STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2013
v	No. 309477 Muskegon Circuit Court
DANDREE BLACK, Defendant-Appellant.	LC No. 11-060803-FH

Before: BORRELLO, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder. MCL 750.84. He appeals as of right. We affirm.

On July 3, 2011, defendant and his brother, Robert Bateman, had an altercation at Bateman's apartment, located at 535 West Webster Avenue in Muskegon. There was conflicting testimony whether defendant and Pamela Gathers, Bateman's friend or fiancée, lived in the apartment as well. Defendant, Gathers, and Bateman were at the apartment that day and defendant and Bateman were drinking. Defendant left the apartment for about 10 to 15 minutes and Bateman locked the door behind him. When defendant returned, he forcibly broke in the door. Bateman could not recall exactly what occurred, but at some point he had a knife and thought he threatened defendant with it. Bateman also recalled defendant came at him with a crowbar in his hands. Gathers' preliminary examination was read into the record at trial and she testified that first defendant and Bateman had a fist fight, then defendant left the apartment. When he returned, he had a crowbar and hit Bateman in the face and head a couple times. Gathers testified that Bateman did not have a knife or other weapon. Bateman was in the hospital for six days and was in a coma for four days. Bateman had many injuries in the face and head area, including fractures and bleeding on the brain.

Phillip Ashendorf lived in an apartment in the same house as Bateman and testified that on July 3, 2011, defendant stopped at his apartment and asked to borrow his crowbar. Defendant took the crowbar and returned it about two to three minutes later. Defendant told Ashendorf to not tell anyone and to hide the crowbar. Defendant "acted funny" and was in a hurry.

When officers responded to the scene, they found the door to Bateman's apartment broken in, blood in the kitchen, a knife on the kitchen floor, and Bateman bleeding heavily from

his head. Bateman lost consciousness in the ambulance as he was being transported to the hospital.

Gathers spoke with Officer Justin Sunday at the scene and he put out the description of the person who assaulted Bateman. Officer Chad Van Dam found defendant, who matched the description of the suspect. Officer Van Dam approached defendant, who indicated he knew why the officer wanted to talk with him. Defendant then spontaneously indicated he had an argument with Bateman. Defendant then provided different versions of what happened. Defendant had no apparent injuries except an old scratch on his arm. He did not mention a knife or crowbar. Officer Van Dam subsequently transported defendant back to the scene, where he told Officer Sunday that Bateman did not have a weapon during the fight and defendant did not have a crowbar. Defendant instead claimed that Bateman punched Gathers in the face four or five times. Gathers denied being assaulted and there were no indications she had been punched in the face.

At trial, defendant testified that he was not drinking, but Bateman was. They went together to get cigarettes for Gathers' grandmother and became separated. Defendant returned to the apartment alone and on his way, borrowed the crowbar from Ashendorf to work on his bike. He took the crowbar to the apartment, and only Gathers was home. Ten minutes later, Bateman returned to the apartment and kicked the door in. He was mad and accused defendant and Gathers of having an affair. Gathers and Bateman got in a fight and Bateman hit Gathers on the top and side of her head with his open hand. Bateman threatened to throw Gathers out a window. Defendant told Bateman to stop, and Bateman turned on defendant. Bateman hit defendant all over his body and defendant tried to protect himself. Bateman then got a knife and came at defendant, who grabbed the crowbar, and when Bateman got close to defendant, moving the knife in a stabbing motion, defendant hit Bateman. Defendant claimed he hit Bateman one time with the crowbar.

On appeal, defendant first argues the statements he made to Officer Van Dam were inadmissible because he was not provided *Miranda*[1] warnings. This issue was preserved in a pretrial motion to suppress. *People v Genter, Inc*, 262 Mich App 363, 368-369; 686 NW2d 752 (2004). We review de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009). The trial court's factual findings are reviewed for clear error. *Id.*

At the hearing on the motion to suppress, Officer Van Dam testified that he never asked defendant any question and that defendant "just willingly kind of blab[bed] out a statement." Defendant was not handcuffed, restrained, or told he was being detained. Defendant testified to the contrary that Officer Van Dam asked questions about what happened and told defendant he was being detained. The trial court denied the motion to suppress.

The Fifth Amendment's privilege against self-incrimination requires that before the police may question a person who is "in custody," the person must be warned that he or she has

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

certain rights. *Miranda v Arizona*, 384 US 436, 444-445; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *Miranda* warnings are required when there is a custodial interrogation. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). There is "custodial interrogation" when there is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* (quotation omitted). "[V]olunteered statements of any kind are not barred by the Fifth Amendment and are admissible." *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995).

In this case, the trial court accepted as truthful Officer Van Dam's testimony that he did not ask any questions and that there was no interrogation. "[G]reat deference is given to the trial court's assessment of the credibility of witnesses[.]" *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992); see also MCR 2.613(C). The trial court's finding that there was no interrogation, and that *Miranda* warnings were not required, is not clearly erroneous, and we will not disturb it. *Chowdhury*, 285 Mich App at 514. Thus, the trial court properly denied defendant's motion to suppress where there was no custodial interrogation without benefit of *Miranda* warnings.

Next, defendant argues the trial court improperly allowed Gathers' preliminary examination testimony to be admitted at trial because Gathers was not unavailable and because defendant's right to confrontation was violated. This issue is preserved. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) (citation omitted). The trial court's determination of whether a witness was unavailable will not be disturbed absent an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998) (citations omitted). Whether admission of evidence "violated defendant's Sixth Amendment right of confrontation is a question of constitutional law that this Court reviews de novo." *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011) (citation omitted).

A witness is unavailable when she "persists in refusing to testify" or "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). If unavailable, a witness's prior testimony may be admitted if the party against whom the testimony is offered had an opportunity and a similar motive during cross-examination. MRE 804(b)(1). To show that witness is unavailable "the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial." *Bean*, 457 Mich at 684. "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id.* (citations omitted).

In this case, the sheriff's department attempted to find Gathers at three different addresses. The prosecutor worked with the Muskegon Police Department and the Muskegon Heights Police Department. Detective Keith Stratton and the prosecutor searched for Gathers and knocked on doors looking for her. When Gathers was contacted by telephone, she would not reveal her location and indicated she would not cooperate. On this record, the trial court did not abuse its discretion because the record supports that the prosecution "made a diligent good-faith effort" to locate Gathers. *Bean*, 457 Mich at 684.

Defendant also argues the admission of Gathers' preliminary examination testimony violated his right to confrontation because cross-examination was limited. The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. See also Const 1963, art 1, § 20. Testimonial statements of a witness who does not appear at trial are only admissible if the defendant had a prior opportunity for cross-examination and the witness was unavailable to testify. *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Because Gathers' prior testimony is testimonial, "the Sixth Amendment demands" that Gathers was unavailable at trial and there was a prior opportunity for cross-examination for that testimony to be admitted. *Id.* "The Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988) (quotations omitted).

There were two times when defense counsel's questioning was limited at the preliminary examination. One time concerned how long defendant was gone from the apartment when he left and then returned. The district court properly determined the question was asked and answered and told defense counsel to move on with his cross-examination. Shortly thereafter, defense counsel again asked Gathers how long defendant was gone from the apartment, and she answered. Thus, although cross-examination was limited at one point, Gathers testified to the sought after fact more than once. Second, the district court ended defense counsel's inquiry into whether she was drinking on the day of the incident. At that point, Gathers had already testified on direct that she had not been drinking and she had testified on cross-examination that she had not been drinking, but defense counsel was again asking if she had been drinking that day. Defense counsel's inquiry as to Gathers' drinking was not barred from this subject, but repetitive questions were. Defendant claims that questioning was also limited regarding how the knife got on the floor, but the record does not reflect defense counsel's questions were limited in this regard.

On the record before us, defense counsel's opportunity to effectively cross examine Gathers was not limited so as to allow us to conclude that there was a Confrontation Clause violation. The trial court limited defense counsel's cross-examination, only as to subject matter about which Gathers had already testified. Defendant was not denied his right to confrontation.

Next, defendant argues the trial court abused its discretion when it did not appoint substitute counsel. We review the trial court's decision for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

On the first day of trial, defendant requested substitute appointed counsel, claiming defense counsel had a conflict of interest, was biased, told defendant he was a liar, and said the defense was nothing but a lie. Defense counsel represented there was a difference of opinion regarding whether defendant should testify, but denied calling defendant a liar. Substitute counsel should be appointed "only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Good cause exists when there is a dispute between counsel and the defendant such that there is "destruction of

communication and a breakdown in the attorney-client relationship." *People v Bass*, 88 Mich App 793, 802; 279 NW2d 551 (1979) (citation omitted). When trial counsel is honest and forthright about the merits of the case, there is not a dispute sufficient to appoint substitute counsel. *People v Shuey*, 63 Mich App 666, 673-674; 234 NW2d 754 (1975).

Upon close review, the record reflects defendant requested substitute counsel not because of a difference regarding whether he should testify, but because defendant thought defense counsel did not believe him. Substitute counsel was not warranted simply because defense counsel was honest about the merits of the case. *Shuey*, 63 Mich App at 673-674. Moreover, the trial court confirmed with defendant that it was his decision whether to testify, and that counsel had a duty to advise defendant about that decision. Ultimately, defendant testified, reflecting there was a resolution to any difference. Substitute counsel was not warranted. Also, defendant requested substitute appointed counsel on the first day of trial. This undoubtedly would have disrupted the judicial process. There were about 90 jurors at the courthouse at the time of defendant's request. The trial court did not abuse its discretion when it denied appointment of substitute counsel. *Traylor*, 245 Mich App at 462.

Next, defendant argues offense variable (OV) 9, MCL 777.39(1)(c), was improperly scored. Because defense counsel and defendant explicitly agreed to the scoring on the record, this issue is waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Nevertheless, we note that OV 9 was properly scored. OV 9 is scored at 10 points when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." In determining the number of victims, the trial court is to "[c]ount each person who was placed in danger of physical injury or loss of life . . . as a victim." MCL 777.39(2)(a). The term "victim" does not only refer to defendant's intended victims, but includes people placed in danger during the commission of the offense. *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004).

In this case, defendant broke in the door of the small apartment and swung a crowbar at Bateman in Gathers' presence. Although Bateman was the focus of defendant's attack, there is some evidence in the record to support that Gathers was placed in danger by defendant's enraged actions. The trial court did not err when it scored OV 9 at ten points. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted).

Defendant also argues trial counsel was ineffective for failing to object to the scoring of OV 9. Because the trial court did not err in scoring OV 9 at ten points, any objection on this basis would have been meritless. Defense counsel is not ineffective for failing to make a meritless objection. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (citations omitted).

Next, defendant raises many unpreserved sentencing errors. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Because these issues are not preserved, they are reviewed for plain error affecting substantial rights. *Id.* To demonstrate plain error, a defendant must show: (1) error occurred; (2) "the error was plain"; and (3) "the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.*

At the outset, we note defendant relies on the federal sentencing guidelines for some of his arguments. Our sentencing courts are not required to refer to the federal guidelines, *People v Weathersby*, 204 Mich App 98, 114; 514 NW2d 493 (1994), and we find no validity to defendant's arguments based on the requirements of those guidelines.

Defendant also argues his sentence is invalid because the trial court did not consider mitigating evidence such as his family support and remorse. A sentencing court in Michigan is only required to rely on the statutory minimum and maximum sentences when it sentences a defendant. *People v Nunez*, 242 Mich App 610, 617-618; 619 NW2d 550 (2000). The trial court was not required to consider the alleged mitigating evidence, including defendant's acceptance of responsibility, when it sentenced defendant. *People v Osby*, 291 Mich App 416, 416; 804 NW2d 903 (2011). Moreover, because defendant's sentence was within the applicable guidelines range, we must affirm his sentence. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 791-792; 790 NW2d 340 (2010).

Defendant further argues his sentence is invalid because the trial court did not articulate reasons for the proportionality of the minimum and maximum sentences. Although a trial court must articulate its reasons for a sentence on the record, this "requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). In this case, the trial court noted the guidelines, sentenced defendant within the guidelines, and satisfied the articulation requirement. *Id.* Regarding defendant's vague claim that the trial court failed to state why the minimum and maximum sentences were proportionate, a sentence within the guidelines is presumed proportionate. *People v Bailey*, 218 Mich App 645, 647; 554 NW2d 391 (1996) (citation omitted).

Defendant also argues an inference could be made from the Presentence Investigation Report (PSIR) that defendant had a "mental disease or defect" and that this provided the basis for an objective and verifiable reason for a downward departure from the sentencing guidelines. There must be a "substantial and compelling reason" for a downward departure from the guidelines. *People v Babcock*, 469 Mich 247, 251; 666 NW2d 231 (2003). A substantial and compelling reason must be based on objective and verifiable facts, and must "'keenly' or 'irresistibly' grab [the court's] attention[.]" *Id.* at 257 (quotation omitted). Defendant's argument that a downward departure was justified is without merit because the PSIR does not reflect any mental or current substance abuse issues. Instead, it reflects defendant had "good" mental health and was not currently using substances or in treatment. Defendant has the burden of providing to this Court the factual basis for any argument on which reversal is predicated. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Because there is no evidence to support defendant's claim, we cannot conclude that the trial court committed plain error when it did not identify defendant's mental health status as a factor to support a downward departure.

Defendant also argues the trial court should have conducted an assessment regarding his "rehabilitative potential through intensive alcohol, drug, and psychiatric treatment." MCR 6.425(A)(1)(e) requires that the PSIR include "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report[.]" There is no indication that in this case, there was a current psychological or psychiatric report to be included.

The information in defendant's PSIR was accurate and complete, and defendant is not entitled to resentencing. *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003).

Defendant also argues that his sentence is excessive under the federal and state constitutions, but he fails to argue the merits of this claim. A defendant may not merely announce his position and leave it to this Court to rationalize his claims. *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009). The issue is abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Defendant further suggests in his statement of the question presented that trial counsel was ineffective for failing to object to the length of the sentence. Defendant does not address the merits of this claim, and it is also abandoned. *Payne*, 285 Mich App at 195; *Harris*, 261 Mich App at 50.

Next, defendant raises two arguments regarding jury instructions. First, defendant argues the missing evidence instruction should have been given to the jury and that defense counsel was ineffective for failing to request it. The issue is waived because defendant did not request the missing evidence instruction at trial and approved the jury instructions with one unrelated exception. *Carter*, 462 Mich at 214-215. Nevertheless, we note defendant's claim is without merit. Defendant argues the instruction was necessary because the recording of defendant's statements to Officer Van Dam were not produced. The missing evidence instruction provides that "where the prosecution fails to make reasonable efforts to preserve material evidence, the jury may infer that the evidence would have been favorable to defendant." *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), overruled on other grounds *People v Grissom*, 492 Mich 296, 320; 821 NW2d 50 (2012). This instruction only applies if the prosecution acts in bad faith when it fails to produce the evidence. *Id.* at 515. There is no evidence in this case that the prosecution acted in bad faith. In the absence of bad faith, as here, the instruction was not warranted. *Davis*, 199 Mich App at 515. Because the instruction was not warranted, defense counsel could not be ineffective for failing to request it. Counsel is not required to make frivolous or meritless motions. *Knapp*, 244 Mich App at 386.

Second, defendant argues the flight instruction was improper. Defense counsel objected to the given flight instruction and thus, this issue is preserved. *Carter*, 462 Mich at 214-215. The flight instruction is supported when there is evidence that the defendant fled the scene, ran from the police, resisted arrest, attempted to escape custody, or left the jurisdiction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). To provide the flight instruction, there must be some evidence that the defendant "feared apprehension" when he left the scene. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). In this case, there was evidence that after the assault, defendant returned the crowbar to Ashendorf, asked Ashendorf to hide it and not tell anyone, and was in a hurry. This was evidence that defendant fled, and the flight instruction was properly provided. *Coleman*, 210 Mich App at 4.

Finally, in a Standard 4 brief, defendant raises issues of insufficient evidence and ineffective assistance of counsel on the basis that defense counsel did not move for directed verdict. Defendant does not actually argue the merits of his claims; they are abandoned. *Payne*, 285 Mich App at 195; *Harris*, 261 Mich App at 50. Accordingly, we will not address these claims.

Finally, while defendant argues that he is, at least, entitled to an evidentiary hearing, he has failed to follow all of the requirements necessary to seek such a hearing. MCR 7.211(A), (C)(1).

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto