STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 2017
v	No. 335302 Kent Circuit Court
LUIS MANUEL LOPEZ-OCHOA, Defendant-Appellant.	LC No. 16-001904-FC

Before: SWARTZLE, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

In this case, a jury convicted defendant of two counts of first-degree criminal sexual conduct causing bodily injury, MCL 750.520b(1)(f). The trial court sentenced defendant to two concurrent terms of 15 to 50 years' imprisonment, with credit for 192 days served. Defendant now appeals. We affirm.

This case involves a sexual assault of an adult woman in her home. During the evening of February 14, 2016, the 61-year-old victim, her roommate, Victor Cervantes, and Cervantes's friend, defendant, were drinking alcohol at the victim's apartment in Grand Rapids, Michigan. The group was gathered around the dining room table of the home drinking beer and liquor. The victim's ex-husband, Craig, was also home, but he was sitting in the adjacent living room watching television and drinking beer; he was not participating in the group's gathering at the dining room table. At some point in the evening, Craig asked Cervantes to go to the store and get some tobacco. When Cervantes left, defendant asked the victim to help him work a radio in Cervantes's bedroom.

When the victim entered the bedroom, defendant closed the bedroom door, grabbed the victim by her left arm, and threw her face down on the bed. Defendant ripped the victim's clothes off and sexually assaulted her twice. He also forcibly groped the victim's left breast. The victim told defendant to stop, but he did not stop until he was finished.

Craig did not see or hear the assault, but he went to look for the victim after noticing that she was gone. He found the victim lying on the floor in Cervantes's bedroom with her pants and underwear down. She was crying, and she said, "He raped me." Defendant then fled the house. Craig went downstairs and told a neighbor to call 911. Police officers arrived shortly thereafter. When police arrived, they described the victim's demeanor as "distraught." She told police that defendant sexually assaulted her. Craig gave police officers defendant's first name, a description

of defendant, and a description of defendant's vehicle. Police found defendant at a nearby farm where he worked and lived, and they arrested him.

Police officers transported the victim to the YWCA where she met with Alison Edidin, a sexual assault nurse examiner. Edidin did a physical examination of the victim. She noted multiple lacerations and tears on the victim's privates that were bleeding. She noted that the "whole area was an abrasion" and that the victim was in extreme pain during the examination. Edidin also noted pain and redness on the victim's left breast as well as bruising on the victim's left forearm.

Defendant first argues that trial counsel was ineffective for failing to impeach the victim with inconsistent statements from her preliminary examination testimony. We disagree.

In order to find merit in a defendant's claim of ineffective assistance of counsel, the defendant must prove: (1) that the attorney made an error, and (2) that the error was prejudicial to defendant. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 311, 314; 521 NW2d 797 (1994). That is, first, defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *People v Russell*, 297 Mich App 707, 715-716; 825 NW2d 623 (2012). We must analyze the issue with a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and requires that the defendant overcome the presumption that the challenged action or inaction might be considered sound trial strategy. *People v Leblanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Decisions about whether to question a witness are presumed to be matters of trial strategy. *Russell*, 297 Mich App at 716. Second, defendant must show that, but for trial counsel's deficient performance, a different result would have been reasonably probable. *Id.* at 715-716.

At the preliminary examination, the victim testified that before she went into Cervantes's room with defendant, defendant tried to kiss her on the mouth while they were still sitting at the dining room table, but she said "no." She then testified that defendant choked her, but she thought he was "jok[ing] around" and that she thought defendant was "playing with [her]." Then, at trial, the victim testified that defendant did not touch her or try to make sexual advances toward her before asking her to help him with the radio in Cervantes's room.

Defense counsel made the decision not to impeach the victim regarding her inconsistent statements. Had she done so, counsel ran the risk of shedding a negative light on defendant. We conclude that defendant has not overcome the presumption that counsel's decision not to impeach the witness was sound trial strategy. And therefore, defendant has not demonstrated that counsel's performance fell below an objective standard of reasonableness. *Id.*

Assuming for the sake of argument that counsel's failure to impeach the victim did fall below an objective standard of reasonableness, we conclude that defendant has not demonstrated that but for defense counsel's deficient performance, a different result would have been reasonably probable. *Id.* Even if the victim was impeached based on her statements about what happened before she went into Cervantes's room with defendant, the jury heard the rest of the victim's testimony that defendant grabbed her by the arm, forcibly groped her, and that the assault was painful. All of this was supported by Edidin's testimony.

Additionally, to the extent that the impeachment would have supported the defense theory that the sexual acts were consensual, the evidence clearly demonstrated that the victim withdrew any possible consent. Moreover, Cervantes testified that the victim told him that she thought defendant was "nice" and "cute." He also testified that he witnessed the victim and defendant "touching each other" on their "private parts" multiple times that night before the victim followed defendant into Cervantes's bedroom. The jury heard Cervantes's testimony, and it presumably chose to believe the victim's account of the events. Accordingly, we conclude that, even if defense counsel committed an error, defendant has not demonstrated that but for counsel's deficient performance, a different result would have been reasonably probable. *Id*. Therefore, we hold that counsel was not ineffective.

Defendant next asserts that counsel was ineffective for failing to object to the prosecution's statements in the jury's presence about defendant's asserting his right to remain silent during police questioning. However, nowhere in defendant's brief on appeal did defendant develop his argument in this regard. Rather, defendant seems to couch his argument in the area of prosecutorial misconduct. As we have recognized many times:

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. . . . Failure to brief a question on appeal is tantamount to abandoning it. [*People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (citation omitted).]

Therefore, because defendant merely announced an error regarding ineffective assistance of counsel for failure to object to the statements regarding his assertion of his right to remain silent, but he failed to brief the question on appeal, we conclude that he abandoned the issue. However, we will address the issue of prosecutorial misconduct, as defendant did brief that issue.

To begin, in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court outlined the rule pursuant to which law enforcement officers must advise a suspect of certain rights before custodial interrogation. Those rights include the right to remain silent and the right to a retained or appointed attorney to be present during questioning. *Id*. at 467-468, 470. In this case, before questioning defendant, police officers advised him of his *Miranda* rights written in Spanish and clarified orally in Spanish. Defendant asserted his right to have an attorney present during questioning.[1]

"[T]o preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App

[1] Defendant does not argue that he was not advised of, or did not understand, his rights, and his arguments on appeal do not indicate any allegations of a *Miranda* violation.

465, 475; 802 NW2d 627 (2010). Here, defendant did not object to any of the alleged instances of prosecutorial misconduct, nor did he request a curative instruction. Therefore, the issue is unpreserved for appellate review. When there was no contemporaneous objection or request for a curative instruction, appellate review of claims of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Plain error requires showing that (1) error occurred, (2) the error was clear or obvious, and (3) the error affected defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement generally requires showing that the error affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. Reversal is warranted only when the plain error "resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *Id*.

The United States and Michigan Constitutions guarantee defendant's right to a fair trial. US Const, Am VI, XIV; Const 1963, art 1, § 20; *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). A reviewing court cannot find error requiring reversal when a curative instruction could have alleviated any prejudicial effect. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

"[I]n general, prosecutorial references to a defendant's post-arrest, post-*Miranda* silence violate a defendant's due process rights under the Fourteenth Amendment of the United States Constitution." *People v Shafier*, 483 Mich 205, 212-213; 768 NW2d 305 (2009), citing *Wainwright v Greenfield*, 474 US 284, 290-291; 106 S Ct 634; 88 L Ed 2d 623 (1986); *Doyle v Ohio*, 426 US 610, 618-620; 96 S Ct 2240; 49 L Ed 2d 91 (1976). "A reference to a defendant's post-arrest, post-*Miranda* silence generally constitutes a *Doyle* violation unless the reference was so minimal that 'silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference.' " *Shafier*, 483 Mich at 214-215, quoting *Greer v Miller*, 483 US 756, 764-765; 107 S Ct 3102; 97 L Ed 2d 618 (1987).

In this case, defendant claims that the prosecution committed misconduct by speaking in the jury's presence about defendant's asserting his right to remain silent during police questioning. Defendant claims that the prosecution committed misconduct three times: first, during opening statements; second, during direct examination of Detective Ort; and third, during cross-examination of Detective Ort. We disagree.

Regarding the first statement, we conclude that the prosecution did not commit misconduct because any prejudicial effect of the statements could have been alleviated by a curative instruction. *Unger*, 278 Mich App at 235. During opening statements, the prosecution said, "[T]he defendant leaves. I believe it's two days later, that the police department is able to track him down . . . . Detective Ort, along with a Spanish[-]speaking officer attempt to interview [defendant]. He declines, which is his—he has every right to do." This reference to

defendant's post-arrest, post-*Miranda* silence violated defendant's right to due process under the Fourteenth Amendment of the United States Constitution. *Shafier*, 483 Mich at 212-213. However, we conclude that a curative instruction could have alleviated any prejudicial effect by informing the jury that the reference to defendant's silence was not submitted to it as evidence from which it was allowed to draw any permissible inference. See *Shafier*, 483 Mich at 214-215; see also *Greer*, 483 US at 759, 764-765.

Regarding the second statement, the prosecution asked Detective Ort an open-ended question about his investigative efforts: "Where did you meet with the defendant at?" In response to this question, Detective Ort testified that he interviewed defendant with the assistance of a Spanish-speaking police officer. He testified that defendant was given a written copy of his *Miranda* warnings in Spanish. He also stated that Officer Garza clarified his rights in Spanish, including his right to an attorney. Detective Ort testified that defendant then chose not to speak to them without his attorney present. The prosecutor then said, "[W]hich is his right to do." Detective Ort responded stating, "[A]bsolutely." The prosecution did not elicit any additional follow-up questions regarding defendant's refusal to speak with Detective Ort. We conclude that the prosecution did not commit misconduct because the prosecution's question was "aimed at eliciting testimony about [Detective Ort's] investigative efforts, not about . . . defendant's refusal of a police interview." *People v Dennis*, 464 Mich 567, 575; 628 NW2d 502 (2001).

Regarding the third incident, Detective Ort made a statement during cross-examination that "normally" in a case like defendant's he would obtain a statement from the suspect. However, he stated that he did not obtain a statement from defendant in this case because defendant would not talk to him without an attorney present. Defendant cannot attribute such statements to the prosecution as prosecutorial misconduct because they were not elicited by the prosecution—they were elicited by defendant's counsel on cross-examination.

This case is distinguishable from *Shafier*, in which the prosecution repeatedly elicited testimony about defendant's silence and highlighted the importance of the silence throughout the trial. In this case, the prosecution did not specifically elicit testimony from Detective Ort regarding defendant's silence, and it did not follow up with any additional questions about defendant's silence. Nor did the prosecution highlight the importance of defendant's silence. The first statement could have been cured by the trial court issuing a curative instruction. The second statement was provided by Detective Ort in response to an open-ended question about Detective Ort's investigative efforts. The third statement was elicited by defendant's own counsel on cross-examination. Accordingly, we conclude that defendant has not demonstrated plain error. *Carines*, 460 Mich at 763.

Defendant has also not demonstrated that any error affected his substantial rights. The victim testified that defendant sexually assaulted her and that it caused her pain. Edidin testified regarding the extent of the victim's injuries. Defendant has not shown that any possible error in referring to his silence affected the outcome of the lower court proceedings in light of the evidence supporting the assault, let alone "resulted in the conviction of an actually innocent defendant" or "affected the fairness, integrity, or public reputation of the judicial proceedings." *Id*.

Defendant next argues that the trial court improperly assessed 10 points to Offense Variables (OV) 3 and 4. We disagree.

Questions of statutory interpretation are questions of law that we review de novo. *People v Gaston*, 496 Mich 320, 325; 852 NW2d 747 (2014). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *Id*. Preponderance of the evidence means that the evidence "when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008) (citation omitted).

The scoring of OV 3 is governed by MCL 777.33, which states in relevant part:

> (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (d) Bodily injury requiring medical treatment occurred to a victim..... 10 points
>
> (e) Bodily injury not requiring medical treatment occurred to a victim 5 points
>
> (f) No physical injury occurred to a victim ..... 0 points[.]
>
> (2) All of the following apply to scoring offense variable 3:
>
> * * *
>
> (d) Do not score 5 points if bodily injury is an element of the sentencing offense.
>
> (3) As used in this section, "requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment.

In this case, defendant was convicted of first-degree criminal sexual conduct causing bodily injury, MCL 750.520b(1)(f). By the very nature of the conviction, the jury found beyond a reasonable doubt that defendant caused bodily injury to the victim. Therefore, the critical inquiry is whether such bodily injury required medical treatment, per MCL 777.33.

Defendant argues that the record does not indicate that the injuries were medically treated, and therefore, assessing 10 points to OV 3 was erroneous. However, MCL 777.33 does not require that the victim actually seek medical treatment, only that such medical treatment be necessary. MCL 777.33(3). Edidin's testimony regarding the extent of the victim's injuries

supported that the victim suffered bodily injury requiring medical treatment, even if she did not actually receive medical treatment. Therefore, we conclude that a preponderance of the evidence supported the trial court's assessing 10 points to OV 3.

Defendant next argues that the trial court erroneously assessed 10 points to OV 4 because the record did not support that the victim suffered a psychological injury that was serious enough to require professional treatment, regardless of whether the victim actually sought treatment. We disagree.

The scoring of OV 4 is governed by MCL 777.34, which states:

> (1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim ..... 10 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim ..... 0 points
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

"When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a PSIR, plea admissions, and testimony presented at a preliminary examination." *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). A victim's feelings of being angry, hurt, violated, and frightened, as well as "trying to block out the memory" of a crime after the crime are sufficient to assess 10 points to OV 4. *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012) (brackets and citation omitted).

In this case, the victim had difficulty testifying at the preliminary examination. Even so, she testified at the preliminary examination that she was "stressed out about all of this." She also said, "I'm still shaken up over it all, and I threw up all the next day." Moreover, the victim had difficulty testifying at the trial, oftentimes giving nonverbal responses to difficult questions. Additionally, at sentencing, the prosecution stated:

> I'd just like to state on [the victim's] behalf, she has been in constant contact with either my office or Victim Witness throughout the entire case. Obviously, the Court heard her testimony, and when she found out about the sentencing date, she indicated that essentially, just because of her own anxiety, she could not be in the courtroom again with the defendant . . . .

Moreover, the victim authored a Victim Impact Statement, in which she described her newly acquired lack of trust, paranoia, and reclusive nature. She also detailed how she wanted to

move out of the home so that she could get on with her life. A preponderance of the evidence supports that the victim felt "angry, hurt, violated, and frightened" or was "trying to block out the memory" of the crime. *Williams*, 298 Mich App at 124. Therefore, we hold that the trial court did not err in assessing 10 points to OV 4.

Defendant lastly argues that it was unconstitutional to include a 20% late fee in his sentence for fines, costs, and fees not paid within 56 days of sentencing. See MCL 600.4803(1). However, defendant has not presented any evidence that the trial court ever actually imposed the late fee on him. It is completely uncertain whether defendant has or will actually suffer the injury of having said late fee imposed. Defendant's injury is merely hypothetical and is contingent on the trial court's actually imposing the late fee. Because there is no evidence that the trial court ever has or ever will in fact impose the late fee on defendant, we conclude that the issue is not ripe for appeal. Therefore, we decline to answer defendant's question in that regard. See *People v Jackson*, 483 Mich 271, 297-298; 769 NW2d 630 (2009).

Affirmed.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Jane E. Markey