STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 270047 Kent Circuit Court
ANTHONY LAMONT MAY, Defendant-Appellant.	LC No. 05-003497-FC

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(F). The trial court sentenced defendant as an habitual offender, fourth offense, to 14 to 40 years' imprisonment. Defendant appeals as of right both his conviction and sentence. We affirm both.

Defendant argues on appeal that at various times throughout his trial he was denied the effective assistance of counsel. Because defendant failed to move for a new trial or for a *Ginther*[1] hearing, our review of defendant's arguments is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, he was denied his Sixth Amendment right to counsel. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *Id.*; *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first argues that counsel was ineffective for failing to exercise peremptory challenges against two specific jurors, one whose father, more than 15 years previous, pleaded

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

guilty to sexually abusing her brother and sister, and another whose sister "was strangled, [and] left for dead". Generally, counsel's decisions regarding the selection of jurors are presumed to be matters of trial strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (O'Connell, P.J.). We will not second-guess counsel on matters of trial strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The record before us reveals that both jurors stated that they could be fair and decide defendant's case solely on the evidence presented. Defendant has presented nothing to refute their assertions. Because jurors are presumed to be impartial, *id.* at 256, and defendant has not demonstrated impartiality by these jurors, he has not shown that counsel's performance in failing to use peremptory challenges to remove these jurors fell below an objective standard of reasonableness. *Mack, supra* at 129.

Defendant also argues that counsel was ineffective for failing to object to the hearsay testimony of Samantha Golembeski (the victim's cousin), Detective Hartuniewicz, and Pamela Jendritz, the registered nurse who examined the victim and testified about her medical condition. At trial, Jendritz testified that, as she took the victim's medical history, the victim told her that she went to downtown Grand Rapids with a man, whom she had known for three years, and that, following dinner, the man took her to his house where, after he kissed her and pulled down her nylons, "it happened," despite her saying "no". Although Jendritz performed a "medical forensic evaluation," she took the victim's medical history "[f]or diagnosis and treatment," as she needed to determine whether the victim needed further medical care. Because the victim's statement to Jendritz was made for purposes of medical treatment, Jendritz's testimony was admissible pursuant to MRE 803(4), the hearsay exception for statements made in the course of medical treatment or medical diagnosis. See *People v Matuszak*, 263 Mich App 42, 52-53; 687 NW2d 342 (2004). Accordingly, any objection to Jendritz's testimony would have been futile. Counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). In addition, because Jendritz's testimony was cumulative of the victim's trial testimony, there is no reasonable probability that, if counsel objected and the trial court sustained the objection, the outcome of defendant's trial would have been different. *Carbin, supra* at 600.

Golembeski testified that after the victim returned home, she stated that she was dirty and that she had said "no." MRE 803(2) provides a hearsay exception for excited utterances, defined as "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). There is no doubt that the sexual assault was a startling event for the victim. Based on the record, we are convinced that the victim's statements to Golembeski were made while she was under the stress caused by the sexual assault. The victim made her statements less than 35 minutes after the assault occurred. In addition, the victim's demeanor, as testified to by Golembeski, along with Bushre, Koster, and Kasaju, who spoke with the victim after she made her statements to Golembeski, demonstrates that she continued to be under the stress of the sexual assault long after the challenged statements. These witnesses testified that the victim was hysterical and upset. Because Golembeski's testimony was admissible under MRE 803(2), any objection would have been futile, and counsel was not ineffective for failing to object. *Fike, supra* at 182. Further, because Golembeski's testimony was corroborative of the victim's testimony, and also of the testimony of Bushre and Kasaju, there is no reasonable probability that, had counsel objected and the trial court sustained the objection, the outcome of defendant's trial would have been different. *Carbin, supra* at 600.

Defendant next challenges Detective Hartuniewicz's testimony, given in response to a question from defense counsel, that when he discussed Jendritz's report with Jendritz, they only discussed the tears found in the victim's genital area and how the tears were an indication of force. Defense counsel's failure to object to testimony that he himself elicited does not fall below an objective standard of reasonableness. *Mack, supra* at 129. Defendant has not overcome the strong presumption that counsel was engaged in sound trial strategy when he elicited the testimony at issue. As such, defendant is not entitled to relief. *Mack, supra.*

Defendant additionally argues that counsel was ineffective for failing to object when Arianna May, defendant's daughter, testified to defendant's prior bad acts. Arianna testified that she lied to the police officers about her location on the night of the sexual assault to protect defendant because "they [the police] have been trying to get him, like there's always a case." She explained that the police "were always at [their] house. . . . [M]y stepmother kind of built him up a record, and, you know, they were always trying to arrest him and put him in jail for nonsense." A defendant's prior bad acts are inadmissible to prove the defendant's propensity to commit such acts. MRE 404(b); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, the testimony of Arianna was not offered to prove defendant's propensity to commit the sexual assault or to commit any other crimes. Rather, it was offered to explain why Arianna acted as she did, and why she falsely told the police that she was at defendant's house on the night of the sexual assault. Accordingly, an objection by counsel that Arianna's testimony violated MRE 404(b) would have been futile. *Fike, supra* at 182. Moreover, it was defense counsel who, on cross-examination, asked Arianna why she lied to the police. On redirect examination, the prosecutor asked her to clarify her earlier testimony. Again, we do not find counsel's failure to object to testimony that was elicited by him or responsive to his cross-examination to fall below an objective standard of reasonableness. *Mack, supra* at 129. Defendant cannot overcome the strong presumption that counsel was engaged in sound trial strategy when eliciting the testimony at issue. *Id.*

In his last claim for ineffective assistance of counsel, defendant argues that counsel was ineffective for failing to object when Jendritz testified that, based on her experience, it would be unusual for tears such as she found in the victim's genital area to occur during consensual intercourse. According to defendant, counsel should have objected because the prosecutor had agreed that Jendritz could not testify as to whether the victim consented to the sexual intercourse. However, based on our review of the record, such an objection to the nurse's testimony would have been futile. While the prosecutor agreed with defense counsel that Jendritz could not offer an opinion as to whether the victim consented to the sexual intercourse, he argued that she could offer an expert opinion regarding whether the tears found in the victim's genital area were consistent with consensual sexual intercourse. Over counsel's objection, the trial court permitted such testimony. Accordingly, because the trial court qualified Jendritz as an expert for the purpose of offering an opinion regarding whether the victim's injuries were consistent with consensual intercourse, any objection to the Jendritz's testimony would have been futile. *Fike, supra* at 182. Defendant was not denied the effective assistance of counsel.

Defendant next claims on appeal that the trial court erroneously admitted into evidence love letters that he had written to two women, Amela Buljko and Sarah Price. According to defendant, the letters were irrelevant and more prejudicial than probative. The trial court overruled defendant's objection that evidence of the letters was irrelevant. We review a trial

court's evidentiary decision for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Because defendant did not object to the letters on the basis that they were more prejudicial than probative, the issue whether the letters were inadmissible pursuant to MRE 403 is unpreserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground"). We review an unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The letters were relevant to defendant's credibility. Defendant told each of the two women, within two days, that she was the woman for him, indicating that defendant was deceiving Buljko or Price or both. The letters had a tendency to make it more probable that defendant was not credible, particularly that he was deceiving Sergeant McGuffee when he told McGuffee that the victim became "very suggestive" and that she was on him "like a mink." In addition, the letters were relevant to defendant's theory of defense, that the victim was the sexual aggressor. Because defendant, within days, proclaimed his love to two women, the letters have a tendency to make it more probable that defendant, rather than the victim, initiated the sexual intercourse. His claim that he rebuffed the victim was less credible in light of his interaction with women in general. The trial court did not abuse its discretion in holding that the letters to Buljko and Smith were relevant. *Martin, supra* at 315.

Even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403. Because all evidence presented by the prosecution is prejudicial to a defendant, the inquiry under MRE 403 is whether the evidence was unfairly prejudicial. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). Evidence is unfairly prejudicial if it injects considerations extraneous to the merits of the lawsuit, such as the jury's bias, sympathy, anger, or shock. *Id.* at 337. Although the evidence of his letters to Buljko and Price was prejudicial to defendant, defendant has failed to establish that his letters plainly and clearly injected considerations extraneous to the merits of the lawsuit. *Carines, supra* at 763. The admission of the letters defendant wrote to Buljko and Price was not plain error requiring reversal.

Defendant also argues on appeal that the trial court erred in scoring offense variables (OVs) 4, MCL 777.34, and 10, MCL 777.40. We review a trial court's scoring decisions for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). We will uphold a scoring decision for which there is any evidence in support. *Id.* at 454.

A trial court may score ten points for OV 4, MCL 777.34, if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). At defendant's sentencing hearing, the victim testified that, on three occasions after the sexual assault, she sought professional treatment. In addition, the victim testified that she did not leave her apartment for a while, she took time off from work, and she no longer trusts people and feels that she is being punished every day. Based on these statements by the victim, there is evidence in the record to support the trial court's scoring decision that the victim suffered serious

psychological injury requiring professional treatment. *Cox*, *supra* at 454. The trial court did not err in scoring ten points for OV 4.

Fifteen points may be scored for OV 10, MCL 777.40, if "[p]redatory conduct was involved." MCL 777.40(1)(a). The statute defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In the present case, there was evidence that defendant insisted that he pick up the victim from her apartment. The victim told Kasaju that defendant wanted to pick her up. In addition, there was evidence from which to infer that defendant never intended for his business partner to meet him and the victim at Bistro Bella Vita. Defendant told the victim that his business partner's name was Richard or Rick, while he told the interviewing police officer that his business partner's name was Muwi. Further, while at the restaurant, defendant made it appear to the victim that he talked to his business partner three times on the telephone. However, according to defendant's cellular telephone records, defendant called his residence three times and a cellular telephone with a California area code one time. After defendant and the victim left the restaurant, defendant brought the victim to his house, where they were alone, and assaulted her. Accordingly, there is evidence in the record to support the trial court's scoring decision that defendant engaged in predatory conduct. *Cox*, *supra* at 453. The trial court did not err in scoring OV 10.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray