STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2009
v	No. 286823 Oakland Circuit Court
DANIEL ROGER TURNER, Defendant-Appellant.	LC No. 2007-216077-FC

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Defendant was convicted of three counts of first-degree criminal sexual conduct (CSC) against the victim, a minor daughter of his live-in girlfriend at the time, Mary Crain. Defendant appeals as of right his sentences and jury trial convictions of two counts of first-degree CSC (person under 13), MCL 750.520b(1)(a), and one count of first-degree CSC (relationship), MCL 750.520b(1)(b). Defendant was sentenced, as a second habitual offender, MCL 769.10, to 30 to 60 years' imprisonment for each CSC conviction. We affirm.

A. ADMISSIBILITY OF EVIDENCE UNDER MCL 768.27b

Defendant argues that he is entitled to a new trial because evidence of prior sexual acts between him and the victim's mother, Crain, were admitted into evidence. We disagree.

Preserved issues of whether evidence was admissible are reviewed for a clear abuse of discretion by the trial court. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A trial court abuses its discretion when it reaches a decision resulting in an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). However, when the decision regarding the admission of evidence involves a preliminary question of law, the issue is reviewed de novo. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

Normally, MRE 404(b) prohibits the admission of evidence of "other crimes, wrongs, or acts [when they are used] to prove the character of a person in order to show action in conformity therewith." However, the Michigan Legislature enacted MCL 768.27b, which provides the following:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.
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> * * *
>
> (5) As used in this section:
>
> > (a) "Domestic violence" or "offense involving domestic violence" means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:
> >
> > > (i) Causing or attempting to cause physical or mental harm to a family or household member.
> > >
> > > (ii) Placing a family or household member in fear of physical or mental harm.
> > >
> > > (iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
> > >
> > > (iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Thus, MCL 768.27b allows for what previously would have been inadmissible propensity evidence in domestic violence cases. See *Pattison*, *supra* at 619.

In the present case, the prosecution argued at the lower court that the evidence of defendant having anal intercourse with Crain was admissible because the sexual acts were unwanted and forced upon Crain, thereby falling under the definition of "domestic violence" under MCL 768.27b(5)(a)(iii). Crain testified as follows regarding these sexual encounters with defendant:

> *Q.* Alright, and tell the jury what it was the defendant did to you that you didn't like?
>
> *A.* He would put his penis in my butt.
>
> *Q.* Okay. The first time that happened, tell us where had you been?
>
> *A.* I had been at his house.
>
> *Q.* Okay. And what had you been doing that night?
>
> *A.* I had been drinking.

Q. Okay. And would you say you were intoxicated?

A. Yes.

Q. And describe to me how – were you aware that he was doing that when he started to do it?

A. No.

Q. Okay. How did you discover he was doing that?

A. He told me.

Q. Okay. Did that happen any time after that first time?

A. Yes.

Q. Okay. And after that first time, were you intoxicated the next time?

A. No.

Q. Alright, did you say something to him about doing that sexual act?

A. I told him I didn't want to do it.

Q. Alright and what did he say?

A. He said it would be okay –

Q. Okay. –

A. – that I'd be alright.

Q. And did he try to do that to you?

A. Yes.

Q. How many times do you think defendant did that to you?

A. I don't – like ten.

Q. Okay. And on each occasion did you tell him you didn't want to do that?

A. Yeah, I told him I didn't like it, I didn't want to do it.

Q. Okay. Did there come a time that you stopped telling him that you didn't want him to do it?

A. Yes, I had no choice, he'd make me do it anyways.

Then, on cross-examination, defense counsel produced prior sworn testimony of Crain, where she admitted that the anal sex between her and defendant was consensual at times.

The issue boils down to whether the past anal sexual conduct between defendant and Crain qualifies as "domestic violence" under MCL 768.27b. Defendant argues that the conduct does not meet the statutory definitions. We agree.

The prosecution argued at the trial court that the relevant definition was under MCL 768.27b(5)(a)(iii), "Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress." Crain's statement that "he'd make me do it anyways" is insufficient to support a finding that the activity was accomplished by "force, threat of force, or duress." Crain elaborated that when she resisted on one occasion, defendant responded by saying, "It [will] be okay – it will be alright." Defendant's persuasive techniques fall well short of using force, threatening with force, or using duress. Therefore, there was insufficient evidence to show that the prior sex acts between defendant and Crain were acts of "domestic violence," and they should not have been admitted under MCL 768.27b.

The prosecution also argues that the conduct in question would alternatively fall under the definition provided in MCL 768.27b(5)(a)(iv): "Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." The prosecution argues that a reasonable person in Crain's position would have felt harassed or molested. However, as noted earlier, there was not enough evidence to show what specific acts defendant committed in order to get Crain to acquiesce in performing the anal sex acts. Therefore, there was insufficient evidence to establish that defendant's actions harassed or molested Crain.

On appeal, the prosecution argues that if defendant's prior acts with Crain did not qualify as "domestic violence," then their admission is proper in any event since MRE 404(b) would not act as a bar. As the prosecution notes, MRE 404(b) governs only "civil or criminal legal wrong[s]." See *People v VanderVliet*, 444 Mich 52, 82; 508 NW2d 114 (1993), amended by 445 Mich 1205 (1994). However, that fact is irrelevant since MRE 404(a) *does prohibit*, in general, character evidence for proving that someone acted in conformity. *People v Dobek*, 274 Mich App 58, 101; 732 NW2d 546 (2007). Here, the prosecution's sole purpose in proffering the evidence was to show that defendant had a propensity for anal sex.[1] This is character evidence, and it cannot be used for such purpose.

However, to the extent that Crain's testimony was inadmissible, any error was harmless. A trial court's error in determining admissibility is not a ground for reversal unless, after an examination of the entire cause, it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000), rem 465 Mich 931; 639 NW2d 255 (2001), on rem 249 Mich App 728; 643 NW2d 607 (2002). There is

[1] Ostensibly, the prosecution wanted to show that defendant had a propensity for acquiring anal sex by force. But as noted earlier, the actual evidence of his and Crain's sexual conduct did not establish this fact.

nothing to suggest that Crain's testimony had any significant effect on the jury reaching its guilty verdicts. A jury hearing this testimony would not have been more motivated to convict defendant. The factual differences between the situation Crain faced and the situation the victim faced were too diverse to have had much impact on the jury. The fact that defendant had anal intercourse with Crain, an adult, approximately ten times over a three-year period would not make a jury more likely to believe that defendant had anal intercourse with the victim, a child, dozens of times over a one-year period. The salient evidence was the victim's powerful, graphic testimony detailing how defendant repeatedly had sexually assaulted her and how defendant fled to Kentucky after the initially being accused. Therefore, since Crain's testimony regarding her own sexual experiences with defendant was so attenuated to the charged offenses, there was little likelihood that a jury would have come to a different verdict had the contested evidence not been admitted.

B. CONSTITUTIONALITY OF MCL 768.27b

Defendant next argues that MCL 768.27b is unconstitutional because it allows the Legislature to impermissibly encroach on the Supreme Court's authority to manage the practice and procedure of the courts of the state. We disagree.

Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *People v Russell*, 266 Mich App 307, 315; 703 NW2d 107 (2005). Under the plain error rule, defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008).

The Supreme Court has the sole authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state." Const 1963, art 6, § 5. "This exclusive rule-making authority in matters of practice and procedure is further reinforced by separation of powers principle." *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999). However, this rule-making authority only extends to matters of "practice and procedure." *Id.* at 27. Thus, if a statute addresses purely procedural matters, it is an infringement of the Court's authority, but if the statue addresses substantive law, then it is permissible. *Id.* A statutory rule of evidence will violate the constitutional separation of powers only when "no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified." *Id.* at 30.

This Court, in *People v Schultz*, 278 Mich App 776; 754 NW2d 925 (2008), already addressed whether MCL 728.27b violates this constitutional separation of powers. The Court determined that the statute "reflects a 'policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords.'" *Id.* at 779 (quoting *Pattison*, *supra* at 620). The *Schultz* Court held that MCL 768.27b was constitutional because it "is a substantive rule engendered by a policy choice, and it does not interfere with our Supreme Court's constitutional authority to make rules that govern the administration of the judiciary and its process." *Schultz*, *supra* at 779.

This Court and trial courts are bound by binding precedent established by the Supreme Court and this Court. MCR 7.215(C)(2); *Cross*, *supra* at 738; *People v Beasley*, 239 Mich App

548, 556; 609 NW2d 581 (2000). Since the *Schultz* and *Schanz* decisions are binding, defendant failed to show how he was affected by any plain error, and his claim fails.

C. OV 7 AND OV 8 SCORING

Defendant next contends that he should be resentenced because the guidelines range used at sentencing was incorrect. We disagree.

The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Thus, this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). "Scoring decisions for which there is any evidence in support will be upheld." *Hornsby*, *supra* at 468.

Defendant first argues that the trial court erroneously scored 50 points for Offense Variable (OV) 7. MCL 777.37(1)(a) provides that 50 points are to be scored for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The trial court determined that 50 points was warranted because defendant threatened the victim during at least one of the sexual assaults by saying that he would beat her and her mother's "brains out" if she told anyone about what had happened. The evidence supports a finding that defendant exhibited conduct designed to substantially increase the fear and anxiety suffered by the victim during the assault. However, these threats were only issued at the initial sexual assault, which, for some reason, was not one of the charged offenses. The victim, who was under 13 years of age at the time, was digitally penetrated during this assault. Two of the three charged offenses related to the victim being under 13 years of age, and both of those offenses dealt with defendant penetrating her with his penis.

Only conduct related to the charged offense may be taken into consideration when scoring the offense variables. *People v Sargent*, 481 Mich 346, 349; 750 NW2d 161 (2008). Even though the initial sexual assault was not a sentenced/charged offense, the threat was related to the subsequent assaults. A reasonable inference is that the threat did not solely pertain to that first sexual assault – it was acting as a deterrent for disclosing all sexual assaults. A reasonable person in the victim's position would have felt the threat was an on-going one that pertained to disclosing any of the sexual assaults and not just the first one. Accordingly, even though the threat was issued on an earlier occasion, it was sufficiently related to the charged offenses.[2] Therefore, the trial court's decision to award 50 points for OV 7 should not be disturbed.

[2] We note that the recent Supreme Court case *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), does not alter our opinion. *McGraw* held that any actions *subsequent* to the offense's commission cannot relate back to the sentencing offense. *Id.* at 121. Here, the threat happened *before* the sentenced offenses.

Next, defendant argues that he was erroneously scored 15 points for OV 8. A sentencing court is to score 15 points for OV 8 when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a).

The trial court adopted the prosecution's argument that defendant asported the victim into the woods at one time and sexually assaulted her. However, the testimony does not establish that defendant was responsible for moving the victim into the woods by any means. But more importantly, as before, this particular sexual assault was not one of the charges offenses. The charged offenses were very specific regarding the actual sex acts that occurred (penis in vagina, penis in anus, penis in mouth), while there was no testimony regarding what defendant specifically did in the woods. In addition, the charged offenses all occurred inside the family home. Furthermore, unlike the threats that were issued to keep the victim silent, any act of asporting on an isolated occasion would be wholly unrelated to the actual sentenced offenses. Therefore, OV 8 should be scored at zero points, and the trial court abused its discretion in awarding 15 points for OV 8.

Defendant's Sentencing Information Report shows that he was scored a total of 150 points for his overall OV score. But the lower court already had ruled in the subsequent hearing that OV 10 should have been scored at ten points instead of 15 points. This OV 10 score reduction, combined with the OV 8 correction, results in a reduction of 20 points to the overall OV score for a total of 130 points. However, this new OV total does not result in a guidelines change because it still is in level VI with at least 100 points. When a scoring error does not alter the appropriate guidelines range, there is no need to resentence. *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006). Since the guidelines range the trial court used was indeed correct, defendant's sentences are upheld.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next asserts that he was denied the effective assistance of counsel at trial. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Because this Court denied defendant's motion to remand for an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the

proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008).

Defendant first argues that he was denied the effective assistance of counsel when his trial attorney failed to make all relevant objections to the scoring of OV 7 and any objection whatsoever regarding the scoring of OV 8. We disagree. After defendant's brief was filed with this Court, the lower court held a hearing regarding the scoring of OV 7, OV 8, and OV 10. Therefore, defendant cannot show how he was prejudiced by the lack of these objections at sentencing since he got the review he wanted when the trial court held the subsequent hearing to reevaluate the scoring on all of these OV factors. Moreover, as discussed, *supra*, defendant's guidelines calculations by the trial court were correct, thereby again negating any prejudice.

Defendant, in his Standard 4 brief, next argues that he was denied the effective assistance of counsel when his trial counsel failed to investigate a false police report, which was supposedly made by the victim. However, the record contains no reference to any such police report, let alone its contents or how it would have been admissible at trial. This Court's review is limited to the record. *Wilson*, *supra* at 352. Therefore, without anything on the record to support defendant's claim, defendant has failed to overcome the strong presumption that trial counsel was effective. Defendant also claims that trial counsel should have utilized certain expert witnesses so that they could have testified regarding the victim's psychological health and how the medications she was taking affected her. These claims fail for the same reason – there is nothing on the record that shows how any supposed expert witnesses would have testified.

Defendant next argues in his Standard 4 brief that his trial counsel should have objected to certain testimony of Dr. Mary Smyth. Specifically, defendant claims that Dr. Smyth's testimony, saying that an intact hymen does not necessarily preclude penile penetration, was inadmissible because the testimony does not comport with MRE 702.

MRE 702 provides the following:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Here, Dr. Smyth's testimony would fall under the umbrella of "scientific, technical, or other specialized knowledge" that would assist the trier of fact. She testified regarding how an intact and undamaged hymen "is not really relevant" with respect to determining whether someone was penetrated. Clearly, this testimony would assist the jury. A layperson could easily have assumed that an intact hymen is definitive proof that no sexual penetration occurred. Furthermore, Dr. Smyth established that her methodology was sound when she indicated that it is known in the medical community that at least one pregnant woman had been known to of had an intact hymen. See *Unger*, *supra* at 217-218 (stating that an expert's opinion is admissible if it is based on methods and procedures of science rather than subjective belief or *unsupported speculation*). It is important to note that Dr. Smyth never stated that the victim was penetrated. All Dr. Smyth

said is that one could not preclude that possibility based on finding an intact hymen. Therefore, any objection to Dr. Smyth's testimony would have been meritless. Counsel is not ineffective for failing to advocate a meritless position or failing to make a futile objection. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens