STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLINTON ROYCE WHEELER,

Defendant-Appellant.

UNPUBLISHED
May 4, 2010

No. 289331
Kent Circuit Court
LC No. 08-004220-FH

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

After a jury trial, defendant Clinton Royce Wheeler was convicted of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(g) (personal injury to helpless or incapacitated victim). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to 8 to 30 years' imprisonment, with 66 days' credit for time served. Defendant appeals as of right. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant contends there was insufficient evidence to support the jury's finding that defendant caused personal injury to the victim. We review a challenge to the sufficiency of the evidence 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, we 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 in 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 under MCL 750.520b(1)(g), which provides:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she *engages in sexual penetration* with another person and if any of the following circumstances exists:
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> * * *

> (g) *The actor causes personal injury to the victim*, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. [Emphasis added.]

For purposes of CSC I, "personal injury" is defined as "*bodily injury*, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(n) (emphasis added). The prosecutor argued that the victim in this case suffered a bodily injury, and we conclude on this record that the evidence was sufficient to prove that element beyond a reasonable doubt.

The victim testified that she felt pain when she awakened and found defendant penetrating her vagina with his penis. Immediately following the sexual intercourse, the victim stated to a friend, "I hurt down there" and "I really hurt." The victim testified that immediately following the assault, she asked defendant "Why did you hurt me?" and "Why did you do this to me?" The victim explained that she still felt pain in and around her vagina when she went to the YWCA a few hours later. A nurse-examiner from the YWCA testified that the victim had an abrasion and tear near her vagina, and that she provided the victim with an antibiotic. Additionally, a nurse practitioner testified that she treated the victim about two weeks after the sexual assault. The nurse practitioner testified that the victim suffered irritation and had a laceration near her vagina. This Court has held that, for purposes of CSC I, bodily injuries "need not be permanent or substantial" and "evidence of even insubstantial physical injuries is sufficient to support a conviction for [CSC I]." *People v Himmelein*, 177 Mich App 365, 377-378; 442 NW2d 667 (1989). See also *People v Hollis*, 96 Mich App 333, 337; 292 NW2d 538 (1980) (victim suffered visible bruises and scratches). The evidence presented was sufficient to establish the personal injury element of CSC I.

II. PRETRIAL AGREEMENT

Next, defendant raises several arguments concerning a pretrial agreement between his defense counsel and the prosecuting attorney in which the prosecuting attorney agreed to "seriously consider" dropping the charge against defendant if defendant successfully passed a police-administered polygraph examination. After the oral agreement, defendant took and passed a privately administered polygraph examination, and his defense counsel gave the results to the prosecuting attorney. The prosecutor thereafter proceeded to trial. At trial, the trial court permitted introduction of portions of the polygraph report and testimony of the polygraph examiner at trial for purposes of impeachment. During the trial, neither party was permitted to use the word "polygraph" or refer to the fact that defendant had taken a polygraph examination.

Defendant argues that he is entitled to specific performance of the pretrial agreement. Because defendant failed to raise this argument during the trial proceedings, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). In *People v Wyngaard*, 462 Mich 659, 667; 614 NW2d 143 (2000), our Supreme Court held that even in the context of authorized plea agreements, a criminal defendant is not always entitled to specific performance. Instead, the Court held, "[l]ogic dictates that we should remedy a due process violation by attempting to cure the defendant's detrimental reliance." *Id*. In this case, defendant is not entitled to specific performance of the pretrial agreement. Moreover, defendant has failed to show that he detrimentally relied on the agreement. Nothing in the purported agreement required defendant to

obtain a private polygraph examination. Defendant made a strategic decision to hire a private polygraph administrator to perform a polygraph and then voluntarily submitted the results to the prosecutor. The prosecutor did not require him to take this examination or request the results of the examination. Nothing in the record suggests that defense counsel asked the prosecutor if the private examination could be used in lieu of a police-administered examination. Furthermore, the portions of the report and the testimony of the examiner introduced at trial involved minor inconsistencies and did not prejudice defendant.

Defendant also argues that the prosecutor committed misconduct when he failed to adhere to the terms of the pretrial agreement and used portions of the polygraph report and testimony of the polygraph administrator for purposes of impeachment. Defendant failed to preserve his argument for review because he did not raise the issue during the trial portion of the proceedings. See *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Id*.; *Carines*, 460 Mich at 763-764.

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). In this case, the pretrial agreement only required that the prosecutor consider dropping the charge against defendant. Defendant cannot show that the prosecutor's failure to honor the pretrial agreement denied him a fair and impartial trial or proceeding. Similarly, the prosecutor's use of the impeachment evidence did not amount to misconduct. Defendant was not required to obtain a private polygraph examination, and he voluntarily gave the report to the prosecutor.

In addition, defendant contends that the trial court erred in admitting portions of the polygraph report and testimony of the examiner for impeachment purposes. Specifically, defendant contends that the evidence was inadmissible pursuant to MRE 410. Defendant failed to preserve this evidentiary issue for appellate review because he did not raise a contemporaneous objection on the same basis in the trial court. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). We review a trial court's decision to admit evidence for an abuse of discretion, but preliminary questions of law related to that decision are reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). We review unpreserved evidentiary errors for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

MRE 410 provides, in relevant part, that in a criminal trial, "[a]ny statement made in the course of plea discussions with an attorney for the prosecuting authority which do[es] not result in a plea of guilty or which result[s] in a plea of guilty later withdrawn" is inadmissible. MRE 410(4). In this case, defendant did not make the statement to the polygraph examiner in the presence of an attorney for the prosecuting authority in the course of a plea negotiation. Thus, MRE 410 was inoperative in this case. See *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996) (MRE 410 is inoperative where statements are made to police outside the presence of a prosecuting attorney). Defendant's claim of evidentiary error lacks merit.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that he was denied his constitutional right to the effective assistance of counsel. Whether defendant was denied his right to effective assistance of counsel

presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and issues of constitutional law de novo. *Id.* Because defendant's request for a *Ginther*[1] hearing was denied, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must show that trial counsel's performance was "deficient" and that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600. "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

Defendant argues that defense counsel rendered deficient performance when he failed to argue to the jury during his closing argument that the victim's minor injuries did not amount to a "personal injury" for purposes of CSC I. In this case, although counsel did not discuss the nature of the victim's injuries during his closing argument, he argued that the victim was not credible and he highlighted evidence to support his assertion. Defense counsel's decision to focus on attacking the victim's credibility during his closing argument was a strategic decision, and we will not second-guess counsel on matters involving trial strategy or assess counsel's competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant also argues that his counsel rendered ineffective assistance when he failed to properly cross-examine a prosecution witness about a prior statement she made to a friend regarding the victim's lack of emotion when defendant approached her immediately after the incident. After reviewing the record, we conclude that defense counsel did not act deficiently during his cross-examination of the prosecution witness. *Toma*, 462 Mich at 302. Defense counsel extensively questioned the witness regarding how the victim reacted when defendant entered the bedroom after the incident. The witness essentially testified that the victim did not have a heightened emotional reaction when defendant entered the room where she was seated on a bed. The jury was made aware that the victim did not yell at defendant, move away from defendant, physically confront defendant, or attempt to leave the bedroom when defendant entered and tried to speak with her. The witness testified that the victim indicated that she did not want anyone to physically confront defendant. The record does not indicate that the questioning now suggested by defendant would have resulted in the witness testifying in a manner inconsistent with any prior statement. Moreover, "[t]he questioning of witnesses is presumed to be a matter of trial strategy" *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008), and we will not second-guess counsel on matters involving trial strategy, *Horn*, 279 Mich App at 39.

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[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

IV. SENTENCING

Finally, defendant raises several challenges to his sentencing. Defendant argues that the trial court erred in scoring prior record variable (PRV) 5 (prior misdemeanor convictions), offense variable (OV) 3 (physical injury to victim), and OV 4 (serious psychological injury requiring professional treatment). "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 777.55 governs the scoring of PRV 5 and provides, in relevant part, that a sentencing court must assess ten points for this variable if "[t]he offender has 3 or 4 prior misdemeanor convictions . . . ." MCL 777.55(1)(c). Defendant contends that the trial court erroneously scored PRV 5 at ten points. Defendant does not dispute that he has three prior misdemeanor convictions, but he contends that the presentence investigation report (PSIR) is unclear regarding whether he had legal representation when he was convicted of those misdemeanors. Defendant argues that misdemeanor convictions where a criminal defendant did not have access to counsel cannot be considered for purposes of sentencing. When a criminal defendant makes a collateral challenge of prior adjudications used subsequently for purposes of sentencing, the defendant "bears the initial burden of establishing that the conviction was obtained without counsel or without a proper waiver of counsel." *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994). Specifically, a defendant must "present prima facie proof that a prior conviction violated *Gideon*,[2] or present evidence that the sentencing court either 'failed to reply' to a request for or 'refused to furnish' requesting copies of records and documents." *Id.* at 32. In this case, defendant has failed to show that his prior misdemeanor convictions were obtained in violation of his constitutional right to counsel. Defendant does not offer "prima facie proof" that his prior convictions were procured in violation of *Gideon*. Instead, he merely cites to the PSIR, which indicates that it is "unknown" whether defendant was afforded counsel or waived counsel for his misdemeanor convictions. The trial court did not abuse its discretion in scoring PRV 5 at ten points. *McLaughlin*, 258 Mich App at 671.

MCL 777.33 governs the scoring of OV 3 and provides, in relevant part, that the trial court assess ten points when a victim suffered "bodily injury requiring medical treatment." MCL 777.33(1)(d). In this case, the victim testified that she felt pain when defendant penetrated her vagina with his penis. Immediately after the incident, the victim told a friend that she felt pain. The victim underwent a medical evaluation at the YWCA, and at that time she was given antibiotics. The victim later underwent a medical evaluation with a nurse practitioner. This evidence supports the trial court's scoring of OV 3 at ten points. *Endres*, 269 Mich App at 417.

Finally, MCL 777.34 governs the scoring of OV 4 and provides, in relevant part, that the trial court assess ten points if the victim suffered a "[s]erious psychological injury requiring professional treatment." MCL 777.34(1)(a). The statute provides, "[s]core 10 points if the

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[2] *Gideon v Wainwright*, 372 US 335, 83 S Ct 792; 9 L Ed 2d 799 (1963).

serious psychological injury *may* require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2) (emphasis added). Here, at the time of the assault, the victim was asleep and intoxicated. She did not feel well and was unresponsive just moments earlier. The victim testified that she awakened when she heard defendant state, "damn girl, you're tight," and she discovered that defendant was on top of her with his penis inside her vagina. She felt pain in her vagina. She was unaware of her surroundings, she did not know where her fiancé was, and she became hysterical and began crying immediately after the assault. Further, in her victim impact statement, she indicated that the incident caused her to suffer "psychologically." We conclude that this evidence supports the trial court's scoring of OV 4 at ten points. *Endres*, 269 Mich App at 417.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell