STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2002
v	No. 230328 Oakland Circuit Court
FRANKLIN DAVID CLAYTON, Defendant-Appellant.	LC No. 2000-172553-FH

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of sexual penetration by an HIV[1] infected person with an uninformed partner, MCL 333.5210. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to a term of 58 months to 15 years' imprisonment. He appeals as of right. We affirm defendant's conviction but remand for resentencing.

In June 1999, the victim rented a room in a house where three other men lived. According to the victim, he did not know these individuals but had answered an advertisement in the newspaper. The night after he moved in, all four men were watching television and drinking beer together. The victim admitted that he was attracted to defendant and testified that later in the evening he and defendant went into his bedroom. The victim performed oral sex on defendant. Defendant then engaged in unprotected anal sex with the victim. The victim claimed that defendant refused to use a condom because it "didn't feel right." The next morning, defendant again anally penetrated the victim.

The victim testified that during a walk they took the following morning, defendant told him that he was HIV-positive. The victim contends that defendant never informed him about his HIV status before they engaged in unprotected sexual activities. When the victim discovered defendant was infected with HIV, he went to the hospital and reported the incident to the police. The victim spent the following 2-1/2 weeks living at HAVEN House[2] and never returned to the house where defendant lived. He estimated that since the incident he has been tested "about forty times" for HIV.

[1] Human Immunodeficiency Virus.

[2] Domestic violence shelter.

Defendant testified on his own behalf at trial and claimed that he informed the victim of his HIV status before engaging in any sexual acts. Specifically, defendant stated that he told the victim that he had tested HIV-positive but that it was now undetectable.[3] Defendant claimed that he was not attracted to the victim but only had sex with him after four hours of smoking marijuana and drinking. Defendant further maintained that everybody in the house was either drinking or doing some type of drugs on the night in question. According to defendant, the victim became upset when defendant told him that he only wanted to be friends. Defendant admitted that he had a conversation with the victim the following morning about HIV as they walked past a store that was displaying an AIDS quilt. Defendant told the victim that he had a friend who died from AIDS and repeated that he had once tested positive for HIV. Defendant stated that at that point the victim became distraught and left.

Officer Andrew Wurm interviewed defendant on April 12, 2000. In his statement, defendant admitted that he had oral and anal sex with the victim. Defendant further acknowledged that he had been HIV-positive for the past five years. Defendant stated that he did not inform the victim of his HIV status before engaging in unprotected sexual relations because he assumed the victim knew he was HIV-positive. At trial, defendant claimed that Officer Wurm gave him a piece of paper and told him to reduce these three facts to a written statement. Defendant further claimed that when he finished writing these facts, he put a dash to write further. According to defendant, Officer Wurm told him that was all he needed and took the paper from him. Officer Wurm denied threatening defendant or dictating the contents of the written statement. Rather, Officer Wurm testified that he simply instructed defendant to write out what defendant told him happened on the night in question.

I. Prosecutorial Misconduct

Defendant initially argues on appeal that he is entitled to a new trial because the prosecutor improperly dissuaded a defense witness from testifying. We disagree. A "court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B); *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Id*. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Defendant raised this issue at trial and the trial court agreed to speak with the witness. However, the witness never appeared in court and the prosecutor flatly denied any misconduct.

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[3] Dr. Alena Jandourek testified that defendant was HIV-positive and enrolled in a study with her clinic at the time of the incident. Dr. Jandourek explained that in July 1999, defendant's HIV level was considered undetectable because he had less than fifty copies of HIV virus per milliliter of blood. However, she stated that even if a person's HIV level was undetectable, that person still had HIV and could transfer the virus to others.

Defendant wanted the witness to testify that she had a sexual relationship with defendant after he informed her that he was HIV-positive. The trial court noted that such testimony could open the door to evidence of a prior incident in which defendant allegedly bit the witness, broke her skin, and exposed her to the HIV virus. When the trial court subsequently asked defendant what he wanted to do about the witness' failure to appear, counsel replied that he would "play it by ear," and later indicated that the he was "going to go with what I have." During the hearing on defendant's motion for a new trial, the trial court found that there was no support by affidavit or in the record to substantiate defendant's claim that the prosecutor improperly intimidated the witness. The trial court further stated that counsel could have requested a bench warrant if he wanted the witness to appear.

It is improper for a prosecutor to intimidate or even suggest that a witness not testify. *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992). However, apart from defense counsel's mere statement that the witness felt intimidated by the prosecutor's alleged misconduct, there is nothing in the record to support this claim. Indeed, the witness never appeared in court and defendant declined to enforce the witness' subpoena at trial. Consequently, we find no miscarriage of justice and conclude that the trial court properly denied defendant's motion for a new trial on this ground. See *People v Stacy*, 193 Mich App 19, 30; 484 NW2d 675 (1992).

II. Defendant's Trial Testimony

Defendant next contends that he is entitled to a new trial because he was required to testify under the influence of seven prescription drugs. We disagree.

Defendant's medical records were admitted at trial. Moreover, defendant made several references to the medications he was taking and commented that his memory had been affected by death threats in jail, stress, and the psychotropic medications he was taking. However, defendant testified in detail about the incident and claimed that the victim was aware of his HIV status before they had sex. We further note that when the prosecutor specifically asked defendant whether he had any memory problems, defense counsel successfully objected to the line of questioning and accused the prosecutor of harassing the witness.

At sentencing, defendant informed the trial court that he had AIDS-related dementia and that his mental capacity was "greatly inhibited, deteriorated." The trial judge noted that she was present at defendant's trial and did not observe any memory problems when he took the stand; rather, it appeared to her that defendant was "very, very sharp." The trial court ultimately denied defendant's motion for a new trial on this ground, finding that defendant had testified regarding the medication he was on and had failed to show how his testimony was adversely affected.

A review of the record reveals that defendant's medical records and the fact he was on psychotropic medication were before the jury. More importantly, it was defense counsel that prevented the prosecution from inquiring into defendant's alleged memory problems. It is well settled that "counsel may not harbor error as an appellate parachute." *People v Tate*, 244 Mich App 553, 558; 624 NW2d 524 (2001). Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this issue. *Jones, supra* at 404.

III. Jury Instructions

Defendant also maintains that he is entitled to a new trial because the trial court erroneously refused to instruct the jury on battery as a cognate lesser included offense. We disagree.

The parties' dispute concerns whether battery may be considered a cognate lesser offense of penetration of an uninformed partner, MCL 333.5210, such that the trial court should have provided a jury instruction on it. Because this issue was preserved at trial and raised on appeal, it is controlled by our Supreme Court's recent decision in *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002). According to *Cornell, supra* at 354-355, 358-359, MCL 768.32 only permits a trial court to instruct on necessarily lesser included offenses, and not on cognate lesser offenses. Thus, an instruction on battery would have been improper even if it could be characterized as a cognate lesser offense of penetration of an uninformed partner. Accordingly, we find no error.

IV. Cumulative Errors

Defendant further suggests that he was denied a fair trial given the cumulative effect of the alleged errors. Because we find no error with regard to any of defendant's challenges, the cumulative error doctrine is inapplicable. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

V. Sentencing

Defendant ultimately asserts that he is entitled to resentencing because the sentencing guidelines were improperly scored. The statutory guidelines apply to this crime because it was committed after January 1, 1999. MCL 769.34(2). "This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). A trial court's scoring decision will be upheld on appeal if there is any supporting evidence in the record. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant challenges the scoring of offense variable (OV) 3, which provides for a score of twenty-five points where a "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). The trial court ruled that "a life threatening injury occurs when an HIV person has unprotected sex with another person." We disagree. Although it is clear that defendant engaged in life threatening behavior, *People v Jensen*, 222 Mich App 575, 585; 564 NW2d 192 (1997), there is no evidence that the victim was actually infected with HIV as a result. Absent proof that the victim suffered a life threatening or incapacitating injury, we decline to speculate regarding whether such an injury will occur in the future. Because this affects the scoring level, resentencing is required.

Defendant also maintains that the trial court erroneously scored ten points for OV 4, serious psychological injury requiring professional treatment. MCL 777.34. Ten points may be

scored under OV 4 "if the serious psychological injury *may* require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2) (emphasis added). The victim testified that he was frightened and nauseous when he learned that defendant was HIV-positive, that he stayed at HAVEN, a domestic violence shelter, for 2-1/2 weeks after the incident, and that he was tested "about forty times" for HIV infection. Although the victim failed to indicate whether he was receiving professional treatment at the time of trial, the statute does not require proof of such treatment. We further note the trial court's impression that the victim appeared deeply traumatized by the events and needed to seek psychological help. The evidence supports the trial court's scoring of OV 4. *Leversee, supra* at 348.

Defendant next alleges that the score of fifty points for OV 11, two or more criminal sexual penetrations, was improper. MCL 777.41(1)(a). Although the victim testified that the three instances of oral and anal penetration were consensual, the trial court reasoned that sex cannot be voluntary when one person is uninformed about the other person's HIV-positive status. OV 11 is properly scored in any crime against a person. MCL 777.22(1). Additionally, MCL 777.41(2)(a) provides that "all sexual penetrations of the victim by the offender arising out of the sentencing offense" must be scored. We may not go beyond the words of the statute unless the statutory language is ambiguous. *People v Tomasovich*, 249 Mich App 282, 285-286; 642 NW2d 682 (2002). The clear language here supports the trial court's scoring decision.

Defendant further opines that he erroneously received twenty points under prior record variable (PRV) 5, for having seven or more prior misdemeanor convictions. MCL 777.55. Defendant raised this issue for the first time in a motion for resentencing, which was filed several months after he was sentenced. MCL 769.34(10). The trial court noted at sentencing that defendant had three prior felony convictions and nine misdemeanor convictions. Defendant argues on appeal that his convictions for driving with a suspended license and "obstructing police" [sic] should not be scored under PRV 5 because they involve public safety violations rather than crimes against a person or property. We agree that defendant's conviction for driving with a suspended license should be excluded because it is not in one of the enumerated categories of misdemeanors under PRV 5. MCL 777.55(2). However, resisting or obstructing a police officer is specifically designated a crime against a person, MCL 777.16x, and, therefore, a misdemeanor for obstructing a police officer may properly be scored under PRV 5. MCL 777.55(2)(a). Consequently, the trial court did not err in scoring PRV 5.

Defendant's convictions are affirmed. This matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey