STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION July 12, 2011 9:05 a.m.
v	No. 297889 Wayne Circuit Court
DEANDRE MANTRELL MCDONALD, Defendant-Appellant.	LC No. 09-008686-FC

Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J.

Defendant appeals by right his convictions by a jury of kidnapping, MCL 750.349, armed robbery, MCL 750.529, and first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c). Defendant was acquitted of felony-firearm, MCL 750.227b, and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(c). Defendant also appeals his sentences of 225 months' to 60 years' imprisonment on each of his three convictions; his kidnapping and armed robbery sentences were to be served concurrently but, pursuant to MCL 750.520b(3), they were to be served consecutively to his CSC-I sentence. Defendant's convictions were based largely, although not exclusively, on DNA evidence obtained at a hospital. We affirm.

The victim in this case was accosted, ordered into a car, robbed, and raped at gunpoint by a man while walking home from work in Detroit. She initially got a good look at the man's face before he ordered her not to look at her. Among other things, the man took her cell phone. When he finally let her go, she almost immediately happened across an ambulance and was taken to the hospital, where a sexual assault examination was performed after some delay. Numerous swabs and samples were taken and packaged into a "rape kit," a sealed container for sexual assault evidence. Meanwhile, the police tracked the victim's cell phone to a barbershop, and from there to a person who was in a relationship with defendant's brother, and from there to defendant. DNA evidence was obtained from defendant. The victim was unable to select a photograph of defendant out of a photographic lineup, although the photograph quality was apparently very poor; defendant refused to participate in a corporeal or voice lineup, and the victim was able to identify defendant as the rapist in court and from a photograph she found of him on the internet through independent research. Two different forensic scientists in unrelated crime laboratories analyzed actual sperm cells found in the rape kit and matched them to defendant's DNA. It was established that at no time was a sperm sample obtained from defendant.

Defendant first argues that it was error to permit the emergency room attending physician, Dr. Loeckner, who did not himself administer the sexual assault examination, to testify about that examination. The doctor who did personally perform the examination, Dr. Abbas, did not testify at trial. Defendant argues that this constituted inadmissible hearsay and a violation of his right to confront witnesses against him. We find no basis for reversal.

Defendant did not object to Dr. Loeckner's testimony, and he affirmatively stated that he had no objection to the admission of Dr. Abbas's notes. The former failure to object constitutes mere forfeiture of an error, whereas the latter affirmative approval constitutes a waiver. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Unpreserved but not waived claims of error are reviewed for "plain error," meaning there must be obvious error that caused a defendant actual prejudice, and reversal is not warranted unless the defendant was actually innocent or the error fundamentally undermined the integrity of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This same standard of review applies to unpreserved claims of both nonconstitutional and constitutional error. *Id*., 761-767.

Even if we were to presume that error occurred, Dr. Loeckner's testimony helped defendant, if anything. Dr. Loeckner admitted that he did not know whether Dr. Abbas really followed the proper protocols; furthermore, Dr. Loeckner's testimony brought out the fact that no semen was observed during the examination, a fact that defendant made use of during closing argument.

But the gravamen of defendant's argument has less to do with who testified than with the implication that the sexual assault examination was mishandled, and the rape kit contaminated, undermining their reliability. The rest of the evidence overwhelmingly shows no such thing to be possible. Even if Dr. Abbas had, hypothetically, not fully followed proper protocols, two different forensic scientists in two different accredited crime laboratories matched defendant to the sperm cells found during the rape examination, and they did so without consulting each other. Because the victim's DNA was also found on the items in that particular rape kit, that kit must be the correct one for this case and had not become mixed up with a piece of evidence from another investigation. Defendant implies that the rape kit at the hospital could have been mishandled in such a way that his sperm could have gotten into it, but there is absolutely no evidence in the record from which such an extraordinary conclusion could be drawn. Indeed, it is a patently ridiculous implication because the forensic scientists explicitly analyzed *actual sperm cells* that were found to contain defendant's DNA. Literally the only way the rape kit could have been contaminated is if the police or the doctors somehow *obtained a sperm sample* from defendant, which they did not. The DNA samples they took from defendant came from his *mouth*. Finally, old-fashioned detective work led police to defendant, and Rosendale identified defendant as the rapist in court and from a photograph she found.

Even if error occurred, defendant is *not* actually innocent, and given defendant's partial reliance on the evidence to which he did not object, such error did not affect the fairness, integrity, or public reputation of the proceedings.

Defendant next argues that the trial court deprived him of due process and violated MCR 6.414(J) because of the way in which it asked the jury to rely on its collective memory instead of granting its request to review transcripts of certain testimony. We disagree. It might have been

better practice for the trial court to tell the jury explicitly that if they continued to feel a need for a transcript in the future, they could make another request. However, the trial court emphasized that it was merely denying their request "at this time," and given that it was only an hour into deliberations, defendant agreed that for the time being the request should be denied. The trial court did not tell the jury that transcripts would simply not be available for weeks or months or not at all. See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Smith*, 396 Mich 109, 110; 240 NW2d 202 (1976). The trial court did not foreclose the possibility of the jury obtaining transcripts in the future and therefore did not violate MCR 6.414(J).

Defendant finally argues that the trial court mis-scored three Offense Variables (OV) in calculating his guidelines range for sentencing. We disagree and find that in fact the trial court scored one of his offense variables too low.

Offense Variable (OV) 3 should be scored at 10 points if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). The victim did not suffer any acute physical trauma or injury as a result of the rape and most of the medical treatment she received was precautionary. However, "bodily injury" encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence. See *People v Cathey*, 261 Mich App 506, 513-517; 681 NW2d 661 (2004). In that case, this Court held that *in the context of a CSC offense*, a resulting pregnancy constituted "bodily injury," even though in most other contexts it would be considered quite the opposite. See *id*. at 514 n 5. The evidence here was that the victim suffered an infection as a consequence of the rape, which constitutes "bodily injury requiring medical treatment" within the meaning of OV-3.

OV-7 should be scored at 50 points 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." MCL 777.37(1)(a). Defendant here ordered the victim to keep her eyes closed, indicated to her that he and other implied accomplices knew who she was and had been watching her, and made threats that clearly indicated that he could find her again in the future, thereby suggesting not only that she was suffering a horrific assault but that there might never be any escape, either. Defendant argues that there was no evidence of overt sadism, torture, or physical brutality beyond what was technically necessary to accomplish the charged offenses. However, even though the victim eventually concluded that defendant really did not know who she was, there was ample evidence that defendant engaged in "conduct designed to substantially increase [her] fear and anxiety."

OV-19 should be scored at 15 points if a defendant "used force or the threat of force . . . to interfere with, attempt to interfere with, or [resulting] in the interference with the administration of justice or the rendering of emergency services." MCL 777.49(b). It should be scored at 10 points if a defendant "otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). The trial court scored OV-19 at 10 points.

Defendant asserts that the trial court impermissibly scored OV-19 on the basis of conduct that occurred after the completion of the charged offenses, because OV-19 does not explicitly permit the court to do so. See *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). However, our Supreme Court has explained that OV-19 contemplates post-offense conduct by necessary implication. *People v Smith*, 488 Mich 193, 200; 793 NW2d 666 (2010). And even if

it did not, defendant's discussion about how he knew who the victim was and that his boys had been watching her was an obvious threat that transpired *during* the kidnapping, and any brutalized person would interpret that as an implication that she or he could be found again in the future. Furthermore, defendant required the victim to promise not to contact the police *as a precondition to letting her go*. Defendant accurately notes that the victim only testified at the preliminary examination that defendant made her promise not to tell anyone as a precondition to letting her go. However, the trial court properly considered testimony from the preliminary examination at sentencing. *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993). And a threat to kill a victim to prevent that victim from reporting a crime warrants scoring 15 points for OV-19. *People v Endres*, 269 Mich App 414, 420-422; 711 NW2d 398 (2006).

The specific CSC offense for which defendant was charged and convicted was penetration involving the commission of another felony. MCL 750.520b(1)(c). The underlying felony is therefore part of the CSC offense itself. Armed robbery explicitly includes conduct that includes flight or attempts to retain possession of stolen items. MCL 750.529, 750.530(2). Kidnapping is defined as restraining another person, meaning restricting or confining their liberty, and thus necessarily is an ongoing offense until the victim is released. MCL 750.349(2); see also *People v Behm*, 45 Mich App 614, 620-621; 207 NW2d 200 (1973). The victim's liberty was not free from restraint until she was not only out of defendant's car, but defendant was in fact out of shooting range—after all, he had a gun trained on her even after she got out. Therefore, even if defendant had not made the threat to the victim until she was already walking away, none of defendant's charged offenses were complete until it was clear that he could no longer change his mind and order her back into the car.

If there is any error at all in this matter, it is that defendant received a lower guidelines score than he should have. We will not, however, require that score changed because no cross-appeal has been filed.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause