STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2007
v	No. 272132 Wayne Circuit Court
JAMES EDWARD TAYLOR, Defendant-Appellant.	LC No. 05-009811-01

Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e), felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 174 months to 30 years for each CSC conviction, one to four years for the assault conviction, and a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion by allowing evidence that the police discovered a Weatherby 20-gauge shotgun in his home when it was undisputed that the gun was not used in the charged crimes. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. Thus, "evidence is admissible if it is helpful in throwing light on any material point." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

We find merit to defendant's claim that the shotgun was not relevant to a material point in this case. In short, the shotgun was not relevant to the victim's credibility where the victim specifically described the two weapons used during the criminal episode, and there was no evidence that the victim ever saw the Weatherby shotgun or that defendant used it during the criminal episode. But "a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496;

596 NW2d 607 (1999) (footnote omitted). The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *Id*. at 495.

The evidence of the Weatherby shotgun was not prejudicial considering that the testifying officer, who is a weapon's instructor, described it as a collector's item and stated that it had never been fired, that it had a lock on it, and that it had "nothing to do with this crime." Further, although the Weatherby shotgun was not connected to the charged offenses, the victim testified that defendant was armed with two other guns during the offenses. Evidence was presented that defendant briefly visited a storage unit shortly before the police searched his residence, and that the police later found two guns inside the storage unit that the victim identified as the guns used during the offenses. Under the circumstances, it is not more probable than not that the Weatherby shotgun evidence affected the outcome of the trial. Therefore, any error was harmless.

Defendant alternatively argues that defense counsel was ineffective for cross-examining a detective about an initial barricaded gunman police report, because counsel's questioning caused the trial court to allow the evidence of the Weatherby shotgun. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Decisions about what questions to ask are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant has not overcome the presumption that defense counsel's decision to cross-examine the detective about a barricaded gunman report was a matter of sound strategy. The defense theory was that the victim fabricated the allegations against defendant. One of defense counsel's apparent strategies was to counteract the testimony against defendant with evidence that the initial report to the police involved a barricaded gunman and that "nothing about a rape" was mentioned. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Additionally, as previously indicated, the evidence of the shotgun was not prejudicial considering that it was described as a collector's item and was admittedly unrelated to this case. Consequently, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's action, the result of the proceeding would have been different. Therefore, he has not established a claim of ineffective assistance of counsel. *Effinger, supra*.

Next, defendant argues that he was denied a fair trial by the trial court's remarks to the jury attributing various delays during trial to defense counsel. Because defendant did not object to the trial court's comments, we review this claim for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006).

Trial was initially scheduled to begin on the morning of June 19, 2006. Apparently, defense counsel called and indicated that he had injured his back. Trial began later that afternoon with another attorney appearing for defendant for the limited purpose of swearing in the jury. On June 20, 2006, defense counsel appeared, and trial resumed. On June 21, 2000, defense counsel informed the court that he was unable to appear because of a back injury, and the court agreed to adjourn trial. It explained the following to the jury:

> Ladies and gentlemen of the jury, I don't know how to tell you this other than to tell you that we will be unable to proceed with the trial today. The defense attorney . . . has reinjured his back and cannot make it here today. He has a doctor's appointment this afternoon. He is going to make every effort to be here tomorrow morning.

Trial resumed on June 22, 2006. At 4:05 p.m., a sidebar discussion was held, following which the trial court instructed the jury as follows:

> Well, ladies and gentlemen of the jury, including two days of delay and the length of time things have taken today, it is clear that we are not going to finish this trial today.
>
> It is also clear that I will not be here. I am here tomorrow but I have a full schedule and the prosecutor can't be here tomorrow. I am on vacation Monday and Tuesday. A long-planned family reunion. So guess what? We are going to have [sic] resume this trial on Wednesday.

"If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed." *Conley*, *supra* at 308 (citations omitted). "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" *Id.* (citations omitted).

In this case, the trial court's initial remarks explaining that defense counsel had reinjured his back were not of such a nature as to unduly influence the jury. The court merely advised the jury that trial would be adjourned that day and explained why. The court's comments were not calculated to be critical of defense counsel or to cause the jury to believe that the court had any opinion regarding the case. Further, nothing in the court's later remarks can be construed as placing any fault on defense for the second delay. Rather, the court plainly indicated that the delay was caused by a combination of the trial court's schedule, the prosecutor's unavailability, and the court's preplanned vacation. Moreover, the trial court instructed the jury that its comments are not evidence, that it is not trying to influence the vote or express a personal opinion about the case when it makes a comment, and that if it believes the court has an opinion, that opinion must be disregarded. Jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). For these reasons, no plain error has been shown.

Defendant next argues that he was entitled to a mistrial after the trial court "revealed its partiality and improperly usurped the role of the prosecutor" by instructing the prosecutor to

peremptorily excuse a prospective juror. This Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Lett*, 466 Mich 206, 223; 644 NW2d 743 (2002). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant correctly notes that a trial court must "avoid any invasion of the prosecutor's role." *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). Here, the record does not support defendant's claim that the trial court usurped the prosecutor's role. Rather, outside the presence of the prospective jurors, the trial court inquired whether the prosecutor intended to use a peremptory challenge to excuse a prospective juror. The court noted that the prospective juror was a student who had an impending examination and was also "very pregnant" and "would have been physically miserable while serving as a juror." The court explained that it directed its inquiry at the prosecutor only because defendant had already used all of his peremptory challenges, otherwise it would have directed its inquiry at both parties. There is no indication that the trial court coerced the prosecutor into excusing the juror. Indeed, defendant acknowledges that the court's inquiry was only a suggestion. The prosecutor noted for the record that she had planned to excuse the juror before the court mentioned it. Also, there is no indication that defense counsel expressed a desire during voir dire to retain the juror, counsel did not object at the time to the trial court's inquiry or the prosecutor's use of a peremptory challenge to excuse the juror, and counsel subsequently expressed satisfaction with the impaneled jury. Under the circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Lett*, *supra*.

Defendant next argues that the trial court erred when it admitted the victim's post-offense statements to her daughter, Detroit Police Officer Eric Smigielski, Ecorse Police Corporal Christoval Trevino, and Ecorse Detective Sergeant Gregory Blade. We disagree.

Although defendant objected to the evidence of the victim's statements to her daughter, he did not object to the victim's statements to the three police officers. Accordingly, we review the former for an abuse of discretion, *McDaniel*, *supra* at 412, and we review the latter for plain error affecting defendant's substantial rights, *Kimble*, *supra* at 312.

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998) (Boyle, J). The excited utterance exception permits the admission of statements that (1) arise out of a startling event, and (2) are made while the declarant was under the excitement caused by that event. MRE 803(2); *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999), aff'd 464 Mich 756; 631 NW2d 281 (2001).

Defendant argues that the victim's statements were not admissible under the excited utterance exception because too much time elapsed between the time of the incident and the victim's statements to her daughter and the three police officers. The focus of the excited utterance rule is the "lack of capacity to fabricate, not the lack of time to fabricate," and the relevant inquiry is one concerning "the possibility for conscious reflection." *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998). The length of time between the startling event and the statement is an important factor to consider in determining admissibility, but it is not

dispositive. *Id*. Rather, the key question is whether the declarant was still under the stress of the event, and the trial court is accorded wide discretion in making that preliminary factual determination. *Id.* at 551-552; see also *Layher*, *supra* at 582.

Although the criminal episode ceased in the late hours of September 6, 2005, the victim and defendant remained in defendant's bed and defendant had a gun nearby. The victim explained that she was able to leave defendant's house on the morning of September 7, 2005, after she was certain that defendant was asleep. The victim went directly home and told her daughter what had occurred at about 6:00 a.m. The victim's daughter described the victim as "crying and very scared and just looked very troubled, very scared," and hysterical. She further testified that she had never seen her mother like that before. Officer Smigielski testified that when he arrived at the victim's house at about 7:00 a.m., she was "crying and upset," and needed to be calmed down. Ecorse Police Corporal Trevino saw the victim at the police station at about 8:00 a.m., and described her as "very upset," "tearful," and speaking rapidly. It took the officer a "good five or ten minutes" to calm her down. Ecorse Detective Sergeant Blade, the officer-in-charge, spoke to the victim at about 9:00 a.m. He described her as "very highly upset," "shaking," "fearful," "crying and saying she could have been killed." He opined that the victim was probably hysterical.

The testimony describing the victim's condition was sufficient to show that she was still under the stress caused by the event when she made the statements. Consequently, the trial court did not abuse its discretion in admitting the victim's statements to her daughter under MRE 803(2). Also, because it is not plainly apparent that the victim's statements to the three police officers could not have been received successfully and correctly under MRE 803(2), defendant has failed to demonstrate plain error in this regard.

In a related claim, defendant argues that defense counsel was ineffective for failing to object to the victim's statements to the three police officers. In light of our conclusion that the statements qualified as excited utterances under MRE 803(2), any objection would have been futile. Consequently, defendant cannot establish that counsel was ineffective for failing to object to the statements. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

Next, we reject defendant's claim that the trial court abused its discretion in scoring 50 points for OV 7 of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

MCL 777.37(1)(a) directs a score of 50 points if "a victim was treated with sadism, torture, or excessive brutality or conduct that is designed to substantially increase the fear and anxiety a victim suffered during the offense." There was evidence that during the criminal episode, defendant brandished a Tech 9 gun, inserted a clip, "cocked [it] back," and screwed a silencer on it. Defendant thereafter put the gun to the victim's head and said he was going to kill her and that nobody would hear. When the victim begged defendant to allow her to see her children again, defendant responded that she was going to die and that he was going to kill her children also. Defendant told the victim that after killing her, he would wrap her body and take it to the river. Throughout the criminal episode, defendant repeatedly put the gun to the victim's

head and threatened to kill her and her children. Defendant's threatening conduct was contemporaneous with the sexual assaults and was designed to increase the fear and anxiety the victim was suffering from the assaults.

Contrary to defendant's claim, "where the crimes involved constitute one continuum of conduct, as here, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense." *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003). Therefore, in scoring OV 7, the trial court properly could consider defendant's conduct while feloniously assaulting the victim before and after the sexual assaults. Consequently, the trial court did not abuse its discretion in scoring 50 points for OV 7.

Finally, we reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. The only possible error at trial involved the evidence of the Weatherby shotgun, which we have determined was harmless. Because no other errors have been identified, there can be no cumulative effect of several errors and reversal under a cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood