

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LAMARR JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 28, 2004

No. 247710

Wayne Circuit Court

LC No. 02-013976-01

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from nonjury convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and felonious assault, MCL 750.82, for which he was sentenced to concurrent prison terms of fifteen to thirty years on the CSC convictions and one to four years on the assault conviction. We affirm defendant's convictions but remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that he was denied a fair trial due to the improper admission of other acts evidence. The issue has not been preserved, defendant having failed to object at trial. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Therefore review is precluded unless the defendant demonstrates plain error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Alternatively, defendant contends that trial counsel was ineffective for failing to object to the improper other acts evidence. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To obtain relief, defendant must show an error by defense counsel that affected the outcome of the proceedings. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233; 661 NW2d 553 (2003).

Although the prosecutor elicited testimony from the victim that defendant had physically assaulted her in the past, such evidence was not offered under MRE 404(b)(1) to prove that defendant committed the crimes charged. Rather, it was offered to explain why the victim had obtained a personal protection order against the defendant. While that evidence was not particularly relevant, it was first raised and explored by defense counsel during cross-examination. Because defendant opened the door to that line of questioning, it was not improper for the prosecutor to develop it further on redirect examination. *People v Verburg*, 170 Mich

App 490, 498-499; 430 NW2d 775 (1988); *People v Stratton*, 64 Mich App 349, 354-355; 235 NW2d 778 (1975). Therefore, defendant has not shown plain error. Moreover, the alleged error was unlikely to have affected the outcome of the case because defendant was tried before a judge sitting without a jury. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

Defendant next contends that he is entitled to resentencing because offense variables 11, 12, and 13 were improperly scored.

Defendant's objection to the scoring of OV 11, MCL 777.41, was properly preserved for appeal, MCR 6.429(C), but is without merit. *People v McLaughlin*, 258 Mich App 635, 675-676; 672 NW2d 860 (2003).

Defendant has waived any claim of error with respect to the scoring of OV 12, MCL 777.42. Not only did he fail to raise a timely objection, MCR 6.429(C), he advised the court that apart from objections specifically noted, the other variables had been scored accurately. Therefore, there is no error to review. *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000).

Defendant's objection to OV 13, MCL 777.43, was preserved for appeal. MCR 6.429(C). Defendant was assessed twenty-five points for this variable, indicating that the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b).

The instructions for OV 13 provide that the court is to count "all crimes within a 5-year period, including the sentencing offense, . . . regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). It appears that defendant was assessed twenty-five points for the three offenses of which he was convicted. However, unless an offense is "related to membership in an organized criminal group," the court is not to "score conduct scored in offense variable 11 or 12." MCL 777.43(2)(c). Thus, excluding the penetration scored under OV 11, defendant had two crimes against a person stemming from this incident. Defendant's prior convictions consisted of misdemeanor offenses and a felony crime against property. Defendant was charged with, but acquitted of, unarmed robbery, MCL 750.530, in connection with this incident. Although acquittal of an offense does not necessarily preclude its use for scoring purposes, *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415; 670 NW2d 655 (2003), we find that the evidence was insufficient to support a finding even by a preponderance of the evidence that defendant committed that offense. Therefore, OV 13 was improperly scored. Correction of this error would change defendant's classification in the sentencing grid, MCL 777.62, from D-VI to D-IV and reduce the guidelines from a range of 135 to 225 months to a range of 126 to 210 months. Therefore, resentencing is required. MCL 769.34(10).

Defendant's convictions are affirmed, but the case is remanded for resentencing. Jurisdiction is not retained.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood