with the intent to do great bodily harm. Although the trial court recognized that there was an event that may have caused excitement, namely that the victim struck defendant in the right eye, the court found there "was sufficient enough time to mitigate the excitement." The trial court's findings are supported by eyewitness testimony that, after the point in time when defendant testified the victim struck her, defendant chased the victim with a knife around a table, making a number of stabbing motions towards the victim before backing him into another room and stabbing him in the chest. The trial court's finding that defendant acted with the intent to do great bodily harm is not clearly erroneous and is supported by a preponderance of the evidence. The trial court correctly assessed 25 points for OV 6. See MCL 777.36(1)(b).[1]

Defendant's arguments regarding other inaccurate information relied upon by the trial court lack merit. "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). At sentencing, the trial court stated, "you'd been gone three or four days; but you're at your mother's house, and [the victim] was abusive to you, but you leave your son there?" Later in the proceedings, the court stated, "[y]ou leave your son for four days with a man that you say is abusive to you? . . . Well, you shoulda' took [sic] your son." It is apparent that the trial court was critical of defendant because she left her son with an abusive man. But there is no evidence that the court based defendant's sentence on the precise number of days she was not home. Because the trial court did not rely on the specific number of days that defendant was absent, defendant's sentence must be upheld. MCL 769.34(10).

Similarly, the trial court did not rely upon a mistaken belief that defendant directed her son to dispose of the knife. After describing how defendant chased the victim with a knife and the amount of force required to stab a human being, the court stated:

> And then what did you do? You went across the street to go call for 911. And then you tell your son to go hide the—or, "I didn't mean it," or something with the knife, to get rid of it, because it's all about you. Throw him up under the bus. He don't [sic] matter. It's about me. I don't wanna [sic] go to prison. I'm sorry.
>
> Well, guess what? That's too bad.

Taking the court's comments into context, the court did not rely on a misunderstanding that defendant's son was told to dispose of the knife. The trial court began to state that defendant's son was told to hide the knife, but the court interrupted itself before completing the statement. The court made it clear that it was upset that defendant prioritized her needs and

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[1] Defendant's total OV score was 95 points. Therefore, even if the trial court had assessed 10 points instead of 25 points for OV 6, defendant's sentencing guidelines range would have remained unchanged. See MCL 777.61; see also *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

desires above those of her son. The court did not rely on a misunderstanding regarding disposal of the knife. Defendant is not entitled to relief because the trial court did not rely upon inaccurate information at sentencing. MCL 769.34(10).

Nor was counsel ineffective for failing to object to the aforementioned alleged errors at the time of sentencing. "[C]ounsel does not render ineffective assistance by failing to raise futile objections." *Ackerman*, 257 Mich App at 455.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly