STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY SHAFER,

Defendant-Appellant.

UNPUBLISHED
February 25, 2000

No. 213598
Kent Circuit Court
LC No. 97-03211-FC

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Defendant Ricky Shafer was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of assault with intent to rob while armed, MCL 750.89; MSA 28.284. He was sentenced as an habitual fourth offender, MCL 769.12; MSA 28.1084, to a term of thirty to fifty years in prison. Defendant appeals as of right. We affirm.

Defendant argues that the evidence was insufficient for the jury to conclude beyond a reasonable doubt that he committed three counts of first-degree criminal sexual conduct and one count of assault with intent to rob while armed. We disagree. Essentially, defendant asks us to determine that the victim's testimony was not credible. However, we do not interfere with the jury's role of determining the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

In the present case, the jury was justified in convicting defendant of three counts of first-degree criminal sexual conduct if it chose to believe the victim's testimony that defendant forced her to engage in oral, vaginal and anal sex. *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994). Further, the jury was justified in convicting defendant of assault with intent to rob while armed if it chose to believe the victim's testimony that defendant forced her at knifepoint to give defendant all her money. *Id*; *People v Cotton*, 191 Mich App 377, 391-392; 478 NW2d 681 (1991). We will not interfere with the jury's decision to believe the victim's testimony rather than defendant's version of events. *Wolfe, supra*.

Defendant's second issue on appeal is that the prosecutor engaged in misconduct when cross-examining defendant on his silence at the time of his arrest, as well as when telling the jury that defendant's silence at the time of his arrest supported the prosecutor's argument that defendant's trial testimony was false. We disagree. Defendant did not raise any objection to the prosecutor's conduct below. Unpreserved error is reviewed under the plain error standard. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture of an issue under the plain error rule, (1) error must have occurred; (2) the error must be plain, i.e. clear or obvious; and (3) defendant must demonstrate prejudice. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence. *Id.*

Here, defendant argues that under *People v Bobo*, 390 Mich 355, 359-361; 212 NW2d 190 (1973), a prosecutor is precluded from cross-examining a defendant regarding a prior statement, including omissions, to a police officer. However, *People v Collier*, 426 Mich 23, 39; 393 NW2d 346 (1986), limited the *Bobo* decision, holding that *Bobo* only precludes impeachment for and comment on silence at the time of arrest in the face of accusation.

Further, our Supreme Court has held that when an individual has opted not to remain silent, but has made affirmative responses to questions about the same subject matter testified to at trial, omissions from the statements do not constitute silence. *People v Cetlinski*, 435 Mich 742, 749; 460 NW2d 534 (1990). Therefore, *Bobo* does not apply to the present case where defendant's silence was not the focus of the cross-examination. Here the prosecutor was exploring the differences between defendant's spontaneous post-arrest statement and his later statements. See *Cetlinski, supra*, 746-747; *People v Avant*, 235 Mich App 499, 509-512; 597 NW2d 864 (1999).

Defendant also argues that defendant's conviction should be reversed and a new trial ordered because the record is silent as to whether defendant received a *Miranda*[1] warning before defendant told police that he had consensual sex with the victim. We note that defendant's assertion is contrary to the trial transcript because Officer Preston testified that he did not read defendant the *Miranda* warnings after arresting and placing defendant in his squad car because Officer Preston was not prepared to question defendant. Officer Preston was not interrogating defendant when defendant voluntarily told Officer Preston that he had consensual sex with the victim. Defendant acknowledged on the stand that his spontaneous statement was voluntary; therefore, the prosecutor properly used defendant's voluntary, pre-*Miranda* statement to attack defendant's credibility. See *People v Alexander*, 188 Mich App 96, 102-103; 469 NW2d 10 (1991).

Defendant also argues that the prosecutor's disclosure to the jury that defendant had been in jail since his arrest constituted prosecutorial misconduct. We disagree. We note that defendant himself informed the jury, both during cross-examination of the victim and during defendant's own testimony, that he was incarcerated. Further, had defense counsel made a timely objection during the prosecutor's closing argument, the trial court could have instructed the jury that it is not to consider defendant's pretrial detainee status as a reflection of defendant's guilt or innocence. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *Avant*, *supra*, 512. Because the trial court could have dispelled any misleading inferences with a curative instruction had defendant objected at trial, and because a

miscarriage of justice will not result from declining to consider this issue further, we need not review defendant's claim of prosecutorial misconduct. *Stanaway*, *supra*, 687; *Avant*, *supra*, 512; *People v Wilson*, 230 Mich App 590, 595; 585 NW2d 24 (1998).

Finally, defendant argues that the trial court abused its discretion by imposing a sentence that is excessively disproportionate to the seriousness of the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). There is no merit to this claim. Here, defendant argues that his sentences are disproportionate because they were based on improperly scored guidelines. However, defendant was sentenced as an habitual offender, and the sentencing guidelines do not apply. *People v Cervantes*, 448 Mich 620, 622, 625 (Riley, J.), 630 (Cavanagh, J.); 532 NW2d 831 (1995); *People v Kennebrew*, 220 Mich App 601, 612; 560 NW2d 354 (1996). Based upon the seriousness of the crimes that defendant committed against the victim and defendant's three prior convictions, defendant has demonstrated that he is unable to conform his conduct to the law. *People v Hansford (After Rem)*, 454 Mich 320, 326; 562 NW2d 460 (1997). We conclude that defendant's sentences are proportionate and find no abuse of discretion.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald

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