STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2010
v	No. 291076 Wayne Circuit Court
CARLOS LEBRON BARTELL, Defendant-Appellant.	LC No. 08-011116-FC

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f)(i). The trial court sentenced defendant to 210 to 420 months' imprisonment. Defendant appeals as of right. We affirm.

I. BASIC FACTS

On October 10, 2002, the victim left a Detroit club with a friend. The friend, who was driving, dropped the victim off somewhere near her home. As the victim walked home, "everything went blank." She remembered that she was sexually assaulted and that two men were involved in the assault. The victim recalled that at least one of the men penetrated her vagina with his penis, but she could not remember if both men penetrated her.

Sperm was found on the rectal swab in the victim's rape kit. A DNA profile from the sperm was developed. Several years later, a DNA sample was taken from defendant. Defendant's DNA matched the DNA of the sperm found on the rectal swab.

II. 180-DAY RULE

Defendant claims that the trial court erred in denying his motion to dismiss based on a violation of the 180-day rule, MCL 780.131. We disagree. We review a trial court's decision on a motion to dismiss for an abuse of discretion, *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998), but underlying legal questions are reviewed de novo, *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Carnicum*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

On June 9, 2008, the prosecutor received notice from the Department of Corrections that defendant was requesting a final disposition of the CSC I charge against him. Defendant's trial was scheduled to begin on October 29, 2008. However, the prosecutor moved for an adjournment after the Detroit crime lab was shut down. She explained that she requested the Michigan State Police crime lab to redo the DNA testing but she did not believe that the retesting would be finished by October 29. The trial court suggested moving defendant's trial to December 2008, to which defense counsel stated, "That would be fine." When the trial court suggested December 19, 2008, defense counsel stated, "Thank you very much." The courthouse, however, was closed on December 19 because of a snowstorm. Defendant's trial was rescheduled for and commenced on January 21, 2009, which was 217 days after the prosecutor received notice from the Department of Corrections.

Plaintiff claims that defendant waived his rights under the 180-day rule when he agreed to the December 19, 2008 trial date, a date outside the 180-day period. "Waiver is the intentional relinquishment or abandonment of a known right or privilege." *People v Williams*, 475 Mich 245, 260; 716 NW2d 208 (2006). If a defendant waives his rights under a rule, the defendant may not seek appellate review of a claimed deprivation of those rights, because waiver has extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Unlike the waiver of a constitutional right, which must be knowingly and intelligently made, *People v Jones (After Remand)*, 197 Mich App 76, 80; 495 NW2d 159 (1992); see also *Williams*, 475 Mich at 261, the waiver of a statutory right must only be voluntarily made, *Jones*, 197 Mich App at 180.

In *Jones*, the Court, while deciding whether the defendant waived his rights under the Interstate Agreement on Detainers (IAD), MCL 780.601, stated that "[a] waiver is established when a defendant, either expressly or impliedly, agrees or requests to be treated in a manner contrary to the terms of the IAD." *Jones*, 197 Mich App at 80. It further stated that a defendant does not need to know the specific protections afforded him under the IAD in order to waive its provisions and that a "defendant generally must object to those procedures or actions by the trial court that may infringe upon the protections afforded by the IAD." *Id.* at 81. In the present case, defendant agreed to a trial date outside the 180-day period. By agreeing to the December 19, 2008 trial date, defendant engaged in conduct that was inconsistent with the rights afforded him under the 180-day rule. Thus, defendant waived his rights under the 180-day rule and he may not seek appellate review based on a claimed deprivation of those rights.

Nonetheless, there is no merit to defendant's argument that there was a violation of the 180-day rule. Defendant admits that the closing of the Detroit crime lab and the snow day were "valid considerations" for his trial being adjourned, but claims that there is no good-faith exception to the 180-day rule. In *People v Walker*, 276 Mich App 528, 539-540; 741 NW2d 843 (2007), this Court held that the Supreme Court in *Williams*, 475 Mich at 259, implicitly overruled the good-faith exception when it held that MCR 6.004(D), which referenced a good-faith exception, was invalid to the extent that it deviated from the language of MCL 780.131. However, the Supreme Court subsequently vacated that portion in *Walker* that dealt with the good-faith exception. *People v Walker*, 480 Mich 1059; 743 NW2d 912 (2008). In *People v Davis*, 283 Mich App 737, 743; 769 NW2d 278 (2009), this Court stated that *People v Hendershot*, 357 Mich 300; 98 NW2d 568 (1959), remained good law. According to *Hendershot*, 357 Mich at 304, even if a defendant's trial does not occur within the 180-day period, there is no violation of the 180-day rule if "apparent good-faith action is taken well

within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial." Thus, contrary to defendant's assertion, dismissal of the CSC I charge was not required merely because he was not tried within the 180-day period.

There is no indication that any delay in bringing defendant to trial was inexcusable or demonstrated an attempt by the prosecutor not to promptly try defendant. Trial was scheduled for October 29, 2008, a date well within the 180-day period, but was delayed for approximately two months after the Detroit crime lab was shut down and the prosecutor sought verification of the DNA testing results. Trial was then delayed another month when the courthouse was closed on December 19, 2008, for a snow day. The delays were unforeseeable events that were beyond the prosecutor's control, and the first delay ensured that defendant would be tried on accurate DNA testing. The record establishes that the prosecutor took good-faith action within the 180-day period and promptly proceeded to ready the case for trial. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to dismiss.

III. JURY TRIAL WAIVER

Defendant next argues that the trial court erred in denying his request to withdraw his waiver of a jury trial. We disagree. We review a trial court's decision on a motion to withdraw a jury trial waiver for an abuse of discretion. *People v Wagner*, 114 Mich App 541, 559; 320 NW2d 251 (1982).

Defendant does not contest that he knowingly and voluntarily waived his constitutional right to a jury trial. MCR 6.402(2); *People v Cook*, 285 Mich 420, 422; 776 NW2d 164 (2009). Once a defendant has validly waived his right to a jury trial, the defendant does not have a constitutional right to withdraw his waiver. *State v Morton*, 648 SW2d 642, 643 (Mo App, 1983); *Sharpe v State*, 174 Ind App 652, 658; 369 NE2d 683 (1977). In *Wagner*, 114 Mich App at 558-559, this Court stated:

> "As a general rule, and apart from statutes limiting its authority, a court may permit the withdrawal of a waiver of the right to trial by jury, or on motion or request, set aside such a waiver, if the request is timely made, unless the waiver has been acted upon. According to some cases, once a waiver of jury trial has matured, the waiver may not be withdrawn at the instance of one party, although other cases have recognized that such a waiver may, for good cause, be withdrawn with the consent of the court. As a general rule, a waiver of a jury trial voluntarily and regularly made cannot afterward be withdrawn except in the discretion of the court." [Quoting 47 Am Jur 2d, Jury, § 67, pp 684-685.]

When defendant informed the trial court that he wanted to withdraw his jury trial waiver, he simply told the court that he had "changed his mind." He provided no explanation for his change of mind. Because defendant failed to provide the trial court with any reason for wanting to withdraw his jury trial waiver other than a simple change of mind, which does not constitute good cause, the trial court did not abuse its discretion when it denied defendant's motion to withdraw his waiver.

Defendant claims that the trial court should have inquired as to why he changed his mind about a bench trial. Even if defendant is correct, the reasons that defendant provides in his brief

on appeal would not have established good cause for withdrawing his waiver. Defendant states that he changed his mind because he was considering calling a witness and testifying himself and he believed that the testimony would best be received by a jury. He also states that the question of whether the DNA evidence provided proof of guilt beyond a reasonable doubt was best considered by a jury. However, when defendant waived his jury trial, he was planning on testifying and calling a witness or two. In addition, the case had always been a case based on DNA evidence. Defendant was identified as a suspect of the CSC I through a DNA match. Accordingly, because defendant's claimed reasons for why he changed his mind existed when he waived his right to a jury trial, the reasons do not establish good cause for withdrawing the waiver.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant next claims that, because the victim's memory of the sexual assault was so poor, his conviction for CSC I is not supported by sufficient evidence. We disagree.

We review a claim of insufficient evidence de novo. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). "When ascertaining whether sufficient evidence was presented in a bench trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* Circumstantial evidence and the inferences arising therefrom can constitute satisfactory proof of the elements of the crime. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). It is for the trier of fact, rather than this Court, to decide what inferences can be fairly drawn from the evidence and to determine the weight accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The victim testified that she was sexually assaulted by two men and that at least one of the men penetrated her vagina with his penis. Sperm with DNA matching defendant's DNA was found on the rectal swab in the victim's rape kit. Dr. Melanie Trapani, an expert in forensic analysis, testified that she has found sperm cells on a rectal swab when the victim's complaint is vaginal penetration. The victim also testified that she had a long-term boyfriend, she did not know defendant, and she would not have consented to sexual intercourse with defendant.[1] The victim further testified that before the sexual assault "everything went blank" and that she suffered head and facial injuries. The facial injuries required surgery for the insertion of a plate on the left side of her eye. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find that defendant engaged in vaginal penetration with the victim and that defendant used force causing personal injury to accomplish the penetration. Defendant's conviction is supported by sufficient evidence.

Defendant also argues that there was a "gross inaccuracy" in the evidence presented by the prosecutor. Defendant claims that Officer Kimberly Kovacs Turner perjured herself at trial

[1] The trial court correctly stated that lack of consent is not an element of CSC I. *People v Stull*, 127 Mich App 14, 20; 338 NW2d 403 (1983).

because she testified that she took the victim's statement but the statement provides that it was taken by "Delplac." However, the report is not properly before us because it was not introduced into evidence at trial. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal.").

V. SENTENCING

Defendant makes several challenges to his sentence. He argues that the trial court increased his minimum sentence by relying on facts not proven to a jury beyond a reasonable doubt, in contravention of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). He also argues that the trial court improperly scored prior record variable (PRV) 7 and offense variables (OVs) 3 and 7. He further claims that his sentence is disproportionate.

A. *BLAKELY*

Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Accordingly, defendant's argument that the trial court violated *Blakely* in scoring the guidelines is without merit.

B. PRV 7

Defendant argues that the trial court erred in scoring PRV 7, MCL 777.57, at 20 points. He claims that because he was convicted of criminal enterprise and three counts of safe breaking in 2007, these four felony convictions are neither subsequent nor concurrent to his CSC I conviction. Defendant waived any argument concerning the scoring of PRV 7 when he expressly agreed that the variable was correctly scored at 20 points. *Carter*, 462 Mich at 215-216.

Regardless, there is no merit to defendant's claim that PRV 7 was erroneously scored. Twenty points may be scored for PRV 7 if "[t]he offender has 2 or more subsequent or concurrent convictions." MCL 777.57(1)(a). Contrary to defendant's assertion, the relevant date for scoring PRV 7 is not the date he was convicted of CSC I, but the date he committed CSC I. Pursuant to MCL 777.57(2)(a), points are to be scored for PRV 7 "if the offender was convicted of multiple felony counts or *was convicted of a felony after the sentencing offense was committed*" (emphasis added). Defendant committed CSC I in October 2002. He was then convicted of four felonies in 2007. Because defendant was convicted of two or more felonies after he committed the sentencing offense, the trial court did not err in scoring 20 points for PRV 7.

C. OV 3 AND OV 7

Defendant claims that the trial court erred in scoring 25 points for OV 3, MCL 777.33, and 50 points for OV 7, MCL 777.37. We review a trial court's scoring decisions to determine whether the trial court properly exercised its discretion and whether record evidence supports a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). A scoring decision for which there is any evidence in support will be upheld. *Id.*

Defendant does not dispute that the victim suffered life threatening or permanent incapacitating injuries, MCL 777.33(1)(c), or that the victim was treated with excessive brutality, MCL 777.37(1)(a). He claims that there was no "clear proof" that he was the person who inflicted the injuries. However, the victim testified that she was sexually assaulted and that she did not have any injuries to her face or head before the assault. The DNA of the sperm that was found on the victim's rectal swab matched defendant's DNA. This evidence is proof that defendant was the person who inflicted the victim's injuries. The trial court did not improperly score OV 3 and OV 7.

D. PROPORTIONALITY

Finally, defendant claims that his sentence of 210 to 420 months' imprisonment is not proportionate to the seriousness of the offense and the dangerousness of the offender. The recommended minimum sentence range for defendant was 126 to 240 months. A minimum sentence that falls within the recommended minimum sentence range is presumed to be proportionate. *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). Defendant fails to present any unusual circumstances to overcome the presumption of proportionality. *Id.*

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Alton T. Davis