

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUIS TERRELL TAYLOR,

Defendant-Appellant.

UNPUBLISHED

November 19, 2009

No. 285889

Kent Circuit Court

LC No. 07-009880-FC

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(g) (injury to physically helpless victim). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 10 to 30 years' imprisonment. He appeals as of right. We affirm.

Defendant first contends that he was denied his due process rights and his right to a fair trial when a prosecution witness identified her report as a "polygraph report" two times during a 30 second span in her testimony. A trial court's decision whether to grant a mistrial following reference to a polygraph examination is reviewed for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513-514; 603 NW2d 802 (1999). This Court will find an abuse of discretion, "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court should grant a mistrial only if there is an irregularity that is prejudicial and denies a defendant the right to a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

Results of a polygraph examination are inadmissible at trial. *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985). However, reference to the fact that a polygraph examination was administered does not always warrant reversal. *People v Nash*, 244 Mich App 93, 98; 625 NW2d 87 (2000). The following factors are relevant to determine if reference to a polygraph requires reversal:

- (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than

merely the fact that a test had been conducted. [*Nash, supra*, quoting *People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982).]

In this case, the context of the officer's reference to the polygraph report indicates that her statements were unsolicited and inadvertent. She referenced the polygraph report during cross-examination after defense counsel first asked about a police report and she corrected him as to the proper title of her report. Additionally, the officer informed the court that this was her first time testifying at a trial, and she indicated on the record that she accidentally referenced the word "polygraph," and that the prosecutor instructed her not to use the word "polygraph." The improper references to a polygraph report occurred two times in a 30-second timeframe and the trial court thereafter provided a curative instruction to the jury. Nothing in the record suggests that the officer was attempting to bolster the credibility of any witness; she merely referenced the title of the report she prepared. Moreover, there was no mention of the results of the polygraph examination, and the officer did not testify that she thought defendant was dishonest.

While defendant argues that there was heightened prejudice in this case because both the prosecutor and defense counsel referred to the officer as an "interview specialist" throughout her testimony, we find defendant's claim to be unpersuasive where the polygraph examination, the context of the interview, and the officer's opinion and skills were not the central focus of her testimony. In sum, defendant was not denied his right to a fair trial or due process, and the trial court did not abuse its discretion in denying the motion for mistrial.

Next, defendant contends that admission of evidence of a previous conviction from Ottawa County following a no contest plea, and evidence of statements he made during the sentencing phase of that case, were inadmissible pursuant to MRE 410, and thus, that the admission of this evidence violated his due process right to a fair trial. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court commits an abuse of discretion when it admits evidence that is inadmissible as a matter of law. *Id.* An erroneous admission of evidence is a nonconstitutional error. *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). "[A] preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (quotations omitted).

MRE 410 excludes admission of evidence of a no contest plea against a defendant who entered that plea; the exclusion applies in both criminal and civil proceedings unless the plea forms the basis of a conviction used for impeachment purposes under MRE 609. MRE 410; *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 511-512; 679 NW2d 106 (2004). In this case, the trial court abused its discretion when it allowed the prosecutor to impeach a defense witness with evidence that defendant was convicted in the Ottawa County case. The offense underlying the no contest plea did not contain an element of "dishonesty or false statement" or theft. MRE 609(a)(1), (2). However, the error was harmless because it does not appear more probable than not that it was outcome determinative. *Lukity, supra*. The facts and circumstances surrounding defendant's Ottawa County conviction were properly admitted at trial pursuant to MRE 404(b), reducing any prejudicial effect of the evidence concerning defendant's actual conviction for that offense. With regard to defendant's argument concerning evidence of his statements made during the sentencing phase of the Ottawa County case, he has abandoned

this portion of his argument for appellate review because he failed to develop or discuss it in his brief on appeal. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority”). Even were we to consider defendant’s argument, and assuming that we were to find error, however, we would conclude that any such error was harmless because it does not appear more probable than not that it was outcome determinative. *Lukity, supra*.

Additionally, defendant contends that there was insufficient evidence presented at trial to support his conviction. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction this Court must construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

Defendant was convicted of CSC I (injury to physically helpless victim), pursuant to MCL 750.520b(1)(g), which provides that a person is guilty if he or she engages in sexual penetration and causes personal injury to the victim “and the actor knows or has reason to know that the victim is physically helpless.” For purposes of this statute, “personal injury” is defined in part as “mental anguish,” MCL 750.520a(n), and the prosecutor argued the victim suffered mental anguish in this case. Defendant now argues the evidence was insufficient to show mental anguish.

In order to prove “mental anguish” a prosecutor must prove beyond a reasonable doubt “that the victim has experienced extreme or excruciating pain, distress, or suffering of the mind.” *People v Petrella*, 424 Mich 221, 257-258; 380 NW2d 11 (1985). The Court in *Petrella* provided the following relevant factors to consider when determining if evidence shows the victim suffered “mental anguish”:

- (1) Testimony that the victim was upset, crying, sobbing, or hysterical during or after the assault.
- (2) The need by the victim for psychiatric or psychological care or treatment.
- (3) Some interference with the victim’s ability to conduct a normal life, such as absence from the workplace.
- (4) Fear for the victim’s life or safety, or that of those near to her.
- (5) Feelings of anger and humiliation by the victim.
- (6) Evidence that the victim was prescribed some sort of medication to treat her anxiety, insomnia, or other symptoms.
- (7) Evidence that the emotional or psychological effects of the assault were long-lasting.

(8) A lingering fear, anxiety, or apprehension about being in vulnerable situations in which the victim may be subject to another attack.... [*Id.* at 270-271.]

In this case, the evidence viewed in a light most favorable to the prosecution revealed that the victim awakened to find defendant with his penis on the inner portion of her lip and that she tried to think of a way out of the bedroom without allowing defendant to know she was afraid. She did not know if she had been raped. She was crying and went to find her friend immediately after the incident. She informed her friend of the incident. The victim was ill from drinking. She tried to return to sleep, first at the house where the party was held and later at her aunt's house. She was subsequently taken to the hospital because of her excessive alcohol consumption, and she reported the incident to hospital staff. She also provided a police statement that morning. The victim explained that the incident affected her in that she was afraid to arrive home when all of the lights are off, that she missed "a lot" of work because of the incident, that she did not spend as much time with friends anymore, and that she often wanted to be alone. She also testified that she thought of the incident every day when waking up and going to bed, and that, since the incident, she had no interest in going anywhere. The victim's aunt testified that the victim was depressed after the incident, spent less time with her friends and more time with her family, that she missed work, that she gained 30-40 pounds, and that she no longer cared about her outward appearance. A friend also testified that, following the incident, she and the victim no longer spent as much time together. The victim eventually saw a counselor a few times, but, she primarily relied on her family and faith to keep going. While there were facts that could mitigate the severity of the emotional distress, the issue was one for the trier of fact, and a rational trier of fact could have concluded beyond a reasonable doubt that the victim suffered "mental anguish" for purposes of CSC I. *Petrella, supra*.

Finally, defendant argues that the trial court erred in scoring Offense Variable (OV) 4 at ten points. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). MCL 777.34 governs the scoring of OV 4 and provides in part that a trial court assess ten points if the victim suffered a "serious psychological injury" that "may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(1)(a), (2). For the reasons discussed above with respect to defendant's sufficiency of the evidence challenge, we conclude that the record supports the trial court's assessment of ten points for OV 4.

We affirm.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey