

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH ALLEN GREEN, a/k/a KENNETH
GREEN,

Defendant-Appellant.

UNPUBLISHED

December 18, 2008

No. 279327

Livingston Circuit Court

LC No. 06-016206-FC

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of third-degree criminal sexual conduct, MCL 750.520d (force or coercion). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to 5 to 30 years' imprisonment. For the reasons set forth below, we affirm, but remand for correction of defendant's judgment of sentence.

I. Facts and Procedural History

On November 8, 2006, defendant sexually assaulted "RW" at Jason Churches's home in Putnam Township. The record reflects that, on the night of the assault, RW used cocaine with defendant and Churches. After Churches went to bed, defendant pulled RW toward him on a pullout sofa bed. RW testified that she was scared and confused because she had known defendant for 21 years and had never had a romantic relationship with him. Defendant started to kiss RW and he held RW down as she tried to protest and pull away. Thereafter, he pulled RW's leg out of her pajamas, held her down with his hand on her throat, and engaged in intercourse with her. After defendant ejaculated, RW went into the bathroom. When she returned, she and defendant snorted another line of cocaine and defendant again forced her to engage in sexual intercourse. At trial, defendant maintained that RW consented to the intercourse. The jury acquitted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b, but convicted him of the lesser offense of third-degree criminal sexual conduct on the remaining first-degree criminal sexual conduct charge.

I. Analysis

A. Admission of Evidence of Prior Convictions

Defendant argues that the trial court erred when it admitted, as impeachment evidence, some of his and Churches's prior convictions. However, defendant has waived this claim because the record shows that defendant and Churches testified about their prior convictions during their direct examinations rather than on cross-examination. *Ohler v United States*, 529 US 753, 760; 120 S Ct 1851; 146 L Ed 2d 826 (2000) ("a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error."); see also *People v Rodgers*, 248 Mich App 702, 716; 645 NW2d 294 (2001).

Were we to find that defendant did not waive this issue, his arguments nonetheless lack merit. MRE 609(a) provides that evidence of a witness's prior convictions is admissible on cross-examination for purposes of attacking credibility if:

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

Thus, a trial court must first determine whether the conviction involves an element of dishonesty or false statement. *People v Parcha*, 227 Mich App 236, 241; 575 NW2d 316 (1997). "If so, the evidence is automatically admissible" under MRE 609(a)(1). *Id.* If the conviction lacks an element of dishonesty or false statement, "the court must determine whether the conviction contained an element of theft," and, if so, whether "the crime was punishable by more than one year in prison, and, if the witness is a criminal defendant, whether the probative value of the evidence outweighs its prejudicial effect." *Id.* at 241-242. In determining the probative value of a prior conviction,

the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. [MRE 609(b).]

Here, defendant complains that the trial court erroneously ruled that the probative value of his prior convictions outweighed their prejudicial effect. In 1997, defendant was convicted of larceny of a firearm and breaking and entering a vehicle with intent to steal property worth over \$5. The convictions were nearly ten years old at the time of trial, and the trial court acknowledged that the convictions were dissimilar to the charged offenses. The trial court opined that defense counsel could argue these factors to the jury to minimize the weight of the evidence. Further, though the trial court did not speculate whether its ruling would deter defendant from testifying, it had no such deterrent effect. Moreover, the probative value of the

evidence was particularly significant in this case because the primary issue was one of credibility. The sole question before the jury was whether it should believe defendant or RW because their versions of events differed. Accordingly, any prejudicial effect of the prior convictions did not outweigh their probative value.

Defendant also claims that the trial court erred when it admitted evidence of Churches's conviction for witness intimidation. Defendant claims the crime does not contain an element of theft, false statement, or dishonesty. It appears from the record that Churches was convicted of violating MCL 750.122, which prohibits, *inter alia*, threatening, intimidating, or interfering with a witness's testimony. This Court has previously recognized that "[t]he unifying theme among the[] subsections [of § 122] is an attempt to identify and criminalize the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding[.]" *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003). Therefore, contrary to defendant's argument, Churches's prior conviction contains an element of dishonesty or false statement and was admissible for impeachment purposes under MRE 609(a)(1).

B. Admission of Other Acts Evidence

Defendant maintains that the trial court erroneously admitted other acts evidence related to his physical abuse of Marcella Nelson in 1995. Because defendant did not timely object to the introduction of the evidence, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).¹

Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime. *Knox*, *supra* at 509. Second, the evidence must be relevant under MRE 402. *Id.* Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id.* Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id.*

Here, the prosecutor offered evidence about defendant's physical abuse of Nelson for a proper purpose—to explain why RW did not yell for help when defendant sexually assaulted her even though Churches was in the next room. RW testified that she did not yell for help because she had witnessed defendant beat Nelson with a baseball bat and she did not want to make defendant angry. The evidence was also relevant because RW's testimony about defendant's assault on Nelson supported her claim that defendant sexually assaulted her despite her failure to call for help. Because the evidence was probative of RW's credibility, a central issue in this case, it was relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), *mod on other grounds* 450 Mich 1212 (1995).

¹ Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Defendant claims that the evidence failed to meet the third requirement for admissibility on the ground that it was more prejudicial than probative under MRE 403. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). “The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself.” *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). As explained, the evidence of defendant’s assault on Nelson was directly probative of RW’s credibility and was significant for the jury to determine the ultimate issue, i.e., whether defendant committed the sexual assaults or whether RW engaged in consensual sexual intercourse. While prejudicial, any danger of unfair prejudice did not outweigh the significant probative value of the evidence.

Despite satisfying the requirements for admissibility, defendant contends that the trial court should have excluded the evidence because, under MRE 404(b)(2), the prosecutor failed to give proper notice of her intent to introduce it during trial. While this constitutes plain error, reversal is not required. *People v Hawkins*, 245 Mich App 439, 453-455; 628 NW2d 105 (2001). As in *Hawkins*, the evidence of defendant’s assault on Nelson was highly probative, it was not unduly prejudicial, and defendant “has never suggested how he would have reacted differently to this evidence had the prosecutor given notice.” *Id.* at 455. Further, defendant cannot claim surprise because the prosecutor introduced the same evidence for the same purpose during defendant’s preliminary examination. Accordingly, defendant has failed to establish that the error warrants reversal.²

C. Sentence

Defendant claims that the trial court erroneously sentenced him as a fourth habitual offender. However, the record reflects that the trial court actually sentenced defendant as a third habitual offender. Accordingly, defendant is not entitled to resentencing, but we remand this case to the trial court for the limited purpose of correcting the judgment of sentence to reflect that defendant was sentenced as a third habitual offender.

Defendant further argues that the evidence does not support the trial court’s score of ten points for offense variable 4 (OV 4). Defendant’s sentencing guidelines range was 51 to 127 months, and the trial court sentenced him within that range to a minimum term of 60 months in prison. “[I]f [a] sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.” *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); see also MCL 769.34(10). Because defendant failed to preserve this issue by raising it through one of these three methods, we affirm defendant’s sentence. MCL 769.34(10).

² For the same reasons, to the extent defendant argues that trial counsel was ineffective for failing to object to the admission of the evidence, he has failed to establish prejudice. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

In any event, defendant's argument lacks merit. MCL 777.34(1) allows a trial court to score ten points under OV 4 for "psychological injury" if "[s]erious psychological injury requiring professional treatment occurred to a victim." Subsection (2) of MCL 777.34 authorizes a trial court to score ten points if "the serious psychological injury *may* require professional treatment." (Emphasis added.) The record shows that RW was unable to sleep for days following the incident and that her doctor prescribed sleep medication for her. RW also testified that she moved so that defendant would not know where she lived and that she locked herself in her bedroom and placed chairs in front of her doors. She further testified that she attends counseling sessions once a week. For these reasons, the record supports the score of ten points for OV 4.³

Defendant also claims that his sentence is too long in light of his background and the circumstances of this case. Again, however, defendant's sentence is within the appropriate guidelines range and, therefore, it is appealable only if he raised his claim at sentencing, in a motion for resentencing, or a in motion for remand. MCL 769.34(10). Defendant failed to do so and we, therefore, affirm his sentence.⁴

Affirmed and remanded for correction of defendant's judgment of sentence to reflect his sentencing as a third habitual offender. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

³ Defendant claims that the trial court wrongly interpreted MCL 777.34, but he fails to explain his argument. A defendant "may not 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) (citation and quotations omitted). Accordingly, defendant has abandoned this issue.

Defendant argues that he is entitled to resentencing because the trial court increased his sentence on the basis of facts not found by a jury, citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006). Therefore, defendant's argument lacks merit.

⁴ We also reject defendant's claim that his sentence violates the federal and state constitutions. A sentence within the guidelines range is presumptively proportionate and a proportionate sentence does not constitute cruel or unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).