STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 2, 2009
v	No. 280077 Lenawee Circuit Court
BOBBY WAYNE HODGES, Defendant-Appellant.	LC No. 06-012777-FH

Before: Servitto, P.J., Owens and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct (CSC) involving personal injury, MCL 750.520c(1)(f). We affirm.

I. Motion for Expert Witnesses at Public's Expense

Defendant argues that the trial court violated his due process rights when it denied his motion to appoint two expert witnesses: (1) a DNA expert and (2) a toxicology expert. We disagree. We review the trial court's decision whether to grant an indigent defendant's motion to appoint expert witnesses at the public's expense for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). MCL 775.15, upon which defendant's motion was based, permits an indigent criminal defendant to obtain an expert at the public's expense if the defendant can show that the "expert testimony would likely benefit the defense." *Id.* at 443.

Because defendant filed his pretrial motion for a DNA expert before the DNA results were obtained, the trial court concluded that the motion was moot and defense counsel agreed. When a defendant's attorney explicitly states on the record that the defendant has no objection, the argument is waived on appeal and any error has been extinguished. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Therefore, defendant waived his argument with respect to the DNA expert. With respect to the toxicology expert, the trial court denied defendant's motion on the basis that defendant is not indigent. Defendant retained his own attorney and was prepared to pay $10,000 for her services, and, as the trial court noted, defendant's recent request for bond suggested the availability of funds. Under these circumstances, MCL 775.15 did not apply and the trial court did not abuse its discretion. Defendant's due process rights were not violated.

II. Other Acts Evidence

Defendant next argues that the trial court abused its discretion when it admitted other acts evidence pursuant to MRE 404(b). We disagree. The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). To be admissible under MRE 404(b)(1)[1], the other acts evidence (1) must be offered for a proper purpose, (2) must be relevant to an issue of fact or consequence at trial, and (3) its probative value must not be substantially outweighed by unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id*. at 74.

The prosecutor sought to introduce evidence of a similar allegation against defendant that occurred approximately two weeks after the instant offense in order show defendant's absence of mistake and method of operation, or common scheme and plan. In the instant offense, the victim became intoxicated while at a campsite with her boyfriend, defendant, and another woman. After defendant fell asleep in the center room of a three-room tent, the victim and her boyfriend went to sleep in a side room. The victim soon awoke feeling pain in her vaginal area. She observed defendant lying on top of her and believed he was attempting to penetrate her vagina. She protested and defendant rolled off of her. The victim testified that she never consented to sexual relations with defendant. The subsequent offense involved another victim who attended a bar crawl with her boyfriend and a group of friends, including defendant. Everyone became intoxicated. When the group returned to one of the friend's home, the victim fell asleep in a bedroom. Later, the victim, who was lying on her stomach, awoke to someone penetrating her from behind. The assailant covered her head with sheets during the assault and the victim did not see who raped her. Defendant's DNA was identified from a sperm sample recovered during the victim's subsequent vaginal examination.

We are of the view that the subsequent assault was logically related to a contested issue at trial—whether defendant touched the victim by mistake—and was therefore offered for a proper non-character purpose. *People v Crawford*, 458 Mich 376, 385-388; 582 NW2d 785 (1998). Both incidences involved defendant going out with a group of friends, drinking to the point of inebriation, returning with the group to a place to sleep, and defendant then sexually assaulting an intoxicated female while she slept. The allegation that defendant was involved in a

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[1] MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

substantially similar incident made defendant's theory that the contact was accidental less probable. *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995). Thus, we cannot agree with defendant's contention that the evidence is nothing more than propensity evidence in disguise as the prosecution met its burden of showing that the subsequent act was logically relevant to an ultimate issue in the case. *Crawford*, *supra* at 391.

Defendant argues, however, that the other act evidence's probative value was substantially outweighed by unfair prejudice because it confused the issues during trial. The trial court provided a limiting instruction to prevent this effect. Juries are presumed to follow the instructions given to them. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, defendant's argument must fail. We conclude that the trial court did not abuse its discretion when it admitted the other acts evidence.

III. Sufficiency of the Evidence

Defendant further contends that the prosecution failed to present sufficient evidence to support his conviction. We disagree. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of second-degree CSC involving personal injury are that the defendant: (1) engaged in sexual contact with the victim, (2) used force or coercion to accomplish the sexual contact, and (3) the defendant caused the victim to suffer personal injury. *People v Alter*, 255 Mich App 194, 202; 659 NW2d 667 (2003); MCL 750.520c(1)(f). On appeal, the only issue is whether the prosecution presented sufficient evidence of personal injury. MCL 750.520a(n) defines "personal injury" as "bodily injury, disfigurement, *mental anguish*, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ" (emphasis added). Mental anguish exists where a "victim experienced extreme or excruciating pain, distress, or suffering of the mind." *People v Mackle*, 241 Mich App 583, 597; 617 NW2d 339 (2000) (quotation marks and citation omitted). Some factors that this Court has considered in finding "mental anguish" include evidence that the victim was upset during or after the assault, subsequent necessity for psychological treatment, an inability to conduct a normal life, fear for the victim's safety, and continuing feelings of vulnerability. *People v Petrella*, 424 Mich 221, 270-271; 380 NW2d 11 (1985).

