S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAAL SHAHEED HUNT,

Defendant-Appellant.

UNPUBLISHED
December 16, 2004

No. 252178
Jackson Circuit Court
LC No. 03-000659-FC

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to 47 to 120 months in prison. We affirm.

The assault in this case occurred outside a club around closing time. Approximately one-hundred people were loitering in the parking lot when the victim, Leonard Jeffries, was assaulted by defendant and co-defendant Anthony Neal; co-defendant Ricky Dempsey was acquitted. Although Jeffries had no recollection of the assault, his physician testified that he sustained multiple wounds to his head and face, and remained unconscious for several days following the incident.

Corey Hall testified that when he looked outside the club, he saw a large crowd surrounding Jeffries, who was laying on the ground: defendant was jumping on him and co-defendant Neal was kicking him. When Hall approached the scene and told defendant and co-defendant Neal to stop, they walked away. Cassandra Claybrook (legally LaShawna Denard) testified that she saw defendant ("Flea") and co-defendant Neal ("A.D.") kicking Jeffries. Nisha Glaspie testified that she saw Jeffries laying on the ground, and that defendant, co-defendant Neal, and co-defendant Dempsey kicked him in the head approximately thirty times.

Defendant first argues that he was denied the effective assistance of counsel where his defense attorney failed to present expert testimony concerning the unreliability of eyewitness testimony, to undermine the eyewitness' identification of him. We disagree. Because defendant

failed to move for a *Ginther*[1] hearing or a new trial on the basis of ineffective assistance of counsel, our review of this issue is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

"To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms." *Id*. at 714. "Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable." *Id*. Additionally, "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

Initially, we note that defense counsel's determination whether to present an expert witness "is presumed to be a strategic one for which this Court will not substitute its judgment." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). A review of the record reveals that rather than call an expert witness to testify, defense counsel attempted to undermine the credibility of the eyewitness identifications of defendant by pursuing several lines of questioning during cross-examination, including the following: attacking Hall's memory regarding what defendant was wearing; eliciting testimony that Hall's memory had faded since the incident; attempting to impeach Hall with preliminary examination testimony that he had only identified co-defendant Neal; inquiring about Hall and Glaspie's ability to see defendant when there was only one light on the outside of the building; eliciting testimony that Claybrook initially refused to talk to the police, and that it was only after a drug raid of her home that she talked to them, because she was afraid that she might go to jail and have her children taken away; attempting to elicit testimony that Claybrook only made a positive in-court identification because of threats or promises made by a detective; eliciting testimony that Claybrook and Glaspie had consumed alcohol and drugs on the evening of the incident, and that their perception of the incident was skewed; and inquiring about Glaspie's ability to perceive the incident because of the distance at which she observed the altercation.

We find that defense counsel acted reasonably when he extensively cross-examined Hall, Claybrook, and Glaspie regarding the relevant circumstances surrounding their identifications, and that defendant has not overcome the strong presumption that counsel employed a sound trial strategy to forego "perhaps lengthy expert testimony that [the jury] may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

Defendant next argues that the trial court erred in scoring fifty points for offense variable 7 (OV-7) when calculating the legislative sentencing guidelines for assault with intent to do great bodily harm less than murder. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score," *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and "[s]coring decisions for which there is any evidence in support will be upheld." *People v Elliot*, 215 Mich App 259, 260;

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

544 NW2d 748 (1996). "This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000); MCL 769.34(10).

We find that the trial court did not abuse its discretion in scoring fifty points for OV-7, where there was evidence to support a finding of aggravated physical abuse. MCL 777.37(1)(a) provides that fifty points should be scored for OV-7 if "a victim was treated with sadism, torture, or excessive brutality, or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(3) defines sadism as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." Here, the evidence adduced at trial supported the trial court's determination that fifty points was warranted for OV-7 where the victim was "stomped and kicked and jumped on . . . until he [wa]s unconscious." Accordingly, defendant was properly scored fifty points for OV-7, and his minimum sentence of 47 months fell within the minimum sentence guidelines range of 19 to 47 months for a second-offense habitual offender.

Finally, defendant argues that he is entitled to be resentenced because the facts supporting his sentence were not admitted by him or found by a jury beyond a reasonable doubt under *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has stated that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Therefore, defendant's argument is without merit.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio