Court of Appeals, State of Michigan

ORDER

People of MI v Michael Guerra Jimenez

Docket No. 271931; 278192

LC No. 03-008021-FH

Michael J. Talbot
Presiding Judge

Mark J. Cavanagh

Brian K. Zahra
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued June 17, 2008, is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 28 2008
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2008
v	Nos. 271931; 278192 Lapeer Circuit Court
MICHAEL GUERRA JIMENEZ, Defendant-Appellant.	LC Nos. 03-007890-FH; 03-008021-FH

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM..

In these consolidated appeals, defendant, who at all times relevant to this matter was a licensed masseur, appeals as of right his jury trial convictions for four counts of fourth-degree criminal sexual conduct, MCL 750.520(e)(1)(a), for conduct that occurred during massage sessions with the victims. In Docket No. 271931, defendant was convicted of two counts and sentenced to a term of five years' probation with the first year to be served in jail, $120 state minimum costs, $500 court costs, $912 prosecution costs, and $1,484 in attorneys' fees. In Docket No. 278192, defendant was convicted of two counts and sentenced to a concurrent term of five years' probation with the first year to be served in jail, and additional $120 state minimum costs, $60 crime victim rights, $60 prosecution costs, $1,485 in attorney fees. We affirm defendant's convictions, but we remand for clarification regarding the imposition of attorney fees.

Defendant's convictions arise from massage services rendered to three female victims, Theresa Nivison, Susan Ford and Janeen Day, between August, 2002 and March, 2003, while leasing space to perform massage therapy in the chiropractic offices of Dr. Ernest Centofani.

I. Sufficiency of the Evidence

Defendant first challenges the sufficiency of the evidence supporting his convictions. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Lanzo Construction Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "In reviewing a challenge to the sufficiency of the evidence, this Court analyzes the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

The crime of fourth-degree criminal sexual conduct requires a finding that sexual contact occurred. *People v Russell*, 266 Mich App 307, 311; 703 NW2d 107 (2005), citing MCL 750.520e. MCL 750.520a provides that:

> (o) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor' s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:
>
> (i) Revenge.
>
> (ii) To inflict humiliation.
>
> (iii) Out of anger.

"The actor must touch a genital area intentionally, but he need not act with the purpose of sexual gratification. Rather, it suffices if 'that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.'" *People v Fisher*, 77 Mich App 6, 13; 257 N.W.2d 250 (1977), quoting MCL 750.520a.

Here, Nivison testified that, during her massage, defendant's hands "actually made contact with the crack of [Nivison's] butt," defendant massaged her breasts, and spread his fingers over and "across the vaginal area." Day testified that defendant massaged her buttocks, touched her anus and that defendant's fingers brushed over her vagina. Ford testified that defendant massaged between her buttocks, her breasts and that defendant inserted his finger into her anus and vagina.

Defendant did not claim that the above sexual contact was incidental to his massage. Rather, defendant specifically denied having touched any of the victims' buttocks, breasts, anus or vagina. Accepting the victims' testimony in the light most favorable to the prosecution, there is ample evidence that defendant intentionally touched the victims' intimate parts. Although defendant claims the jury merely speculated that he had a sexual purpose in doing so, the evidence is sufficient if 'that intentional touching can *reasonably be construed* as being for the purpose of sexual arousal or gratification." MCL 750.520a (Emphasis added). Susan Ford testified that after a massage, defendant asked, "[d]o you masturbate." Moreover, there was testimony from defendant's massage instructor, and defendant, that the touching of intimate parts during a massage is simply not appropriate. Given this evidence, a jury could readily construe defendant's inappropriate touching of intimate parts as done for the purpose of his own sexual arousal or gratification or done for a sexual purpose. A rational jury could conclude beyond a reasonable doubt that defendant committed fourth-degree sexual conduct.

II. Evidence of Habit

Next, defendant claims the trial court abused its discretion in precluding evidence that defendant habitually used proper massage techniques, thereby preventing defendant from establishing that he acted in conformity with this habit while massaging the victims. We conclude there is no legal merit to this claim.

MRE 406 reads:

> "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

Such evidence must establish a set pattern or show that something is done routinely or has been performed on countless occasions. *Cook v Rontal*, 109 Mich App 220, 224-225, 311 NW2d 333 (1981), superceded on other grounds, *Lewis v LeGrow*, 258 Mich App 175, 670 NW2d 675 (2003).

However, in *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 318 NW2d 639 (1982), this Court observed,

> [t]he witness must be able to testify that the practice has been performed on countless occasions. To do this, the witness must have some knowledge of the practice and must demonstrate this knowledge prior to giving testimony concerning the routine practice. Where a witness cannot demonstrate such knowledge, he cannot testify as to the routine nature of the practice.

Here, defendant's two proposed witnesses had each only been massaged by defendant once before. Thus, the proposed witnesses could not have testified to the routine or habitual nature of defendant's massages, and the trial court properly precluded this evidence.

III. Defendant's Right to a Fair Trial

Defendant next argues that for a myriad of reasons, he was denied his sixth amendment right to a fair trial before an unbiased jury. Defendant first asserts that he is entitled to a new trial because, during voir dire, Day left the courtroom in tears, which one prospective juror admitted made him believe defendant was guilty. However, defendant did not object to the above behavior and then expressed satisfaction with the chosen jury. Accordingly, defendant's waiver extinguished any error that may have occurred. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Ho*, 231 Mich App 178, 183-185; 585 NW2d 357 (1998). Moreover, because defendant failed to preserve the issue by moving for a new trial in the lower court under MCR 2.611(A)(1)(f) or by moving for relief from judgment under MCR 2.612(C)(1)(b), review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 597 NW2d 130 (1999); *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Here, defendant cannot establish plain error affecting substantial rights. Although the record suggests that Day's actions possibly biased a prospective juror against defendant, the trial court removed the juror for cause due to her response to Day's conduct. Because defendant has presented no evidence that any juror actually empanelled was biased, there is no evidence to infer the jury was tainted. Thus, defendant has failed to establish an error affected his substantial rights.

Defendant next argues he was denied a fair trial when the trial court denied his motion to sequester the victims. The decision whether to order the sequestration of a witness is left to the discretion of the trial court. *People v Jehnsen*, 183 Mich App 305, 309; 454 NW2d 250 (1990).

MCL 780.641, provides that:

> The victim has the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies.

We conclude the trial court did not abuse its discretion in not sequestering the victims. Defendant claims that not sequestering Ford allowed her testimony to be colored by previous victims' testimony. In support, defendant notes two instances where Ford, who testified after Day and Nivison, answered questions by referring to the testimony of Day and Nivison. Defendant highlights in his brief on appeal that Ford indicated, "I don't remember, like the other two girls, the details." However, review of Ford's testimony reveals that Ford's mention of previous testimony was innocuous and does not form a basis to set aside defendant's convictions:

> *Q.* So you go in the room and what happens after that?
>
> *A.* I don't remember, like the other two girls, the details, but there is a sheet. He told me, "get undressed, get under the sheet and I'll be back in a few minutes."

Defendant also claims prejudice resulting from Ford's response, "it was like what the other girls said," to a question regarding how defendant massaged her. Similarly, defendant omits Ford's entire answer in which she explains, "it was like what the other girls said, just massaging the buttocks and hand down the crack." Ford's full response indicates that her testimony was based on independent recollection and not the testimony of Day or Nivison. Accordingly, defendant has failed to show harm.

Defendant also argues prejudice resulted from the failure to sequester the alleged victims, when Ford, during Nivison's testimony, broke into tears and abruptly left the courtroom. However, the only evidence supporting this assertion is an affidavit, executed nearly one year after trial, from defendant's friend, Linda Maylock, in which she avers that "everyone heard her cry and saw her get up and run out of the room." While Maylock avers that "everyone" observed Ford's behavior, there is no record evidence that the jurors were affected by her behavior. Thus, defendant has not shown that the failure to sequester Ford during trial caused harm to defendant's case.

Defendant also suggests the victims outbursts were orchestrated. Defendant again relies on an affidavit from Maylock, in which she avers that Ford and Day sat next to each other during the trial. However, merely sitting near one another does not alone suggest that outbursts were orchestrated. Defendant's claim must be rejected.

IV. Instructional Error

Defendant next argues his convictions should be overturned because of instructional error by the trial court that was corrected in response to a question submitted by the jury after deliberations had commenced. Specifically, defendant argues that reversal is required because

the trial court omitted the "sexual contact" element from the jury instruction for fourth-degree CSC.

This Court has held that counsel's affirmative statement that there were no objections to the jury instructions constitute express approval of the instructions and waiver of review of the instructions on appeal. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Lueth*, 253 Mich App 670, 688, 660 NW2d 322 (2002). Here, although the trial court omitted the "sexual contact" element from the jury instruction for fourth-degree CSC, defense counsel expressly approved the instructions. Thus, any claim of error is waived.

Further, defendant cannot show harm from the trial court's initial omission of the "sexual contact" element from the jury instruction for fourth-degree CSC because the jury was given the proper instruction before rendering its verdict. The trial court timely corrected its error. After determining that it omitted the "sexual contact" element from the jury instruction for fourth-degree CSC, the trial court gave the proper instructions, which defense counsel again expressly approved. Accordingly, defendant cannot show harm in this regard.

V. The Effective Assistance of Counsel

Next, defendant asserts that he was denied the effective assistance of counsel. An ineffective assistance of counsel claim should be raised by a motion for a new trial or by an evidentiary hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Defendant made neither request below. Where no evidentiary hearing has been held on a claim of ineffective assistance of counsel, appellate review is limited to the existing record. *Id*. at 423. The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlan*c, 465 Mich 575, 579; 640 NW2d 246 (2002).

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994). Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be taken in difficult cases. *Id.* at 325. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy. *People v Mitchell*, 454 Mich 145, 155; 560 NW2d 600 (1997). An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999)

Here, as addressed, *infra*, the trial court did not abuse its discretion in allowing them to remain in the courtroom. Defense counsel is not ineffective for failing to make a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). We also find without merit defendant's claim that defense counsel was ineffective in failing to object to the trial court's omission of the "sexual contact" element from the jury instruction for fourth-degree CSC. As explained, *infra*, the jury was later properly instructed and defendant has not established harm.

For these reasons, we reject defendant's claims that his trial counsel was constitutionally deficient.

VI. Challenges to Fines and Costs

Finally, Defendant challenges the trial court's decision to impose fines, costs and penalties. Defendant argues that the trial court improperly assessed several costs and that he is financially unable to pay those costs and fines properly imposed.

This court reviews de novo the application and interpretation of statutes. *People v Morson*, 471 Mich 248, 255, 685 NW2d 203 (2004). Also, this Court reviews a court's factual findings for clear error. See MCR 2.613(C); *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). To the extent that defendant did not preserve the assessment claims for appellate review, this Court's review is limited to plain error affecting his substantial rights. *Carines*, *supra*.

"A trial court may require a convicted felon to pay costs only where such requirement is expressly authorized by statute." *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). Here, the trial court imposed costs pursuant to MCL 769.1k(1)(b)(iii), MCL 769.1j(1), MCL 771.3, MCL 600.4801 and MCL 600.4803. Each assessment is addressed separately.

A. Costs of Prosecution

MCL 771.3(2) provides that, "[a]s a condition of probation, the court may require the probationer to do 1 or more of the following:" "(c) Pay costs pursuant to subsection (5)." MCL 771.3(2)(c). Subsection (5) provides that, "[i]f the court requires the probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer."

Defendant specifically claims that the prosecution improperly sought to recoup the cost of an airline ticket for Day's child, Elijah. We conclude the trial court did not commit error in concluding that the cost of the second airplane ticket was "specifically incurred in prosecuting the defendant." Defendant is correct that Elijah's presence was not necessary to prosecute defendant. However, while Elijah's attendance was not necessary to prosecution's case, the prosecution required Day's testimony to convict defendant beyond a reasonable doubt. Defendant's claim that Day should have left Elijah at home fails to appreciate that absentee care may have cost more than the cost of an airline ticket.

Defendant also claims that "the checks and vouchers indicate only a total of $851[.50[1]], but the defendant was assessed a total of $972." The prosecution responds by noting that the $851.50 in travel expenses was added to a $60 prosecution ordinance fee in both lower court files. Defendant did not respond to this claim in its reply brief, and thus, has not shown that imposition of an additional $60 for each file pursuant to prosecution ordinance fee was improper. Defendant has not shown error in the assessment of his costs of prosecution.

[1] The $851.50 was apparently rounded to $852.

B. Attorneys' Fees

MCL 769.1k(1) provides that:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
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> * * *
>
> (b) The court may impose any or all of the following:
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> * * *
>
> (iii) The expenses of providing legal assistance to the defendant.

Defendant's only claim in regard to the assessment of the attorneys' fees is that he is required to pay more than that paid to his attorneys. Defendant notes that the lower court record only reflects two payments to attorneys totaling $1485, yet defendant was assessed $2970 in attorneys' fees.

In response, the prosecution claims "a simple phone call to defendant's trial attorneys would have established that they were in fact paid a total of $2,290.00 for their services." Regardless, the prosecution did cite to four documents, each entitled, "statement of service and order for payment of court appointed represented," apparently signed by the trial court, that indicate that monies had been issued to defendant's attorneys by Lapeer County, totaling $2,290.00. Defendant's claim that his attorney had only been paid $1485 must be rejected.

The record reflects that the trial court approved, for both lower court docket numbers, defendant's attorneys' requests for "retainer, pre-trial, contested motion, trial 1st day, 2nd day, 3rd day, 4th day, sentencing, felony retainer and resentencing." However, the trial court denied defendant's motion to sever and there was only one trial. While we appreciate that defendant's attorneys may have worked more in this case because there were two lower court docket numbers, defendant's attorneys simply did not conduct two trials. Indeed, one reason the trial court granted the prosecution's motion to consolidate, in part, was for a more efficient use of resources. On the other hand, the trial court did issue separate "statement[s] of service and order for payment of court appointed representation" for each lower court docket number. Thus, the lower court record reflects that the trial court intended that defendant's attorneys be paid $2,290. Given the apparent inconsistency of assessing defendant's attorneys' fees for two trials when only one trial occurred, we conclude it is necessary to remand this matter to the trial court for purposes of clarification, and if necessary, a re-assessment of attorneys' fees.

C. Court Costs

Defendant specifically claims that $500 in courts costs is not authorized by statute. However, MCL 769.1k(1) provides that:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> * * *
>
> (b) The court may impose any or all of the following:
>
> * * *
>
> (ii) Any cost in addition to the minimum state cost set forth in subdivision (a).

MCL 769.1k(3) also provides that "[s]ubsections (1) and (2) apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation. Thus, MCL 769.1k(1) (b)(ii) authorizes court the assessment of court costs in this case, and defendant's argument is without merit.

D. State Minimum Costs

Defendant argues that the trial court improperly imposed state minimum costs. However, MCL 769.1j(1) provides that,

> (1) Beginning October 1, 2003, if the court orders a person convicted of an offense to pay any combination of a fine, costs, or applicable assessments, the court shall order that the person pay costs of not less than the following amount, as applicable:
>
> (a) $60.00, if the defendant is convicted of a felony.
>
> * * *
>
> (3) Payment of the minimum state cost is a condition of probation

The trial court properly assessed defendant minimum state costs.

E. Late Penalty

MCL 600.4801 and MCL 600.4803, provides that,

> (1) A person who fails to pay a penalty, fee, or costs in full within 56 days after that amount is due and owing is subject to a late penalty equal to 20% of the amount owed. The court shall inform a person subject to a penalty, fee, or costs that the late penalty will be applied to any amount that continues to be unpaid 56 days after the amount is due and owing. Penalties, fees, and costs are due and owing at the time they are ordered unless the court directs otherwise. The court shall order a specific date on which the penalties, fees, and costs are due and owing. If the court authorizes delayed or installment payments of a penalty, fee, or costs, the court shall inform the person of the date on which, or time schedule

> under which, the penalty, fee, or costs, or portion of the penalty, fee, or costs, will be due and owing. A late penalty may be waived by the court upon the request of the person subject to the late penalty.

Here, the judgment of sentence indicates that the "due date for payment [was] June 26, 2006," and that "[f]ines, costs and fees not paid within 56 days of the due are subject to a 20% late penalty on the amount owed." Defendant failed to pay and the late penalty was assessed. Here, the trial court acted pursuant to statutory authority, and defendant has not shown plain error affecting substantial rights.

F. Defendant's Claimed Inability to Pay Assessments

As mentioned, defendant's primary claim is that he is indigent, cannot afford to pay the assessments and will not be able to pay them in the future. At re-sentencing, defense counsel noted that defendant had just served nearly one year in jail, defendant's wife had recently undergone surgery, and even that he could no longer work as a massage therapist and has fewer prospects for employment now that he must register as a sex offender.

The trial court held that,

> in regards to these financial obligations, the Court appreciates the fact that you may not have the financial resources now to do that, but the Court is going to assess these costs. And during the course of the probationary period, if he has the financial ability to pay, the Court will make that determination; it he doesn't have the financial ability to pay, then certainly the Court will not determine that to be a violation of his probationary sentence. But at this point in time, there certainly is a financial obligation the Court feels is appropriate.

In regard to the amount of costs to be assessed, MCL 771.3, specifically provides that:

> The court shall not require a probationer to pay costs under subsection (2) unless the probationer is or will be able to pay them during the term of probation. In determining the amount and method of payment of costs under subsection (2), the court shall take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.

Defendant essentially complains that the trial court did not find that he had the present ability to pay and it did not find he would have the future ability to pay. The trial court plainly agreed that defendant "may not have the financial resources now." However, defendant's term of probation is five years. Defendant's pre-sentence sentence investigation report (PSIR) indicates that he began working as a rough carpenter in 1984, and has returned to working in rough carpentry and is presently self-employed. The PSIR also indicates that he had tried working for carpentry companies, but could not maintain employment because of time needed for court. But in working for those companies, defendant reportedly made $20 and $22 dollars per hour. The PSIR also indicates, except for high-blood pressure, defendant is in good health.

We conclude that the trial court did not commit error in concluding that defendant would be able to pay the assessments in the future. The trial court appreciated that defendant may not currently be able meet his financial obligations, but considered that defendant has a five year probationary term. Defendant is in good health, able to work, and there is no evidence that he is now unable to maintain employment. Further, defendant is free to ask the sentencing judge to reduce the assessments. MCL 771.3(5)(b).

Defendant's reliance on *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004) is misplaced. The defendant in *Dunbar* was sentenced to prison and this Court recognized that there was no statutory authority in place to evaluate defendant's ability to pay his attorneys' fees. Here, defendant was given a probationary term pursuant to MCL 771.3, which controls conditions of probationary sentences.

Unlike *Dunbar*, a statutory scheme exists in this case to determine defendant's ability to pay. Further, our Supreme Court has previously interpreted this statutory scheme, and noted under MCL 771.3, "[a] probationer is free to ask the sentencing judge to reduce the amount of restitution or costs, . . . and it is clear that a probationer cannot be punished for failure to pay restitution or costs that the probationer cannot afford." *People v Music*, 428 Mich 356; 361-362; 408 NW2d 795 (1987). The Court also noted that a "defendant who timely asserts an inability to pay restitution or costs must be heard." *Id*. at 362. The Court held that, "[i]n that situation, a sentencing judge shall determine whether the restitution or costs are within the defendant's means."

The trial court has acted in accord with MCL 771.3 and *Music* by considering defendant's objections based on his ability to pay, indicating that it had merely assessed defendant's costs, and reassuring defendant that it would not require defendant pay if he were unable. There is no indication that the trial court threatened to "imperil [defendant] with further incarceration or punishment because of his financial inability to comply." *People v Guajardo*, 213 Mich App 198, 202; 539 NW2d 570 (1995). Thus, defendant's claim that he cannot now or in the future pay costs beyond $60 is premature and should be dismissed without prejudice.

Defendant's convictions are affirmed. We remand for clarification as it relates to the assessment of attorney fees.

We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra