STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2008
v	No. 278244 Midland Circuit Court
BRIAN DANIEL O'HARE, Defendant-Appellant.	LC No. 06-003033-FC

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

PER CURIAM.

Defendant appeals as of right from his jury convictions of kidnapping, MCL 750.349 (restraint with the intent to engage in criminal sexual conduct), and criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(c) (sexual penetration under circumstances involving the commission of any other felony).[1] We affirm.

Defendant and the complainant were married, but separated, and were in the process of getting a divorce at the time of the incident underlying this prosecution. They had one child, a three-year-old daughter. One evening the complainant picked up their daughter from defendant's parents' house. As she was driving home, defendant surprised her by jumping out from the back seat and into the front seat of her vehicle. Defendant said "I told you to watch your back; I told you to watch what you were doing." The complainant tried to turn the vehicle around to go back to defendant's parents' house, but defendant threatened to kill her if she did. Since defendant had abused her in the past, she took his threat seriously. One time defendant drove to a cornfield, threw her out of the car, and tried to leave her there. Another time, when he was in the Marines, he hit her a few times and gave her a black eye.

In fear, complainant followed defendant's directive and drove to a Meijer store parking lot where they talked. Defendant wanted her to go with him to their former apartment and she said "no" about 20 times. Defendant then grabbed the back of her hair and pulled her down to the center console and told her she had to drive or he would. The complainant did not feel free to leave, so she drove to their apartment as defendant directed. Once in the parking lot, she did not want to get out of the car but defendant took the car keys, her purse, and her daughter and

[1] Defendant was acquitted of a second count of CSC I.

pushed her out of the vehicle. In the apartment, defendant "kind of pushed [her] into the bedroom." According to complainant, she told defendant that she did not want to have sex and defendant proceeded to take her clothes off. She began to cry. Defendant continued, inserting his penis into her vagina. When their child walked in, defendant got up, removed the child, and returned to insert his penis into her vagina. She continued to cry. After defendant was done, they left the apartment and, on the way back to the Meijer store parking lot, defendant struck complainant with his fist on the right side of her head. When defendant's father arrived in the parking lot, defendant got out of her vehicle and left with his father. Later that night, the complainant reported the incident. Thereafter defendant was arrested, charged, and subsequently convicted on kidnapping and one count of CSC I. This appeal followed.

Defendant argues first that he was denied the effective assistance of counsel because his attorney (1) failed to plead an insanity or involuntary intoxication defense, (2) failed to seek the suppression of defendant's statements to police on the ground that defendant's mental illness made him susceptible to coercion, (3) failed to object to the prosecutor's introduction of defendant's prior assault of the complainant, and (4) failed to object to the jury instructions because they allowed a conviction of CSC in the absence of force. After review of the existing record, we conclude that none of these claims warrant relief.[2] See *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

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 fell 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).

First we consider defendant's claim that his counsel was ineffective for failing to raise an insanity or involuntary intoxication defense. "A defendant is entitled to have his counsel investigate, prepare, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present that defense and that the defense was substantial. *Id*.

Here defendant claims he was entitled to raise an insanity defense under MCL 768.21a(1), but there is no evidence that his purported history of substance abuse and mental health issues rendered him legally insane. Likewise, there is no evidence that defendant made a good-faith effort to avail himself of the right to present such a defense at trial and even on appeal has not provided supporting documentation. Further, defendant does not argue that he lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law, MCL 768.21a(1), but consistently maintained his innocence and asserted a defense of consent at trial. And, defendant has proffered no evidence that he suffered from involuntary intoxication.

[2] Defendant did not move below for a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), and this Court denied defendant's motions to remand for an evidentiary hearing.

Because there is no basis for concluding that either defense was a substantial defense, defendant's claim of ineffective assistance of counsel premised on this argument is without merit. See *Ayres, supra*; *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Second, we consider defendant's claim that his counsel was ineffective because he failed to seek the suppression of defendant's statements to the police on the ground that his mental illness made him susceptible to coercion and thus his statements to police were involuntary. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). A waiver of *Miranda*[3] rights is voluntary if it was "the product of free and deliberate choice rather than intimidation, coercion or deception." *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000) (citations omitted). Here, nothing in the record suggests that defendant was suffering under any sort of mental defect at the time of his custodial interrogation. To the contrary, the evidence suggests that his decision to waive *Miranda* rights was completely voluntary; therefore, defendant's claim of ineffective assistance premised on this argument is without merit.

Third, we consider defendant's claim that his attorney was ineffective because he failed to object to the prosecutor's improper admission, under MRE 404(b), of defendant's prior assault of complainant. Under MRE 404(b), evidence of prior bad acts is only admissible if the evidence is offered for a proper purpose, is relevant, and its probative value is not substantially outweighed by the potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). It appears here that defendant is claiming in his Standard 4 brief that the evidence of defendant's previous abusive behavior against complainant was irrelevant and amounted to "character assassination."

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. In this case, the evidence was admitted to refute defendant's claim that he did not restrain the complainant, she consented to going with him and having sex with him.[4] Under MCL 750.349(1), an element of kidnapping is restraint. To "restrain" means "to restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority." MCL 750.349(2). The complainant's testimony included that (1) she did not consent to going with defendant, (2) after defendant appeared in her car she tried to turn the vehicle around to return to his parents' house but he threatened to kill her, (3) she took his threat seriously because he had "been very abusive in the past towards me," and (4) throughout the course of this incident she was afraid and did not feel free to leave. Thus, the evidence of defendant's prior abusive behavior toward the complainant was relevant to the issue of restraint and defendant's counsel was not ineffective for failing to object to its admission.

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[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] However, under MCL 750.520b(1)(c), we note that consent is not a defense if penetration occurred during the commission of another felony. See *People v Wilkens*, 267 Mich App 728, 737; 705 NW2d 728 (2005).

Fourth, we consider defendant's claim that his attorney was ineffective for failing to object to the jury instructions because they allowed a conviction of CSC in the absence of force. The instruction provided that "the prosecution does not have to show that [the victim] resisted the defendant." Defendant claims in his Standard 4 brief that a conviction under MCL 750.520b requires that an element of force be proven. However, defendant was convicted under MCL 750.520b(1)(c) and only two elements need be proven under that statute: "(1) a sexual penetration (2) that occurs during the commission of another felony." *People v Waltonen*, 272 Mich App 678, 693-694; 728 NW2d 881 (2006); *People v Wilkens*, 267 Mich App 728, 737; 705 NW2d 728 (2005). Thus, defendant's attorney was not ineffective for failing to object to the jury instructions on this ground.

Next, defendant argues that the trial court erred when it admitted, without proper notice, the MRE 404(b) evidence of defendant's prior assault against complainant and when it permitted the complainant to read excerpts of her preliminary examination testimony to the jury. Because no objections were made to the admission of this evidence during trial, our review is for plain error. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The MRE 404(b) evidence that defendant takes issue with is the complainant's testimony about defendant striking her while he was in the Marines, giving her a black eye. Defendant claims this evidence was not offered for a proper purpose and was irrelevant. For the reasons discussed above, we disagree. Further, the evidence was not unfairly prejudicial. See *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Although it may have been damaging to defendant's position, it was highly probative of an issue of consequence and there is no evidence that the jury gave it preemptive weight. And to the extent defendant is claiming that proper notice under MRE 404(b)(2) was not provided, plain error was not established because the evidence was properly admitted.

We also reject defendant's argument that plain error occurred when the complainant was permitted to read excerpts of her preliminary examination testimony to the jury. Generally, hearsay is inadmissible. However, during cross-examination defense counsel repeatedly referred to select passages of the complainant's preliminary examination testimony in an effort to impeach her testimony. See MRE 613(b). On re-direct examination, the prosecutor also turned to the preliminary examination testimony merely to clarify what the complainant meant at that time, and to put her previous statements in context. Under MRE 613(b), the prosecutor's actions were permissible; thus, plain error was not demonstrated.

Next, defendant raises several sentencing issues. First, defendant argues that the trial court erred when it scored ten points for offense variable (OV) 9, which pertains to the number of victims, because his daughter was never in any danger during the incident. Defendant raised this issue at sentencing and so it is preserved for our review. See MCL 769.34.

MCL 777.39(1)(c) provides that OV 9 should be scored at 10 points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." Further, MCL 777.39(2)(a) directs to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." "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). Following defendant's

objection to the scoring, arguing that his daughter was not a "victim" of his crimes, the trial court held:

> The kidnapping itself was where he's surreptitiously in the back of a vehicle making his presence known. The mother and child are in the car. That's a two-victim crime. I mean, that's the—that's the beginning of the kidnapping itself. The whole essence of this case is that mother and daughter were together and throughout this entire time line, and I think it's a correct scoring of OV 9 to say there were two victims. Two people were placed in danger the minute he raised his head in the back of that SUV.

We conclude that the record evidence adequately supports the score and the trial court properly exercised its discretion. See *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Second, defendant argues that the trial court erred by scoring 25 points for OV 11 for an additional criminal sexual penetration because the jury only found defendant guilty of one count of CSC I. However, OV 11 was originally scored at 50 points and defense counsel asked the court to reduce it to 25 points "for just one other penetration" because the sentencing offense should not be scored. Because counsel agreed with, and in fact requested, the scoring, any error was waived. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). In any event, defendant did not properly raise this issue and, because his sentence is within the appropriate guidelines sentence range, review is precluded. See MCL 769.34(1); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

Next, defendant argues that his overall sentence of 150 to 360 months constituted cruel and unusual punishment. Because defendant raises this issue for the first time on appeal, his sentences are within the appropriate guidelines range, and he cannot demonstrate that the trial court engaged in incorrect scoring or relied on inaccurate information to determine his sentence, defendant is precluded from raising this issue on appeal. MCL 769.34(10); *Kimble*, *supra* at 310-311. We reject defendant's claim that the trial court relied on inaccurate information in the PSIR to determine his sentence because at sentencing defendant was given the opportunity to clarify any factual issues and successfully did so before he was sentenced. And contrary to defendant's claim, the trial court did consider defendant's rehabilitative potential, finding that since defendant was a very young man he has been committing violence against women in an escalating pattern leading to these offenses. In any case, sentences falling within the recommended guidelines range are presumptively proportionate, and proportionate sentences do not constitute cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002); *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000). To the extent that defendant claims he was entitled to a downward departure under the federal sentencing guidelines, this claim is without merit because this is not a federal case. Finally, defendant's argument that judicial fact finding is not permitted for indeterminate sentencing schemes has been considered and rejected by our Supreme Court. *People v McCuller*, 479 Mich 672, 676-677; 739 NW2d 563 (2007); see, also, *People v Drohan*, 475 Mich 140, 160, 164; 715 NW2d 778 (2006).

Next, in his Standard 4 brief, defendant argues that there was insufficient evidence to support his bindover and subsequent convictions. We disagree. A lower court's decision to bind

over a defendant is reviewed for an abuse of discretion. *People v Hamblin*, 224 Mich App 87, 91; 568 NW2d 339 (1997). To bind a defendant over for trial, there must be evidence that a felony was committed and probable cause to believe that defendant committed it. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003). However, errors or deficiencies in the bindover are harmless if sufficient evidence is presented at trial to convict defendant of the charges. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996). Therefore we turn to the dispositive issue whether the evidence at trial was sufficient to support defendant's convictions. And after de novo review, considering the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Under MCL 750.349(1)(c), a person is guilty of kidnapping if "he . . . knowingly restrains another person with the intent to . . . engage in criminal sexual penetration or criminal sexual contact with that person." Under MCL 750.520b(1)(c) a defendant is guilty of CSC I if "[s]exual penetration occurs under circumstances involving the commission of any other felony." Here, defendant argues that because the complainant could have escaped, and she consented to having sex with him, there was insufficient evidence to support his convictions. Considering the evidence in a light most favorable to the prosecution, and drawing all reasonable inferences and credibility choices in support of the jury's verdict, we disagree. See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *Johnson*, *supra*.

Defendant ambushed the complainant in her car where she was alone with her three-year-old daughter, said to her "I told you to watch your back," and when she tried to return to his parents' home, he threatened to kill her. Because of the violence defendant had committed against her in the past, she believed him. After she refused to go to their former apartment, defendant grabbed the back of her hair, pulling her head down, and told her she had to drive or he would. When she did not want to exit the vehicle at the apartment, defendant took the car keys, her purse, and her child and pushed her out of the vehicle. Once inside the apartment, he pushed her into the bedroom, removed her clothes and, despite her protests and crying, he penetrated her vagina with his penis. Afterwards, while driving back to the Meijer store parking lot, defendant struck the complainant with his fist on the right side of her head. We conclude that the evidence was sufficient for the jury to find that defendant restrained complainant with the intent to engage in criminal sexual penetration with her, and that sexual penetration did in fact occur during this kidnapping. Therefore, this issue is without merit.

Finally, defendant claims that he was denied a fair trial by prosecutorial misconduct involving two comments made during closing argument. Because defendant did not preserve this issue for appeal, our review is for plain error affecting his substantial rights. See *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Allegations of prosecutorial misconduct are examined on a case-by-case basis, viewing the statements in context, as well as defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant's first claim of misconduct relates to the prosecutor's comment, during his argument pertaining to the CSC counts, that he did not believe that the complainant consented to the sex. The prosecutor said, "Even let's assume for the sake of argument that maybe she consented to the sex. I doubt it. I don't think so. But if she did, that's not part of the . . . criminal sexual conduct charge. He had sexual intercourse with her, criminal sexual conduct

with her in the process or in the course of kidnapping her." Defendant claimed throughout this case that the sex was consensual and that the complainant should not be believed. Here, the prosecutor was merely arguing that, even if the complainant did consent to having sex, the crime of CSC I was complete when the sexual penetration occurred during the course of the kidnapping. And he further argued that, from the facts in evidence—particularly the abuse—that the complainant consented to having sex was unlikely. That is permissible argument. See *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007); *Thomas*, *supra* at 455.

Defendant's second claim of prosecutorial misconduct relates to the following comment, made during rebuttal argument, "Did [defendant and his father] lie about the weather? I submit they did." However, thereafter, the prosecutor stated that, "[another witness] testified to what the weather was there." A prosecutor is allowed to argue inferences based on the evidence such as whether a witness is worthy of belief. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In summary, defendant has failed to establish plain error with regard to his prosecutorial misconduct claims.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra