

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WESTCARR,

Defendant-Appellant.

UNPUBLISHED

May 20, 2004

No. 243042

Wayne Circuit Court

LC No. 01-010393

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of three counts¹ of first-degree criminal sexual conduct (CSC I), MCL 750.520b (victim under thirteen), and from his subsequent sentencing to three concurrent terms of fifteen to thirty years' imprisonment. We affirm.

Defendant first contends that the trial court erred by permitting the prosecutor to endorse a medical witness on the first day of trial and by denying his request for an adjournment. This Court reviews the trial court's decision to permit late endorsement of a witness and the decision to deny a request for an adjournment for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998), *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999). "An abuse of discretion is found when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003), citing *Gadomski*, *supra* at 32-33.

MCL 767.40a(4) provides that: "The 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." The statutory requirements were satisfied because

¹ Defendant was originally charged with, and went to trial on, four counts of first-degree CSC, but Count IV, a charge of fellatio, was dismissed at trial because the victim indicated that the second episode involving oral sex occurred in Florida.

the prosecutor established good cause for his failure to list Dr. Babitch: he was unaware of his existence or proposed testimony until he was provided with the report of the follow-up examination by the victim's mother, and that did not happen until the first day of the trial in the middle of the jury selection.

Moreover, to establish an abuse of discretion, defendant would have to show that he was unfairly prejudiced. *Callon, supra* at 328. Defendant has not established prejudice because he has failed to demonstrate that he was unable to procure his own medical expert before the end of the trial or that an independent medical examination would have produced evidence favorable to the defense. Additionally, the existing situation—where the first doctor who examined the victim after the alleged assault concluded that her hymen was probably intact and the second doctor who performed a follow-up examination several days later concluded that it was not—presented an ambiguity in the evidence that benefited defendant.

Likewise, defendant has failed to show an abuse of the trial court's discretion in denying defendant's request for a continuance. Defendant made his request on the first day of trial, a Thursday, during jury selection. The trial court noted that defense counsel had indicated that he had, at least at one time, anticipated calling a doctor, and defense counsel agreed that he had had one in mind. The trial court observed that after the jury was selected, the trial would not begin until the following Monday so that if defendant concluded he needed a counter-expert, "you need to get one." Defendant therefore had Friday, the weekend, and the first two days of trial to talk with the expert "he had in mind" and determine whether it would avail the defense anything to present the doctor's testimony. Defendant also could have used this time to interview Dr. Babitch and determine if presentation of his own expert would be appropriate.

Moreover, the trial court did not preclude defendant from requesting a continuance if it became clear that he had secured the testimony of his own doctor but that the doctor was not immediately available to testify. Instead, it appears that the defense concluded that it would not pursue its own medical witness. This strategic decision makes sense because there was an ambiguity between the testimony of the initial examining physician and the doctor who did the follow-up examination. This ambiguity gave defendant a basis on which to argue that someone had physically molested the complainant *after* the initial examination, or that someone had manipulated the complainant to make it appear she had been molested. Accordingly, defendant has failed to establish an abuse of the trial court's discretion.

Defendant next contends that he was deprived of his right to the effective assistance of counsel where his trial counsel failed to object to the improper MRE 404(b) testimony of his wife, who claimed that defendant had physically abused her during her marriage. Defendant admits that he did not move for an evidentiary hearing or for a new trial claiming ineffective assistance of counsel. Review of an unpreserved claim of ineffective assistance of counsel is precluded unless there is sufficient detail in the existing record to support the claim. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). This Court will find ineffective assistance only if the defendant demonstrates that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by his counsel's defective performance to the extent that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant's trial strategy, as he announced in his opening statement, was to claim that his wife had induced the victim, her daughter, to make these false allegations of sexual molestation because of her own animosity toward defendant. Although she did mention briefly that defendant had physically abused her, it was defense counsel who delved into these allegations at length as a prelude to alleging that defendant's wife had tried to "get back" at defendant. We do not second-guess trial counsel on matters pertaining to trial strategy. *Pickens, supra* at 330.

Defendant next contends that the trial court abused its discretion when it permitted the prosecutor to present the victim's father as a rebuttal witness in violation of the sequestration order. Defendant also claims that the testimony constituted improper rebuttal on a collateral issue. Defendant objected to this testimony because the witness had been present in the courtroom during the testimony and argued that allowing him to testify would violate the sequestration order. However, defendant did not object that the testimony would constitute improper rebuttal on a collateral matter. We review the preserved issue regarding the violation of the sequestration order for an abuse of discretion. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). "A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice has resulted." *Solak, supra* at 669. Regarding defendant's rebuttal/collateral evidence claim, that unpreserved issue is reviewed for plain, outcome-determinative error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Regarding the preserved issue, the trial court explained that it allowed the witness to testify because the prosecutor indicated he excused the witness from the courtroom as soon as it became apparent that he would be a rebuttal witness. Defendant did not dispute the prosecutor's statement. Additionally, defendant's father was not an eyewitness to any of the molestation incidents. His testimony was presented solely to cast doubt on defendant's insistence that he was never alone with the children. Thus, the trial court's decision was based on a logical reason, not on "a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *Callon, supra* at 326.

Regarding the unpreserved issue concerning the introduction of improper rebuttal evidence on a collateral matter, our Supreme Court stated in *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996), that "[r]ebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same,'" quoting *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947), quoting *People v Utter*, 217 Mich 74, 83; 185 NW 830 (1921). The testimony was proper rebuttal because it contradicted defendant's own testimony that he was never alone with the children. This was not collateral evidence because it was "narrowly focused on refuting defendant's denial" that he would have had an opportunity to molest the complainant. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). The trial court did not abuse its discretion by permitting the prosecutor to present Norman's testimony in rebuttal. Therefore, defendant has failed to demonstrate plain error affecting his substantial rights.

Defendant finally contends that the trial court erred in scoring OV 13, MCL 777.43, for fifty points because it was precluded from doing so by MCL 777.41(2)(c). Contrary to defendant's assertion on appeal, defendant did not object to the trial court's rescoring of OV 13.

Challenges to the scoring of the sentencing guidelines may not be raised on appeal “unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.” MCL 769.34(10); see also MCR 6.529(C); *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).² This Court applies plain error review to an unpreserved sentencing issue. *People v McDaniel*, 256 Mich App 165, 171; 662 NW2d 101 (2003), lv held in abeyance *People v McDaniel*, unpublished order of the Supreme Court, issued September 11, 2003 (Docket No. 123437), citing *Carines*, *supra* at 764-766. “To avoid forfeiture under the plain error rule, defendant must establish that: (1) error occurred, (2) the error was clear and obvious, and (3) the plain error affected his substantial rights, in that the error affected the outcome of the lower-court proceedings.” *McDaniel*, *supra* at 171, citing *Carines*, *supra* at 765.

According to the sentencing information report (SIR), the court scored the first of the three offenses,³ the information lists this as a count of first-degree CSC based on vaginal penetration. That count was “the sentencing offense” as used in OV 11. MCL 777.41. If multiple penetrations occur during the course of “the sentencing offense,” then defendant would be assessed points under OV 11 based on those multiple penetrations. Support for this interpretation is derived from the plain language of the statute: the court is required to score “all sexual penetrations . . . arising out of the sentencing offense,” MCL 777.41(2)(a), but “[m]ultiple sexual penetrations . . . extending beyond the sentencing offense may be scored in offense variables 12 or 13.” MCL 777.41(2)(b).

In *People v McLaughlin*, 258 Mich App 635, 671-678; 672 NW2d 860 (2003), this Court upheld the trial court’s scoring of OV 11 for fifty points in a case involving multiple separate sexual penetrations within one criminal episode because it interpreted the language of MCL 777.41 to preclude scoring for the one penetration that formed the basis of an individual first-degree CSC conviction but to allow scoring for other independent penetrations occurring in the criminal incident—even if they formed the basis for other first-degree CSC convictions. Therefore, in a case such as this where there are other penetrations independent of the sentencing offense (a separate penetration occurring during the same criminal incident as the scoring offense, another incident in Detroit, and one in Florida), the scoring for those multiple, separate

² Our Supreme Court has granted leave to appeal in *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002), lv gtd 468 Mich 870 (2003). The Court has directed the parties to brief “(1) whether the preservation requirement of MCL 769.34(10) applies to the claim relating to Offense Variable 16; (2) if applicable, would the statute preclude an appellate court from considering the claim of error even under a plain error standard; and (3) if so, whether such a provision is within the power of the Legislature.” 468 Mich at 870. Until the Court resolves this preservation issue, however, we are bound by our previous decision in *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

³ Although MCL 777.21(2) appears to require the trial court to score each offense, this Court has held that, at least “where the crimes involved constitute one continuum of conduct,” § 21(2) does not preclude the court from considering “the entirety of defendant’s conduct in calculating the sentencing guidelines range with respect to each offense.” *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003).

penetrations is accomplished under OV 13. Defendant has failed to demonstrate plain, outcome-determinative error because the trial court's scoring of OV 13 is supported both by a plain-language interpretation of MCL 777.41 and MCL 777.43 and by the evidence.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Karen M. Fort Hood