

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR L. KEELER,

Defendant-Appellant.

UNPUBLISHED

December 28, 2001

No. 216357

Wayne Circuit Court

Criminal Division

LC No. 97-008891

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f), and first-degree home invasion, MCL 750.110a(2), following a bench trial. The trial court sentenced defendant to concurrent prison terms of ten to twenty years for the first-degree CSC conviction and five to twenty years for the home invasion conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erroneously admitted hearsay testimony that tended to corroborate the complaining witness' version of events. Because defendant failed to preserve this issue with an objection to the challenged testimony at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

The testimony at issue came from two police witnesses, each of whom spoke to the complainant at the hospital within several hours of the assault. Both witnesses testified that they found the complainant in a state of great anxiety, describing her as shaking and sobbing. Given this record, it is not plainly apparent that the challenged testimony could not have been received successfully and correctly under MRE 803(2), covering a declarant's statements about a startling event made while under the stress of that event. See *People v Smith*, 456 Mich 543, 552-553; 581 NW2d 654 (1998); *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988). Defendant has failed to establish outcome determinative plain error. *Carines, supra*.

Next, defendant argues that the trial court's statement from the bench did not adequately explain its verdict and revealed that the court failed to apply the presumption of innocence and the pertinent evidentiary standard with respect to each element of each charged offense, denying him due process of law. We disagree.

A trial court, when sitting as the finder of fact, is obliged to state its findings and conclusions concerning contested matters. MCR 2.517(A)(1). However, “[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.” MCR 2.517(A)(2).

In announcing its decision, the trial court twice referenced the beyond-a-reasonable-doubt standard, obviously indicating that it was cognizant of the applicability of that elementary point of law. Defendant insists that the court, having admitted to doubts, should have found him not guilty. We disagree. The court’s statements of doubts, considered in context, concern several evidentiary particulars about which a reasonable factfinder could hardly not have doubts, in light of some evidentiary inconsistencies. However, the inquiry is whether every element of each crime was proved beyond a reasonable doubt¹; the focus is on *reasonable* doubt, not *any* conceivable doubt, and on reasonable doubts concerning the *elements* of the crimes, not every matter in evidence.

Defendant asserts that, because the court convicted in the face of its own doubts, it effectively shifted the burden of proof, requiring that he prove his innocence. Again, we disagree. Looking at the court’s statement, “I start the other way and I say I believe that the defendant committed this crime,” in conjunction with its other statements, it is apparent that the court was not starting with a presumption of guilt. Instead, the court was firmly convinced by the evidence that someone had broken into the complainant’s home and raped her, and that that person was defendant. “Somebody first of all raped this woman. About that the [c]ourt has no doubt. . . . The question really is under the objective circumstances of what occurred in this case, is her courtroom identification of the defendant as the person who raped her sufficiently reliable” The court thus stated that it was convinced by the evidence of the prosecutor’s theory of the crimes, but continued its inquiry in order to determine whether it held its beliefs beyond a reasonable doubt: “The question is, is there the requisite level of certainty in that belief[?]”

The doubts of which the court spoke concerned whether the light was on, whether the television was on, and the time of day that the assault happened, all of which are matters about which the complaining witness equivocated. Those matters are distinct from the elements of the crimes however; a reasonable factfinder could have doubts about those secondary evidentiary particulars and still believe beyond a reasonable doubt that defendant satisfied the elements of the specific crimes with which he was charged. There was no improper burden shifting in this instance.

Defendant complains that the court did not state that it was applying the presumption of innocence, and failed also to enumerate the elements of the charged offenses. Defendant’s argument is inapt. Defendant cites cases for the proposition that failure to instruct a jury on each element of each offense, or on the presumption of innocence, warrants reversal. However,

¹ The Due Process Clause of the Michigan Constitution (Const 1963, art 1, § 17) allows a criminal conviction only upon proof *beyond a reasonable doubt* of each element of the crime. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The Due Process Clause of the United States Constitution (US Const, Am XIV, § 1) demands nothing less. *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997), citing *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

defendant cites no authority for the proposition that, in a bench trial, the court must demonstrate on the record that the court itself understands the elements of the crimes at issue, and also the presumption of innocence. To the contrary, “[a] trial judge is presumed to know the law.” *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988). Failure to recite those elementary principles of law does not suggest violation of those principles. Instead, the presumption that went unchallenged at trial shall likewise remain intact on appeal.

Defendant next argues that his sentence is disproportionately harsh, considering that the victim was not a child and suffered no permanent physical injury, that no weapon was used, that defendant’s criminal record includes only minor offenses, and that defendant suffers from mental-health problems. We disagree.

Defendant’s sentence is within the range recommended by the applicable sentencing guidelines,² and thus is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). The trial court well accounted for the mitigating factors to which defendant points, in that the court, despite having the discretion to make the present sentences consecutive to those imposed in another case for a similar crime, chose to let all sentences run concurrently. Defendant has failed to rebut the presumption of proportionality in this instance.³

Defendant also alleges a history of mental illness and asserts that, for want of prescription medicine while incarcerated awaiting trial, he was not competent to stand trial, and that defense counsel was ineffective for failing to ensure that he received the medicines he needed while in jail.

This Court remanded this case to the trial court to entertain a motion for an evidentiary hearing on these issues, MCR 7.211(C)(1)(a), but appellate counsel, after obtaining multiple extensions of time for this purpose, elected not to proceed with that motion because he could not muster sufficient evidence of defendant’s incapacity at the time of trial to make an evidentiary hearing worthwhile. While appellate counsel continues to assert defendant’s incapacity at the time of trial, the brief points to no evidence beyond what was available to counsel when counsel waived recourse to the motion on remand that this Court ordered. Having affirmatively relieved the trial court of having to rule on the question of defendant’s competence, defendant has extinguished this issue on appeal.⁴ *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144

² The conduct for which defendant was convicted occurred on October 7, 1997, before the January 1, 1999, effective date of the legislative sentencing guidelines enacted pursuant to MCL 769.34. Thus, applicable to this case are the judicial guidelines promulgated by the Supreme Court.

³ Defendant’s mental-health problems constitute a double-edged sword in this regard. The legitimate purposes of sentencing include punishing the offender and protecting society. See *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), citing *Williams v New York*, 337 US 241; 69 S Ct 1079; 93 L Ed 1337 (1949). If defendant’s criminal conduct was in part a consequence of his mental-health problems, that consideration suggests that defendant may be less deserving of punishment, while militating in favor of incarceration for the sake of protecting society from the ravages of defendant’s mental illness.

⁴ In any event, defendant points to no actual evidence, beyond his own bald assertions, that he
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(2000); see also *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988) (“Defendant should not be allowed to assign error on appeal to something which his own counsel deemed proper at trial. To do so would allow defendant to harbor error as an appellate parachute.”).

Defendant’s claim of ineffective assistance of counsel is predicated solely on the assertion that counsel failed to ensure that defendant was receiving the medicine he needed while incarcerated. Thus, because defendant fails to show that he suffered any incapacity in the event, no claim of ineffective assistance can follow from it. Again, this issue was extinguished when appellate counsel affirmatively renounced the opportunity to have the trial court rule on the matter, as per the remand from this Court.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ William C. Whitbeck

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suffered some mental disability at the time of trial, and the Presentence Investigation Report indicates no psychiatric history. Defendant’s argument is wholly lacking in substance.