STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2004
v	No. 244712 Oakland Circuit Court
ERIK NATHANIEL MUEHLENBEIN, Defendant-Appellant.	LC No. 2002-182924-FC

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by jury of kidnapping, MCL 750.349, and two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b. The trial court sentenced defendant to concurrent terms of 285 to 720 months' imprisonment on each of the three convictions. We affirm.

On appeal, defendant first argues that he was denied his constitutional rights to due process and a fair trial by the introduction of irrelevant evidence concerning the beating of the victim's friend. We disagree. Because no objection to the admission of the evidence was made at trial, defendant bears the burden of establishing plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Generally, evidence tending to show that a defendant committed another criminal offense is inadmissible on the issue of his innocence or guilt for the offense charged. *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973); *People v Key*, 121 Mich App 168, 179; 328 NW2d 609 (1982). An exception to the rule is where "acts, conduct and demeanor of a person charged with a crime at the time of, or shortly before or after the offense is claimed to have been committed, may be shown as a part of the *res gestae*." *People v Savage*, 225 Mich 84, 86; 195 NW 669 (1923); cf. *DerMartzex*, *supra* at 414. Our Supreme Court has explained:

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence.

[*People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).]

Here, evidence that defendant participated in the assault on the victim's friend that precipitated the victim's kidnapping gave the jury an intelligible presentation regarding the full context in which the events took place. *Sholl, supra* at 741. Therefore, the evidence was relevant as part of the res gestae of the crime. MRE 401, 402. Consequently, defendant fails to establish the existence of plain error.

Defendant next argues that defense counsel provided ineffective assistance by failing to challenge the introduction of evidence regarding the victim's friend's injuries, failing to present the defense of voluntary intoxication to the kidnapping charge, and failing to challenge the scoring of offense variable (OV) 13. Because defendant's request for a *Ginther*[1] hearing was denied, this Court's review is limited to errors apparent on the record. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

"To demonstrate ineffective assistance of counsel, defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived of a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To prove ineffective assistance based on defense counsel's failure to object, a defendant is required to overcome the presumption that his counsel's actions were the result of sound trial strategy. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994).

Here, defendant asserts that his trial counsel was ineffective because he failed to object to the evidence concerning the victim's friend's injuries. However, the defense strategy, as demonstrated in the opening statement, was to show that defendant was sleeping in the car during the events leading up to the conduct for which defendant was charged, including during the kidnapping of the victim, and to shift the blame to the codefendant, Mohammed Hassan, who "is a bad guy" and who had fled the country. Defendant's counsel's choice not to object to the testimony regarding the beating of the victim's friend could reasonably have been made in furtherance of that trial strategy. We will not second-guess counsel's strategic decision. *Gonzalez, supra* at 644-645.

Defendant also maintains that his trial counsel was ineffective for failing to offer the defense of voluntary intoxication to the kidnapping charge. Voluntary intoxication is no defense to a general intent crime, *People v Langworthy*, 416 Mich 630, 638; 331 NW2d 171 (1982), and a showing of specific intent is not required for "forcible confinement or imprisonment of another within this state," *People v Jaffray*, 445 Mich 287, 298; 519 NW2d 108 (1994). Therefore, this issue has no merit.

Finally, defendant argues that his trial counsel provided ineffective assistance by failing to object at sentencing to the scoring of OV 13, even though OV 11 was scored as well. The prosecution concedes that it was error to score OV 13 when OV 11 was also scored, and we

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

agree. See MCL 777.41-777.43. However, subtracting the 25 points assessed for OV 13 does not change defendant's offender classification or reduce the guideline range. Consequently, defendant cannot establish that counsel's error resulted in prejudice. *Gonzalez, supra* at 644; *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Defendant next challenges the sufficiency of the evidence for the kidnapping and CSC I charges. Regarding the kidnapping charge, defendant again relies on the contention that the kidnapping charge in this case requires proof of specific intent and that the evidence of his state of intoxication likely would have resulted in an acquittal if the jury had been instructed on the defense of voluntary intoxication. But, as already noted, forcible kidnapping is not a specific intent crime, *Jaffray*, *supra*, and therefore voluntary intoxication is no defense. Accordingly, there was no error.

Regarding the CSC I convictions, defendant claims that the evidence was insufficient because "there was substantial evidence in support of his defense of consent." As argued by defendant, his claim is not really a challenge to the sufficiency of the evidence. Rather, defendant argues that his defense of consent should have prevailed and likely would have succeeded but for the admission of the evidence regarding the beating of the victim's friend, and if the jury had been instructed that voluntary intoxication was a defense to the charge of kidnapping. Previously in this opinion, we have rejected defendant's challenges to the admission of the evidence of the beating of the victim's friend and to the propriety of a voluntary intoxication instruction. Thus, neither of those factors implicates whether the evidence was sufficient. Defendant's argument regarding whether the defense of consent should have prevailed implicates the assessment of credibility. Defendant does not maintain that the prosecution failed to introduce credible evidence in support of its theory that the sexual penetrations performed by defendant on the victim were nonconsensual.[2] Defendant only maintains that his evidence of consent should have prevailed. Thus, the trial set up a classic credibility dispute for the jury to resolve. We will not second-guess the decision of the jury. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999) (Questions of credibility are for the trier of fact to resolve and this Court will not resolve them anew on appeal.).

Defendant's final claims address the sentence imposed for his convictions.[3] Defendant argues that scoring prior record variable (PRV) 7 (multiple convictions) and OV 11 (multiple penetrations) "result[s] in excessive points awarded and could not possibly reflect the intent of the [L]egislature." However, defendant provides no meaningful analysis and does not support this claim by citation to relevant authority. Consequently, this claim is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely

[2] "In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

[3] We already have noted that the improper scoring of OV 13 does not require resentencing. See *supra*.

announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

Defendant also asserts that his sentence "reflects the sentencing judge's desire to punish defendant for exercising his constitutional right to a jury trial." In support of this claim defendant points to the lesser sentence imposed on one of the codefendants who pleaded guilty and to the prosecutor's arguments at sentencing for the sentence that was ultimately imposed by the trial court. However, defendant's sentence was within the appropriate guideline sentence range. Sentences within the guideline range must be affirmed unless error is found in the scoring of the guidelines or inaccurate information is relied upon to determine defendant's sentence. MCL 769.34(10). Here, defendant has not established error in the scoring that would affect his guideline range and we are not persuaded that the sentencing court relied on inaccurate information. In particular, the record does not reflect that the trial court used the sentence to impose a penalty on defendant for exercising his right to a jury trial, nor do we believe that a sentence that is within guidelines, and therefore is presumptively proportionate, see MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003) (a sentence within the sentencing guidelines range is not subject to review for proportionality), can constitute one that is a punishment for exercising the right to a trial by jury.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly