STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 12, 2006
v	No. 263592 Macomb Circuit Court
JOHN LEE WIECZOREK, Defendant-Appellant.	LC No. 2004-003466-FC

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f), and assault with intent to do great bodily harm less than murder, MCL 750.84.[1] Pursuant to MCL 769.12, he was sentenced as a fourth habitual offender to concurrent prison terms of 30 to 100 years for the CSC I conviction, and 6 to 100 years for the assault conviction. He appeals as of right. We affirm.

I. Underlying Facts

On the evening of May 13, 2004, defendant picked up the victim on Eight Mile Road in Detroit. The victim testified that she agreed to have sex with defendant in exchange for money. Defendant drove his company truck to a dark area behind a factory off Eight Mile Road. The victim testified that as soon as defendant parked, he punched her in the face, and thereafter pulled her hair and repeatedly struck her in the face and head. Defendant then pulled down his pants, held the victim's head, and briefly "stuck his penis" in her mouth. Defendant then pulled down the victim's pants, directed her to kneel, and announced that he was going to have anal sex with her. Defendant placed his penis in the victim's anus briefly, as he continued to pull her hair and punch her. Eventually, the victim unlocked and opened the passenger side door, and rolled out of the truck onto the ground. Defendant "jumped out [of the truck] on top of [the victim] and started punching [her] again in the face." He then allegedly choked her and threatened to kill her. The victim managed to escape, and obtained a ride to a nearby gas station where Richard Radtke, her former husband, was waiting. The victim did not report the matter to the police.

[1] Defendant was acquitted of an additional charge of CSC I.

On May 14, 2004, the police questioned defendant after his company's foreman reported that blood, vomit, and hair were in the truck that defendant had returned. Testimony from the foreman and police officers revealed that there was a "large amount" of "blood splatter throughout the passenger side," "smears on the window," "blood splatters" on the floor, roof, and seat, and hair "wrapped around" the window handle. Defendant gave four different explanations about what happened in the truck. Defendant first stated that he had cut his finger, but later claimed that he had assaulted a female prostitute on Eight Mile Road after she attempted to rob him at knifepoint. After learning about defendant's arrest, the victim contacted the police. DNA testing of the blood found in the truck matched a DNA sample taken from the victim. Testing of blood found on the shirt defendant was wearing on May 13, 2004, revealed a mixture of defendant's and the victim's DNA. But "[m]ost of the blood was from [the victim]."

Defendant testified on his own behalf, and claimed that he was acting in self-defense. Defendant admitted that he solicited the victim for oral sex. He claimed, however, that after he parked and pulled down his pants, the victim brandished a knife, demanded money, and indicated that her accomplice was nearby.[2] As the victim reached for defendant's money, he struck her and forced her out of the passenger side door. Defendant struck the victim again when she held onto the door, and they both fell out of the truck. Defendant got back in the truck and left. Defendant claimed that he repeatedly lied to the police to conceal his act of soliciting a prostitute.

II. Venue

Defendant first agues that he was improperly tried in Macomb County because the offenses occurred in Wayne County. We disagree. "A trial court's determination regarding the existence of venue in a criminal prosecution is reviewed de novo." *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004) (citation omitted). Venue is part of every criminal prosecution and must be proven by the prosecutor beyond a reasonable doubt. *Id.* Due process requires that the trial of criminal prosecutions should be by a jury of the county or city where the offense was committed, except as otherwise provided by the Legislature. *Id.* The following exception is provided in MCL 762.3(1):

> Any offense committed on the boundary line of 2 counties or within one mile of the dividing line between them, may be alleged in the indictment to have been committed, and may be prosecuted and punished in either county.

Defendant does not dispute that the offenses occurred within one block of Eight Mile Road. Defendant only argues that the acts occurred on the Detroit side of Eight Mile Road, which is Wayne County. In the relevant area, Eight Mile Road is the boundary between Wayne County and Macomb County. Because the offenses occurred within one mile of the boundary between the two counties, venue was proper in either county. MCL 762.3(1). Consequently, the trial court was authorized to try defendant in Macomb County.

[2] The victim denied possessing a knife.

III. Double Jeopardy

Defendant also argues that his convictions and sentences for CSC I and assault with intent to do great bodily harm less than murder, arising from a single assault, violate his double jeopardy protections against multiple punishments for the same offense. We disagree.

Because defendant failed to raise this issue below, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense, including multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 63-64; 549 NW2d 540 (1996). But there is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements. See *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995); *People v Swinford*, 150 Mich App 507, 515; 389 NW2d 462 (1986).

In *Swinford*, this Court upheld the defendant's convictions of assault with intent to commit CSC involving penetration and CSC I because "each offense occurred separately." *Id.* at 516. The defendant engaged in a car chase with the victim, ultimately running her off the road. *Id.* at 511. The defendant exited his car, approached the victim, "pulled the [victim] to the back seat of the car and proceeded to commit various acts of criminal sexual conduct." "After threatening to kill her, the [defendant] drove away in his car." *Id.* This Court explained that the defendant was convicted of the assault charge based on his actions during the car chase, and the CSC charge arose out of his actions after the cars had come to a stop. *Id.* at 515-516.

As it relates to this case, a person is guilty of CSC I if the person "(1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual penetration." *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004). "Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997).

The victim testified that, while inside the truck, defendant repeatedly punched her and pulled her hair as he forced her to engage in anal sex. The victim opened the door and rolled onto the ground. According to the victim, defendant then "jumped out on top of [her]," "started punching [her] again in the face," choked her, and threatened to kill her before she escaped. Defendant's CSC I charge arose out of his actions inside the truck, and the assault charge arose out of his actions outside the truck after the CSC I offense had been completed. Because defendant committed two distinct offenses during the same episode of criminal behavior, the double jeopardy provisions do not prohibit multiple punishments for those separate acts. *Swinford*, *supra* at 516. Consequently, there was no plain error in this regard.

IV. Offense Variables

Defendant argues that the trial court abused its discretion in scoring OV 4 (psychological injury to a victim), OV 7 (aggravated physical abuse), and OV 8 (asportation) of the sentencing guidelines. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision for which there is any evidence in support will be upheld. *Id.*

A. OV 4

MCL 777.34(1)(a) provides that ten points are to be scored if "[s]erious psychological injury requiring professional treatment occurred to a victim." "In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2). The trial court's score of ten points was supported by the victim's impact statement, in which she stated that the "crime has left [her] fearful and untrusting of people," "[b]eing alone out in public often scares [her]," and that "[t]he emotional injuries will probably never heal completely."

B. OV 7

MCL 777.37(1)(a) directs a score of 50 points if the victim was "treated with sadism, torture, or excessive brutality." In her impact statement, the victim indicated that she suffered numerous injuries, which took more than a month to heal. The victim testified that defendant continuously beat her for 10 to 15 minutes. The victim explained that there were "bruises over [her] whole face," her "eyes were swollen and black," her "mouth was swollen" with "lots of cuts," and "half [her] hair was ripped out." Radtke testified that the victim's "face was black and blue," her "hair was pulled out," and she "had a bloody mouth, bloody nose, black eyes, [and] fingerprints around her neck." A police evidence technician opined that, given the amount of blood splatter, "a substantial injury occurred to someone." This evidence indicates that the victim was treated with excessive brutality and supports the trial court's score of 50 points for OV 7.

C. OV 8

MCL 777.38(1)(a) directs a score of 15 points if the "victim was asported to another place of greater danger or to a situation of greater danger." The victim testified that, after defendant picked her up, she told him that "there's [sic] some areas that [she] used to park." Defendant told the victim that he could not park his truck in residential areas, but he "knew of a place." Defendant then drove about a mile, and parked in a "very dark" and secluded area behind a factory. This evidence was sufficient to show that the victim was asported to a place of greater danger. Defendant focuses on the fact that the victim "was not physically forced to accompany [him]." But this Court has explained that "'asportation' as used in MCL 777.38(1)(a) can be accomplished without the employment of force against the victim." *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Because there was evidence to support the trial court's score of 15 points for OV 8, there was no abuse of discretion.

V. Defendant's Supplemental Brief

A. Effective Assistance of Counsel

In a supplemental brief filed in propria persona, defendant contends that a new trial is required because defense counsel was ineffective, or alternatively, that remand is necessary to enable him to develop this claim. We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant claims that defense counsel was ineffective for failing to "attempt to cross examine the complaining witness on inconsistent, conflicting, or possible perjured testimony given at preliminary examination, and during trial." Defense counsel did, in fact, question the victim about certain inconsistencies in her testimony at the preliminary examination. Defendant has not identified any other contradictions, or what factual information could potentially be obtained at an evidentiary hearing. As the appellant, defendant is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

Defendant also argues that defense counsel was ineffective for failing to "investigate [the victim's] and witness [R]ichard Radke's prior criminal history for purposes of impeachment." But defendant has failed to provide any information regarding what criminal background should have been introduced, on what basis defense counsel could have successfully moved to introduce the evidence, or how he was prejudiced by the omission of the evidence. Furthermore, at trial, the victim testified that she did not initially contact the police because she "had warrants out for [her] arrest." Additionally, evidence was introduced that the victim was a prostitute who used heroin and crack cocaine, and that Radtke was a drug user and acted as the victim's pimp. Against this backdrop, and the evidence against defendant, there is no reasonable probability that additional impeachment evidence would have changed the result of the proceedings.

We reject defendant's claim that defense counsel was ineffective for failing to request appointment of an expert witness to aid in investigating a defense theory of self-defense. A defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial. MCL 775.15; *People v Hill*, 84 Mich App 90, 95-96; 269 NW2d 492 (1978). Here, defendant was able to adequately present his self-defense claim through his testimony at trial, and the trial court's jury instructions. Moreover, defendant does not explain what possible assistance an expert could have provided, or what information would potentially be obtained at an evidentiary hearing.

We also reject defendant's claim that defense counsel was ineffective for failing to object to the prosecution's production of its witness list on the first day of trial. The record citation

provided by defendant does not show that the prosecution's witness list was untimely. Rather, it shows that on the first day of trial, the prosecutor presented a "witness list which [he] narrowed to help [the trial court] and [defense counsel]." The prosecutor named the witnesses he intended to call, which included the victim, Radtke, defendant's foreman, and five police officers. Moreover, defendant does not claim that he was surprised by any of these witnesses. Because there was no basis for a proper objection in this regard, defendant cannot establish a claim of ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to make a futile objection or to advocate a meritless position).

Defendant argues that defense counsel was ineffective for failing to interview him before the preliminary examination in order to effectively challenge the victim's identification of him as the perpetrator. However, identification was not an issue in this case. The defense was self-defense, i.e., that the victim attempted to rob defendant at knifepoint. Defendant admitted that he picked up the victim to engage in oral sex. DNA testing of blood found on defendant's shirt and in the truck matched a DNA sample taken from the victim. There is simply nothing in the record that supports defendant's assertion in this regard, and defendant has not identified what useful information could be produced at an evidentiary hearing.

We reject defendant's argument that defense counsel was ineffective for failing to "object to Investigating Detective's testimony on forensic crime lab reports/evidence as that testimony is to be given by an expert in that field." Defendant does not identify the detective or the "reports/evidence," makes no argument regarding the actual admissibility of the "reports/evidence," and has not indicated how a remand would further develop this claim. *Matuszak*, *supra* at 59.

Defendant further argues that defense counsel was ineffective for failing to call his wife as a defense witness. Defendant claims that his wife would have testified that he told her that the victim attempted to rob him with a knife. But defendant has not provided a witness affidavit disclosing the witness's proposed testimony or indicating that the witness would have been willing to testify on his behalf. Additionally, the proposed testimony would have been hearsay, MRE 801, and defendant has not identified any exception allowing its introduction, MRE 802. In short, defendant's mere assertion in his brief that the witness could have supported his defense is insufficient to warrant a remand.

Defendant also cursorily argues that remand is necessary to develop his claim that defense counsel was ineffective for failing to move for judgment notwithstanding the verdict (JNOV), for failing to obtain rulings on pretrial motions regarding venue and "Appointment of Investigator," and for failing to request a jury instruction on venue. First, defendant has presented no persuasive case law or facts that would support a motion for JNOV, *id.*, and counsel is not required to advocate a meritless position. *Snider*, *supra*. Also, defendant has made no argument concerning what possible assistance an investigator could have provided, or how he was prejudiced by the lack of an investigator. Further, in light of our determination in part II that venue was proper, it follows that counsel's inaction in this regard did not deprive defendant of the effective assistance of counsel. Finally, with regard to all of these claims, defendant has failed to indicate what useful information could possibly be obtained at an evidentiary hearing.

For these reasons, we reject defendant's claim that defense counsel was ineffective, and we are not persuaded that remand is necessary.

B. Peremptory Challenges

We also reject defendant's claim that he was entitled to 20 peremptory challenges, as provided by MCL 768.13. The right to exercise a peremptory challenge is provided by court rule and statute. MCL 768.13 provides that "[a]ny person who is put on trial for an offense punishable by death or imprisonment for life, shall be allowed to challenge peremptorily 20 of the persons drawn to serve as jurors, and no more[.]" But MCR 6.412(E)(1) provides that a defendant is entitled to 12 peremptory challenges when the offense charged is punishable by life imprisonment. The trial court did not err in following the court rule in this instance, and allowing only 12 peremptory challenges. MCR 1.104 provides: "Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court." Therefore, provisions of the court rules governing practice and procedure take precedence over conflicting statutes. *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002) (when the court rule pertains to practice and procedure, it takes precedence over the statute); see also Const 1963, art 6, § 5 (requiring the Supreme Court, and not the Legislature, to enact rules of practice and procedure for the Michigan courts).

We also reject defendant's related claim that defense counsel was ineffective for failing to request the eight additional peremptory challenges. As previously indicated, under MCR 6.412(E)(1), defendant was entitled to only 12 peremptory challenges. Further, MCR 6.412(E)(2) allows the trial court to increase the number of peremptory challenges "[o]n a showing of good cause." Not only has defendant failed to argue a basis on which defense counsel could have shown good cause for additional peremptory challenges, he has not identified one juror whom he would have removed. Because there was no basis for defense counsel to request 20 peremptory challenges, defendant cannot establish a claim of ineffective assistance of counsel.

C. 180-day Rule

We also reject defendant's claim that the trial court erred in denying his motion to dismiss the charges for violation of the 180-day rule.[3] Defendant claims that his trial was delayed 231 days, which was 51 days beyond the 180-day cutoff.[4] The purpose of the 180-day rule is to resolve untried charges against prisoners so that the sentences may run concurrently. *People v Chavies*, 234 Mich App 274, 279, 280; 593 NW2d 655 (1999), overruled on other grounds *People v Williams*, 475 Mich 245, 252; 716 NW2d 208 (2006). The failure to bring an incarcerated defendant to trial within the requisite 180-day period divests the court of jurisdiction and requires dismissal of the charges. MCL 780.133; MCR 6.004(D)(2)[5]; *Williams*, *supra*. The 180-day rule does not, however, require that trial commence within 180 days. Rather, if apparent good-faith action is taken within that period, and the prosecutor proceeds promptly

[3] In arguing the motion, defense counsel stated, "my client has asked me to make a motion on the 180 day rule." Defendant thereafter argued on his own behalf.

[4] When defendant was arrested, he was placed on a parole hold for previous offenses.

[5] MCR 6.004(D) has been amended to conform to the 180-day rule set forth in MCL 780.131, effective January 1, 2006.

toward preparing the case for trial, the rule is satisfied. MCR 6.004(D); *People v Hendershot*, 357 Mich 300, 303-304; 98 NW2d 568 (1959); *People v Bradshaw*, 163 Mich App 500, 505; 415 NW2d 259 (1987). This Court reviews a trial court's attribution of delay for clear error. *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998).

We agree with the trial court that there was no violation of the 180-day rule in this case. The record shows that the prosecution made a good-faith effort to bring defendant to trial, and that the largest delay was not attributable to the prosecution. The record shows that defendant filed several pretrial motions. Defendant also requested at least four adjournments, which caused delays of several days. For example, at defense request, a pretrial hearing was adjourned from November 22, 2004, until December 15, 2004. A hearing scheduled for January 19, 2005, was adjourned until February 18, 2005. A hearing scheduled for January 25, 2005, was initially adjourned until February 18, 2005, and again adjourned until March 3, 2005. In sum, although defendant was not brought to trial within 180 days, the delay was principally caused by the defense,[6] and there is no indication that the prosecutor failed to make a good-faith effort to bring the criminal charges to trial within the required time. This claim does not warrant reversal.

D. CJI2d 3.10

As we determined above, venue was proper in Macomb County. MCL 762.3(1). We therefore decline defendant's request to remand because the trial court failed to sua sponte instruct the jury on venue.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra

[6] At the hearing on this issue, the court clerk reviewed the record and remarked that "Everything was defense caused except one 20 day adjournment."