STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 27, 2007
v	No. 265197 Wayne Circuit Court
VERNICE RAY ROBINSON, Defendant-Appellant.	LC No. 04-011031-01

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b, kidnapping, MCL 750.349, assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The court sentenced defendant to concurrent prison terms of 20 to 30 years each for the first-degree CSC and kidnapping convictions, five to ten years for the assault with intent to do great bodily harm conviction, and two to four years for the felonious assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. For the reasons stated below, we affirm.

I. Hearsay

Defendant avers that the trial court improperly admitted the victim's statement to a sexual assault forensic examiner because it was hearsay. The record shows that the prosecutor never questioned the witness, Kimberly Hurst, about the complainant's patient-history statement during direct examination. Rather, defense counsel first explored this issue on cross-examination. Defense counsel asked Hurst to review the statement and then questioned the witness about portions of it in an attempt to show that the examiner had made assumptions or drew inferences about the cause of the victim's injuries. Only after defense counsel's continued questioning regarding what the victim said, did the prosecutor ask to have the statement read. Defense counsel subsequently marked as a defense exhibit the entire record of complainant's treatment in the emergency room and distributed a copy to each juror. Under these circumstances, we conclude that defendant waived any claim of error involving the complainant's statement. "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Hilgendorf v St John Hosp*, 245 Mich App 670, 683; 630 NW2d 356 (2001), quoting *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Where an issue

is waived, it is "extinguished" and there is no error to review. *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001).

II. Prosecutorial Misconduct

Defendant also says the prosecutor engaged in misconduct by eliciting evidence of his probationary status. Defendant claims that he was denied a fair trial because the evidence was unfairly prejudicial under MRE 403, and inadmissible under both MRE 404(b) (evidence of prior bad acts) and MRE 609 (impeachment by evidence of a prior conviction). Because defendant did not object to the prosecutor's questioning about defendant's probationary status, this issue is not preserved. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecution took the position at trial that defendant fled the state immediately after the charged incident and was arrested in Ohio several weeks later. At trial, defendant denied that he left the state after the charged crime was committed in July 2004, but stated that he left for Akron, Ohio, in September 2004, on his way to a funeral in Mississippi. The prosecutor then asked defendant whether he was under a court order not to leave the state. Defendant replied that he was not, but explained that he needed permission from his probation officer, and stated that he was certain he had permission from his probation officer to leave the state. The prosecutor later elicited evidence that defendant had not requested permission from his probation officer to leave the state in 2004, but had asked for permission to attend a funeral in Mississippi in 2003. In his closing argument, the prosecutor argued that defendant's testimony about having permission to leave the state was a lie, as was the remainder of his testimony, and that defendant's flight could be considered by the jury as evidence of his consciousness of guilt.

The prosecutor's questioning did not constitute plain error. First, it was defendant who first volunteered that he was on probation. Second, considered in context, the questioning was not improper under MRE 404(b). Evidence that defendant was restricted from leaving the state because of his probation was relevant to whether he left the state for innocent reasons or because of consciousness of guilt. The prosecutor did not elicit or use the evidence for the purpose of suggesting that defendant had a propensity for committing physical and sexual assaults because of his bad character. Third, though defendant correctly argues that evidence of a witness's probationary status is not admissible under MRE 609 for the purpose of attacking the general credibility of the witness, the prosecutor did not elicit the evidence for this purpose, and did not argue that defendant was not a credible witness merely because of his probationary status. Rather, the evidence was elicited for the purpose of exploring whether defendant legitimately left the state and to rebut defendant's specific testimony that he had permission from his probation officer to leave the state to attend a funeral in 2004. Finally, considering the limited purposes for which the evidence was elicited and used, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. For these reasons, defendant has not demonstrated that a plain error affected his substantial rights.

III. Late Endorsement of Witness

Also, defendant maintains that the late endorsement of a firearms examiner denied him a fair trial. "The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by

stipulation of the parties." MCL 767.40a(4). A trial court's decision to allow the late endorsement of a witness is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 35; 592 NW2d 75 (1998).

Here, the firearms examiner was not previously identified because the officer in charge of the case had been transferred to another unit and was unaware until the day before trial that defendant had been arrested, that a preliminary examination had been held, and that the case was scheduled for trial. Consequently, bullets recovered from the crime scene were never submitted to a firearms examiner until after the trial began. Though defendant asserts that the prosecutor was trying to "sandbag" the defense, he does not explain how he was prejudiced by the late endorsement. The only significance of the firearm examiner's testimony was that three bullets recovered from the crime scene were fired from the same weapon. No weapon was ever recovered and nothing in the examiner's testimony linked the bullets to defendant. Under the circumstances, the trial court's decision to allow the late endorsement was not an abuse of discretion.

IV. DNA Results

In a pro se supplemental brief, defendant argues that his right to due process was violated by the prosecution's failure to disclose DNA test results. Issues that implicate due process concerns are reviewed de novo. *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001).

A defendant has a due process right of access to certain information possessed by the prosecution. *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998). "Under due process principles, the prosecution is obligated to disclose evidence that is both favorable to the defendant and material to the determination of guilt or punishment." *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). Although the government must provide existing exculpatory evidence in its possession, it is not required to develop evidence that does not yet exist. *People v Anstay*, 476 Mich 436, 460-461; 719 NW2d 579 (2006).

Here, the record does not support defendant's claim that the prosecution failed to disclose DNA test results. On the contrary, the testimony at trial indicated that no evidence of sperm or semen was found during the physical examination of the complainant, or in condoms that were recovered from the crime scene. No DNA evidence was presented at trial and the evidence technician testified that no DNA testing of any samples was conducted. Thus, there is no merit to this issue.

Defendant also argues that defense counsel was ineffective for failing to object to the lack of DNA evidence. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*[1] hearing, our review is limited to errors apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).[2]

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] To establish ineffective assistance of counsel, the burden is on defendant to show that counsel
(continued…)

As previously indicated, there were no DNA test results to demand. However, defense counsel did question the evidence technician about the unlikelihood that the condoms ever had semen in them, and about the reasons for failing to conduct DNA testing that could have exonerated defendant. The fact that the physical evidence could not be linked to defendant was favorable to the defense, so there were strategic reasons for not demanding DNA testing. Defendant has failed to overcome the strong presumption that counsel's conduct was reasonable. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot

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made an error so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced defendant as to deprive him of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).