Here, the victim's boyfriend testified that, immediately after the incident, the victim was the "most frightened [he] had ever seen her." The victim experienced nightmares, had difficulty sleeping, and sought constant protection from her boyfriend. She also feared defendant and his friends, who knew where she lived, would return and she wanted to move out of her house. Consequently, the victim and her boyfriend moved to California, but the incident continued to affect her as of trial. At the time of defendant's trial, the victim had not visited a doctor for counseling, but had called a rape hotline. Given these facts, there was sufficient evidence for a jury to find beyond a reasonable doubt that the victim suffered personal injury in the form of mental anguish.

IV. Judicial Misconduct

Defendant also argues that the trial court demonstrated bias and denied him the right to present a defense on the basis of five separate acts. We disagree. We review unpreserved challenges of judicial bias for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A criminal defendant is entitled to a "neutral and detached magistrate." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (quotation marks and citation omitted). However, "[a] trial court has wide, but not unlimited, discretion and power in the matter of trial conduct," *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995), and there is "a heavy presumption of judicial impartiality," *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Judicial rulings, as well as a judge's opinions formed during the trial process, are not themselves valid grounds for alleging bias "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Id.* Generally, "[c]omments critical of or hostile to counsel or the parties" do not pierce the veil of impartiality. *Id.*

Defendant gives only cursory treatment to four of the five allegations of judicial bias. Defendant, for example, does not articulate how the trial court's statement when it denied defendant's motion to strike the prosecution's expert witness demonstrated any deep-seated favoritism toward the prosecution or antagonism toward defendant. Nor does defendant identify the trial court's allegedly demeaning and biased comments that allegedly improperly limited defense counsel's questioning of defendant's mother-in-law. Again, defendant does not explain how these comments resulted in bias against defendant. Similarly, defendant, without citing to any authority, claims that the trial court denied his right to present a defense when it excluded evidence regarding whether the DNA analyst excluded the victim's boyfriend's DNA from the sample on the victim's clothing and admitted evidence regarding a 1994 felony allegation against defendant. A defendant may not merely announce a position on appeal and expect this Court to discover and rationalize the legal and factual basis for the allegation. *Badiee v Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005); *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). Given defendant's treatment of these four allegations of bias, we consider them abandoned on appeal. *Great Lakes*, *supra* at 424.

Defendant sufficiently briefed one claim of judicial bias, citing *People v Smith*, 64 Mich App 263; 235 NW2d 754 (1975). Specifically, defendant alleges that the trial court admonished a defense witness in front of the jury, thereby giving the jury the impression that the witness was not credible. At trial, the witness testified that he observed a hickey on defendant the day after the incident with the second victim. The following questioning occurred:

Prosecutor. Do you remember everything that happened a year ago?

A. - - if I think something's very obvious - -

Trial Court. Would you answer the question sir?

A. If you want me to answer, I'd say left side of his neck.

Trial Court. That's your best guess or do you know?

A. That's what I would recollect. It was some time ago.

Prosecutor. Nothing further.

A. but is was very obvious that it was there and - -

Trial Court. Sir.

A. - - and it wasn't there the day before.

Trial Court. Sir. I want you to wait here afterwards, all right?

A. Yes, sir.

Because the prosecutor had concluded his questioning, but the witness continued to speak and offer unsolicited testimony, the trial court had discretion to control his outbursts. *Paquette*, *supra* at 340. Then, outside the jury's presence, the trial court warned the witness that he had been in contempt of court. Our review of the record shows that the trial court did not reprimand the witness in the presence of the jury, see *Lamson v Martin*, 216 Mich App 452, 458; 549 NW2d 878 (1996), and, accordingly, the trial court's conduct did not pierce the veil of impartiality. *Wells*, *supra* at 391. The trial court did not engage in misconduct and defendant was not deprived of a fair trial.

V. Sentencing

Lastly, defendant claims that the trial court lacked evidence to support the scoring of ten points for offense variable (OV) 4. We disagree. This Court reviews the trial court's scoring of the sentencing guidelines for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Where there is any evidence to support the trial court's scoring, its decision will be upheld on appeal. *Id*.

Pursuant to MCL 777.34, the trial court may score ten points for OV 4 if serious psychological injury requiring professional treatment occurred to a victim or if serious psychological injury *may* require professional treatment. MCL 77.34(1)(a) and (2). There is no requirement that the victim actually receive such treatment. *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005). Here, there was evidence on the record to support the trial court's scoring. *Hornsby*, *supra* at 468. The victim sought psychological treatment after defendant's trial as a result of the incident and testified at trial that she was still affected by the incident as of the trial date. Thus, the trial court did not abuse its discretion.

Defendant also argues that the trial court's scoring of OV 4 was contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the evidence of the victim's psychological treatment should have been submitted to the jury and proven beyond a reasonable doubt. However, Michigan's indeterminate sentencing scheme does not violate *Blakely* so long as the judge fixes a sentence within the statutory maximum for the crime charged. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). The judge did so here, and, accordingly, defendant's constitutional rights were not violated.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly