STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 11, 2013
v	No. 307409 Kent Circuit Court
DAVID VIDANA, Defendant-Appellant.	LC No. 10-010009-FC

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b; second-degree criminal sexual conduct, MCL 750.520c; assault with a dangerous weapon, MCL 750.82; and unlawful imprisonment, MCL 750.349b. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 23 to 45 years for the first-degree criminal sexual conduct convictions, 15 to 22-1/2 years for the second-degree criminal sexual conduct and unlawful imprisonment convictions, and four to six years for the felonious assault conviction. Defendant appeals as of right. We affirm.

Defendant argues that his convictions were not supported by sufficient evidence. He claims there was insufficient evidence for the jury to find that he aided and abetted the crimes of his brother, Miguel Vidana. Contrary to his assertion, defendant was only convicted as an aider and abettor for the criminal sexual conduct offenses. He was convicted of felonious assault and unlawful imprisonment for his own actions against Jesse Perdue. Defendant makes no argument that evidence of his actions against Perdue was insufficient for the jury to find that he committed felonious assault and unlawful imprisonment as the principal. We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.* Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of the crime. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

A person who aids or abets the commission of a crime may be convicted as if he directly committed the crime. *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). The three elements of aiding and abetting are the following:

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended commission at the time that the defendant gave aid and encouragement. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (quotation and alternation omitted).]

"Aiding and abetting describes all forms of assistance rendered to the perpetrator, including any words or deeds that may support, encourage, or incite the commission of a crime." *People v Jackson*, 292 Mich App 583, 589; 808 NW2d 541 (2011).

The victim of the criminal sexual conduct, CG, testified that, after Miguel brought her back to the bedroom, he and defendant spoke together in Spanish. Defendant then instructed her to do whatever Miguel told her to do. Miguel and defendant again spoke together in Spanish before defendant left the bedroom. CG also testified that, when Miguel brought her back to the bedroom and later when she left the apartment with Araceli Hernandez, defendant's sister, she saw Perdue laying face down on the living room floor. Perdue testified that defendant forced him from the bedroom by knifepoint. Defendant then instructed him to lay face down on the living room floor and threatened to stab him with the knife if he moved. While he was laying on the floor, Perdue heard CG say "no" to Miguel. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find that defendant's words to CG and his actions against Perdue were acts or encouragement that assisted Miguel in the criminal sexual conduct offenses and that defendant intended the commission of them. *Cline*, 276 Mich App at 642. Accordingly, defendant's convictions for first-degree and second-degree criminal sexual conduct, as an aider or abettor, were supported by sufficient evidence.

Because defendant makes no argument that evidence of his actions against Perdue did not provide sufficient evidence for the jury to find that he committed felonious assault and unlawful imprisonment, we decline to address these issues. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

Next, defendant argues that the trial court erred in denying his *Batson*[1] challenge to the prosecutor's use of a peremptory challenge on juror no. 4, an African-American male.[2] Our review is governed by which step of *Batson*'s three steps is before the Court:

> If the first step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of law

[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

[2] A *Batson* challenge is timely if it is made before the jury is sworn. *People v Knight*, 473 Mich 324, 348; 701 NW2d 715 (2005). Because defendant did not make his *Batson* challenge until after the jury was sworn, defendant's challenge was untimely and, therefore, could be considered waived. *Id.* at 346, 348.

> de novo. If *Batson*'s second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error. [*Knight*, 473 Mich at 345.]

Defendant claims that, because juror no. 4 had ideal qualifications to sit as a juror, the only reason for the prosecutor's use of a peremptory excuse on him was his race. Defendant also claims that the trial court erred in accepting the prosecutor's reasons for excusing juror no. 4 because the reasons were facially false. These arguments implicate the second and third steps.

The second step of *Batson* requires the prosecutor to articulate a race-neutral explanation for the peremptory challenge. *Id.* at 337. A race-neutral explanation is one that is based on something other than the juror's race. *Id.* The prosecutor explained that he excused juror no. 4 because (1) the juror had a bad experience with a police officer, (2) the juror had a conviction for minor in possession, and (3) the juror had family members who had been through the system on domestic violence charges. Because the prosecutor's explanations for excusing juror no. 4 were based on something other than the juror's race, the explanations were race neutral. *Id.*

The third step of *Batson* requires the trial court to determine whether the prosecutor's race-neutral explanation is a pretext and whether the opponent has proved purposeful discrimination. *Id.* at 337-338. The prosecutor's first and third explanations were facially false. Juror no. 4 said during voir dire that he had a conviction for minor in possession, but he did not feel that he had been treated inappropriately or unfairly by the police. Juror no. 4 also said that he had a friend from high school who had been convicted of domestic violence. However, the factual basis for the prosecutor's second reason was true: juror no. 4 had a conviction for minor in possession. Defendant makes no argument that this race-neutral reason was a pretext for discrimination. Accordingly, we affirm the trial court's denial of defendant's *Batson* challenge.

Defendant argues that the trial court erred in denying him an adjournment so that Miguel, whom the prosecutor believed was in Texas or Mexico, could be located and produced at trial. According to defendant, good cause existed for an adjournment because Miguel was the only person who could tell the jury that he was not involved in the criminal offenses. Defendant claims that the trial court, by not granting him an adjournment, denied him numerous constitutional rights and failed to hold the prosecutor to his duty to produce a necessary witness. The record does not contain a request by defendant for the trial court to adjourn trial from the scheduled May 9, 2011, trial date. Accordingly, the issue whether the trial court erred in failing to grant an adjournment is unpreserved. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007).

A trial court has no duty to grant an adjournment on its own motion. *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990).

> The longstanding rule of this state is that, in the absence of a request for a continuance, a trial court should assume that a party does not desire a continuance. Given this clear rule, [a] trial court cannot be faulted for failing to

> grant a continuance on its own motion. This rule makes sense because (1) it acknowledges the fact that the parties may have strategic reasons for wishing to proceed, and (2) a contrary rule would place trial courts in the difficult position of having to order unrequested delays as a prophylactic measure against reversal. [*People v Elston*, 462 Mich 751, 764-765; 614 NW2d 595 (2000).]

Because defendant never requested an adjournment after trial was scheduled to begin on May 9, 2011, the trial court cannot be faulted for failing to grant an adjournment on its own motion. *Id*. Accordingly, the trial court did not commit plain error when it failed to adjourn trial from the May 9, 2011 trial date. *Carines*, 460 Mich at 763.

In addition, defendant claims that trial counsel was ineffective for failing to take steps to ensure that trial would not proceed without Miguel as a witness, such as moving for an adjournment and requesting reasonable assistance from the prosecutor under MCL 767.40a(5) to locate Miguel. The determination whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error, but questions of constitutional law are reviewed de novo. *Id.*

To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation omitted).

At the conclusion of the evidentiary hearing, the trial court stated that, had trial counsel requested an adjournment, it would have denied the motion. The trial court did not clearly err in finding that a motion for an adjournment would have been futile. *LeBlanc*, 465 Mich at 579. First, defendant's trial had already been adjourned four times. The May 9, 2011, date was almost four months after trial had initially been scheduled to commence and was more than three years since the offenses had occurred. Second, defendant did not present any evidence at the evidentiary hearing to indicate that, as of May 9, 2011, anybody had any knowledge that law enforcement would soon locate and apprehend Miguel. Defendant has not presented us with any case law that indicates a trial court should adjourn trial indefinitely until a witness can be located. In addition, it was only after Miguel was returned to Michigan that trial counsel learned from Miguel that he was willing to testify for defendant. Trial counsel, therefore, would not have been able to offer the trial court any reasons to believe that Miguel, once located and apprehended, would have been willing to waive his Fifth Amendment right against self-incrimination to help defendant at trial. See *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Because trial counsel is not ineffective for failing to make a futile motion, *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), counsel's failure to move for an adjournment in this case did not deny defendant the effective assistance of counsel.

Also, trial counsel's failure to file a written request under MCL 767.40a(5) for reasonable assistance in locating Miguel did not deny defendant the effective assistance of counsel. There is nothing in the record to indicate, had trial counsel filed a written request under MCL 767.40a(5), that either (1) the prosecutor or law enforcement would have taken any action, in addition to the efforts already taken to locate Miguel, that would have resulted in Miguel being located, or (2) any information given to defendant by the prosecutor would have resulted in defendant locating Miguel. Thus, even if trial counsel's failure to file a written request under MCL 767.40a(5) fell below objective standards of reasonableness, there is no reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Uphaus (On Remand)*, 278 Mich App at 185.

Next, defendant argues that the trial court erred in denying his motion for a new trial based on newly discovered evidence, an affidavit by Miguel. Defendant obtained the affidavit after Miguel was apprehended in Texas and returned to Michigan. We review a trial court's decision on a motion for a new trial based on newly discovered evidence for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

In *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), our Supreme Court iterated the test that governs motions for a new trial based on newly discovered evidence:

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.

The defendant has the burden to satisfy all four elements of this test. *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).

Evidence known to a defendant at the time of trial cannot be classified as newly discovered evidence and will not be considered grounds for a new trial. *Id.* at 273, 281, 284. Defendant never disputed that he and Miguel were at the apartment where CG and Perdue testified the criminal offenses occurred. It was defendant's theory that, although Miguel may have committed the criminal sexual conduct offenses, he was simply present in the apartment and did not assist Miguel in any crimes. Thus, defendant was aware at all times that Miguel could provide his proposed testimony. Accordingly, because Miguel's proposed testimony was known to defendant at the time of trial, it is not newly discovered evidence and cannot be

grounds for a new trial. *Id.* The trial court did not abuse its discretion in denying defendant's motion for a new trial based on newly discovered evidence. *Lester*, 232 Mich App at 271.[3]

In reaching this conclusion, we reject defendant's reliance on an exception envisioned by the Court in *People v Terrell*, 289 Mich App 553; 797 NW2d 684 (2010). In *Terrell*, this Court held that when a defendant knew or should have known of a codefendant's exculpatory testimony, but was unable to present that testimony at trial because the codefendant invoked his right against self-incrimination, the codefendant's posttrial statements did not constitute newly discovered evidence. *Id.* at 555. The Court clarified that its holding did not preclude the possibility that a codefendant's posttrial statements could qualify as newly discovered evidence. *Id.* at 570. However, the context in which this clarification was given makes clear that the Court was only stating that a codefendant's posttrial statements may constitute newly discovered evidence only if the defendant did not know, and should not have known, of the codefendant's potential testimony at the time of trial.

Defendant further argues that the trial court erred in denying his motion for a new trial based on the verdict being against the great weight of the evidence. He generally claims that the evidence failed to establish that he aided and abetted Miguel in the criminal sexual conduct offenses. We review a trial court's decision on a motion for a new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

A verdict is against the great weight of the evidence when the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Lacalamita*, 286 Mich App at 469. A verdict may only be vacated when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. *Id.* As previously established, *supra*, defendant's convictions were supported by sufficient evidence. The

[3] In addition, we conclude that the trial court did not abuse its discretion in determining that Miguel's proposed testimony was cumulative and would not make a different result probable on retrial. *Cress*, 468 Mich at 692. Besides CG and Perdue, defendant and Miguel were not the only persons inside the apartment. Another brother was at the apartment at the time of the criminal offenses. This brother testified that defendant kept his cool after defendant argued with CG and that Perdue was not in the apartment. He specifically denied seeing Perdue lying face down on the living room floor. Hernandez and a fourth brother were also at the apartment, albeit not at the time of the criminal offenses. This brother testified that he separated defendant and CG after they got into an argument and that everyone then calmed down. Hernandez testified that, when she returned to the apartment, defendant and Miguel were in the living room and there was not a male lying on the floor. Miguel's proposed testimony was cumulative to the testimony of these three siblings, and because the testimony of the three siblings contradicted the testimony of CG and Perdue, Miguel's testimony would not make a different result probable on retrial. We note that, because Miguel did not admit to committing criminal sexual conduct in his affidavit, the mere substance of his proposed testimony would not make him a credible witness.

convictions were supported by the testimony of CG and Perdue. Admittedly, the testimony of CG and Perdue was impeached. Their testimony regarding what happened in the apartment was impeached by the testimony of Hernandez and defendant's two other brothers, who were also at the apartment. In addition, Perdue's testimony was impeached by Officer James Albert's testimony that Perdue stated, after the incident, that he never saw a knife and by Perdue's subsequent written statement, which did not mention a knife. However, conflicting testimony, even if impeached, is not a sufficient ground for granting a new trial. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Although impeached, the testimony of CG and Perdue was not "so far impeached" that it was deprived of all probative value or that the jury could not believe it. *Id.* at 645-646. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial on the ground that the verdict was against the great weight of the evidence. *Lacalamita*, 286 Mich App at 469.

Defendant next argues that the trial court erred in scoring offense variables (OVs) 1, 2, 3, 4, 8, 9, 10, and 13. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). We will uphold a scoring decision for which there is any evidence in support. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant claims that the trial court erred in scoring five points for OV 1, MCL 777.31 (aggravated use of a weapon), and five points for OV 2, MCL 777.32 (lethal potential of the weapon possessed or used), because the testimony of Perdue, the only person who testified that he had a knife, was successfully impeached and because, although the evidence showed that Miguel possessed a knife, the great weight of the evidence demonstrated that he did not aid or abet Miguel in the commission of any offenses. Five points are to be scored for OV 1 if "[a] weapon was displayed or implied." MCL 777.31(1)(e). Five points are to be scored for OV 2 if "[t]he offender possessed or used any other potentially lethal weapon." MCL 777.32(1)(f). Although Perdue's testimony that defendant forced him out of the bedroom by knifepoint and that, while he was lying face down on the living room floor, defendant threatened to stab him with the knife if he moved was impeached, the testimony is still record evidence that defendant possessed and displayed a knife. Accordingly, we affirm the trial court's scoring of OV 1 and OV 2. *Elliott*, 215 Mich App at 260.

Defendant asserts that the trial court erred in scoring ten points for OV 3, MCL 777.33 (physical injury to a victim). Ten points are to be scored for OV 3 if "[b]odily injury requiring medical treatment occurred to a victim," MCL 777.33(1)(d). "'[R]equiring medical treatment'" refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). For purposes of OV 3, "bodily injury" means physical damage to an individual's body. *People v Cathey*, 261 Mich App 506, 514; 681 NW2d 661 (2004). Here, the victim had multiple vaginal tears and abrasions, a 19 millimeter tear on her upper right arm, and bruises on her legs. These injuries are sufficient to constitute bodily injury and are of the type that would generally necessitate medical treatment. The trial court did not abuse its discretion in scoring ten points for OV 3.

Defendant claims that the trial court erred in scoring ten points for OV 4, MCL 777.34 (psychological injury to a victim). Ten points are to be scored for OV 4 if "[s]erious

psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The fact that professional treatment was not sought is not conclusive. MCL 777.34(2); *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012). CG testified that she no longer trusts anyone. In a victim impact statement, CG also wrote that her trust is completely gone. She lives in fear that defendant or a member of his family is going to come after her. She does not go anywhere by herself. She sleeps with a dresser in front of her bedroom door. She wakes her mom in the morning so that her mom can watch her as she gets in her car to go to work. CG wrote that defendant completely ruined her life. CG's statements are evidence that she suffered serious psychological injury. See *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012). Accordingly, we affirm the trial court's scoring of OV 4. *Elliott*, 215 Mich App at 260.

Defendant claims that the trial court erred in scoring 15 points for OV 8, MCL 777.38 (victim asportation or captivity), because there is no evidence that he had physical contact with CG and the evidence did not establish that Miguel moved CG into the bedroom. Fifteen points are to be scored for OV 8 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 testimony showed that CG originally ran into the bedroom where Perdue was sleeping because she was scared. She and defendant had gotten into an argument and defendant had tried to punch her. CG testified that Miguel, after he forced her to watch defendant beat Perdue before he was later taken to the living room, brought her to the kitchen, where he grabbed a knife, and then walked her back to the bedroom. At that point, CG was alone in the bedroom with Miguel, who had a knife. Miguel took CG to a place or situation of greater danger when he brought her back to the bedroom. Accordingly, we affirm the trial court's scoring of OV 8.

Defendant asserts that the trial court erred in scoring ten points for OV 9, MCL 777.39 (number of victims), because he did not say or do anything that endangered CG. Ten points are to be scored for OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). Each person who was placed in danger of physical injury or loss of life is to be counted as a victim. MCL 777.39(2)(a). There were two victims. Both CG and Perdue were placed in danger of physical injury. In addition, the record does not support defendant's claim that he did not do or say anything that endangered CG. The evidence showed that defendant forced Perdue to lay face down on the living room floor, which prevented Perdue from rendering assistance to CG, who was alone in a bedroom with Miguel. Because record evidence supports a finding that there were two victims, we affirm the trial court's scoring of OV 9. *Elliott*, 215 Mich App at 260.

Defendant asserts that the trial court erred in scoring 25 points for OV 13, MCL 777.43(1) (continuing pattern of criminal behavior). Twenty-five points are to be scored for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). A trial court must count "all crimes within a 5-year period, including the sentencing offense," regardless whether the crimes resulted in convictions. MCL 777.43(2)(a). For his conduct on April 26, 2008, defendant was convicted of two counts of first-degree criminal sexual conduct, second-degree criminal sexual conduct, felonious assault, and unlawful imprisonment. These five offenses are crimes against a person. MCL 777.16d; MCL 777.16q; MCL 777.16y. Accordingly, record evidence supports the trial court's score of 25 points for OV 13, and we affirm it. *Elliott*, 215 Mich App at 260.

Finally, defendant claims that the trial court erred in scoring five points for OV 10, MCL 777.40(1) (vulnerable victim). It is unnecessary to address OV 10 because, assuming the score of five points was in error, this would merely decrease defendant's total OV score of 85 to 80, leaving him at OV level V on the grid. MCL 777.62. Absent a change in the minimum sentence range, a remand for resentencing is not necessary. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) ("Where a scoring error does not alter the appropriate guidelines range, resentencing is not required.").

Lastly, defendant argues that the cumulative effect of errors denied him a fair trial. However, because there were no errors, there can be no cumulative effect of errors meriting reversal. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra