STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS DURELL SIMMONS,

Defendant-Appellant.

UNPUBLISHED
December 11, 2007

No. 271675
Wayne Circuit Court
LC No. 06-003040-01

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f) (force or coercion used to accomplish sexual penetration resulting in personal injury), and one count of unarmed robbery, MCL 750.530. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to thirty-five to fifty years' imprisonment for each of his CSC I convictions and 5 to 22 ½ years' imprisonment for the unarmed robbery conviction. We affirm defendant's convictions and sentences, but reverse the portion of the judgment of sentence and order requiring defendant to repay his attorney fees, and remand for the trial court to consider defendant's ability to pay.

Defendant first argues that evidence that the victim identified him in a photographic lineup should have been suppressed because the identification occurred while defendant was in custody and without his attorney being present.[1] We disagree.

The Sixth Amendment right to counsel "attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings." *People v Hickman*, 470 Mich 602, 609; 684 NW2d 267 (2004). Here, the identification procedure was conducted prior to the initiation of formal charges. Consequently, defendant's Sixth Amendment right to counsel had yet to attach at the time the photographic lineup was conducted. Further,

[1] The trial court denied the motion on the basis that it was untimely, and presented "too little, too late." Rather than evaluate whether the trial judge's ruling was contrary to the pre-trial judge's scheduling order, we will address the issue on the merits.

defendant was given the opportunity to participate in a live lineup, but declined to do so in the absence of his attorney. Detective James Hines, who was handling the matter, attempted to reach defendant's attorney and left several messages. He conducted the photo lineup after the attorney failed to respond. Defendant has failed to demonstrate that the court erred in declining to suppress the identification.

Even if admission of the photographic identification were improper, any error was harmless. The victim talked to defendant at a bus stop for five minutes and walked with defendant for nearly eight blocks before accompanying him into the alley where the rape occurred. The victim affirmed that she was able to "get a good look" at defendant, and assisted in creating a composite drawing of the perpetrator that was later found to resemble defendant. Therefore, any error in admitting the photographic identification was harmless. *People v Rodriguez* (*On Remand*), 216 Mich App 329, 332; 549 NW2d 359 (1996).

Defendant next contends that the trial court erred in admitting testimony concerning his statements to police about other crimes, in violation of MRE 404(b).[2] We disagree. Generally,

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[2] Hines testified:

> *Q*. Can you tell us what it is Mr. Simmons said to you?
>
> *A*. Well, he said – he started off, hypothetically speaking what if a brother wanted to confess to you about 12 rapes in Highland ' and all that brother wanted was one week to say goodbye to his wife and family.
>
> *Q*. When Mr. Simmons said that to you what, if anything, did you do?
>
> *A*. I told him hypothetically speaking I would do whatever I could to make it happen.
>
> *Q*. What, if anything, did you do after that conversation?
>
> *A*. We had some more hypothetical conversations that he doled out and then, once it was done, I immediately went to the prosecutor's office and I can't recall the name of the prosecutor that I met but I met with a couple of prosecutors and I met a female prosecutor. She then in turn went and gathered another prosecutor to confer with and it was determined then that there was nothing we could do for him.
>
> *Q*. Now you said he had some other hypotheticals he wanted to talk about?
>
> *A*. Yes. He also mentioned at least five in Detroit that the brother might be able to give up and he just kept insisting on that week, all the brother wants is a week. A week where?
>
> *Q*. A week where?

(continued…)

evidence is admissible if it is relevant and inadmissible if it is not. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 562 (2002). 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 or less probable than it would be without the evidence. MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). MRE 404(b) precludes the admission of prior crimes, wrongs or acts "to prove the character of a person in order to show action in conformity therewith."

Detective Hines recounted defendant's offer to provide information involving other rapes that had occurred in Highland Park and Detroit in exchange for the opportunity to see his wife and children. These statements were not hearsay and were admissible as a statement by a party opponent. See MRE 801(d)(2). While the content of defendant's statements implicated MRE 404(b),[3] the statements were relevant without an intermediate inference to character. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). The evidence showed a consciousness of guilt. Further, defendant's statement that if he could not make a deal, "he would drag this out in court and he would have his attorney put all the cases together and he would plead out to 15 years," can be viewed as an admission.

(…continued)

A. To spend time say goodbye to his wife.

Q. Now, what is actually in that report?

A. Do you want me to read it from the beginning?

Q. Do you have a memory of everything in that report or would it help you to review it before you testify about it?

A. It would help to review it.

Q. Take a minute to review it.

A. I'm done.

Q. Okay. You indicated that he said something regarding, hypothetically speaking he could help solve 12 cases?

A. Right, that was his initial statement. Later on he said, it went from the hypothetical brother to all I want is a week to say goodbye to my wife and I'll give you, I'll tell you everything about all of the rapes in Highland Park and the three in Detroit.

[3] We reject the prosecution's argument that MRE 404(b) is inapplicable to the instant case because Hines's testimony described defendant's prior statement of intent and not defendant's prior acts. Although MRE 404(b) applies to prior acts, not prior statements of intent, *People v Goddard*, 429 Mich 505, 514-515, 518; 418 NW2d 881 (1988), defendant's statements to Hines did not involve prior statements of intent, rather they involved prior crimes.

Further, even if we were to find plain error, defendant has failed to demonstrate his actual innocence or show how the integrity of the proceedings was affected. The victim had ample opportunity to view defendant during the assault, positively identified defendant as the perpetrator in a photographic lineup, and participated in the creation of a composite sketch that depicted defendant. Consequently, the admission of this evidence did not affect defendant's substantial rights and was harmless. *Rodriguez, supra* at 332.

Defendant next claims that defense counsel was ineffective in failing to request the appointment of an expert on eyewitness identification. We disagree. Because there was no evidentiary hearing, this Court limits its review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's errors, the result of the proceedings would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

It is presumed that defense counsel's decisions regarding what evidence to present or whether to call and question witnesses constitute trial strategy, which this Court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Moreover, a defense counsel's failure to call witnesses or present other evidence may amount to ineffective assistance of counsel "only when it deprives the defendant of a substantial defense." *Id*. "A substantial defense is one which might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

At trial, defense counsel thoroughly cross-examined the victim regarding discrepancies in her identification of defendant as the perpetrator. Specifically, the victim could not remember defendant's height and weight, and the photograph of defendant the victim identified did not match her original description of the perpetrator. Further, the victim admitted during cross-examination that no other witnesses were present during the incident. During closing argument, defense counsel asserted that no physical evidence linked defendant to the crime and reiterated the discrepancies in the victim's identification of defendant.

In light of this thorough cross-examination and closing argument, defense counsel may have reasonably concluded that "the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." See *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Consequently, defense counsel's decision not to call an expert witness constituted sound trial strategy that did not deprive defendant of a substantial defense. Therefore, defendant has failed to establish that counsel's failure to call an expert witness fell below an objective standard of reasonableness or was outcome determinative. *Effinger*, *supra* at 69.

Defendant next asserts that the trial court erroneously scored 50 points for offense variable (OV) 7. We disagree. This Court reviews the application of the sentencing guidelines de novo but reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Cook*, 254 Mich App 635, 638; 658 NW2d 184 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 7 is scored for "aggravated physical abuse." MCL 777.37(1). A trial court should assess 50 points for OV 7 when "[a] victim was treated with terrorism, sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a); *Hornsby*, *supra* at 468. Sadism is "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3); *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

In scoring 50 points for OV 7, the trial court indicated that the victim suffered prolonged pain and humiliation for defendant's gratification when defendant forced her to bend down before penetrating her and to swallow his ejaculate. The record confirms that defendant twice forced the victim to perform fellatio and instructed her "suck [his] juices off," and to swallow at his command. Defendant also told the victim to turn away from him, bend over and touch the ground before penetrating her vagina with such force that her head hit the brick wall in front of her. When defendant's obscene comments are considered in conjunction with the repeated brutality of the assault, there is sufficient support for the conclusion that the victim was subjected to extreme humiliation[4] inflicted for defendant's gratification. Thus, the score of 50 points for OV 7 was not an abuse of discretion.

Defendant next argues that his sentence violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We review this unpreserved issue for plain error affecting substantial rights. *Carines*, *supra* at 763. Defendant acknowledges that our Supreme Court has found that Michigan's sentencing scheme is unaffected by *Blakely* because Michigan uses an indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Nevertheless, defendant claims that our Supreme Court's ruling was improper and notes that *Drohan* and *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006), reaffirmed by *People v McCuller* (*On Remand*), 479 Mich 672; 739 NW2d 563 (2007), were wrongly decided in light of *Cunningham v California*, 549 US ___; 127 S Ct 856; 166 L Ed 2d 856 (2007). However, our Supreme Court recently found that *Cunningham* does not affect Michigan's indeterminate sentencing scheme. *McCuller* (*On Remand*), *supra* at 676; *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). Therefore, defendant's claim fails.

Lastly, defendant argues, and the prosecution concedes, that the trial court erred in requiring defendant to repay his attorney fees without considering defendant's ability to pay.

When ordering a criminal defendant to reimburse attorney fees, a trial court must "provide some indication of consideration [of the defendant's ability to pay], such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). Relevant factors in this consideration include defendant's foreseeable ability to pay and defendant's future earnings. *Id.* Here, although the judgment of sentence and order for reimbursement indicate that defendant

[4] There was testimony that the victim repeatedly rinsed her mouth out for nearly twenty minutes while at the hospital.

must repay $760 in attorney fees, the trial court provided no indication that it considered defendant's foreseeable ability to pay or future earnings. Therefore, the trial court erred.

We affirm defendant's convictions and sentences, but reverse the portion of the judgment of sentence and the trial court's order requiring defendant to repay his attorney fees and remand for the trial court to consider the attorney fees in light of defendant's ability to pay.[5]

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Brian K. Zahra

[5] On remand, an evidentiary hearing is not required, rather, "[t]he court may obtain updated financial information from the probation department." *Dunbar*, *supra* at 255 n 14.