

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
July 17, 2012

v

WILLIAM SHANTE JENKINS,  
Defendant-Appellant.

No. 303917; 304204  
Wayne Circuit Court  
LC No. 10-010643-FC

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

PER CURIAM.

Following a bench trial, defendant was convicted as an aider and abettor of torture, MCL 750.85, and unlawful imprisonment, MCL 750.349b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent sentences of 20 to 60 years' imprisonment for each conviction. Defendant appeals as of right. We affirm.

Defendant was part of a group of three men who held and injured Bernard Pogue in a house in Detroit. The other two men in the group were Robert Giles and a man known as "Snoop." On an August evening in 2010, Pogue obtained \$100 worth of crack cocaine from Giles on credit, telling Giles that he would stay at the house until midnight and would then go with Giles to withdraw money from an ATM to pay for the crack. Apparently, Pogue's wages were to be available by direct deposit as of midnight. At midnight, the three men drove with Pogue to an ATM, but Pogue's funds were not available. They tried again 40 minutes later but Pogue was still unable to withdraw funds. The men took Pogue back to Giles's house, where they beat him repeatedly, kept him in a gated room, and poured a pot of scalding hot water and grease on him. In addition, Giles's mother, Jackie, hit Pogue in the head with a skillet when he tried to escape.

Defendant first argues on appeal that he was denied the effective assistance of counsel because his attorney failed to properly impeach Pogue's testimony, which varied notably from the testimony Pogue gave at the preliminary examination. We disagree.

An ineffective assistance of counsel claim is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* A trial court's findings of fact are reviewed under a clearly erroneous standard. *Id.*, citing MCR 2.613(C); MCR 7.211(A)(3)(a).

Constitutional law questions are reviewed de novo. *Id.* Because defendant did not present this issue in the trial court, this Court's review is "limited to mistakes apparent on the record." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

To prove ineffective assistance of counsel, a defendant must show counsel's performance was deficient and that the deficiency resulted in prejudice to the defendant. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v Gardner*, 482 Mich 41, 50 n 11; 753 NW2d 78 (2008), citing *Strickland*, 466 US at 688. To show prejudice, defendant must demonstrate a reasonable probability of a different outcome were it not for counsel's deficiency. *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004), citing *Strickland*, 466 US at 694.

Defense counsel's cross-examination of Pogue was somewhat convoluted. Pogue had gone to Giles's house on two consecutive days, and some of counsel's questions were unclear as to which day was at issue. Counsel also had difficulty with the impeachment process. However, on each of these occasions, counsel attempted to correct her mistakes and elicit proper testimony. Additionally, the trial judge asked questions directly of Pogue to clarify the testimony. The judge's involvement in the questioning allowed the judge to clarify the evidence despite the sometimes confusing testimony. "A judge, unlike a juror, possesses an understanding of the law which allows [her] to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001), quoting *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

In essence, defendant bases his ineffective assistance of counsel claim on the underlying inconsistencies between Pogue's preliminary examination testimony and his trial testimony, asserting that, were it not for counsel's inadequacy, Pogue's testimony would have been so thoroughly impeached that it could not have formed the basis for defendant's convictions. While a comparison of the two transcripts reveals inconsistencies which have some bearing on Pogue's credibility, the inconsistencies do not support defendant's actual innocence. Additionally, the inconsistencies would not have rendered Pogue's testimony so worthless that the outcome of defendant's trial would have been different. Moreover, defense counsel did draw out some of the inconsistencies when cross-examining Pogue.

In addition, the trial court determined that defendant's testimony was inherently incredible. In light of the inconsistencies defense counsel was able to identify in Pogue's testimony and the trial court's finding that defendant's testimony was inherently incredible, defendant has not shown that there was a reasonable probability of a different outcome had it not been for counsel's arguably deficient performance.

Defendant next argues that he was convicted against the great weight of the evidence. We disagree. A new trial may be granted to a defendant when his verdict is "against the great weight of the evidence or contrary to law." MCR 2.611(A)(1)(e). A new trial is warranted only if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009), citing *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

Reconciling the testimony and determining the credibility of witnesses are generally tasks left to the finder of fact and, alone, are insufficient grounds for granting a new trial. See *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Examples of the rare times when granting a new trial is appropriate are when testimony that has clearly been credited when reaching the verdict is inherently implausible, patently contradicts the reality of the physical evidence, or is seriously impeached. See *id.* at 643-644.

The weight of the evidence supported defendant's convictions. Michigan's unlawful imprisonment statute, MCL 750.349b, provides, in relevant part:

- (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
  - (a) The person is restrained by means of a weapon or dangerous instrument.
  - (b) The restrained person was secretly confined.
  - (c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

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- (3) As used in this section:
  - (a) "Restrain" means to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.
  - (b) "Secretly confined" means either of the following:
    - (i) To keep the confinement of the restrained person a secret.
    - (ii) To keep the location of the restrained person a secret.

In *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994), our Supreme Court explained that the essence of "secret confinement" is "deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." Although *Jaffray* interpreted secret confinement under Michigan's kidnapping statute, this Court has applied the definition to unlawful imprisonment. See *People v Railer*, 288 Mich App 213, 218; 792 NW2d 776 (2010). A defendant may be convicted of unlawful imprisonment even if the victim had the opportunity to escape but did not attempt to do so for fear of reprisal. See *id.* at 218.

Michigan's torture statute, MCL 750.85, provides, in relevant part:

(1) A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.

(2) As used in this section:

(a) “Cruel” means brutal, inhuman, sadistic, or that which torments.

(b) “Custody or physical control” means the forcible restriction of a person’s movements or forcible confinement of the person so as to interfere with that person’s liberty, without that person’s consent or without lawful authority.

(c) “Great bodily injury” means either of the following:

(i) Serious impairment of a body function as that term is defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c.

(ii) One or more of the following conditions: internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds.

Intent may be inferred from any facts in evidence, including the nature of the wounds inflicted. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

Defendant was convicted under an aiding and abetting theory on both counts. To convict under an aiding and abetting theory, the prosecution must show:

“(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.” [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006), quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004).

The phrase ‘aids or abets’ is used to describe assistance given to the perpetrator of a crime by words or deeds that may encourage, support, or incite the commission of that crime. *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974).

Defendant’s primary argument is that the inconsistency of Pogue’s testimony rendered it worthless for the purpose of proving defendant’s guilt. The implication is that the trial court should have weighed more heavily defendant’s testimony that he never touched Pogue except for a brief tussle in the kitchen which Pogue initiated, that he was out of the house for much of the night, that he never prevented Pogue from leaving the house, and that Pogue remained there voluntarily. However, as noted, the trial court found defendant’s testimony inherently incredible. The credibility and weight of the evidence are issues for the trier of fact, and this Court will not disturb factual findings unless they are clearly erroneous. See *Lemmon*, 456 Mich at 642-643.

No such finding is warranted here. Pogue's testimony was not inherently implausible, contradictory to physical reality, or impeached to the point of worthlessness. See *id.*

In light of the weight the trial court gave Pogue's testimony, the evidence did not clearly preponderate against a finding that defendant aided and abetted unlawful imprisonment and torture. Pogue testified that defendant accompanied him, Giles, and Snoop to the ATM machine to collect the \$100 Pogue owed them for crack, and that after finding Pogue had insufficient funds, all three men took him back to the house, where defendant took part in the beating that occurred in the basement. Pogue testified defendant personally struck his hands with a two-by-four. Pogue also testified that, after Giles took him to the gated room upstairs, defendant, Giles, and Snoop all continued to beat him. Pogue said defendant opened the gate for Giles to bring through the pot of scalding-hot water and grease, which Giles threw on defendant. According to Pogue, defendant tussled with Pogue in the kitchen to prevent him from escaping, until Jackie hit Pogue on the head with a skillet.

The evidence shows Giles, Snoop, and defendant knowingly restrained Pogue, intentionally keeping him in the house until they could be paid for the crack Pogue had smoked. The two-by-four, the scalding water, and the skillet were all dangerous weapons or instruments used to confine Pogue, either through use or threat of use. Additionally, Pogue was secretly confined for the purpose of the unlawful imprisonment statute. Knowing restraint of a person under each of these circumstances independently supports a conviction for unlawful imprisonment. The evidence does not clearly preponderate against a finding that defendant aided and abetted unlawful imprisonment.

The evidence also shows that Giles, Snoop, and defendant intended to cause Pogue cruel or extreme physical pain and suffering. The blows Snoop and defendant struck to Pogue with the two-by-four were deliberate, methodical, and resulted in serious injuries to Pogue's head and hands. In addition, the scalding water yielded severe burns. The men also repeatedly beat Pogue for extended periods, both before and after his burns were inflicted. A jury could easily infer the intent to cause cruel or extreme pain and suffering from these acts. The men also actually inflicted great bodily injury on Pogue through these acts. Pogue required skin grafts and weeks of hospitalization to treat his burns. Serious burns and scalding are within the definition of great bodily injury under MCL 750.85(2)(c)(ii). Finally, the last element of torture was met because Pogue was within the custody or physical control of the men. The evidence does not clearly preponderate against a finding that defendant aided and abetted torture.

Defendant also challenges his sentence. He argues that the trial court improperly scored offense variable (OV) 3 and OV 8 for the purpose of sentencing. We disagree.

Application and interpretation of the sentencing guidelines is reviewed by this court de novo. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). With respect to scoring under each variable of the guidelines, "[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). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 3 deals with physical injury to a victim and provides that 25 points should be scored on this variable if a victim receives a “[l]ife threatening or permanent incapacitating injury.” MCL 777.33(1)(c). Ten points are scored if a victim’s bodily injury requires medical treatment but is not life-threatening or permanently incapacitating. MCL 777.33(1)(d). Medical testimony is not required to establish that an injury is permanent or life-threatening. See *People v McCuller*, 479 Mich 672, 697 n 19; 739 NW2d 563 (2007).

Pogue suffered severe burns on his body from his chest to his knees. He was hospitalized for six weeks and required skin grafts. He also received staples in his head to close up the wound made by the skillet. From the nature of the injuries and the treatment required, it could be inferred that Pogue’s injuries were life-threatening, especially if he had not received extensive medical care. Accordingly, defendant’s score of 25 points under OV 3 will be upheld.

OV 8 addresses asportation or captivity of a victim and provides that 15 points should be scored if “[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.” MCL 777.38. The prosecutor need not prove forcible asportation. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

Giles, Snoop, and defendant took Pogue from the house to the ATM. Although the ATM was not necessarily a place of greater danger than the house, the men then took Pogue back to the house, where they proceeded to sequester him first in the basement and then, later, in an upstairs room of the house which was gated and had bars on the windows. Defendant also later assisted in taking Pogue back to the gated room after he had attempted to escape through the kitchen. These subsequent locations were more dangerous because of the reduced possibility of escape or opportunity to be seen by anyone who might have been able to assist Pogue. This evidence supports the trial court’s score of 15 points for defendant under OV 8.

Affirmed.

/s/ Peter D. O’Connell  
/s/ Kathleen Jansen  
/s/ Michael J. Riordan