STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2012
v	No. 305357 Wayne Circuit Court
JAMES ALLEN BROOKS, Defendant-Appellant.	LC No. 10-011439-01-FC

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct (CSC I),[1] assault with intent to do great bodily harm less than murder (AIGBH),[2] domestic violence,[3] resisting or obstructing a police officer,[4] and interfering with a crime report.[5] Defendant was sentenced to concurrent prison terms of 15 to 25 years for CSC I, six to 10 years for AIGBH, and 63 days in the county jail, with 63 days jail credit, for each of the other crimes. Defendant appeals by right. We affirm.

I. FACTS

The charges involved an incident at the home defendant had shared with his wife, "VB." VB had filed for divorce and defendant had just moved out. The couple had a five-year-old daughter. On the night in question, defendant came over to get a microwave at about 9:00 p.m. VB testified that she was watching television and said "Hello" to defendant. He responded by

[1] MCL 750.520b(1)(f). Defendant was acquitted of a separate count of CSC I, MCL 750.520b(1)(f) (forcible penetration with a cell phone).

[2] MCL 750.84.

[3] MCL 750.81a(2).

[4] MCL 750.81d(1).

[5] MCL 750.483a(2)(b).

screaming, hitting her, and knocking over her chair. Then he got on top of her and started choking her. He shoved his fingers down her throat, struck her in the face, grabbed her hair, and hit head on the floor repeatedly. She tried to get her cell phone, but defendant took it and started beating her with it. He was also shoving the phone down her throat and she gagged. Then she tried to get up and defendant picked her up and threw her into the entertainment center. He continued to hit her and to bang her head on the ground. She asked him to let her stand up because her head was spinning. VB would stand up, and defendant would knock her down again. This went on for "a really long time."

At some point, VB testified, she apparently "blacked out," because the next thing she knew she "woke up" naked while defendant was raping her. Defendant scratched her breast, and pinched and squeezed her nipples. He said, "I am going to kill you." VB may have blacked out again, because the next thing she remembered was defendant running the water in the kitchen. At this point, VB ran upstairs. She had trouble seeing because her contact lens had fallen out from defendant hitting her in the face. She closed herself in the bathroom and tried to call 911 on the land line. Defendant came in the room, took the phone, and asked why she called 911. She answered that she did not think the call went through. Defendant took out the phone's batteries. He then picked VB up and threw her down on the bathroom floor.

VB tried to crawl away, but defendant grabbed her and pulled her back. At this point, the couple's daughter woke up and came down the hall crying. VB begged defendant to let her calm the child down. Defendant agreed, but repeated that he was going to kill VB. VB then went and laid down with the child, who continued to cry. Defendant came and laid on the other side of the child, and said, "You're not going to see daddy for a really long time, he did something really, really bad."

Police, who had been dispatched to the home, knocked at the door, and defendant went into a home office which contained a gun safe. Defendant said to VB, "I'm not going to jail for this, I'm going to kill you." VB went downstairs to unlock the door. Defendant came up behind her and slammed it shut. The police instructed defendant to open the door. VB ran back upstairs with her daughter. A few minutes later, she returned and saw defendant on the floor in handcuffs. At trial, photos were admitted showing her bruises and the home's disarray.

Huron Township police officers testified regarding the struggle with defendant. Arriving at the home, Officer Jason Otter saw VB, her face bloody. VB said, "Help me, please." Then defendant came and yanked her back inside the home and slammed and locked the door. Officer Otter kicked the door until the door jamb gave way, but defendant slammed the door shut again.

Next, Officer Hindley arrived and shoved his shoulder into the door. Ultimately, police were able to gain entry into the home. Officer Hindley and defendant began to wrestle and were "slamming into the walls." Defendant, who was training to be a martial arts fighter, had Officer Hindley in a headlock. Officer Otter had to spray defendant with pepper spray before he let Hindley go. Hindley also tasered defendant. During this time, VB was walking around "like a zombie." Officers recovered five long guns from the gun safe. Defendant's mother came and retrieved defendant's and VB's daughter.

VB was hospitalized for two days. She did not tell police or examining physicians about the sexual assault. She first told her sister, who informed hospital personnel.

II. EXPERT TESTIMONY

Kristine McGregor, RN, a sexual assault forensic examiner, had examined VB, and testified for the prosecution at trial. Following voir dire, the trial court certified McGregor as an expert in sexual assault exams and trauma nursing, and defense counsel stated that he had no objection to the certification. McGregor testified that she had examined VB in the hospital, and that VB had numerous injuries. Specifically, McGregor testified that VB suffered abrasions, contusions and hemorrhages. However, VB had no broken bones, concussions, or injuries to her vaginal area. McGregor testified that injuries to the vagina are "not very often" found after a sexual assault, and that eighty percent of rape victims did not incur any physical injury in that area because the vagina is pliable.

McGregor also testified regarding rape trauma syndrome (RTS). McGregor explained that RTS is characterized by shock and confusion in the acute phase, which lasts anywhere from a few hours to two days after the sexual assault. In later phases, sensory phenomena such as a familiar scent might bring back the emotions and fears VB experienced. In the last phase, the person would return to a normal lifestyle, accept what happened, and try to move on. McGregor testified that VB was "definitely in the acute phase" when McGregor saw her the day after the incident.

On appeal, defendant argues that the trial court erred by permitting McGregor's testimony regarding RTS because such testimony exceeded the scope of her expertise in sexual assault exams and trauma nursing. Specifically, defendant argues that "[t]his trial was a 'one on one' credibility contest between [defendant] and his wife. Nurse McGregor's expert opinion [with regard to RTS] impacted the jury on the resolution of VB's credibility." We disagree.

Defendant did not object to McGregor's testimony regarding RTS, and raises an objection to her testimony for the first time on appeal; therefore, this issue is unpreserved.[6] Accordingly,

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[6] The prosecution argues in its brief that defendant waived this issue entirely because, prior to the commencement of McGregor's testimony, defendant's trial counsel specifically stated that he had no objection to her expert certification. We disagree. "[W]aiver is the intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999) (citations and quotations omitted). It does not follow that by agreeing that McGregor was qualified to testify regarding sexual assault exams and trauma nursing, defendant "intentional[ly] relinquish[ed] or abandon[ed]" his right to object to testimony that arguably exceeded the scope of her expertise. *Id*. The prosecution fails to recognize the distinction between waiver of objection to an expert's qualifications and a separate objection that specific aspects of the expert's testimony exceeded the scope of those qualifications.

> to avoid forfeiture . . . [defendant bears to burden to show that] 1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain . . . error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.[7]

Defendant has failed to meet his burden to show that plain error occurred here. Even assuming, arguendo, that the trial court erred by allowing McGregor to testify about RTS, defendant has failed to show that the error was "plain, i.e., clear or obvious," or that "the plain error . . . affected the outcome of the lower court proceedings."[8] McGregor's testimony regarding RTS was not the sole evidence of sexual assault in this case. VB testified that she was raped by defendant during the course of a violent physical assault. The evidence of the physical assault was substantial and, as noted, McGregor testified that apparent physical injury to the vagina is not common even after a violent rape.[9] Accordingly, the jury could have concluded, even without McGregor's testimony regarding RTS, that defendant was guilty of CSC I. In short, even if McGregor's testimony regarding RTS was improper, defendant has provided no evidence, and made no argument, that the jury would not have found VB's testimony credible and convicted him without McGregor's testimony. Defendant has accordingly forfeited his right to appellate review of this issue.

III. PRIOR ACTS

Defendant next argues that the trial court erred by ruling admissible the prosecution's evidence regarding defendant's prior threats and acts of violence against VB. We disagree.

Because defendant failed to preserve this issue at trial, defendant again bears the burden to avoid forfeiture of the issue by demonstrating that the admission of the evidence of which he now complains amounted to plain error affecting his substantial rights.[10] Generally, prior acts evidence is governed by MRE 404(b)(1). However, in cases of domestic violence, such as here, a different rule, MCL 768.27b(1), controls. That rule states, in relevant part:

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[7] *Id*. at 763 (citations and quotations omitted).

[8] *Id*.

[9] Defendant does not dispute that this portion of McGregor's testimony was within the scope of her expertise.

[10] *Carines,* 460 Mich at 763.

> [I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

Under MCL 768.27b(1), evidence of other acts of domestic violence may be used to prove any other issue, including defendant's character, if the evidence is relevant and meets the test in MRE 403.[11] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[12] MRE 403 provides that evidence is inadmissible when its prejudicial effect substantially outweighs its probative value. "Unfair prejudice [under MRE 403] may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence."[13] Indeed, prior acts evidence under MCL 768.27b(1) is admissible even if the prior acts are identical to the charged crime.[14]

Here, the evidence of defendant's prior assaults on VB was relevant because it "illustrated the nature of defendant's relationship with [VB] and provided information to assist the jury in assessing her credibility."[15] Moreover, the evidence did not violate MRE 403. At trial, VB testified about only one of the three acts allowed by the court, thus lessening any prejudicial effect. Further, VB's testimony regarding her injuries was corroborated by police photos, testimony of police who arrived at the scene, VB's medical records, and McGregor's graphic descriptions of injuries. Weighed against this other evidence, we find it improbable that the jury gave "undue or preemptive weight"[16] to the evidence of defendant's prior acts, particularly in light of the fact that the evidence was of a prior assault less severe than the charged crime in the instant case. Accordingly, because the evidence of which defendant complains was relevant and not substantially more prejudicial than probative under MRE 403, it was properly admitted under MCL 768.27b(1). We therefore conclude that defendant has failed meet his burden to establish that the admission of this evidence amounted to plain error, and has thus forfeited his right to review of this issue.

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[11] *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

[12] MRE 401.

[13] *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008) (citations omitted).

[14] *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

[15] *Id*.

[16] *Blackston*, 481 Mich at 462.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel when his attorney failed to call him as a witness and conceded his guilt of aggravated domestic violence.[17] We disagree.

Whether a defendant's trial counsel was ineffective "is a mixed question of fact and constitutional law."[18] A trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo.[19] Moreover, where, as here, such a claim is unpreserved, our review is limited to mistakes apparent on the record.[20]

To establish a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below objective standards of reasonableness, and (2) but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different.[21] Effective assistance of counsel is presumed and the "defendant bears a heavy burden to prove otherwise."[22] Decisions to decline to object to procedures, evidence, or an argument may fall within sound trial strategy.[23] Defense counsel is afforded wide latitude on matters of trial strategy, and this Court abstains from reviewing such decisions with the benefit of hindsight.[24]

Concerning the right to testify, defendant argues that his attorney's failure to call him as a witness amounted to a waiver of the defense of consent and deprived him of the right to present a defense in his own words. Specifically, defendant argues that he did not take the stand because his counsel told him it was not necessary, since a jury would not convict him of sexual assault. Also, defendant claims that his attorney did not discuss the consequences of not testifying on the defense of consent. According to defendant, VB had consented to sex with defendant on other occasions after filing for divorce, and defendant's mother testified that she "knew" the couple had sex because of the way VB's clothes were left on the floor.

We detect no ineffective assistance of counsel because the court questioned defendant at length regarding his decision and he unequivocally waived his right to testify. Defendant

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[17] Defendant filed an untimely motion to remand to develop these claims, which this Court denied.

[18] *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

[19] *Id.*

[20] *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009).

[21] *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

[22] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[23] *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008).

[24] *Id.* at 242-243.

acknowledged that he knew he had the right to testify. He said he had discussed the plusses and minuses with his attorney, was satisfied with the attorney's counsel in this regard, and had voluntarily decided not to take the stand. Further, the defense of consent was not foreclosed by defendant's not testifying. Defendant's mother had presented this theory, and defense counsel argued that no sexual assault (and possibly no penetration) occurred that night. The defense of consent can be raised through cross-examination of the complainant and other methods.[25]

Additionally, defendant has failed to meet his burden to show that his trial counsel's decision to not call him as a witness was not a decision of trial strategy. Faced with the strong evidence of brutality against VB, defendant may have wished not to undergo cross-examination. Indeed, at trial, defendant stated that the decision not to testify was his own after discussions with his attorney. Accordingly, we are not persuaded that the decision not to testify was the product of ineffective assistance of counsel.

Defendant's next claim of ineffective assistance deals with his counsel's concession, in opening statement, that defendant was guilty of the misdemeanor of domestic violence. Defendant asserted in his affidavit that this was not proper strategy and he did not discuss it with his attorney or agree to it. Defendant cites *Wiley v Sowders*,[26] where the Court characterized an attorney's concession of a client's guilt as functionally equivalent to a guilty plea. Defendant's argument is misplaced. Courts have drawn a distinction between conceding guilt on a lesser charge or a crime rather than the most serious charge. Indeed, "arguing that the defendant is merely guilty of the lesser offense is not ineffective assistance of counsel. Where defense counsel . . . recognizes and candidly asserts the inevitable, he is often serving his client's interests best by bringing out the damaging information and thus lessening the impact." [27] Here, defense counsel conceded guilt only on a misdemeanor, while arguing that the more serious charges were not proven. Accordingly, defendant has failed to establish ineffective assistance of counsel.

V. SENTENCING

Defendant also argues that his attorney's agreeing to change the recommended scoring on the sentencing variables was ineffective assistance of counsel. Defendant also argues that his counsel's agreeing to change the recommended denied him the right to be sentenced on accurate information. We disagree.

This Court reviews for clear error the trial court's cited factors for departing from a recommended sentencing range.[28] The Court reviews de novo whether the factors are objective and verifiable, and reviews for abuse of discretion the lower court's determination that the

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[25] *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

[26] 647 F2d 642, 650 (CA 6, 1981).

[27] *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984) (citations omitted).

[28] *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008).

factors provided substantial and compelling reasons to depart from the recommended range.[29] The standard of proof for sentencing variables is preponderance of the evidence.[30] Interpretation and application of the sentencing guidelines is a question of law, which is reviewed de novo.[31]

At sentencing, defense counsel agreed that the score on offense variable (OV) 11 should have been 25 rather than 0. Counsel had discussed this matter with the assistant prosecutor, and possibly the court, off the record. MCL 777.41(1)(b) provides that in scoring OV 11, criminal sexual penetration, the court should assign 25 points if one penetration occurred. Here, the sentencing information report scored OV 11 at 0, for an OV score of 85, which was OV level V.

Our review of the record shows that the scoring of OV 11 at 25 was incorrect. Defendant was charged with a second count of CSC I. VB testified that, on the night of the assault, defendant screamed that she "liked [her] cell phone so much" and "tried to penetrate [her] vaginally with [her] cell phone." Defendant was ultimately acquitted of CSC I related to the cell phone. Because points should not be scored for the penetration that forms the basis of a CSC I conviction,[32] the only possible circumstance supporting a score of 25 points would have been penetration of VB's genital opening with her cell phone. However, VB did not testify that defendant penetrated her with her cell phone. She stated at trial and at the preliminary examination that defendant "tried" to penetrate her vagina with her cell phone. Her statements did not show penetration as defined in MCL 750.520a(r).[33] Therefore, it was not appropriate to use the cell phone incident to increase OV 11 to 25 points.

However, the error on OV 11 does not require reversal. The guidelines score contained another mistake in defendant's favor, on OV 5. The couple's young daughter clearly suffered serious psychological harm as the result of defendant's assaultive acts against VB and the police. At sentencing, it was revealed that the child was in counseling. MCL 777.35(1)(a) provides for a score of 15 points on OV 5, where a family member suffers serious psychological injury requiring treatment. Because a correct score of 15 on OV 5 would leave the OV score at level VI, even with a score of 0 on OV 11, we find no error requiring resentencing. Moreover, regarding defendant's claim of ineffective assistance as it relates to sentencing, because the sentencing would have been the same even with a proper score on OV 11, defendant has failed to establish the outcome-determinative prejudice necessary to establish ineffective assistance of counsel.[34]

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[29] *Id*.

[30] *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

[31] *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

[32] MCL 777.41(2)(c).

[33] "[A]ny . . . intrusion, however slight, of any part of a person's body or any object into the genital or anal openings."

[34] *Frazier*, 478 Mich at243.

VI. CUMULATIVE EFFECT OF ERRORS

Defendant's final argument is that the cumulative effect of the errors reviewed above denied him a fair trial and requires reversal. We disagree. Only "actual errors" are aggregated when reviewing this argument.[35] Moreover, "in order to reverse on the basis of cumulative error, the effect of the errors must [be] seriously prejudicial in order to warrant a finding that defendant was denied a fair trial."[36] In the present case, the only error dealt with sentencing and, as discussed, reversal on that issue is not warranted. Accordingly, reversal is not required on a cumulative error theory.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro

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[35] *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

[36] *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 828 (2003) (quotations and citations omitted, brackets in original).