STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2011
v	No. 298373 Oakland Circuit Court
KENDRICK LAMONT MEDLOCK, Defendant-Appellant.	LC No. 2009-227689 - FH

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of third-degree criminal sexual conduct (CSC 3), MCL 750.520d(1)(a), and two counts of fourth-degree criminal sexual conduct (CSC 4), MCL 750.520e(1)(a). He was sentenced, as a fourth habitual offender, MCL 769.12, to 18 years and 2 ½ months to 40 years' imprisonment on the CSC 3 convictions and to 5 to 15 years' imprisonment on the CSC 4 convictions. We affirm.

On appeal, defendant first argues that the rule against use of tacit admissions from *People v Bigge*, 288 Mich 417; 285 NW 5 (1939), and his Fifth Amendment right against self-incrimination were violated, where the prosecutor elicited testimony from defendant on cross-examination indicating that he did not take advantage of an opportunity to talk to police when he failed to keep a prearrest appointment for an interview with a detective. Defendant also argues that counsel was ineffective for failing to object to the questioning.

Given the lack of an objection, defendant must establish that plain error occurred, that any plain error prejudiced defendant, i.e., it affected the outcome of the lower court proceedings, and that the error resulted in his conviction despite his actual innocence or, alternatively, that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In the context of the ineffective assistance argument, defendant must show that counsel's performance was deficient, in that, it fell below an objective standard of reasonableness, and defendant must also establish that the deficient performance prejudiced him, which is demonstrated by showing the existence of a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

In *Bigge*, two individuals had a conversation in the presence of the defendant, during which one stated that the defendant was guilty of embezzlement. The defendant remained silent, and did not profess his innocence. The prosecutor remarked that the defendant had a duty to profess his innocence at that time. *Bigge*, 288 Mich at 419. The Michigan Supreme Court stated that "[t]he time has not yet come when an accused must cock his ear to hear every damaging allegation against him and, if not denied by him, have the statement and his silence accepted as evidence of guilt." *Id.* at 420. The Court also ruled that "[t]here can be no such thing as confession of guilt by silence in or out of court." *Id.*

Our Supreme Court reviewed the application of the *Bigge* decision in *People v Hackett*, 460 Mich 202; 596 NW2d 107 (1999). In *Hackett*, the defendant was implicated in a drug offense, yet there was no specific accusation or words spoken in his presence to which the defendant remained silent. Rather, the prosecutor elicited testimony from the defendant at trial that he had never confronted an individual whom the defendant contended had "set him up," even though the two were incarcerated together following the defendant's arrest. *Id.* at 208-209. The *Hackett* Court noted that *Bigge* preceded the enactment of the Michigan Rules of Evidence and that the *Bigge* rule concerned tacit admissions, just like MRE 801(d)(2)(B), which provides that a statement is not hearsay if the statement is offered against a party and is "a statement of which the party has manifested an adoption or belief in its truth." *Hackett*, 460 Mich at 213. The Court further indicated that "*Bigge*'s application is limited to tacit admissions" and that "*Bigge* precludes the admission of a defendant's prearrest silence in the face of [an] accusation as substantive evidence of his guilt." *Id.* at 213-214.[1] The *Hackett* Court held:

> We conclude that *Bigge* is inapplicable to the resolution of this case. The silence referenced by the prosecution did not occur in the face of an accusation. There is simply no statement that defendant's silence can be construed as tacitly adopting. Thus, the rule of *Bigge* is not violated by the admission of the evidence. [*Id.* at 215.]

The same is true in the case at bar. The challenged testimony did not concern defendant standing silent in the face of a direct accusation; rather, the evidence merely indicated that defendant decided not to appear at the police interview and speak to the detective. There is no statement that defendant tacitly adopted. We instead simply have nonresponsive conduct that could be used by the prosecution as evidence of consciousness of guilt. *People v Solmonson*, 261 Mich App 657, 667; 683 NW2d 761 (2004).

Moreover, *Hackett* provided that, even if the *Bigge* rule regarding tacit admissions was implicated, "a defendant's prearrest silence is admissible for impeachment purposes." *Hackett*, 460 Mich at 213-214, citing *People v Cetlinski (After Remand)*, 435 Mich 742, 757; 460 NW2d 534 (1990) (nonverbal conduct or a failure to come forward is relevant and probative for impeachment purposes when the court finds that it would have been natural for the person to

[1] The Court observed that "[t]he issue of prearrest silence is one of relevance," and that "[a] criminal defendant's failure to respond to an accusation is not probative evidence of the truth of the accusation." *Hackett*, 460 Mich at 214-215.

interject exculpatory information under the circumstances). Assuming a *Bigge* violation, the *Hackett* Court found that the evidence was nonetheless admissible to impeach the defendant's testimony that he was an innocent bystander to the drug transaction, given that it would have been natural for him to have confronted the person who allegedly set him up when they were in jail together. Here, considering that defendant adamantly testified on direct examination that he did not engage in sexual acts with the victims and that he knew that the general subject matter of the proposed police interview was going to concern the CSC allegations, it would have been natural for him to attend the scheduled interview and talk with the detective in order to try and straighten out the matter.[2] As such, the challenged testimony was admissible for purposes of impeachment, even if there were a *Bigge* violation. We also note that while defendant claims that the prosecution utilized the testimony as substantive evidence of guilt, defendant cites no supporting transcript pages and our thorough review of the prosecutor's closing argument reveals no mention whatsoever of the testimony.

With respect to the Fifth Amendment aspect of defendant's argument, the argument fails because defendant was not in custody, nor had he invoked his Fifth Amendment right, at the time of the scheduled interview. In *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996), this Court ruled:

> Next, defendant asserts that the prosecutor impermissibly referred to defendant's exercise of his Fifth Amendment right to remain silent by introducing testimony that defendant had canceled a scheduled interview with the police. . . . We find no miscarriage of justice. Here, defendant's Fifth Amendment right against self-incrimination was not violated because defendant was not in custody and had not invoked his Fifth Amendment right at the time the scheduled interview was canceled. [Citation omitted; see also *Solmonson*, 261 Mich App at 664-665.]

Use of a defendant's silence amounts to a deprivation of constitutional rights only "when the government has given the defendant a reason to believe both that he has a right to remain silent and that his invocation of that right will not be used against him, which typically only occurs post-arrest and post-*Miranda*." *People v Borgne*, 483 Mich 178, 187-188; 768 NW2d 290 (2009).

For the reasons stated above, both the *Bigge* and the Fifth Amendment arguments fail relative to the challenge of the testimony elicited during defendant's cross-examination. Moreover, because there is no merit to defendant's arguments, any objection would have been futile; therefore, the ineffective assistance of counsel claim necessarily fails. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Additionally, given the entirety of the record, we cannot conclude that defendant established prejudice, that he is actually innocent,

[2] Recently, our Supreme Court in *People v Borgne*, 483 Mich 178, 187; 768 NW2d 290 (2009), acknowledged that a defendant's silence can be used to impeach his exculpatory testimony, where the silence occurred before his or her arrest.

or that any assumed error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence. Reversal is unwarranted.

Defendant next argues that he was denied a fair trial where evidence was presented showing that he was on parole, which is entirely irrelevant to the CSC charges. Defendant also maintains that counsel was ineffective for introducing the evidence and failing to object to the evidence when touched upon by the prosecutor on cross-examination. The argument that the evidence was inadmissible was waived by defendant. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000). During direct examination, defendant testified numerous times regarding his parole status, meetings with his parole officer, parole restrictions, including that he was not supposed to be driving, and a conversation with his parole officer in which defendant informed him of unfounded CSC accusations. He did so, in part, to support his defense. He claimed that there was no plan for him to drive the victims to a Christmas tree lighting party on the day of the sexual assaults as alleged by the prosecution, noting his parole restrictions and meetings with his parole officer. Defendant "may not harbor error as an appellate parachute." *Id.* at 214. The issue was waived.

In the context of the ineffective assistance claim, defendant fails to overcome the strong presumption that counsel's performance constituted sound trial strategy. *Carbin*, 463 Mich at 600. Defendant argues that the testimony could have been developed in a manner that generically referenced "appointments" without indicating that parole meetings were involved. First, this argument does not address other parole matters, such as parole restrictions, about which defendant testified. Second, the likelihood is that the jury would be less inclined to believe defendant if he spoke of anonymous appointments, such that it was reasonable for counsel to elicit specifics about defendant's parole. Moreover, on direct examination, as a strategic move, defendant immediately admitted that he had several past convictions for crimes involving theft and dishonesty, including retail fraud. Given that the jury was exposed to that evidence, any testimony regarding parole was absolutely harmless; therefore, the requisite showing of prejudice was not established for purposes of the ineffective assistance claim. *Id.*

Finally, defendant argues that offense variable eleven (OV 11), MCL 777.41, was improperly scored at 50 points where it should have been scored at zero points. Defendant also argues that the trial court actually reduced the score to 25 points, which was not reflected in the presentence investigation report (PSIR). The record indicates that the probation officer scored OV 11 at 50 points, that, at the sentencing hearing, the trial court reduced the score to 25 points, and that the change did not affect the minimum sentence range, which remained at 117 to 320 months, consistent with MCL 777.63. The PSIR was not corrected to show a score of 25 points for OV 11.

The scoring of the sentencing guideline variables is determined by reference to the record, using the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "[T]his Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score." *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009) (citation omitted). MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

Under OV 11, 50 points are to be scored where there were "[t]wo or more criminal sexual penetrations," 25 points are to be scored where "[o]ne criminal sexual penetration occurred[,]" and zero points are to be scored where "[n]o criminal sexual penetration occurred[.]" MCL 777.41(1). All sexual penetrations of the victim "arising out of the sentencing offense" are to be scored. MCL 777.41(2)(a). However, the statute also provides, "Do not score points for the penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(c). Further, "[m]ultiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13." MCL 777.41(2)(b).

In *People v Johnson*, 474 Mich 96, 101-102, 102 n 2; 712 NW2d 703 (2006), our Supreme Court, construing OV 11, observed:

> In this case, the sentencing offenses are for third-degree criminal sexual conduct. Therefore, in order to count the penetrations under OV 11, there must be the requisite relationship between the penetrations and the instances of third-degree criminal sexual conduct. The victim testified that she had sexual intercourse with defendant on two different dates in November 2001. There is no evidence that the penetrations resulted or sprang from each other or that there is more than an incidental connection between the two penetrations. That is, there is no evidence that the penetrations arose out of each other. More specifically, there is no evidence that the first sexual penetration arose out of the second penetration or that the second penetration arose out of the first penetration. Because the two sexual penetrations did not "aris[e] out of" each other, the trial court erred in scoring OV 11 at 25 points.
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> In this case, defendant was convicted of two separate counts of third-degree criminal sexual conduct. Third-degree criminal sexual conduct is an offense based on sexual penetration. MCL 750.520d. The penetration that formed the basis of defendant's first offense "aris[es] out of the [first] sentencing offense." The penetration that formed the basis of defendant's second offense "aris[es] out of the [second] sentencing offense." However, the penetration that formed the basis of the first offense cannot be used for scoring the first offense, and the penetration that formed the basis of the second offense cannot be used for scoring the second offense. This is because MCL 777.41 (2)(c) prevents the court

> from scoring points "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." While the precise meaning of the language in MCL 777.41(2)(c) is not at issue in this case, it is clear that each criminal sexual penetration that forms the basis of its own sentencing offense cannot be scored for purposes of that particular sentencing offense.

Here, the guidelines were scored for the three CSC 3 convictions, and all of the sexual penetrations upon which defendant was convicted essentially arose out of each other where they occurred in a single, ongoing transaction. *Johnson* appears to indicate that in such a situation, we could count two if not three sexual penetrations for purposes of OV 11, given that if we focus on one of defendant's three convictions of CSC 3, we could not count that particular offense in the scoring, but we could count the other two because they all arose out of each other. However, we need not determine if such an interpretation of *Johnson* is correct, as there was evidence of a fourth sexual penetration, penis to anus, which also occurred within the same transaction as the other penetrations. Therefore, that fourth sexual penetration arose out of the three CSC 3 sentencing offenses, MCL 777.41(2)(a), yet it did not form the basis of a "third-degree criminal sexual conduct offense," MCL 777.41(2)(c). Accordingly, said sexual penetration justifies a score of 25 points under MCL 777.41(1)(b) ("[o]ne criminal sexual penetration occurred").[3]

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens

[3] We find it unnecessary to remand for correction of the PSIR to show a score of 25 points instead of 50 points relative to OV 11. The matter is irrelevant and has no affect on defendant. The minimum sentence range is the same regardless of whether the score was 25 or 50 points.