STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v	No. 320016 Washtenaw Circuit Court
MARK DOUGLAS COLE, Defendant-Appellant.	LC No. 13-000711-FH

Before: SHAPIRO, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Following a jury trial, defendant Mark Douglas Cole was convicted of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with victim younger than 13); and assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1). He was sentenced to 38 months to 15 years' imprisonment for CSC II and to 38 months to 10 years' imprisonment for assault with intent to commit CSC involving sexual penetration. Defendant appeals as of right. We affirm defendant's convictions but remand for further proceedings consistent with this opinion.

Defendant first argues that trial counsel was ineffective for failing to challenge two prospective jurors, P and B, for cause after they expressed uncertainty about whether they could be fair.[1] We disagree.

A defendant must establish two requirements to show ineffective assistance of counsel: (1) "his attorney's performance fell below an objective standard of reasonableness," and (2) "this performance so prejudiced him that he was deprived of a fair trial." *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). The first prong requires that defense counsel make "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In order to establish prejudice under the second prong, the defendant must show that

[1] Where no evidentiary hearing was conducted, our review of a challenge to the effectiveness of defense counsel is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

there is "a reasonable probability that the outcome would have been different but for counsel's errors." *Grant*, 470 Mich at 486. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

"[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, which we normally decline to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (internal citations omitted). "[T]his Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror." *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008). In *Unger*, we explained that "[p]erhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions," but "a reviewing court . . . cannot see the jurors or listen to their answers to voir dire questions." *Id*. (internal quotation marks and citation omitted). Further, "[a] lawyer's hunches, based on his observations, may be as valid as any method of choosing a jury." *Id*. Ultimately, "[t]he fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Here, jurors B and P both expressed some uncertainty about whether they could be fair and impartial jurors. However, during subsequent questioning, juror P unequivocally affirmed that she would be able to listen to the testimony and the jury instructions and that she could "then apply those instructions to the facts." Further, juror B felt that she could listen to the testimony and the jury instructions and apply them. She stated that she thought she "could be fair." Accordingly, both jurors demonstrated a willingness to be fair and open minded, and we decline to use the benefit of hindsight to assess counsel's performance. See *Unger*, 278 Mich App at 258. Moreover, defense counsel was able to observe the jurors' facial expressions and body language, and his "hunches, based on his observations, may be as valid as any method of choosing a jury." *Id*. Accordingly, we conclude that defendant has not established that defense counsel's performance was objectively unreasonable, *Grant*, 470 Mich at 485, and we decline to "substitute our judgment for that of defendant's counsel" in regards to trial strategy, *Unger*, 278 Mich App at 258.[2]

Next, defendant argues that the trial court abused its discretion in admitting several photographs as demonstrative evidence and that the admission of such photographs denied him due process.[3] We disagree.

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[2] Defendant argues that defense "counsel informed [a] SADO legal assistant . . . that he did not challenge the two jurors because [defendant]'s family was still together and united, whereas in this kind of crime you would expect there to be rumors in the family and a divided front." Nothing in the record supports this assertion. However, assuming it is true, defense counsel's questions were consistent with this strategy.

[3] A trial court's decision on the admissibility of evidence is reviewed for an abuse of discretion. *People v Lane*, 308 Mich App 38, 51; 862 NW2d 446 (2014). "The trial court abuses its

"Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case." *People v Bulmer (After Remand)*, 256 Mich App 33, 35; 662 NW2d 117 (2003). Further, "the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice." *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). See also *Bulmer (After Remand)*, 256 Mich App at 35 (explaining that "demonstrative evidence must be relevant and probative").

Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" MRE 403. Unfair prejudice exists when "*marginally* probative evidence will be given undue or preemptive weight by the jury." *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010) (quotation marks and citation omitted; emphasis in original).

Defendant's neighbor, Robert Leaveck, testified that he was in the woods near defendant's house when he saw defendant standing next to an ATV. Leaveck testified that he noticed movement beside defendant. Leaveck walked closer, saw defendant "humping his hips back and forth," and observed that the victim was on the fender of the ATV with one leg out of his diaper. Leaveck was the only witness who saw defendant and the victim in the woods. Leaveck testified that he could see that defendant was "raping a baby."

Four photographs were admitted in this case. In the photographs, a doll was used to represent the victim and a police officer was used to represent defendant. The photographs depicted the scene on the ATV as described by Leaveck and were relevant to illustrate his testimony. Leaveck testified that the photographs were in the exact location and that they were a fair and accurate representation of how the woods looked, with the exception of some added foliage. Because the photographs illustrated Leaveck's testimony regarding a material issue in the case (i.e., that he saw defendant engaged in what appeared to be sexual contact with the victim), the photographs were relevant. See *Bulmer (After Remand)*, 256 Mich App at 35 (holding that demonstrative evidence was relevant and that "[i]t illustrated [a witness]'s testimony regarding a material issue relating to the case"). The photographs also assisted the jury in judging Leaveck's credibility as to what he saw. A witness's credibility is always relevant. See *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990).

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discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law." *Id*. Further, even if the trial court erred in its decision to admit evidence, the defendant has the burden to demonstrate that the preserved evidentiary " 'error resulted in a miscarriage of justice.' " See *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001), quoting *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999). Accordingly, reversal is not required for the improper admission of evidence, "unless after an examination of the entire cause, it [] affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *Whittaker*, 465 Mich at 427, quoting *Lukity*, 460 Mich at 496 (internal quotation marks omitted).

Moreover, Leaveck's testimony attested to the similarity of the photographs and what he observed on the day in question, there was no indication that the jury failed to understand the demonstrative nature of the photographs, and defense counsel had full opportunity to cross-examine Leaveck with respect to the photographs and what he observed. Thus, the trial court did not abuse its discretion in admitting the photographs. See *Lane*, 308 Mich App at 51. Finally, because the photographs were more than marginally probative, and because there is no indication that they were given preemptive weight by the jury, the danger of unfair prejudice did not substantially outweigh the probative value of the demonstrative evidence. See *Feezel*, 486 Mich at 198.[4]

Defendant also argues that admission of the photographs violated his due process rights. In *People v Blackmon*, 280 Mich App 253, 261; 761 NW2d 172 (2008), we explained,

> Although any error can potentially be argued to have deprived a defendant of his due-process fair-trial right, not every trial error is constitutional in nature. *People v Toma,* 462 Mich 281, 296; 613 NW2d 694 (2000) (not every trial error violates due process). Merely framing an issue as constitutional does not make it so.

Defendant's issue on appeal is an evidentiary issue, and "evidentiary issues fall into a nonconstitutional error category." *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001). And, as explained *supra*, the photographs were admissible and did not result in a miscarriage of justice. Thus, his due process argument is without merit.

Next, defendant argues that he is entitled to resentencing because the trial court sentenced him on facts that were not proven beyond a reasonable doubt as required by *People v Lockridge*, 498 Mich 358, 364; ___ NW2d ___ (2015). Specifically, defendant argues that the facts necessary to assess points under offense variable (OV) 8 (asportation or captivity), MCL 777.38, were not determined by the jury and that if OV 8 were scored at zero points, defendant would be

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[4] Even assuming error in admission of the photographs, defendant has not established that it was "more probable than not that the error was outcome determinative." *Whittaker*, 465 Mich at 427, quoting *Lukity*, 460 Mich at 496 (internal quotation marks omitted). Leaveck testified that he observed defendant with the victim, who had one leg out of his diaper. Leaveck was sure of what he observed. Further, he testified he told defendant that he had better stop. He said that defendant stopped and told him that he had "never had an urge like this before" and had "never done anything like this before." He told Leaveck not to tell anyone and then left on the ATV with the victim. Moreover, although Leaveck was the only eyewitness who testified and there was no physical evidence, the record shows that defendant also made inconsistent statements to the police. See *Unger*, 278 Mich App at 227 ("A jury may infer consciousness of guilt from evidence of lying or deception."). At one point, defendant denied ever being in the woods or ever stopping to urinate. Defendant later changed his story and indicated that he stopped to urinate and thought a bug may have crawled into the victim's pant leg because the victim was jumping around and fussing. Thus, given Leaveck's testimony and defendant's inconsistent explanations, even if the trial court erred in admitting the photographs, reversal is not required.

at OV level II (10 to 24 points) and his minimum sentence range would have been 12 to 24 months.

We review preserved *Lockridge* errors under the harmless error standard. *People v Stokes*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 321303, issued September 8, 2015); slip op at 9-10. If a defendant can establish a *Lockridge* error, he is entitled to a *Crosby*[5] remand for further inquiry as to whether resentencing is warranted (i.e., to determine whether the error was harmless). See *id*. at ___; slip op at 10-12.

As the scoring was based on facts found by the sentencing judge rather than the jury and it resulted in a higher guideline range, defendant is entitled to a *Crosby* remand:

> [O]n a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by [MCR 6.425], if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence. [*Stokes*, ___ Mich App at ___; slip op at 9, quoting *Lockridge*, 498 Mich at 398; slip op at 32-36 (alterations in *Stokes*).]

Defendant finally argues that the trial court lacked authority to impose court costs. Defendant argued that the decision should be controlled by *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014). However, effective October 17, 2014, the legislature amended MCL 769.1k to allow for the imposition of costs that are not independently authorized by the offense statute. See 2014 PA 352. Moreover, in *People v Konopka (On Remand)*, 309 Mich App 345, 360-376; 869 NW2d 651 (2015), we thoroughly addressed and rejected a host of constitutional challenges to the amendment of MCL 769.1k(1)(b), including the same alleged ex post facto violations claimed by defendant in the present case. We are bound by *Konopka*, MCR 7.215(J)(1), and, accordingly, we affirm the trial court's ruling that it had the authority to impose court costs under MCL 769.1k(1)(b)(*iii*). However, consistent with *Konopka*, the amount of costs assessed "must be reasonably related to the court's actual costs" involved in the particular case. *Konopka*, 309 Mich App at 376; see also MCL 769.1k(1)(b)(*iii*). As the court did not state a basis for the amount of costs, upon remand it should do so and assess costs consistent with its findings.

[5] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

We affirm defendant's convictions, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder