STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2015
v	No. 323400 St. Clair Circuit Court
WENDELL CORNELIUS AUSTIN, Defendant-Appellant.	LC No. 13-002900-FC

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

PER CURIAM.

Defendant, Wendell Cornelius Austin, appeals as of right his convictions, following a jury trial, of one count of first-degree home invasion, MCL 750.110a(2), two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, one count of unlawful imprisonment, MCL 750.349b, and one count of assault with intent to commit great bodily harm less than murder, MCL 750.84. The trial court sentenced Austin to serve concurrent terms of 23 years and 9 months' to 51 years' imprisonment for his CSC I convictions, 13 years and 4 months' to 20 years' imprisonment for his home invasion conviction, 10 to 15 years' imprisonment for his unlawful imprisonment conviction, and 6 years and 8 months' to 10 years' imprisonment for his assault conviction. We affirm Austin's convictions, but we remand Austin's sentences to the trial court for it to determine whether resentencing is required.

I. FACTUAL BACKGROUND

The victim testified that Austin, her former boyfriend, sexually assaulted her in her home in October 2013. According to the victim, she and Austin had a domestic relationship from 2006 to 2010 and had children together. The relationship turned violent while the family was living in Arkansas in 2010. During one incident, Austin hit, choked, berated, and sexually assaulted the victim over a period of 13 hours. She did not call the police because Austin threatened to kill her. During another incident, she took the children to a restaurant after Austin slapped her. The police were called, but the victim returned to her relationship with Austin.

According to the victim, the assaults continued after the family moved to Michigan in 2010. Austin would physically assault her and sexual assaults typically followed. The victim did not call the police because she was afraid. However, after about 15 months in Michigan, the victim ended the relationship because she "couldn't take it" anymore. In April 2013, Austin moved back to Arkansas.

Austin testified that he did not physically or sexually abuse the victim in Arkansas or Michigan. He testified that when he moved back to Michigan, he stayed in a homeless shelter so that the family would qualify for public assistance. He knew that the victim was dating a "friend at work" and was happy for the victim.

The victim testified that Austin moved back to Michigan in September 2013. He lived in a homeless shelter, but he stored some of his belongings in her house. The victim allowed Austin to stay in her home one night when the shelter was full, but he sexually assaulted her in the middle of the night. In October 2015, Austin called the victim because the shelter was full. The victim informed Austin that he could not stay in the home, but she left a blanket and food for him in her car. Because she felt "very uneasy," the victim kept a telephone and a knife with her in the bed.

According to Austin, he went to the victim's home to retrieve some of his clothing. By the time he arrived at the home, it was too late for him to return to the shelter. The victim gave him permission to stay in her car for the evening. After spending a while in the car, he became restless. He saw that one of the home's windows was open, so he stood on a trash can, pulled himself up to the roof, and went inside.

According to the victim, she woke up when Austin took the knife from her chest, hit her in the shoulder, and informed her that he had her phone. Austin repeatedly struck the victim in the face and questioned her about her boyfriend, who had been in her home earlier that evening. The victim testified that Austin struck her in the face and head, kicked her in the stomach, choked her, and threw her into a wall. Austin engaged in forcible vaginal and anal intercourse with the victim and told her that he intended to kill her.

The next morning, Austin forced her to call in to work and to the children's school to excuse their absences. He continued to strike her throughout the day. At some point, Austin began taking Xanax and drinking coffee. After Austin fell asleep, the victim left the home with the children and went to the hospital.

Austin testified that he only went into the victim's bedroom to greet her. The victim was shocked, but they talked for a few hours and the victim made him a cup of coffee. Afterward, they went to the bedroom and had consensual vaginal and anal intercourse. She called in to work and they continued talking. At one point, they had a heated argument. The victim slapped Austin, and then they began fighting each other. Austin testified that the victim slapped him twice and he slapped the victim ten times. He heard the victim's nose make a popping sound and he felt terrible. The next thing he remembered was waking up in the hospital. He did not remember speaking with police.

Dr. Edward Mauch testified that the victim had a fractured nasal bone and soft-tissue injuries to her abdomen and pelvis. Christine Cordle, a registered nurse, testified that she performed a sexual assault examination on the victim. Cordle testified that the victim had bruises on her forehead, eye, nose, face, neck, back, and arms. According to Cordle, a hemorrhage in the white of the victim's eye was consistent with strangulation or trauma. The victim also had a vaginal tear, four anal tears, and an anal abrasion. Cordle testified that the victim's injuries were consistent with her account. Brian Schloff, an expert in DNA analysis,

testified that DNA taken from the victim's vaginal swabs matched DNA types from Austin but not the victim's boyfriend. Austin also could not be excluded as a donor for DNA taken from the victim's anal swabs, and the probability that another man was the donor was 1 in 220,990.

Detective Brian Kerrigan testified that he investigated the assault. According to Kerrigan, he found a coat and baseball hat on the roof the house. The screen on a bathroom window was open, unlike the other screens. When he interviewed Austin the next day, Austin stated that the victim had let him into the home. Austin claimed that they had argued, but the argument had not become physical and the victim was not injured. Austin told Kerrigan that he and the victim had consensual vaginal intercourse on the night in question, but that Austin denied even attempting to have anal intercourse with the victim.

The jury found Austin guilty of the offenses previously described. Austin now appeals.

II. CHOICE OF COUNSEL

First, Austin contends that the trial court abused its discretion and violated his right to the assistance of counsel when it refused his request to appoint substitute counsel. We disagree.

We review for an abuse of discretion the trial court's decision regarding substitution of counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). The trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

An accused has the right to counsel for his or her defense. US Const, Am VI; Const 1963, art 1, § 20. A defendant's right to counsel under the Michigan Constitution is the same as that guaranteed by the Sixth Amendment to the United States Constitution. *People v Reichenbach*, 459 Mich 109, 118, 587 NW2d 1 (1998). The right to counsel includes the right to retain counsel of the defendant's choice. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003).

However, a defendant's right to counsel of choice is not absolute. *Id*. The defendant is not entitled to simply request that appointed counsel be replaced. *Traylor*, 245 Mich App at 462. The defendant must show that good cause exists for substitution and that the substitution will not unreasonably disrupt the judicial process. *Id*. Good cause may exist if the defendant and counsel have legitimate differences of opinion about fundamental trial tactics. *Id*. Good cause may also exist if there has been a complete breakdown of the attorney-client relationship. See *id*.

In this case, Austin's initial appointed counsel was replaced at Austin's request in February 2014. At that time, the trial court appointed new counsel on the basis of a breakdown in the attorney-client relationship. On June 9, 2014—the day before trial—Austin's new counsel moved to withdraw. Defense counsel contended that Austin was dissatisfied with counsel's representation because Austin believed that counsel was not giving his full efforts, was a racist, and was in cahoots with the prosecutor and judge. Defense counsel also contended that he and Austin could not communicate effectively about the case and that Austin wanted to present defenses that counsel believed were frivolous.

The trial court held an expedited hearing on the motion. At the motion, Austin addressed the trial court, stating that defense counsel had failed to provide him with discovery materials until the day before trial. Austin was also upset that counsel had encouraged him to plead, and Austin believed that defense counsel was not prepared for trial. The trial court declined defense counsel's motion to withdraw. It declined to substitute Austin's counsel on the basis of "mere dissatisfaction." It found that any breakdown in the attorney-client relationship was due to Austin's decision not to listen to defense counsel, and he was "simply using this disagreement at this time to avoid trial."

We conclude that the trial court did not abuse its discretion by denying defense counsel's motion to withdraw and appoint substitute counsel. "A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *Traylor*, 245 Mich App at 462 (quotation marks and citation omitted). The record supports the trial court's determination that Austin was merely dissatisfied with his appointed counsel and sought to delay trial. Austin previously requested substitute counsel for the same reason, and the timing of Austin's second motion was very close to the beginning of trial. Further, we note that granting the motion would have delayed trial because it was brought the day before trial, and substitute counsel would have needed time to familiarize him- or herself with the facts and prepare Austin's case. We conclude that the trial court's decision did not fall outside the range of principled outcomes.

III. PRIOR ACTS OF DOMESTIC VIOLENCE

Austin contends that the trial court abused its discretion when it admitted unduly prejudicial evidence of his prior acts of domestic violence. We disagree.

We review for an abuse of discretion the trial court's decision about whether to admit evidence. *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013). We review de novo the preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it. *Id*. at 723. The erroneous admission of evidence may deny a defendant his or her constitutional right to due process if it infused the trial with unfairness. *Estelle v McGuire*, 502 US 62, 75; 112 S Ct 475; 116 L Ed 2d 385 (1991).

MCL 768.27b(1) provides that "evidence of a defendant's commission of other acts of domestic violence is admissible for any purposes for which it is relevant if it is not otherwise excluded under [MRE 403]." The purpose of this section is to provide the jury with a full and complete picture of the defendant's history, in order to illuminate the likelihood that the defendant committed the charged crime. *People v Cameron*, 291 Mich App 599, 609-610; 806 NW2d 371 (2011).

However, evidence of prior domestic violence is not admissible if its admission violates MRE 403. See MCL 768.27b(1). MRE 403 provides that even if evidence is relevant, the trial court may not admit it if the danger of its prejudicial effect substantially outweighs its probative value. Under MRE 403, the trial court must balance the probative value of the evidence against its prejudicial effect. *Cameron*, 291 Mich App at 611. Evidence is probative if it has any tendency to make a fact of consequence more or less probable. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Evidence is unfairly prejudicial when it leads the jury to

consider issues extraneous to the merits of the case, such as bias, sympathy, anger, or shock. *Cameron*, 291 Mich App at 611. Evidence is also unfairly prejudicial if it leads to the danger of confusing the issues, misleading the jury, or the presentation of needlessly cumulative evidence. *People v Watkins*, 491 Mich 450, 489; 818 NW2d 296 (2012).

In this case, the victim testified about several prior instances of domestic violence: a 2010 incident where Austin kept her in their home while he choked, beat, and sexually assaulted her; a 2010 incident where Austin slapped her in the face; occasional incidents in 2010 where Austin threw a remote at her and caused her to require stitches; and a 2013 incident in which she agreed to let Austin into her home and he sexually assaulted her. The victim testified that sexual assaults followed the physical assaults "every time."

The trial court determined that this evidence was relevant to help the jury determine whether the sexual acts in this case were consensual. The trial court also found that the prejudicial effect of the evidence did not substantially outweigh its probative value. It issued a cautionary instruction about the proper use of the prior acts evidence.

We conclude that the trial court's admission of this evidence was not an abuse of discretion. The evidence was probative in this case because Austin contended that the victim consented to the conduct. The evidence concerned similar acts of nonconsensual sexual conduct toward the victim that largely occurred in the home, began with an argument over a small matter, and included physical acts and sexual assaults. This evidence was logically relevant to whether the victim consented to the charged conduct. See *People v Drohan*, 264 Mich App 77, 87; 689 NW2d 750 (2004).

This evidence was also not substantially more prejudicial than probative. While the nature of the incidents themselves are shocking, the victim did not testify in gruesome detail about the incidents. The victim's testimony did not seem calculated to arouse the sympathy of the jury or lead to bias. The victim glossed over similar incidents rather than repeating them in detail, thus avoiding the presentation of needlessly cumulative evidence. Finally, our review of the testimony indicates that the largest quantity of testimony was focused on Austin's conduct during the particular assault. It was not likely that the jury was misled or confused by the victim's testimony about the prior domestic violence. We conclude that the trial court's decision to admit this evidence fell within the range of principled outcomes.

IV. SENTENCING

Austin contends that his sentence violated his constitutional rights because his minimum sentences were based on facts not found by the jury. We agree.

In *People v Lockridge*, ___ Mich ___; ___ NW2d ___ (2015), slip op at 22, the Michigan Supreme Court concluded that because Michigan's sentencing scheme allows judges to find by a preponderance of the evidence facts used to compel an increase in the mandatory minimum sentence a defendant receives, it violates the Sixth Amendment to the United States Constitution. On the basis of this conclusion, the Court held that the Michigan sentencing guidelines are only advisory. *Id*. This Court's inquiry under *Lockridge* requires several steps:

> In determining whether there is any plain error under this new scheme, the first inquiry is whether the facts admitted by the defendant and the facts necessarily found by the jury "were sufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced." *Id*. at ___ (slip op at 32). If the answer is "yes," then a defendant cannot establish any plain error. *Id.* at ___ (slip op at 32). If the answer is "no," then a remand to the trial court is required to allow it to determine whether, now aware of the advisory nature of the guidelines, the court would have imposed a materially different sentence. *Id*. at ___ (slip op at 34). If the court determines that it would have imposed a materially different sentence, then it shall order resentencing. *Id*. at ___ (slip op at 34). [*People v Jackson*, ___ Mich App ___, ___; ___ NW2d ___ (2015), slip op at 11-12.]

In this case, Austin contends that his scores under offense variables (OVs) 1, 2, 4, 7, 8, 10, 11, and 13 relied on facts found by the judge rather than the jury. As assessed, Austin's offense variables score was 185 points, placing him in cell VI of Class A offenses.[1] See MCL 777.62 The next lowest cell is V, which recommends sentencing ranges for those defendants with 80-99 points. MCL 777.62.

Considering OVs 1 and 2, judicially found facts affected Austin's score by 20 points. OV 1 requires the trial court to assess 15 points where "the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c). OV 2 requires the trial court to assess five points if "[t]he offender possessed or used a . . . knife or other cutting or stabbing weapon." MCL 777.32(1)(d). The use of a knife, while part of the victim's testimony, was not an element of any crime at issue. The jury could have found that Austin assaulted the victim solely with his fists to support Austin's conviction of assault with intent to do great bodily harm.

Considering OV 4, Austin's score was affected by an additional 10 points. The trial court must assess a defendant ten points under OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Psychological injury is not an element of any of Austin's offenses.

The assessment of OV 7 affected Austin's score by 50 points. OV 7 requires the trial court to assess a defendant 50 points if "[a] victim was treated with . . . sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). This is not an element of the crimes of which Austin was convicted.

Finally, considering OV 8, Austin's score was affected by an additional 15 points. OV 8 requires the trial court to assess 15 points where "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary

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[1] CSC I is a Class A offense. MCL 777.16y.

to commit the offense." MCL 777.38(1)(a). None of the elements of the charged offense include asportation or a specific length of captivity.

We need not consider the additional offense variables. These offense variables have judicially found facts and affected Austin's OV score by 95 points, and removing them from consideration would change Austin's recommended sentencing range. See MCL 777.62. Accordingly, we conclude that we must remand to the trial court for it to determine whether it would have imposed a materially difference sentence.

We affirm Austin's convictions, but remand his sentence to the trial court for determination of whether it would have imposed a different sentence under *Lockridge*. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher