STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2011
v	No. 299018 Kalamazoo Circuit Court
JAWAN ALAN BOWDEN, Defendant-Appellant.	LC No. 09-001568-FC

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b (helpless or incapacitated victim; victim injured), and the trial court sentenced as a fourth habitual offender, MCL 769.12, to a prison term of 12 to 36 years. Defendant appeals as of right. We affirm.

Defendant's conviction arises from the sexual assault of the 16-year old victim during the early morning hours of June 9, 2008, at a hotel in Kalamazoo following a party at which the victim became intoxicated to the point of losing consciousness. Forensic evidence established that multiple men engaged in sexual intercourse with the victim. Defendant did not deny that he was one of these men, but he asserted that he and the victim engaged in consensual intercourse before the party began. At trial, the victim testified that she thought of defendant as her brother because his father and her mother had dated for eight years and that she did not have any romantic relationship with defendant. She was present at the hotel at defendant's invitation to swim in the hotel's pool. She testified that she participated in a drinking game and that defendant encouraged her to drink a substantial number of shots of tequila and/or vodka. She denied engaging in consensual intercourse with anyone while at the hotel. More than three hours after she was last seen consuming alcohol, the victim's blood alcohol content was .37. Hotel surveillance recordings established that defendant was alone with the victim on two separate occasions after she was rendered unconscious by alcohol intoxication. The jury convicted defendant of one count of criminal sexual conduct and acquitted him of a second count.

Defendant first argues that he was denied a fair trial by the presence on the jury of a juror who advised the trial court that, over the previous 20 years, his "entire social network and circle friends [were] police officers, detectives, command officers for the City of Kalamazoo" and that he knew one of the investigating officers socially. We disagree.

This Court reviews defendant's unpreserved challenge to the presence of the juror on the panel for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). An unpreserved error is not a ground for reversal unless the defendant can demonstrate that the error was plain, that it affected the outcome of defendant's trial, and that it resulted in the conviction of an actually innocent person or that it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence." *Id*. (citation omitted).

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). Jurors are presumptively competent and impartial, and the party alleging disqualification for bias bears the burden of proving its existence. *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001); *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). A prospective juror may be removed for cause if the challenging party shows that the juror has a bias against a party or an attorney, the juror has a state of mind that will prevent him from rendering a just verdict, or if the juror has opinions that would improperly influence the juror's verdict. MCR 2.511(D)(2), (3), and (4); *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000). This Court generally presumes that a juror's representation that he is able to set aside any personal bias is sufficient to protect a defendant's right to a fair trial. *Johnson*, 245 Mich App at 256.

During voir dire, the juror at issue stated that he could not take something as true merely because the officer with whom he was acquainted had testified to it, but instead that he would "keep an open mind," treat police witnesses as "any other witness" and evaluate the believability of testimony after it was offered. The juror also commented that the officer was not more credible than defendant because neither had yet testified. Moreover, the juror expressly agreed to follow the court's instructions, without regard to his personal relationships with his ex-wife, who is a Kalamazoo police sergeant, and the other police officers with whom he had socialized. The juror's representations to the court that he could impartially judge testimony offered by the officer, and his disavowal of any prejudice for the prosecution or against defendant, was sufficient to protect defendant's right to a fair trial. *Johnson*, 245 Mich App at 256, citing *Patton v Yount*, 467 US 1025, 1034-1035; 104 S Ct 2885; 81 L Ed 2d 847 (1984) (distinguishing between jurors with fixed opinions and those without fixed opinions); *Irvin v Dowd*, 366 US 717, 723; 81 S Ct 1639; 6 L Ed 2d 751 (1961) ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."); *People v Lee*, 212 Mich App 228, 248-252; 537 NW2d 233 (1995) (trial court did not err by declining to excuse juror who "did not indicate that he had a state of mind that would prevent him from rendering a just verdict," but rather, stated that "he would decide the case consistent with the requirements of the law").

Defendant argues further that his trial counsel was ineffective in failing to challenge the juror's presence on the jury for cause. To succeed on a claim of ineffective assistance of counsel predicated on the failure to challenge or remove a juror, a defendant must show that the juror could have been successfully challenged for cause and that the outcome of the trial likely would have been different had the juror not participated in deliberations. See *Hughes v United States*, 258 F3d 453, 458 (CA 6, 2001) (defendant must show that the juror was actually biased against him). Accord *United States v Angel*, 355 F3d 462, 470 (CA 6, 2004) (defendant must show that

the juror was actually biased to prove ineffective assistance of counsel). In *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008), this Court explained:

> Perhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions. However, as a reviewing court, we "cannot see the jurors or listen to their answers to voir dire questions." For this reason, this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror. [*Id.* at 258 (citations omitted).]

The juror at issue expressed no bias against defendant and did not indicate an inability to judge the case fairly and impartially; instead, he indicated that he could "keep an open mind," treat the police witnesses "the same" as all other witnesses, and follow the court's instructions. Thus, there was no basis to excuse the juror for cause. And, absent a showing of actual bias against defendant, defense counsel's decision not to excuse the juror from the panel was a matter of trial strategy that this Court should not second-guess. *Unger*, 278 Mich App at 258.

Defendant next argues that he was denied a fair trial when the examining nurse testified regarding potential causes of a vaginal tear she observed during the examination of the victim. We disagree.

Generally, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, where, as here, the challenge to the admission of evidence is unpreserved, this Court's review is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Defendant first objects that the nurse was not qualified as an expert before proffering the challenged testimony. However, the nurse was not testifying as an expert witness; she was testifying as a fact witness to her observations of the victim's condition at the hospital. In that context, as a lay witness, the nurse offered opinion testimony within the permissible confines of MRE 701, which allows a witness to testify "in the form of opinions or inferences . . . which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witnesses' testimony of the determination of a fact in issue." To the extent that the nurse offered opinion or inferential testimony, it was rationally based on her perceptions of the victim's physical condition; it did not purport to be based on any "scientific, technical or other specialized knowledge" possessed by an expert. Thus, there was no need to qualify the nurse as an expert witness.

As for the substance of the nurse's testimony, defendant points to *People v Beckley*, 434 Mich 691, 721; 456 NW2d 391 (1990), in which our Supreme Court held that an expert witness may not testify that sexual abuse occurred or that the defendant is guilty, and may not vouch for the veracity of the victim, as supporting a conclusion that the nurse's testimony was impermissible. Setting aside that the nurse did not testify as an expert, the nurse's testimony did not purport to be dispositive as to whether a sexual assault occurred. Rather, she testified as to potential instrumentalities of causation of the victim's injury, which could include blunt force trauma; at most, her testimony was that the injury was "consistent with" forcible sexual intercourse. She did not offer any opinion as to whether the victim was sexually assaulted.

Accordingly, her testimony did not invade the jury's province of determining whether a sexual assault occurred.

Further, the challenged testimony was in no way dispositive as to whether *defendant* sexually assaulted the victim. The jury was aware that another person was previously convicted of first degree sexual conduct committed against the victim. Thus, defendant's assertion that he and the victim had consensual intercourse earlier in the afternoon, before the others arrived at the hotel, was not belied by the presence of the injury. The nature of what happened to the victim was not at issue at trial – it was not disputed that she was sexually assaulted – the only question was defendant's role, if any, in that assault. The nurse offered no testimony whatsoever bearing on resolution of this factual determination. Consequently, defendant has not established plain error arising from the admission of the nurse's testimony.

Defendant also argues that he was denied a fair trial by the trial court's decision to admit into evidence the surveillance recordings of the hotel's second and third floor hallways during the pertinent time frame. We disagree.

Defendant's preserved challenge to the trial court's decision to admit this evidence is reviewed for an abuse of discretion. *Katt*, 468 Mich at 278; *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). A preserved, nonconstitutional evidentiary error does not merit reversal unless it involves a substantial right and affirmatively appears from the entire record that it was more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Contrary to defendant's assertion, the surveillance recordings were relevant to establish the movement of people between two hotel rooms, to show the movement of the victim between the two rooms, and to demonstrate which members of the group were alone with the victim after she lost consciousness. Further, the recordings corroborated the testimony of several witnesses regarding the course of the events, including testimony regarding the length of time it took defendant to respond to a knock on the door on the first occasion that he was alone with the victim. The recordings certainly cast light on defendant's opportunity to sexually assault the victim, establishing beyond refute that he was alone with the victim on two separate opportunities after she lost consciousness. The recordings were "of consequence to the determination of the action" and they made "a fact of consequence more or less probable than it would be without" their admission into evidence. *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). Therefore, it cannot be said that the recordings were not relevant.

MRE 403 permits relevant evidence to by "excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." However, evidence is not unfairly prejudicial simply because it is damaging to the defendant's position at trial; all relevant evidence will be damaging to the extent it tends to prove that the defendant is guilty of the charged offense. *People v Houston*, 261 Mich App 463, 468; 683 NW2d 192 (2004). Unfair prejudice is "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168

(1995). As our Supreme Court observed in *Mills*, 450 Mich at 75-76, quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983):

> "[T]he notion of 'unfair prejudice' encompasses two concepts. First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of 'prejudice' exists. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it. Where a substantial danger of prejudice exists from the admission of particular evidence, unfairness will usually, but not invariably, exist."

The determination of whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to the trial court's contemporaneous assessment of the presentation, credibility, and effect of testimony. *People v Sabin (After Remand*), 463 Mich 43, 71; 614 NW2d 888 (2000).

The recordings at issue were taken by cameras mounted at the opposite end of the hallway from the rooms rented by members of the group. Thus, while persons are identifiable, primarily by their clothing, they appear at a distance in the recordings. And, the victim appears for less than four of the 278 minutes spanned by the recordings, nearly half of which time she is somewhat ambulatory; it is apparent that she is being carried during her later appearances. The victim is, on all occasions in the recordings, fully clothed. There is nothing about the manner in which she is treated during her appearances in the recordings that would generate undue sympathy toward her, or outrage toward those with her. Having reviewed the surveillance recordings, we conclude that the trial court did not abuse its discretion by admitting this evidence at trial.

Defendant next argues that he was deprived of a fair trial when one of the detectives testified that the victim "was adamant" during her initial interview by police, shortly after the victim regained consciousness at the hospital and in response to being informed that a medical examination indicated that she had engaged in sexual intercourse, that she had not participated in consensual sex with anyone on the date in question. Defendant's argument lacks merit.

This Court reviews defendant's preserved challenge to the trial court's decision to permit this testimony, under the excited utterance exception to the hearsay rule, for an abuse of discretion. *Katt*, 468 Mich at 278; *Aldrich*, 246 Mich App at 113. "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Yost*, 278 Mich App at 379. MRE 803(2) allows testimony as to "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." To be admissible as an excited utterance, a statement must (1) arise out of a startling event, (2) be made before there is time to contrive and misrepresent, and (3) it must relate to the startling event. *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979); *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). Ultimately, the determining factor is "whether the statement was made when the witness was still under the influence of an

overwhelming emotional condition." *Id*. at 425. Because a trial court's determination of whether a declarant's statement was made while under the stress of an event is given "wide discretion," this Court will defer to the trial court when the determination of whether the declarant was under the stress of a startling event when the statements were made is a close one. *People v Smith*, 456 Mich 543, 552; 581 NW2d 654 (1998); see also *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995) (stating that a trial court's decision on a close evidentiary question cannot be an abuse of discretion).

The detective testified that she was called to the hospital by the attending nurse when the victim regained consciousness nearly 12 hours after being brought into the hospital. The detective asked the victim what she remembered from her time at the hotel. The victim, who remained "groggy," was able to describe events to the point of participating in the drinking game, but indicated that she did not remember anything further. The detective testified that when she informed the victim that her examination indicated that she had recently engaged in sexual intercourse, the victim had "no knowledge of it"; she was not aware that this had happened, she appeared to be in shock and disbelief, she "became very upset" and began crying, and she began speaking "a little bit more rapidly" than she was before the disclosure. It was while the victim was in this shocked and upset state that she told the detective that she had not had consensual sex with anyone while at the hotel. Considering the proximity of the victim's statements to her being informed that she had been sexually assaulted, the trial court concluded that the victim's statements were made while she remained under the stress of a startling event. *Straight*, 430 Mich at 424-425.

Indeed, defendant does not argue that the victim was not under the stress of a startling event at the time she made the challenged statement. Rather, defendant argues that victim's overwhelming emotional condition was the result of the police questioning rather than of the assault. While the fact that the victim's statements were made in response to police questions is relevant, it does not require automatic exclusion. *Straight*, 430 Mich at 426 n 6; *People v Petrella*, 124 Mich App 745, 759-760; 336 NW2d 761 (1983), aff'd 424 Mich 221 (1985). As previously stated, the determining factor is "whether the statement was made when the witness was still under the influence of an overwhelming emotional condition." *Straight*, 430 Mich at 425. Here, the victim remained under the influence of an overwhelming emotional condition, which resulted from having been made aware that she had been sexually assaulted while she was unconscious and unable to protect or defend herself, at the time she adamantly told the detective that she had not engaged in consensual sex with anyone at the hotel. On this record, we conclude that the trial court did not abuse its discretion by permitting the detective to testify to statements made by the victim upon being informed that a medical examination revealed that she had engaged in sexual intercourse. *Katt*, 468 Mich at 278; *Straight*, 430 Mich at 425.

Defendant next argues that he was denied a fair trial and his right of confrontation by the testimony of a detective that she became aware during her investigation that another suspect had implicated defendant as a potential suspect in the sexual assault of the victim. We disagree.

This Court reviews defendant's preserved challenge to the admission of the detective's testimony on hearsay grounds for an abuse of discretion. *Aldrich*, 246 Mich App at 113. However, defendant did not assert that the detective's testimony violated his right of confrontation. This Court reviews defendant's unpreserved confrontation claim for plain error

affecting defendant's substantial rights. *People v Pipes*, 475 Mich 267, 278; 715 NW2d 290 (2006); *Carines*, 460 Mich at 763-764. An unpreserved error is not a ground for reversal unless the defendant can demonstrate that the error was plain, that it affected the outcome of defendant's trial, and further, that it resulted in the conviction of an actually innocent person or that it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence." *Id.* (citation omitted).

Defendant objected, on hearsay grounds, to the detective's testimony that she learned from another suspect that defendant may have been involved in the commission of the sexual assault. In response, the prosecutor disavowed that the detective's brief statement was being offered for the truth of any out-of-court statement made by the other suspect, explaining that the questioning did not ask for the detective to testify to any specific statement made by anyone. Rather, the prosecutor explained, that the detective's testimony was offered merely to show the course of the investigation and to establish that the detective learned that defendant was a potential suspect. After defense counsel indicated that there was "nothing further," the trial court permitted the detective's single statement in this regard to stand, for the purpose of explaining "what the witness was doing." The detective did not testify to any out-of-court statement made by the other suspect and the testimony was not offered for the truth of any assertion by that suspect. We conclude that the trial court did not abuse its discretion in admitting the evidence. *Aldrich*, 246 Mich App at 113.

Defendant's assertion that the detective's testimony violated his right of confrontation likewise lacks merit. The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with all witnesses against him. . . ." US Const, Am VI. The Michigan Constitution also provides a defendant with this right. Const 1963, art 1, § 20. "The Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination." *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Here, however, the detective's testimony did not contain hearsay; she did not testify to any testimonial statement and the objected-to testimony was not offered to prove that defendant was involved in the sexual assault. The prosecutor expressly disavowed any such purpose, and the trial court ruled that the statement was not offered, nor admitted, for its truth. Accordingly, defendant's right of confrontation was not implicated by the detective's brief testimony. MRE 801(c); *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007) ("the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted"). No relief is warranted.

Finally, defendant asserts that the trial court abused its discretion in scoring offense variables (OVs) 8, 10, and 12. Defendant preserved these challenges by objection at sentencing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Accordingly, this Court reviews the trial court's scoring decisions "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports" the challenged scores. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009), quoting *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (citation omitted). This Court will uphold a trial court's scoring decision if there is any evidence in the record to support it. *Steele*, 283 Mich App at 490.

OV 8 addresses victim asportation or captivity. MCL 777.38. It is to be scored at 15 points if "[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 to commit the offense." MCL 777.38(1)(a). The trial court scored OV 8 at 15 points. While it does not appear that defendant was involved in the asportation of the victim from his third floor room to the second floor room rented by defendant's brother in which the victim was first sexually assaulted, both the surveillance recordings and the testimony at trial established that defendant participated in asporting the victim back to defendant's third floor room after one of the victim's friends discovered that she was being sexually assaulted in the second floor room. And, after the victim was returned to defendant's room, he forced everyone to exit the room, leaving the victim alone and unprotected, susceptible to further assault. The evidence further establishes that, after forcing everyone else to leave his room, defendant returned to the room, where he was again alone with the unconscious victim, and that he then permitted other men access to the victim. This was sufficient to support the trial court's conclusion that defendant asported the victim to a place of greater danger, secreting her away from hotel staff who could have rendered help and keeping her captive in the locked hotel room over which he had exclusive control, away from her friends and others who could have acted to protect her from further assault. *Steele*, 283 Mich App at 490.

OV 10 addresses the vulnerability of the victim. MCL 777.40. It is to be scored at 15 points if "predatory conduct is involved." MCL 777.40(1)(b). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Vulnerability is defined to be a "readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). As our Supreme Court explained in *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008):

> Factors to be considered in deciding whether a victim was vulnerable include (1) the victim's physical disability, (2) the victim's mental disability, (3) the victim's youth or agedness, (4) the existence of a domestic relationship, (5) whether the offender abused his or her authority status, (6) whether the offender exploited a victim by his or her difference in size or strength or both, (7) whether the victim was intoxicated or under the influence of drugs, or (8) whether the victim was asleep or unconscious.

The trial court scored 15 points for OV 10 based on its finding that defendant encouraged the victim to get drunk in order to have sex with her. The evidence at trial established that defendant took the underage victim to the hotel, rented a room, and supplied alcohol, that he enticed and encouraged the victim to drink shots of alcohol to the point of severe intoxication, and that he commented that his brother had asked him to get the victim drunk. This supports a finding that defendant engaged in preoffense conduct directed at the victim – that he deliberately targeted her – for the purpose of her subsequent victimization. Defendant, having rendered the victim vulnerable, then exploited that vulnerability by sexually assaulting her. Thus, there is record evidence supporting the trial court's decision to score OV 10 at 15 points, and this Court will uphold that decision. *Steele*, 283 Mich App at 490.

OV 12 addresses contemporaneous felonious acts. MCL 777.42. It is to be scored at five points if there is one contemporaneous felonious act against a person. MCL 777.40(1)(d). A

felonious criminal act is "contemporaneous" if it "occurred within 24 hours of the sentencing offense," and it "will not result in a separate conviction." MCL 777.42(2). The trial court scored OV 12 at five points explaining that "[b]ased on the DNA evidence, [it was] satisfied by a preponderance of the evidence that there was at least one other felony offense, at a minimum criminal sexual conduct fourth degree." Under MCL 750.520e(1)(c), a defendant commits fourth-degree sexual conduct if he has sexual contact with a person who he knows to be physically helpless. "'Sexual contact' includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose . . ." MCL 750.520a(q). Fourth-degree sexual conduct does not require penetration. And, "'[i]ntimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(e). There was evidence presented at trial that defendant's DNA was present in an anal swab taken from the victim. While it was unclear whether this swab was taken externally, from the victim's anal opening, or internally, from her rectal tract, the presence of defendant's DNA in or around the victim's anal opening is sufficient to support the trial court's conclusion that defendant committed "one other felony offense, at a minimum, criminal sexual conduct fourth degree." *Steele*, 283 Mich App at 490.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello