STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2008
v	No. 276454 Grand Traverse Circuit Court
CHRISTOPHER WILLIAM KELLMAN, Defendant-Appellant.	LC No. 06-010096-FH

Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of two counts of third-degree criminal sexual conduct, MCL 750.520d(b) (force of coercion). Defendant was sentenced by the trial court as a second-offense habitual offender, MCL 760.10, to concurrent prison terms of eight to 22 1/2 years for each of the two counts. We affirm.

Defendant first argues that the trial court abused its discretion by permitting the prosecutor to cross-examine defendant regarding his involvement with a woman other than the complainant. This evidence was admitted to challenge defendant's credibility. We review the admission or exclusion of evidence by the trial court for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). A trial court abuses its discretion when its action "'results in an outcome falling outside the principled range of outcomes.'" *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006), quoting *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Preliminary questions of law regarding the admissibility of evidence are reviewed de novo. *People v Dobek*, 274 Mich App 58, 84-85; 732 NW2d 546 (2007).

Defendant bases his claim on the assertion that the prosecutor mischaracterized defendant's testimony concerning the woman. This assertion is inconsistent with the record. Although the prosecution, defense counsel, and trial court all discussed various interpretations of defendant's testimony, the prosecutor prefaced her questioning about the woman by clarifying defendant's testimony:

> *Q.* You also recently testified that when [the victim] was leaving you were okay with that or maybe even encouraged her to leave because [the woman] was potentially coming over that night. Is that correct?

A. Correct.

Defendant, having explicitly agreed with the prosecution's restatement of his testimony, is barred from claiming on appeal that it was misinterpreted or misrepresented. "'A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.'" *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006) (citations omitted).

Defendant also challenges the relevance of the evidence of the other woman. The prosecution indicated that it wanted to inquire into facts related to the woman "which would make it unlikely that this other female was in fact coming over," thereby "undermin[ing] the truth of [defendant's] statement about that being the reason he wanted [the complainant] to leave" Because the evidence could make defendant's version of events less likely, it was relevant under MRE 401.

Defendant argues that even if the evidence was relevant, the questions were highly prejudicial and should have been excluded. "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Defendant's claim of prejudice relies solely on his assertion that his previous testimony was mischaracterized. Having found that the testimony was not mischaracterized based on defendant's own admission, this claim must fail. In any event, the trial court held that because witness credibility was so important in the case, the probative value outweighed any prejudice. Under the facts, it does not appear that the trial court's conclusion was erroneous. In sum, given that the case rested largely on a credibility contest between defendant and the complainant, the trial court's admission of the evidence did not fall outside the range of principled results. *Carnicom*, *supra* at 616-617.[1]

We find defendant's second claim of error without merit because his claim of prosecutorial misconduct is also premised on the assertion that the prosecutor made gross misstatements of fact as to defendant's testimony. Again, the record shows defendant affirmatively accepted the prosecutor's interpretation of his previous testimony. *Czymbor's*, *supra* at 556.

Defendant's final claim of error is that he received ineffective assistance of counsel because his trial counsel conceded that offense variable (OV) 11 was properly scored at 25

[1] Defendant also argues that if the evidence was relevant under MRE 608(b), it was nonetheless improperly admitted because the court's discretion to admit it under that evidentiary rule was never invoked. Underlying this argument is defendant's assertion that the prosecution mischaracterized his testimony. As noted above, this assertion is inconsistent with defendant's affirmation of the prosecution's characterization of his testimony. Moreover, defendant never raised an objection based on MRE 608(b). Rather, defendant simply argued that the evidence was irrelevant and "unnecessarily prejudicial." Such a general relevancy objection does not ask the court to consider and rule on whether the specific conduct is "probative of truthfulness or untruthfulness." MRE 608(b).

points. We disagree. "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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court generally upholds scoring "'for which there is any evidence in support.'" *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005) (citation omitted).

A score of 25 points for OV 11 is assessed for one criminal sexual penetration occurring during the incident underlying the sentence. MCL 777.41(1)(b). No points are scored for the one penetration underlying a CSC III conviction. MCL 777.41(2)(c). Accordingly, the evidence must establish at least two sexual penetrations during the incident to support an OV 11 score of 25 points. Here, a preponderance of the evidence established three instances of sexual penetration during the assault, two involving penile penetration (one vaginal and one oral), and one involving digital penetration.[2] Therefore, OV 11 was properly scored at 25 points using the uncharged vaginal/penile penetration.

Trial counsel's performance must fall below an objective standard of reasonableness and, but for counsel's errors, there must be a reasonable probability that the outcome of trial could be different in order to establish a claim of ineffective assistance of counsel. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Because there is evidence to support the scoring of OV 11 at 25 points based on the uncharged penile/vaginal penetration, defendant has not shown that there was a reasonable probability that the result would have been different if his counsel had objected, making reversal unnecessary. *Id.*[3]

Finally, defendant has raised two arguments in his reply brief on appeal predicated on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Because these issues were first raised in the reply brief, they are not properly before this Court. MCR 7.212.(G). In any event, they are without merit. In *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), our Supreme Court held that the rule of *Blakely* does not apply to Michigan's legislative sentencing guidelines. Accordingly, defendant ineffective assistance of counsel claim fails because counsel need not raise a meritless argument. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

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[2] We note that the vaginal/penile penetration can be established by a mere preponderance of the evidence, and need not be established beyond a reasonable doubt when used for the purpose of guidelines calculations. *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446, vacated in part on other grounds 469 Mich 415 (2003). There was some evidence of a fourth penetration (cunnilingus), but because the prosecution did not argue for its inclusion when scoring OV 11, we have not addressed it.

[3] Accordingly, we find it unnecessary to address defendant's assertions regarding the correctness of the interpretation of MCL 777.41(2)(c) to permit the assignment of points for all other sexual penetrations arising out of the sentencing offense even if the sexual penetrations resulted in separate convictions.

Affirmed.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello