

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OMAR GONZALEZ,

Defendant-Appellant.

UNPUBLISHED

October 12, 2010

No. 293554

Kent Circuit Court

LC No. 08-005736-FH

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Omar Gonzalez contests his jury trial convictions of fourth-degree criminal sexual conduct¹ and domestic violence² asserting as error the ineffective assistance of counsel in the jury selection process and failing to call an exculpatory witness to testify. Gonzalez also contends the improper scoring of four variables resulting in a sentence higher than the correct guidelines range. We affirm Gonzalez's convictions, but vacate his sentences and remand for resentencing.³

Gonzalez's convictions arise from two separate but related incidents. According to the prosecution's theory of the case, Gonzalez struck his wife during an argument that occurred after she caught him watching her brother Christopher Palazzola and his girlfriend Maria Sanchez engage in sexual intercourse. Gonzalez was also accused of sexually assaulting the intoxicated Sanchez that same evening.

Gonzalez first argues that trial counsel rendered ineffective assistance when he failed to investigate the favorable testimony of Gonzalez's niece, Tatiana, and call her as a defense witness at trial. As recognized by this Court:

¹ MCL 750.520e.

² MCL 750.81(2).

³ This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different."⁴

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy."⁵ "[T]he failure to call witnesses only constitutes ineffective assistance if it deprives a defendant of a substantial defense."⁶ "A defense is substantial if it might have made a difference in the outcome of the trial."⁷ A failure to interview witnesses justifies a finding of ineffective assistance of counsel only when "the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused."⁸ A "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel."⁹ Reviewing the testimony presented at trial, we find that Gonzalez has not rebutted the presumption that counsel's decision constituted trial strategy or that any alleged error was outcome determinative.

Gonzalez has not shown what defense Tatiana's testimony would have supported in light of the other testimony and evidence presented, including that of Gonzalez's other witness, his brother Ramon. Gonzalez contends that Tatiana would have testified that shortly after she witnessed Gonzalez's wife come upstairs and call 911, she went to the basement where she found Gonzalez, Ramon, and Palazzola, but that she did not observe Sanchez in the basement at the relevant point in time. None of the other witnesses testified to having seen Tatiana in the basement, or on the stairs, during the relevant time frames or events. In order to believe Tatiana's testimony, the jury would have to disregard the testimony of all the other eyewitnesses, including Ramon. While the witnesses' versions of the attack differed in some respects, they all agreed that Sanchez was downstairs. All of the witnesses testified that Ramon returned upstairs after assisting Palazzola and Sanchez downstairs. Tatiana's version of events would have been

⁴ *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

⁵ *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

⁶ *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

⁷ *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902 (1996).

⁸ *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990).

⁹ *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

inconsistent with the testimony of Gonzalez's other witness. Tatiana's proposed testimony would also have been rebutted by the tape of the 911 call, in which Ramon's voice is heard. Under the circumstances, we find that Gonzalez has failed to demonstrate that Tatiana's testimony would have made a difference at trial or to rebut the presumption that counsel's decision not to call this individual as a witness was strategic.

Gonzalez next contends that counsel was ineffective when he failed to fully explore the potential bias one of the venirepersons based on his admission that his parents' relationship involved domestic violence. A trial attorney's decisions with respect to prospective jurors are considered matters of trial strategy, and this Court generally declines to evaluate a claim of ineffective assistance of counsel with the benefit of hindsight.¹⁰ This Court has held that failure to challenge a juror does not provide a basis for a claim of ineffective assistance of counsel.¹¹ Specifically:

A reviewing court cannot see the jurors or listen to their answers to voir dire questions. A juror's race, facial expression, or manner of answering a question may be important to a lawyer selecting a jury. Our research has found no case in Michigan where defense counsel's failure to challenge a juror or jurors has been held to be ineffective assistance of counsel. We cannot imagine a case where a court would so hold, and we do not so hold in this case.¹²

Gonzalez concedes that trial counsel exercised all five of his peremptory challenges. Facially adequate reasons support counsel's decision to utilize peremptory challenges to preclude from sitting on the jury four venirepersons for issues pertaining to sexual assault or domestic violence and one venireperson with a brother in law enforcement. Defense counsel heard the challenged juror's representation that he could be impartial despite his parents' history of domestic violence and had the opportunity to assess the juror's demeanor. Nothing in the juror's answers clearly supports a challenge for cause or a claim that trial counsel was acting unreasonably in deciding not to use a peremptory challenge to strike this juror. Because any claim that counsel's alleged error in failing to preclude this potential juror was outcome determinative would be totally speculative, Gonzalez has not met his burden of establishing ineffective assistance.

Gonzalez also contends that numerous scoring errors occurred that necessitate resentencing. The prosecutor concurs with regard to two of the referenced variables. Gonzalez acknowledges that he failed to preserve this issue by objecting to scoring during sentencing. An

¹⁰ *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

¹¹ *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986).

¹² *Id.* at 94-95.

unpreserved objection to the scoring of a prior record variable (PRV) or an offense variable (OV) is subject to appellate review for plain error.¹³

Gonzalez first maintains, and the prosecutor concurs, that the trial court erred when it scored two points on PRV 5 because neither of Gonzalez's previous misdemeanor convictions should have been included.¹⁴ While the trial court is to score two points for OV 5 if the defendant "has 1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication,"¹⁵ not all prior offenses are to be scored.¹⁶ According to the presentence investigation report, Gonzalez was previously convicted of misdemeanors for driving with a suspended license and accosting and soliciting. Because Gonzalez's conviction for accosting and soliciting is specifically designated as a "crime against public order,"¹⁷ the trial court could not use this conviction in scoring PRV 5.¹⁸ This error in scoring placed Gonzalez in a B III grid for his class G offense, with a corresponding minimum sentence range of zero to 11 months. Correcting the scoring for PRV 5 changes Gonzalez's grid placement to an A III, resulting in a recommended sentence range to zero to nine months¹⁹ and necessitating resentencing.²⁰

Gonzalez also argues that the trial court erred when it scored ten points for OV 3. Ten points are to be scored for this variable if "[b]odily injury requiring medical treatment occurred to a victim."²¹ A challenged finding need only be proven by a preponderance of the evidence to support a scoring decision.²² Testimony indicated that Sanchez received two vaginal tear injuries, which could have resulted from blunt force trauma. Sanchez testified that Gonzalez penetrated her with his fingers and penis. The witness who examined Sanchez testified that her injuries would not normally occur through consensual intercourse. Based on this testimony, a preponderance of the evidence supports the trial court's scoring on this offense variable.

¹³ *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007).

¹⁴ MCL 777.55(2).

¹⁵ MCL 777.55(1)(e).

¹⁶ MCL 777.55(2)(a).

¹⁷ MCL 777.5.

¹⁸ See MCL 750.448; MCL 750.451; MCL 777.16w.

¹⁹ MCL 777.68.

²⁰ *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006). See also, *People v Jackson*, ___ Mich ___, ___ NW2d ___ (Docket No. 138988, issued September 7, 2010), slip op at 9-10.

²¹ MCL 777.33(1)(d).

²² *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991); *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006).

Gonzalez further contends that the trial court erred in scoring 25 points for OV 11. A score of 25 points is assigned if one criminal sexual penetration occurred.²³ While the jury declined to find beyond a reasonable doubt that a penetration had occurred, the evidence presented was sufficient to meet a preponderance of the evidence standard. As a result, the score assigned by the trial court to this variable did not constitute error.

Gonzalez next argues, and the prosecution concurs, that the trial court erred in scoring five points for OV 12.²⁴ Based on the scoring of OV 11, we find the trial court erred in the scoring of this variable.²⁵ We note that, despite the error regarding the scoring of this variable, the resultant OV score does not impact Gonzalez's grid placement.²⁶

We affirm Gonzalez's convictions, but vacate his sentences and remand for resentencing consistent with this opinion. We do not retain jurisdiction.²⁷

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter

²³ MCL 777.41(1)(b).

²⁴ MCL 777.42(1)(d).

²⁵ *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

²⁶ See MCL 777.68; *Francisco*, 474 Mich at 89 n 8.

²⁷ Gonzalez also argues that this Court should remand for ministerial correction of his judgment of sentence to reflect that he was acquitted of the charge of CSC III. On remand, the trial court is directed to correct the judgment of sentence accordingly.