STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 11, 2006
v	No. 260487 Wayne Circuit Court
ROBERT LEE JETER, Defendant-Appellant.	LC No. 04-009999-01

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of 12 to 50 years. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Effective Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to argue self-defense, and for advising him to waive his right to a jury trial without moving for a trial before a different judge. Because defendant failed to raise this issue in the trial court in a motion for a new trial or evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

A. Self-Defense

Contrary to what defendant argues, the record clearly demonstrates that defense counsel argued self-defense at trial, and that the trial court was aware of defendant's self-defense claim.

The trial court rejected the claim of self-defense, stating in its findings of fact that the victim "doesn't seem physically capable to take on the defendant," and that a portion of defendant's testimony "doesn't seem to make sense." These findings indicate that the trial court did not find defendant's self-defense claim to be credible. Additionally, the trial court found that defendant specifically intended "to punish [the victim] for coming home so late," and noted defendant's infliction of serious injuries on the victim. A defendant may not claim self-defense where he is the initial aggressor, or used excessive force to defend himself. See *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Because defendant's theory of self-defense was argued by defense counsel and considered by the trial court, we reject this claim of error.

B. Waiver of Jury Trial

Defendant argues that because the trial judge was familiar with the case because he had presided at an earlier suppression hearing, defense counsel should have recommended a jury trial or moved for a different judge. On this record, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged improper action, the result of the proceeding would have been different. *Effinger*, *supra*.

Defense counsel initially recommended that defendant waive a jury, but defendant declined to follow counsel's advice at that time. On the first day of trial, however, defendant requested a bench trial. Defendant was aware that the trial judge who had heard and ruled on his earlier motion to suppress would preside over trial and indicated that he still desired a bench trial, and that this was his own decision. The decision to waive trial by jury ultimately rests with the defendant, MCR 6.402(B), and the record here discloses that defendant specifically stated that it was his decision to proceed with a bench trial and that defense counsel "didn't have nothing to do with [the decision]." Even if we assume that defendant relied on defense counsel's previous advice in making his final decision, defendant has not overcome the presumption that the decision to waive a jury was a matter of sound trial strategy.

Furthermore, there is no basis in the record for concluding that the trial court's prior familiarity with the case affected its bench trial verdict. "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." See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Indeed, the trial court explained to defendant that it would not consider the suppressed evidence, and was able to listen to the evidence, follow the law, and decide the case based on the properly admitted evidence at trial. There is nothing in the record to suggest that the trial court improperly considered the suppressed evidence in reaching its verdict. Defendant is not entitled to a new trial.

II. Sentence

We reject defendant's claim that the trial court improperly scored 50 points for offense variable (OV) 7 (aggravated physical abuse) of the sentencing 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). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

MCL 777.37(1)(a) directs a score of 50 points if the 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." In scoring this variable, the trial court stated that "the transcript speaks for itself, but This Court has never seen a case that would exemplify excessive brutality such as this . . . I've never seen brutality like we've seen in this case." Defendant challenges the score on the basis that there "was nothing that [he] did that substantially increased the fear and anxiety suffered during the offense." But the evidence at trial showed that defendant repeatedly struck the victim with a sawed-off baseball bat over her entire body, including her head, and, when the bat broke on her body, defendant retrieved a full-sized wooden baseball bat and continued the beating. The victim testified that the incident lasted 30 to 40 minutes. The victim suffered numerous injuries, including a broken leg and foot, and pronounced injuries on her head, and was hospitalized for six days. This evidence was sufficient to establish that the victim was treated with excessive brutality. The trial court did not abuse its discretion by assessing 50 points for OV 7.

We also reject defendant's argument that he must be resentenced because the trial court's factual findings supporting its scoring of the sentencing guidelines offense variables were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has recently held that Michigan's sentencing scheme does not offend the Sixth Amendment and observed that *Blakely*, *supra*, concerned an increase in a defendant's maximum sentence in a determinate sentencing scheme, while this state's guidelines govern the establishment of minimum sentences within an indeterminate framework. *People v Drohan*, ___ Mich ___; ___ NW2d ____ (Docket No. 127489, decided June 13, 2006). In addition, *Drohan* reiterated that the Michigan system is unaffected by the holding in *Blakely* . . . ." *Id.* at ___, citing *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter