STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2011
v	No. 299568 Oakland Circuit Court
EDDIE LEE SYKES III, Defendant-Appellant.	LC No. 2008-224342-FC

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, three counts of third-degree criminal sexual conduct (CSC III) involving force or coercion, MCL 750.520d(1)(b), one count of unlawful imprisonment, MCL 750.349b, and one count of unarmed robbery, MCL 750.530. He was sentenced to 50 to 100 years in prison for the CSC I convictions and to 10 to 22 years in prison for all the remaining convictions. Defendant appeals as of right. We affirm defendant's convictions, but remand for the ministerial task of correcting the judgment of sentence.

This case involves a series of sexual assaults on five women, all of which occurred in Pontiac, in an area sometimes referred to as the Baldwin corridor. They took place between November 2007 and September 2008.

Defendant first argues that the admission of the prior testimonies of two victims violated both the Confrontation Clause, US Const, Am VI, and MRE 804(b)(1). Whether defendant was denied his right of confrontation is reviewed de novo, *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000), while a trial court's decision to admit evidence is reviewed for an abuse of discretion, *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion exists if the trial court's decision falls "outside the principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 804(b)(1) provides that if a witness is unavailable, prior testimony can be admitted if there was an "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." A witness is unavailable if the witness

> is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under

> subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown. [MRE 804(a)(5).]

Similarly, while the Sixth Amendment provides that a criminal defendant has the right to confront the witnesses against him,[1] if a witness is absent from trial and unavailable, a prior statement may be admitted without violating this right if the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998), the Court stated:

> The test for whether a witness is "unavailable" as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it.

Accordingly, when a prosecutor seeks to have the declarant's former testimony admitted at trial, he must establish "a reasonable good-faith effort to secure the declarant's presence at trial." *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). The trial court's factual findings regarding due diligence will not be disturbed absent clear error. *Id*.

The first victim was subpoenaed and appeared on at least the first two days of trial, but did not appear as instructed on the fourth day when the prosecutor intended to call her as a witness. When the prosecutor tried to reach the victim by telephone, the victim's mother said she was sick and was not coming, told the prosecutor to "go to hell," and hung up. The prosecutor immediately secured a material witness warrant. When attempts to reach her by the following day were unsuccessful, the court conducted a due diligence hearing to ascertain the efforts made to locate her.

An officer testified at the hearing that he had looked for the absent witness for 5 ½ hours in the vicinity where she was known to have worked as a prostitute. Another prostitute, who was also a victim, did not know of her whereabouts. A friend testified that she was frustrated on the first day of trial because things were not moving fast enough and that her mother was complaining about having to bring her from Arkansas in the first place and about being totally inconvenienced. He contacted the mother when she did not show up and learned that the mother had returned to Arkansas. When the friend called back, the mother answered, and he heard the mother ask if the number being called was his. He heard someone who sounded like the victim say "yes." The mother then hung up. The friend believed she was in Arkansas because he heard her voice, believed that she and her mother would be in court if they were in Michigan, and believed he would know if she was in Michigan because they had so many mutual friends and someone would know. The victim's boyfriend or ex-boyfriend had advised that he had not seen her in a couple of days and did not know anything. The trial court concluded that the

[1] See also Mich Const 1963, art 1, § 20.

prosecution had exercised due diligence. Based on the testimony presented, we cannot conclude that the trial court's due diligence ruling was clearly erroneous. *Briseno*, 211 Mich App at 14.

Defendant posits that local hospitals and jails could have been checked, but this would have made little sense when all indicators suggested that the victim was in Arkansas. He also argues that authorities in Arkansas should have been contacted, but there is no indication such an action would have resulted in her appearance in court. Moreover, defendant's argument is unavailing because the issue is not whether more stringent efforts would have procured the testimony. *Id*. Accordingly, the testimony was properly admitted. *Lukity*, 460 Mich at 488.

With regard to the second unavailable victim,[2] defendant asserts that he was unable to *effectively* cross-examine her at the time of the preliminary examination because he did not have her medical records, and that his right to confront her was therefore violated.

In *Crawford*, the Court held that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination," *Crawford*, 541 US at 53-54; see also *id.* at 59, because the right of confrontation is a procedural guarantee that reliability will be tested by "the crucible of cross-examination." *Id.* at 61. Furthermore, in *United States v Owens*, 484 US 554; 108 S Ct 838; 98 L Ed 2d 951 (1988), the Court held that the right guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 559 (further citations omitted, emphasis added).

Defense counsel had an open-ended opportunity to challenge the victim's credibility at the preliminary examination. On cross-examination, counsel effectively impeached her by highlighting that she did not initially report an alleged anal penetration. Defense counsel also elicited the victim's admission to smoking crack cocaine all day long on the day of the assault and had been using it all week. Although this was not as effective as defendant might have wished, it was effective. Moreover, defendant was allowed to further impeach her testimony with the medical records themselves. Under the circumstances, defendant's challenge to the admission of the preliminary examination testimony is without merit.

Defendant next argues that he was denied the effective assistance of counsel because his attorney did not present an eyewitness identification expert. In *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000) (citations omitted), the Court stated the following:

> In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing. Failure to move for a new trial or for a *Ginther*[1] hearing ordinarily precludes review of the issue unless the appellate

[2] This victim was deceased at the time of trial, and the parties stipulated that the cause of death was unrelated to the actions of defendant.

> record contains sufficient detail to support the defendant's claim. If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel. . . .

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[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant did not request a *Ginther* hearing, and there is nothing in the record from which one could conclude that an eyewitness expert would have testified in defendant's favor. Accordingly, he has effectively waived this issue. *Sabin*, 242 Mich App at 659. We note, however, that "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, the failure to call a witness or present other evidence can constitute ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Here, counsel elicited sufficient information to argue, as she did, that the complainants' credibility was suspect. Further, counsel "may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious," *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999), that drug use and trauma might have an effect on the accuracy of the identifications. Moreover, counsel may have rightly feared that such an expert might opine that the identification by all five witnesses suggested accuracy. Because the failure to call an eyewitness expert may have been a matter of trial strategy and it did not deprive defendant of a substantial defense, defendant has failed to establish ineffective assistance. *Payne*, 285 Mich App at 190.

Defendant next argues that offense variable (OV) 7 should not have been scored at 50 points based on a victim having been "treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." See MCL 777.37(1)(a). "This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. A trial court's scoring decision for which there is any evidence in support will be upheld." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (citations and internal quotation marks omitted).

Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). In one of the rapes at issue, not only were there six penetrations but defendant threatened to "blow [the victim's] motherfucking head off" such that she was "scared to death" and thought she was going to die. In light of the number of penetrations, the location of the penetrations, the injury to the victim, the biting of the victim, and defendant's laughter as the victim screamed for help, the scoring of this variable was supported by the evidence. Taken in isolation, any one of these factors might not escalate the crime to extreme brutality beyond that which might be associated with any rape. However, laughing at the victim's screams while inflicting such brutality is one marker of sadism. The description of the lengthy assaults by the

victim established that defendant's actions were aimed at humiliating her for his sexual gratification. Accordingly, there was no error in the scoring of OV 7.

Defendant next argues that the court erred in scoring 15 points for OV 10 based on the exploitation of a vulnerable victim. Defendant acknowledges that the conduct in this case was predatory. However, citing this Court's opinion in *People v Huston*, 288 Mich App 387; 794 NW2d 350 (2010), defendant argues that the victims were not inherently vulnerable and that it was not enough that they may have been rendered vulnerable by their circumstances. This Court was reversed in *People v Huston*, 489 Mich 451; 802 NW2d 261 (2011). There, our Supreme Court held that where predatory conduct was involved, vulnerability must be determined using only the statutory definition of "vulnerability". *Id.* at 464. MCL 777.40(3)(c) defines "vulnerability" as the "readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." The Court held that such vulnerability could be established by reference to a list in *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008)[3] (which focused primarily on inherent characteristics of the victim) but held that when looking at predatory conduct, vulnerabilities "may arise not only out of a victim's characteristics, but also out of a victim's relationships or circumstances." *Huston*, 489 Mich at 465-466. Thus, the Court upheld a score of 15 points for OV 10 where the defendant "enhanced the victim's 'vulnerability'" by the predatory conduct of "lying in wait while armed and hidden from view before he robbed her." *Id.* at 466.

The characteristics and circumstances of the victims in this case support a score of 15 points. First of all, there was a difference in size with respect to one victim and at least three victims were under the influence of substances. Based on the *Cannon* factors, this was evidence that supported the determination that these victims were vulnerable. However, the victims' circumstances also rendered them vulnerable. Defendant consistently targeted women who were alone walking the streets and/or prostituting in the early morning hours. Their circumstances rendered them more susceptible to injury or physical restraint. Moreover, they were likely chosen as victims because, as prostitutes, they would be less likely to report the rapes to the police. Accordingly, they were vulnerable, and OV 10 was properly scored.

Defendant next argues that the trial court erred in departing from the sentencing guidelines range. In reviewing a departure from the guidelines range, reasons given for departure are reviewed for clear error, the conclusion that a reason is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure, as well as the amount of the departure, are reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). An abuse of discretion exists if the sentence falls outside the range of principled outcomes. *Id.*

[3] This list is derived from (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.

MCL 769.34(3) provides:

> A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:
>
> (a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.
>
> (b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

In *Smith*, 482 Mich at 299-300, quoting *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003), the Court stated:

> In interpreting this statutory requirement, the Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history. [Alteration by *Smith*.]

In departing from the guidelines range, the sentencing court noted the following:

> (1) Although the score for OV 11 requires only two or more sexual penetrations, there were six penetrations with respect to Johnson, and although OV 13 scores a pattern of felonious criminal activity by looking for three or more crimes against a person within a five-year period, defendant committed 11 crimes against a person within an 11-month period of time;
>
> (2) The guidelines do not take into account "the Defendant's bold actions of continuing to attack women in face of the ongoing police investigation that he was made aware of when the officers seized his original vehicle";
>
> (3) The scores did not take into consideration "the severity of what [defendant] visited upon the individual victims." Whereas only 100 points were needed to reach an OV 6 level, a plotting of the additional 95 points would result in 6 additional levels that would roughly double the guidelines range;

(4) Deterring defendant from ever committing similar acts; and

(5) The City of Pontiac was victimized given the public perception that the city was unsafe.

With respect to the first reason, defendant notes that MCL 777.43(1)(c) provides that OV 13 is to be scored 25 points if there is a pattern of felonious criminal activity involving three "or more" crimes against a person. Similarly, MCL 777.41 provides that OV 11 is to be scored at 50 points if a crime involved two "or more" sexual penetrations. Defendant argues that the additional violations were already taken into account by the "or more" language. However, the sheer number of actual crimes involved in this case supported a determination that the offense characteristics were not adequately taken into account by the score.

With regard to the second reason, defendant argues that the fact that he kept offending while being investigated was not an objective and verifiable reason that would keenly and irresistibly grabs one's attention. Defendant came out of the house where the car was parked and the car was subsequently towed. After this event, defendant reoffended. The timing of these events was objective and verifiable, and that defendant was so brazen is remarkable.

As for the third reason, defendant asserts that the total OV score of 195 was only four hypothetical levels above the maximum level VI cell. Specifically, he notes that the top or sixth level for OV scores on the Class A grid is "100+". See MCL 777.62. Because the lower levels changed with each increment of 19 points, defendant asserts that the top level would have to be viewed as covering 100 to 119 points, and that the highest hypothetical level that defendant could reach would be the tenth level, covering 180 to 199 points. Defendant seems to be arguing that the extent of the departure, based on a rough doubling of the range, could not be justified on this basis. However, the sentencing court was not purporting to adhere to mathematical accuracies. It spoke of a "rough" doubling.[4] The 195 points nearly doubled the 100 points needed to reach the sixth OV level. It was a sufficient justification for the extent of the departure.

Defendant does not take issue with the fourth reason—deterrence. However, he argues that the fifth reason, the victimization of the City of Pontiac, was not objective and verifiable. It appears that the judge was simply reflecting on the effect that a serial rapist would have on a community. Although this factor was not objective and verifiable, from the record it is clear that the absence of this particular factor would have had no effect on the court's ultimate sentence. Because the trial court would have departed and would have departed to the same degree, resentencing is not required. See *Babcock*, 469 Mich at 260-261.

[4] Defendant's range was 171 to 356 months, reflecting enhancement based on habitual offender status. A doubling would have resulted in a maximum of 712 months, or roughly 59 years, compared to the 600 month/50 year sentence that defendant actually received.

Finally defendant asserts that the judgment of sentence incorrectly reflects that defendant was convicted of CSC I on Count 10 instead of CSC III. The prosecutor concurs. Accordingly, the judgment of sentence must be corrected.

Remanded for correction of the judgment of sentence, but affirmed in all other respects. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter