

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

HENRY LEE GLEEN,

Defendant-Appellant.

UNPUBLISHED

August 23, 2002

No. 227064

Oakland Circuit Court

LC No. 99-164979-FC

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

In April 2000, a jury convicted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (vaginal penile penetration of a girl under thirteen years of age). Defendant then pleaded guilty to the charge that he was a fourth-offense habitual offender. MCL 769.12. The trial court sentenced defendant to twenty-five to fifty years' imprisonment. Defendant appeals as of right. We affirm.

I. Facts and Proceedings

Defendant was convicted of sexually assaulting his twelve-year-old step-granddaughter. The victim alleged that on August 13, 1997, she got into defendant's car to go to the Pontiac home of one of defendant's friends. Before the victim and defendant reached the friend's home, however, defendant pulled into a park, stopped the car, and raped the victim. The victim testified that defendant also raped her under similar circumstances on August 21, 1997. The second rape formed the basis for the complaint against defendant.

Four days after the second rape, the victim told her mother that defendant had raped her. The victim's mother called defendant's wife, (also the victim's grandmother), and later the victim, her mother and grandmother, and defendant met to discuss the rape allegations. Defendant denied raping the victim. After that meeting, the victim's mother and her aunt, took her to the police station to report the rapes. On August 26, they took her to St. Joseph Mercy Health Center to be examined. Dr. Carlito Mojica examined the victim, but found no indications of forced entry into her vagina. He noted, however, that this finding was not inconsistent with the victim's statement that the rape had occurred five days before the examination.

Approximately four days after the initial police report, Detective Roger Smith of the Pontiac police department requested a meeting with the victim and her mother. The victim's

mother testified that after discussing the allegations with Smith and pursuant to his advice, she wrote a letter to the police department requesting to delay further action on the case until the victim was a little older. In April 1998, she wrote a second letter requesting that the complaint be reopened.

Detective Gail Wojciechowski of the Pontiac police department contacted the victim's mother after the department received the second letter. At trial, she testified that she met with the victim and her mother and requested that the victim write a statement describing what had happened. Subsequently, a warrant was issued for defendant's arrest. Detective Wojciechowski also testified that she had been Detective Smith's partner before retirement. She acknowledged that he had been investigated by internal affairs for failing to follow through with investigations and that, in fact, he had not followed through with the victim's complaint.

Prior to trial, Detective Smith had been listed as a witness for the prosecution. He was not served with the subpoena prepared for him, but was asked to attend the trial by Detective Wojciechowski. Detective Smith failed to voluntarily appear for trial, and the prosecution did not make any attempt to locate him and make him available to testify. The trial court found that the prosecution had not exercised due diligence in trying to locate Smith. Later, defense counsel requested time to locate him so he could be called as part of defendant's case, but the trial court denied this request and stated that defendant would be entitled to an instruction regarding the unavailable witness.

Both Feona Anderson (a friend of defendant) and defendant's wife testified at trial that the victim had told them that defendant had not assaulted her. Defendant's wife also testified that just before the investigation was reopened in 1998, the victim's mother called her at work and told her that defendant was "going to get his." Anderson further testified that the victim told her that her mother was trying to "get her to lie" about the assaults, and that the victim described these efforts in a letter that Anderson gave to defendant the day after the victim wrote it. The victim admitted that she wrote the letter at Anderson's house after being driven there by her grandmother and defendant, but said she did so under duress and only because she was scared. Anderson denied forcing the victim to write the letter.

During voir dire, jury deliberations, and evidentiary rulings or other communications with defense counsel, the trial court made comments that defendant asserts were derisive to defense counsel and prejudicial to defendant. However, no objection to the trial court's conduct was made for the record.

At the conclusion of two days of testimony, the jury was instructed and began its deliberations. Jury deliberations were conducted for four and a half hours over three days before the jury sent the trial court a message indicating that it was unable to reach a unanimous decision. The parties requested and the court gave the "deadlock instruction," CJI2d 5.12, and the jury continued its deliberations. After an additional three hours of deliberations, the jury returned its verdict.

II. Standard of Review

A. Comments by the Trial Court Judge

Defendant claims that several of the trial court's comments influenced the jury and violated his constitutional right to a fair and impartial trial. Because defendant did not object to any of the comments of the trial court, this issue is not preserved¹. Where a defendant has failed to preserve an alleged constitutional error, we review to determine whether a plain error occurred that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant's substantial rights were affected if the error affected the outcome of the proceedings. *Id.* When reviewing whether the trial court's comments deprived defendant of a fair and impartial trial, we consider the entire trial record to determine whether the comments unduly influenced the jury. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

B. The Prosecution's Failure to Produce Detective Smith

Defendant claims that the prosecution inappropriately failed to call Detective Smith, whom defendant asserts was a *res gestae* witness. A defendant must either object to the prosecution's failure to call a *res gestae* witness or move for an evidentiary hearing or a new trial to preserve this objection. *See People v Dixon*, 217 Mich App 400, 409; 522 NW2d 663 (1996). Defendant did not preserve the issue by any of these methods. Moreover, defendant did not object to the curative instruction given by the court in light of its decision that the prosecution had failed to produce an endorsed witness. Therefore, defendant's claim that the instruction was insufficient has also not been preserved. Because of defendant's failure to preserve these issues, our review is limited to determining whether there is plain error. *Carines, supra* at 763-764.

C. Ineffective Assistance of Counsel

"In order to preserve for appellate review the claim that trial counsel was ineffective, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing." *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Because defendant did not preserve this issue by making such a motion, our review is limited to deficiencies in representation that are apparent on the record. *Id.* at 658-659. Moreover, because there was no trial court determination regarding the effectiveness of defendant's counsel, we review this issue to see if defendant has demonstrated a plain error affecting substantial rights. *Carines, supra*, at 763-764.

¹ We note that on one occasion the trial court addressed the jury while defense counsel was not present. Because the basis for objection to this particular comment would not have necessarily been apparent until review of the trial transcript in preparation for appeal, we will treat the objection to this comment as preserved for appellate review and consider whether, reviewing the record as a whole, the objected to comment was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392; 405-406; 521 NW2d 538 (1994).

D. Scoring of Offense Variables 5 and 12

We review a habitual offender's sentence for abuse of discretion. *People v Rodgers*, 248 Mich App 702, 719; 645 NW2d 294 (2001).

III. Analysis

A. Comments by the Trial Court Judge

Upon our review of the record, we find that defendant was not deprived of a fair and impartial trial.

Defendant cites several instances where the trial court directed belittling language at defense counsel. We agree that some of the cited comments of the trial court judge were inappropriate, and while we do not condone the trial court's conduct, we conclude that the jury was not unduly influenced by these comments such that the outcome of the trial would have been different.

Defendant first contends that the trial court reversibly erred by characterizing defense counsel's question to potential jurors (asking whether the prospective jurors believed it was worse for a guilty defendant to be released as a result of a loophole or "technicality," or for an innocent person to be convicted) as "crap" and "nonsense." We agree this hardly qualifies as ideal conduct from the trial court, but find that nevertheless defendant received a fair trial. The jury deliberated for more than four hours over three days before reaching a deadlock. Then, after receiving additional instructions agreed to by counsel, the jury deliberated for three additional hours before reaching a guilty verdict. We conclude that the apparent diligence of the jury demonstrates that it carefully considered the evidence that had been presented in the case and was not motivated to reach a guilty verdict by the comments of the trial court.

Defendant also alleges that the trial court influenced the jury by inappropriately interrupting defense counsel's cross-examination of Detective Wojciechowski about the depth of her investigation leading up to the issuance of the warrant for defendant's arrest. We disagree. "The mode and order of interrogation is within the trial court's discretion." *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995); MRE 611. While the trial court did interrupt defense counsel's cross-examination of Detective Wojciechowski, we believe that this interruption was insignificant in light of the victim's testimony and the other evidence in the case.

Defendant also contends that the trial court's impatience with defense counsel when he was unable to immediately produce another witness negatively influenced the jury. However, an expression of impatience does not necessarily influence the jury to the detriment of defendant's case. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). The record does not establish any influence on the jury that this display of impatience may have caused.

Defendant next argues that the court impermissibly chastised defense counsel after he thanked the judge for an evidentiary ruling. The court stated, "Don't thank me for my instructions, you ought to know what the rule is and that's it. You know the rule, you can't do that." Ideally, the trial court would not respond to counsel's demonstration of respect for the

court in this manner. However, we find that the evidence supports the jury verdict in this case and that the jury was not influenced by the trial court's conduct.

Finally, defendant claims that in responding to a question from the jury during its deliberations, the trial court impermissibly told the jury that the question could not be answered, that they would have to be excused because of defense counsel's absence, and that they should not hold defense counsel's absence "against [defendant] because he had nothing to do with it." While the better practice in this situation is to excuse the jury without any comment as to why this action was necessary, we find that the trial court's statement referencing defense counsel's absence did not contribute to the verdict in any way. The following day, the jury returned and did not withdraw its question. Rather, the jury received the answer to its question, deliberations resumed, and the jury reached its verdict. Thus, we conclude the error was harmless beyond a reasonable doubt.

In sum, we find that although some of the trial court's comments were beyond acceptable bounds, these comments did not influence the jury such that defendant was deprived of a fair trial. *Id.*

B. The Prosecution's Failure to Produce Detective Smith

Defendant asserts that Detective Smith was both an endorsed witness and a res gestae witness, and that the trial court erred by failing to order the prosecution to subpoena Detective Smith to compel his attendance at trial, or give defendant the opportunity to locate him. We disagree. "A res gestae witness is a person who witnesses 'some event in the continuum of a criminal transaction' and whose testimony will 'aid in developing a full disclosure of the facts.'" *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). Detective Smith did not observe any event in the continuum of the criminal transaction. Instead, he interviewed the victim four days after the criminal transaction had ended. Thus, he was not a res gestae witness. However, because Detective Smith was endorsed as a witness by the prosecution, the prosecution was obligated to produce him at trial. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). The trial court recognized this obligation and instructed the jury that because the prosecution had failed to produce Detective Smith, it could infer that his testimony was unfavorable to the prosecution.

Defendant has not demonstrated that the absence of Detective Smith's testimony affected his substantial rights. Defendant claims that Detective Smith would have testified that he believed the victim was not credible. However, both defendant's wife and Anderson attacked the victim's credibility by testifying that the victim had admitted to them that her allegations were false. Any testimony in this regard by Detective Smith would have been cumulative.

Defendant further argues that the trial court's decision somehow violated his right to call and confront witnesses. We disagree. Defendant relies on *California v Green*, 399 US 149, 158; 90 S Ct 1930; 26 L Ed 2d 489 (1970), in support of his claim. However, this case held only that a defendant has a constitutional right to face his accusers. Here, because Detective Smith was not a witness against defendant, defendant was not deprived of his right to confront him.

C. Ineffective Assistance of Counsel

Defendant raises five claims of ineffective assistance of counsel, all of which fail. Defendant has not shown that “counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. . . . , [that] but for counsel’s error, the result of the proceedings would have been different, *and* [that] the attendant proceedings were fundamentally unfair or unreliable.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant alleges that trial counsel failed to insure Detective Smith’s appearance at trial by subpoenaing him and not merely relying on the prosecution. Counsel’s decision to rely on the prosecution to subpoena an endorsed witness did not fall below an objective standard of reasonableness. Moreover, defendant has failed to show a reasonable probability that producing Detective Smith would have affected the outcome of the proceedings since his testimony would have been cumulative.

Defendant next claims that trial counsel failed to object to inadmissible evidence that defendant contributed to efforts to get the victim to recant her allegations against defendant. The evidence at trial showed that just after defendant and Anderson had a conversation, defendant left and Anderson pressured the victim to write a letter recanting her allegations. Because this evidence circumstantially connects defendant to Anderson’s effort to get the victim to recant, the evidence was admissible, see *People v Salsbury*, 134 Mich 538, 569-570; 96 NW 936 (1903), an objection would have been without merit, and defense counsel did not need to object. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant further alleges that trial counsel was ineffective because he forgot to read into the record a portion of the victim’s preliminary exam testimony that would have impeached her trial testimony. Assuming without deciding that trial counsel’s failure to read the transcript was unreasonable, defendant has not directed this court to any specific portion of the victim’s preliminary examination testimony that defense counsel intended to read. Accordingly, we are unable to determine whether any such error actually caused prejudice to defendant.

Defendant also claims that his trial counsel failed to stop his line of questioning and move for a mistrial in response to unsolicited testimony from Detective Wojciechowski that implied that defendant had a prior criminal record. Counsel inquired about how the detective knew defendant’s nickname, and she answered that she had “known [defendant] for a long time.” She also testified that “most everybody” called defendant by his nickname. Defendant claims that this testimony was damaging because it showed that defendant had prior contacts with law enforcement. Even assuming the testimony had this tendency, the reference was only fleeting. Moreover, had counsel objected at this point, he would have merely called attention to the detective’s comment. Accordingly, defense counsel was not ineffective for failing to object or request a mistrial in response to this testimony.

Finally, defendant argues that the trial court’s decision not to permit his counsel to call Detective Smith as a witness deprived him of effective assistance of counsel. Defendant fails to support this argument, and this Court will not search for support on his behalf. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

D. Scoring of Offense Variables 5 and 12

Defendant argues that the trial court improperly scored offense variables 5 and 12, resulting in a disproportionately harsh sentence being imposed. As defendant acknowledges, the sentencing guidelines do not apply to sentences of habitual offenders for offenses occurring before January 1, 1999. *Sabin, supra* at 661. However, the “trial court abuses its discretion when it imposes a sentence that is not proportional to the seriousness of the circumstances surrounding the offense and the offender.” *Id.*

We find that the trial court did not abuse its discretion. Even accepting defendant’s claim that the appropriate guidelines range was 120-300 months, defendant’s minimum sentence of 300 months is within this range, and presumed proportionate. *People v St. John*, 230 Mich App 644, 650; 585 NW2d 849 (1998). Defendant cannot rebut this presumption of proportionality in light of his extensive prior criminal record including four felony and two misdemeanor convictions involving both assaultive and property crimes.

Affirmed.

/s/ Michael J. Talbot
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder