STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2012
v	No. 300209 Lapeer Circuit Court
ERIC ANTHONY MILLER, Defendant-Appellant.	LC No. 09-010234-FC

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of, and sentences for, three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e) (perpetrator armed), along with first-degree home invasion, MCL 750.110a(2), unlawful imprisonment, MCL 750.349b, and aggravated stalking, MCL 750.411i. The trial court imposed concurrent sentences of imprisonment of eighteen years and nine months to forty years for the CSC I convictions, seven years and eleven months to twenty years for the home invasion conviction, seven years and two months to fifteen years for the unlawful imprisonment conviction, and two to five years for the aggravated stalking conviction. We affirm.

I. FACTS

The complaining witness testified that she and defendant had had an intimate relationship, but that when she wished to end it, defendant contacted her with such persistence, both in person and by electronic means, that she came to feel harassed and threatened.

The complainant further testified that, on the night of November 2-3, 2009, when she was in her bedroom and in the early stages of sleep, defendant appeared, undressed and brandishing a knife. According to the complainant, defendant threatened her with the knife, forcibly penetrated her vagina with his penis, and then forcibly penetrated her anus with his penis. The complainant continued that defendant admonished her that they were going to get back together, that she was going to tell that to her friends and family, and that she was otherwise going to abide by his terms and conditions. Then, according to the complainant, in response to some impatience, defendant forcibly inserted a sexual aid into her vagina, and left it there for at least ten minutes while he continued his threats and demands. Before leaving, defendant told the complainant not to speak of the assault to anyone, and spoke of consequences should she fail to accede to that and his other terms and conditions.

The complainant testified that in the days immediately following, defendant was constantly initiating communications, by phone and text messaging, and repeatedly insisting that she see him, and threatening her with consequences if she crossed him.

On appeal, both appellate counsel and defendant in his Standard 4 brief argue that the prosecution failed to present sufficient evidence to support his convictions. Appellate counsel additionally alleges that the trial court erred in admitting certain evidence and also in scoring the sentencing guidelines, and that defendant's trial attorney was ineffective. Defendant, in his Standard 4 brief, argues that he was erroneously subjected to multiple charges rather than just one, that the trial court failed to instruct the jury on the defense's theory of consent, that the lead police investigator resorted to improper conduct, and that the trial court should have recused itself for bias.

II. SUFFICIENCY OF THE EVIDENCE

In deciding a challenge to the sufficiency of the evidence, our task is to review de novo the evidence in the light most favorable to the prosecution to determine whether it was sufficient to persuade a reasonable trier of fact beyond a reasonable doubt that each element of each crime was proved. See *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

Defendant, in his Standard 4 brief, argues that the charges of CSC I and unlawful imprisonment could not be proved, "[d]ue to not only the lack of either DNA or biological evidence, but the testimony and the statements of the alleged victim stating that the offenses occurred only after the defendant had allegedly broken into her home." But defendant offers no legal, or logical, foundation for the premise that it is impossible to commit CSC I or unlawful imprisonment after having broken into the victim's home.

Appellate counsel and defendant both insist that the complainant was not a credible witness, and otherwise ask this Court to interpret the evidence to indicate a consensual relationship. Defendant, in his Standard 4 brief, states that inconsistencies in testimony arising from the preliminary examination and trial leaves the witness "discredited therefor [sic] making any testimony or statement void." But defendant cites no authority for the proposition that a witness who has not been entirely consistent is thereby rendered wholly incompetent. In fact, inconsistencies in testimony do not disqualify the witness, but instead create a credibility issue for jury determination. See *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011).

Likewise, appellate counsel's theories concerning how the complainant's conduct might be inconsistent with that of a person forcibly raped, how the incident could be considered an extension of her and defendant's sexual history, including role playing and feints at violence, and complainant's incentive to accuse defendant falsely are but invitations to reevaluate the evidence de novo and reach a conclusion different from the jury's. But it is not this Court's purpose to entertain plausible alternative interpretations of the evidence presented; rather, at issue is whether the prosecution presented sufficient evidence to persuade a reasonable jury that defendant's conduct satisfied the elements of the crimes with which he was charged.

"It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Accordingly, "it is

well settled that this Court may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Further, the accounts of a single eyewitness can suffice to persuade a jury of a defendant's guilt beyond a reasonable doubt. See *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976). For these reasons, we decline appellate counsel's and defendant's invitations to stray from these principles and reassess credibility, or entertain alternative interpretations of the evidence.

The complainant's unequivocal account explaining that defendant confronted her on several occasions prior to appearing at her home, uninvited, trapping and sexually assaulting her and, then, contacted her several times and used threatening language was sufficient to support the verdict in connection with all six charges. See *Gadomski*, 232 Mich App at 28; *Newby*, 66 Mich App at 405.

III. EVIDENCE OF DEFENDANT'S KNIVES

Appellate counsel argues that defendant was denied a fair trial by admission into evidence both knives and photographs of knives that defendant owned, but which defendant is not alleged to have possessed during the incident. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). An abuse of discretion occurs where the trial court chooses an outcome falling outside a principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

This issue first arose when a police detective identified several images of knives discovered while executing a search warrant at defendant's residence. The officer described an image depicting "a large black knife in a sheath, a multipurpose tool or a Leatherman tool with sheath, a smaller silver folding pocketknife and a blue utility knife, a folding utility knife." Defense counsel objected to admission of the image on the ground that "if there's something on this page that's relevant to this case then the actual item is the best evidence and anything on this page that's not relevant would be prejudicial to my client." The trial court overruled the objection on the ground that the image "has to go to the weight of the evidence."

The prosecuting attorney later offered into evidence a folding utility knife seized from defendant, to which defense counsel objected on the ground that an image of that item was already in evidence. The trial court agreed that the new offering was redundant, but admitted it. And a box cutter that the complainant testified belonged to defendant was admitted into evidence. She testified that she had seen it before, and that defendant routinely carried box cutters with him, but added that she was not aware of his being in possession of that particular knife on the night in question. The complainant testified that she was "terrified" about receiving threatening calls after the incident from defendant whom she knew carried box cutters on his person. Defense counsel did not renew any objections.

Appellate counsel argues that evidence of defendant's knives, other than those he allegedly possessed or produced on the night at issue, was irrelevant and unfairly prejudicial. We disagree in part with the first contention, and in total with the second.

The prosecuting attorney and his witnesses nowhere implied that any of the other knives found in defendant's possession, including the large black one in its sheath, played any role in

the sexual assault. Further, the knives in question included no dagger, switchblade, or other sort of distinctly violent (or defensive) character, but instead were knives of the sort any household might have—folding pocket knife, utility knives, and box cutters. Thus, even if the knives were of doubtful relevance, they nonetheless had very little potential to cause unfair prejudice. Assuming without deciding that admission of the evidence that defendant possessed those knives was error, any such error was harmless. See *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (a defendant pressing a preserved claim of nonconstitutional error bears the burden of showing that it is more probable than not that the error affected the outcome).

However, that defendant regularly went about with a box cutter on his person was in fact relevant—if not to the other charges, then to that of aggravated stalking. Indeed, the complainant testified that knowing that defendant was routinely in possession of such a knife heightened her fears of confronting him.

For these reasons, appellate counsel fails to show that the trial court's evidentiary decisions concerning defendant's knives denied him a fair trial.

IV. SCORING OF THE SENTENCING GUIDELINES

The trial court separately scored the guidelines for all six convictions. In a motion to correct invalid sentences, which the trial court rejected on its merits, appellate counsel raised challenges to the trial court's scoring of offense variables (OVs) 1, 4, 7, 8, 10, 11, and 19. Counsel reiterates those arguments on appeal.

This Court reviews a sentencing court's factual findings for clear error. See MCR 2.613(C); *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). However, the proper application of the statutory sentencing guidelines presents a question of law, calling for review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

In large part, appellate counsel relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) and related authority. In *Blakely*, the United States Supreme Court held that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id*. at 313 (emphasis in the original). But our Supreme Court has reiterated that "'the Michigan system is unaffected by the holding in *Blakely*.'" *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). While acknowledging that our Supreme Court has declared *Blakely* inapplicable to our sentencing law, appellate counsel resorts to *Blakely* in challenging the scoring of certain variables. Appellate counsel argues extensively that the Supreme Court has erred in this regard, but this Court is without authority to overrule decisions of our Supreme Court. See *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253, remanded in part on other grounds 467 Mich 888 (2002); *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987).

Accordingly, the law in Michigan remains that fact-finding for purposes of sentencing is not wholly derivative of the presentation of proofs at trial, but takes place later, governed by substantially different rules. For purposes of sentencing, the court's consideration is not confined to facts determined beyond a reasonable doubt or to evidence that would be admissible

for determination of guilt or innocence. More particularly, factual findings for sentencing purposes require a mere preponderance of the evidence. See *People v Ewing (After Remand)*, 435 Mich 443, 472-473; 458 NW2d 880 (Boyle, J., joined by Riley, C.J., and Griffin, J.) (1990). Information relied upon may come from several sources, including some that would not be admissible at trial, e.g., a presentence investigator's report. *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). See, also, MRE 1101(b)(3).

A. OV 1

The trial court assessed 15 points for OV 1 in connection with each conviction, which MCL 777.31(1)(e) prescribes where "the victim had a reasonable apprehension of an immediate battery when threatened with a knife." Appellate counsel disputes this score solely on the ground that actual use of a knife, as opposed to mere possession of a weapon, is not an element of any of the crimes; thus, the factual basis for this score did not inhere in the jury's verdict, citing *Blakely* and related authority. Because counsel's invocation of *Blakely* is inapt, this argument must fail.

B. OV 4

The trial court assessed 10 points for OV 4 in connection with each conviction, which MCL 777.34(1)(a) prescribes where "[s]erious psychological injury requiring professional treatment occurred to a victim." Subsection (2) in turn prescribes the same number of points "if the serious psychological injury may require professional treatment," and clarifies in counsel's brief that "[i]n making this determination, the fact that treatment has not been sought is not conclusive." Appellate counsel argues that the trial court did not have a sufficient evidentiary basis for concluding that the victim in this case suffered serious psychological injury. We disagree.

A scoring decision will not be reversed if any evidence exists to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Again, the complainant described being stalked by defendant, then discovering him in her bedroom uninvited, brandishing a knife, and repeatedly forcing himself on her sexually. He admonished her repeatedly afterward that there would be "consequences" if she did not abide by his terms and conditions.

In addition, the presentence investigation report includes a victim-impact statement, in which the complainant answered affirmatively when asked if she was psychologically injured, and elaborated that she was "having very hard time sleeping at night." She also reported that she found it "hard to be happy," and felt "furious, upset, depressed." The trial court likewise noted that the complainant stated that "she has a very hard time sleeping at night, she feels emotional stress, and she is furious, upset, and depressed." In light of what the complainant described experiencing at the hands of defendant, and her descriptions of her continuing emotional state, we conclude that the trial court had a reasonable basis for assessing ten points for OV 4.

C. OV 7

The trial court assessed 50 points for OV 7 in connection with each conviction, which MCL 777.37(1)(a) prescribes where "[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." Subsection (3) defines "sadism" for this purpose as conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." Appellate counsel argues that the conduct attributed to defendant was not sufficiently extreme to warrant points under this variable, and that little of the aggression attributed to defendant went beyond what was necessary to commit the crimes. We disagree.

The trial court rebuffed this argument as follows:

> The evidence produced during the trial revealed that after Defendant vaginally raped the victim at knife point both from behind and then while on top, he forced the victim to bend over the bed where he anally raped her. At some point, the defendant forcibly inserted a [sex toy] into the victim's vagina and forced her to sit up while he continually threatened her. The victim testified that she suffered through approximately 20 minutes of threats and demands while clearly in pain and suffering because of having the [sexual aid] in her the entire time.

The trial court ably recounted a good deal of sadistic, torturous, or excessively brutal conduct on defendant's part, sufficient to support the conclusion that defendant inflicted upon the complainant brutality beyond what his crimes required, and did so substantially to increase her fear and anxiety.

D. OV 8

The trial court assessed 15 points for OV 8 in connection with each conviction, which MCL 777.38(1)(a) prescribes where "[a] victim was held captive beyond the time necessary to commit the offense." In justifying its scoring of this variable, the trial court stated as follows:

> [I]t was revealed during the Trial that after the Defendant ejaculated in the victim during the vaginal and anal penetrations, he held the victim at knife point for a considerable period of time so he could additionally rape her with an object while subjecting her to repeated threats. Clearly the victim was held at knife point long after the Defendant had physically completed his multiple sexual acts which were well beyond the time necessary to commit these offenses.

Appellate counsel argues that there was no proof that the victim was held captive beyond the time necessary to commit the offense. But examination of the transcript shows that the trial court correctly identified periods of captivity beyond what was necessary to commit the crimes.

The complainant described defendant's detaining her while admonishing her about restoring their romance, in accord with his terms and conditions, while threatening her with his knife, then inserting the sexual aid in her vagina and leaving it there while forcing her to endure at least ten additional minutes of his rants and threats, before dislodging the aid while continuing to terrorize her verbally.

The complainant's account thus brought to light significant periods of time, apart from what was necessary to commit his crimes, during which defendant restrained her. Her testimony well supported the trial court's decision to score 15 points for OV 8.

E. OV 10

The trial court assessed 15 points for OV 10, which MCL 777.40(1)(a) prescribes where "[p]redatory conduct was involved." Subsection (3)(a) clarifies that this means "preoffense conduct directed at a victim for the primary purpose of victimization." The trial court opined that "the timing of the assault (when everyone is asleep and no other adults were present) and its location (bedroom in the dark) are evidence of pre offense [sic] predatory conduct." The court added, "it was revealed during the trial that defendant watched his victim, texted victim's house guest at work in order to keep track of the Victim's whereabouts and to know when she could likely be coming home, and waited for any opportunity to be alone with her."

Appellate counsel asserts that the evidence does not suggest that defendant exploited any particular vulnerability on the victim's part, on the grounds that she was not especially susceptible to injury, physical restraint, persuasion, or temptation. However, the trial court cited no such inherent vulnerability on the victim's part, but instead concluded that defendant had engaged in predatory conduct—in other words, that defendant had taken pains to manufacture a state of special vulnerability for her. See *People v Huston*, 489 Mich 451, 454; 802 NW2d 261 (2011) ("[A] defendant's 'predatory conduct,' by that conduct alone (*eo ipso*), can create or enhance a victim's 'vulnerability.'") The trial court's recitation that the evidence included that defendant studied his victim's moves over time, and was in communication with her adult housemate, in order to identify a time when he could most advantageously strike the victim, put forward a solid basis for concluding that defendant had engaged in preoffense conduct directed at the victim primarily to victimize her, and thus for assessing 15 points for OV 10. Also of significance is that the evidence suggested that defendant concealed himself in the victim's house until her children were asleep and she herself retired for the night. See *id*. at 454-455, 459-460 (lying in wait for a victim is predatory conduct for purposes of scoring OV 10).

Appellate counsel argues that defendant's pre-assaultive conduct of stalking the complainant should not be deemed predatory conduct in connection with the eventual assault because defendant was charged with, and convicted of, aggravated stalking. However, appellate counsel cites no authority for the proposition that preoffense conduct for purposes of scoring OV 10 may not include conduct resulting in separate charges or convictions. And, while appellate counsel invokes the general principle that OVs "are properly scored by reference only to the sentencing offense," *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009), counsel ignores the fact that the language of a particular offense variable may provide "otherwise." Here, MCL 777.40(3)(a) specifically references "preoffense conduct," which obviously requires inquiry into conduct preceding the sentencing offense.

For these reasons, appellate counsel has failed to bring error in the scoring of OV 10 to light.

F. OV 11

The trial court assessed 25 points for OV 11 in connection with the CSC I convictions, and 50 points in connection with the other convictions. MCL 777.41(1)(a) prescribes 50 points where "[t]wo or more criminal sexual penetrations occurred," and subsection (1)(b) prescribes 25 points where "[o]ne criminal sexual penetration occurred." Subsection (2)(a) states, "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense." Subsection (2)(c) instructs, "Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense."

Appellate counsel argues that there should have been no points for this variable in connection with the CSC I convictions, on the ground that each incidence of CSC was entirely separate from the others. We disagree.

Penetrations other than the one underlying the conviction of the sentencing offense are properly counted for purposes of scoring OV 11 if they have a connective relationship with the sentencing offense that is greater than merely incidental. *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). Accordingly, penetrations occurring on different dates may not be deemed to have arisen from one another. *Id*. at 102. However, in *Johnson, id*. at 100 and n 1, our Supreme Court quoted approvingly from what it had earlier identified as dicta in this Court's opinion in *People v Mutchie*, 251 Mich App 273; 650 NW2d 733 (2002), concerning penetrations occurring in closer proximity to each other. In particular, where "'all three sexual penetrations perpetrated by defendant against the victim occurred at the same place, under the same set of circumstances, and during the same course of conduct, regardless of which first-degree CSC conviction one deems the "sentencing offense" for purposes of OV 11, the other two sexual penetrations unambiguously fall within the scope of "sexual penetrations of the victim by the offender arising out of the sentencing offense."'" *Johnson*, 474 Mich at 100, quoting *Mutchie*, 251 Mich App at 277 and MCL 777.41(1)(a).

That is precisely the situation that this case presents. There were three penetrations all occurring at the same place, under the same circumstances, and during the same course of conduct.

G. OV 19

The trial court assessed 15 points for OV 19 in connection with each conviction, which MCL 777.49(b) prescribes where "[t]he offender used force or the threat of force against another person . . . to interfere with, attempt to interfere with, or that results in the interference with the administration of justice." Fifteen points for this variable is an appropriate score where the evidence indicates "that because of defendant's threats, his victim might have been dissuaded from coming forward with accusations and testimony, thus preventing the discovery and prosecution of defendant's crimes." *People v Endres*, 269 Mich App 414, 420-421; 711 NW2d 398 (2006). The sentencing court may take into account conduct taking place before criminal charges are filed. *Id*.

Appellate counsel argues that interpreting the statute behind this variable to allow any points in this instance would thwart the purpose of the sentencing guidelines to encourage

proportionate sentencing. We agree with the trial court that what defendant did to try to avoid prosecution went beyond the routine. As the trial court recounted,

> that Defendant stalked the Victim, broke into her residence and hold [sic] her in her bedroom against her will at knife point while violent raping her, repeatedly threatened her that he would physically harm or kill the Victim or her family if she reported the incident to the police, supports this Court's determination that the Defendant intended to interfere with a future criminal proceeding arising from the assault.

The trial court's summary illustrates that this case is on all fours with *Endres*.

Defendant alternatively argues that MCL 777.49(b) is void for vagueness, asserting that the direction to assess points for using force or threats to interfere, or try to interfere, with the administration of justice "does not give reasonable notice of what conduct is subject to this additional 'penalty,'" but instead leaves the scoring of OV 19 "a completely arbitrary action, . . . up to the individual unfettered discretion of probation officers, judges, or prosecutors." Again, we disagree.

A criminal statute is unconstitutionally vague if it does not provide fair notice of what conduct is proscribed, it confers unlimited discretion on the fact-finder to determine whether the statute has been violated, or it is so broad as to threaten First Amendment expressive rights. *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). Appellate counsel argues the first two of these three concerns. "When a defendant's vagueness challenge does not implicate First Amendment freedoms, the constitutionality of the statute in question must be examined in light of the particular facts at hand without concern for the hypothetical rights of others." *Id*.

While the statute at issue may possibly admit of some controversy in certain cases, this case permits no such controversy. "The proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed . . . ." *Id*. Further, a statute is not vague if the meaning of the words in controversy can be fairly ascertained by reference to dictionaries, treatises, or judicial decisions. *Id*. at 653. Here, the judiciary has provided considerable guidance, in particular with *Endres*, 269 Mich App at 420-421, advising defendant and the rest of the public that threatening the victim of a crime in hopes of thwarting the crime's discovery and prosecution subjects an offender upon conviction to an assessment of points for OV 19.

Here, defendant did not merely admonish his victim not to speak of the crime as he left her house; instead, he threatened her repeatedly in the course of his severely assaultive conduct, then continued to do so through a series of phone calls and text messages in the days immediately following. Defendant's conduct, as it related to interference with the administration of justice, crossed the line from routine actions normally bound up with criminal activity into a severe and protracted campaign to keep the one witness to defendant's brutal criminal activity quiet. OV 19 was properly scored, and thus properly served to help guide the sentencing court toward a proportionate minimum sentence.

Appellate counsel also invokes due process and the rule of lenity in raising this challenge. But the vagueness doctrine is a subset of due process, *People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011), and the rule of lenity has no application to the criminal statutes of this state. MCL 750.2.[1]

V. ASSISTANCE OF COUNSEL

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). In this case, because a *Ginther*[2] hearing was not conducted, review of this issue is limited to mistakes apparent on the existing record. See *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Appellate counsel argues that defendant's trial counsel was ineffective because he allegedly failed to object to the admission of knives and pictures of knives and failed to raise particular challenges to the scoring of the guidelines. However, on appeal we have treated the evidentiary challenge as preserved because defense counsel did raise a relevancy objection. Accordingly, the claim that a failure to object resulted in the issue not being preserved for appeal is without merit. Further, as stated above, even if the evidence was improperly admitted, the evidence had very little potential to cause defendant unfair prejudice; thus, this argument does not support a claim of ineffective assistance of counsel.

And appellate counsel's arguments concerning trial counsel's failure to raise certain sentencing issues were rendered moot when the trial court elected to entertain a motion for resentencing premised on the sentencing issues reiterated in this appeal. Because the trial court rejected those arguments on their merits, there is no reason to suppose that there would have been any different result had all of those objections been raised at sentencing in the first instance. Moreover, because we rejected all those sentencing challenges as set forth above, the failure to previously raise such issues does not render counsel's performance deficient. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

VI. MULTIPLE CHARGES

Defendant, in his Standard 4 brief, argues that his various criminal counts

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[1] "The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

> were charged as if arising out of separate incidences [sic], yet alleged to have occurred on the same date and time with exception to the charge of aggravated stalking. Each count should have fallen under One (1), not separate which caused the trial court and prosecution to err and violate my constitutional right to be free of Double Jeapordy [sic].

However, single criminal transactions giving rise to several charges, convictions, and sentences is so commonplace that no citation is required. What constitutional double jeopardy principles forbid is a second prosecution for the same offense after acquittal or conviction, and multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004), citing US Const, Am V; Const 1963, art 1, § 15.

Defendant's suggestion that a person convicted of CSC I may not also be charged and convicted of a home invasion or unlawful imprisonment committed contemporaneously is without legal support. Likewise the suggestion that, having achieved an initial penetration in an act of CSC I, the perpetrator is insulated from additional charges resulting from any additional penetrations is without merit. And equally without merit is the suggestion that a person convicted of CSC I is insulated from separate prosecution for stalking the victim in the days before and after that crime.

The complainant testified that defendant penetrated her vagina with his penis, then penetrated her anus with his penis, then penetrated her vagina with a sexual aid, all while armed and threatening her with a knife. The trial court instructed the jury on these three theories of CSC I. Those three distinct penetrations justified the three distinct charges, convictions, and (concurrent) sentences.

The complainant likewise testified that defendant entered her house without permission, assaulted her, while armed with a knife, and while her children were in the house. That criminal conduct was substantially distinct from the sex crimes for which defendant was also prosecuted. And the evidence that defendant restrained his victim while assaulting her, without consent or other lawful authority, and while armed with a weapon also demonstrated criminal conduct substantially distinct from the sex crimes. Further, the complainant's account of extensive unconsented contacts from defendant, before and after the assault—which included demands and threats—also described criminal conduct substantially distinct from the sex crimes.

Because the conduct for which defendant was convicted comprised the six separate offenses for which defendant was charged, convicted, and sentenced, defendant's argument that there should have been only a single charge is without merit.

VII. POLICE MISCONDUCT

Defendant asserts, under the rubric of prosecutorial misconduct, that the chief investigating police officer acted inappropriately. He asserts that the officer's investigation was improper, as was his handling of the crime scene and the collection of evidence. He also asserts that the officer engaged in improper search and seizure practices. However, defendant fails to set forth a developed and understandable argument in this regard. Further, if there were any genuine issues concerning police misconduct underlying this case, the way to address them

would have been to move the trial court to suppress any evidence obtained through such misconduct. See *People v Goldston*, 470 Mich 523, 526; 682 NW2d 479 (2004); *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997). Because of the lack of cogent argument on appeal and the fact that this issue was not raised and decided below, this Court has no basis for granting appellate relief. See *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

VIII. INSTRUCTION ON CONSENT

Defendant argues that the trial court failed to instruct the jury on his theory of consent as a defense to the charges of CSC I. However, the record clearly shows the trial court did, in fact, while instructing the jury on CSC I, cover the defense of consent.

IX. RES GESTAE WITNESS

In his Standard 4 brief, defendant cites cases dating from 1975 to 1981 for the proposition that a prosecuting attorney must endorse and produce all res gestae witnesses, but for a defendant's accomplices. Defendant's information concerning the law of res gestae witnesses is out of date. MCL 767.40a was amended in 1986, with the result that "[t]he prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). Accordingly, instead of having a standing obligation to produce all res gestae witnesses, a prosecuting attorney "may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4).

Defendant asserts that "the trial court abused its discretion in ruling that the prosecutor had exercised due diligence in attempting to produce a res gestae witness at trial," then specifies that the witness in question was "the physician who examined and treated the complainant at the hospital." But defendant provides no record citation to show whether any such issue was raised and decided on the record at all. See MCR 7.212(C)(7). Further, defendant's characterization of a physician who treated the victim after the fact as a res gestae witness is misguided. A res gestae witness is "[a]n eyewitness to some event in the continuum of the criminal transaction and one whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." Black's Law Dictionary (6th ed, 1990), p 1305, citing *People v Baskin*, 145 Mich App 526, [530-531]; 378 NW2d 535 (1985). Moreover, defendant fails to explain what benefit he might have derived from having the allegedly missing witness at his disposal at trial. Thus, defendant fails to show that he suffered any prejudice for want of any witness who was not present at trial.

X. JUDICIAL BIAS

Defendant argues that the trial judge erred in failing to sua sponte recuse himself for bias. A criminal defendant is entitled to a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Defendant asserts that the judge was simultaneously, or perhaps nearly simultaneously, presiding over both the criminal trial and some civil matter in which apparently defendant's ex-wife was a party. But defendant leaves this

Court to guess what the nature of that other litigation was, as well as how apparent it might have been to the judge involved that a party in that other case was formerly married to defendant. And defendant neither cites authority for the proposition that a judge is disqualified from presiding over a criminal matter for having earlier, or simultaneously, presided over a civil matter involving a party of some familial relationship to the criminal defendant, nor offers record citations to show where his trial judge in fact revealed some bias against him in this case, for that or any other reason.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra