STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2013
v	No. 308145 Saginaw Circuit Court
JAMES WALTER GUNN, Defendant-Appellant.	LC No. 10-034957-FC

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM.

Defendant James Gunn appeals as of right his conviction, following a jury trial, of one count of first-degree criminal sexual conduct (CSC I).[1] The jury found that Gunn was not guilty of one count of kidnapping.[2] The trial court sentenced Gunn to serve 225 to 360 months' imprisonment, and ordered him to pay fees that included a $130 Crime Victims' Rights fee. We affirm.

I. FACTS

The complainant testified that on the evening of August 1, 2008, her friend and her boyfriend asked her to purchase alcohol. She drove to a party store, where she arrived at about midnight. When she began to exit her vehicle, she was grabbed by the neck. A male voice told her to "[g]et in the car," and pushed her back into the car.

The complainant testified Gunn sat down in the passenger seat and again grabbed her neck, telling her to drive. The complainant testified that she drove where she was told, that Gunn's hand was on her neck the entire time she was driving, and that he jerked her head around. The complainant testified that when her cell phone kept ringing, Gunn picked it up with his other hand and beat her in the face with it.

[1] MCL 750.520b.

[2] MCL 750.349.

The complainant testified that Gunn told her to park near a school, where he forced her to perform fellatio. At some point afterward, a red SUV arrived; Gunn left her vehicle, and went into the SUV. She called her friend to ask how to get back to her house, but that she did not call 911 because she thought they would instruct her to stay at the scene and she was concerned that Gunn would come back.

Gunn testified that he was at the party store at about 11:15 p.m. with his friends, including James Donald and Mark White. Donald testified that White drove them to the store in a red SUV. Gunn testified that after he made purchases, the complainant approached him in the parking lot and asked if he knew where she could purchase crack cocaine. Gunn testified that he gave the complainant directions to a "crack house," but she asked him to drive her there in her vehicle.

Donald testified that Gunn told him that he was going to ride with the complainant; Gunn drove her car, following White's SUV. Donald and White stopped by the school, and White dropped Donald off. Donald testified that a short while later, the complainant dropped Gunn off and asked how to get to the highway. The complainant did not appear injured.

Gunn testified that he drove the complainant's vehicle to his cousin's house near a school and called his drug dealer a few times, but that his drug dealer did not respond. Gunn testified that he did touch and kiss the complainant while they were in the car, but that he did not strike her. He testified that he did not force the complainant to engage in fellatio, but that she chose to do so. Gunn testified that when his drug dealer did not arrive, the complainant said that she had to leave because it was late and her boyfriend would be upset.

The complainant's boyfriend took her to the emergency room at Covenant Hospital, where she was treated and given stitches. Sue Gatza, who was working at Covenant Hospital that evening as a sexual assault response nurse, testified that she treated the complainant for bruises, areas of tenderness on her head, and a laceration on her lip that required stitches. Gatza also testified that the complainant was very upset and crying.

Saginaw Police Officer Roger Pate testified that he arrived at the hospital at around 9:00 a.m. on August 2 to interview the complainant and collect evidence. An evidence technician recovered a partial hand print from the outside of the complainant's car, above the driver's side door. The evidence also included a facial swab, and blood from the complainant's cell phone.

The complainant testified that in 2010, she saw a picture of Gunn in the paper, and recognized him as the man who assaulted her in 2008. Detective Oberle testified that he interviewed Gunn and showed Gunn the complainant's picture. Detective Oberle testified that Gunn denied leaving the party store with the complainant, or going anywhere with her in her vehicle, or having any kind of sexual contact with her. Gunn testified that he did not think that Detective Oberle was asking about fellatio.

Michigan State Police forensic scientist Gary Ginther testified that he compared the palm print with a copy of Gunn's palm print that was available in the Automated Finger Identification System, and determined that it was a match. Michigan State Police forensic scientist Lauren Lu testified that there was more than one person's blood on the cell phone, and that the complainant

was the blood's primary donor. Lu testified that the complainant's facial swab contained sperm matching Gunn's DNA.

II. IMPEACHMENT EVIDENCE

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision whether to admit evidence.[3] But we review de novo the preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it.[4] The trial court abuses its discretion when it chooses an outcome outside the reasonable range of principled outcomes.[5]

B. LEGAL STANDARDS

A party must satisfy MRE 613(b) to impeach a witness's credibility with a prior inconsistent statement.[6] A statement is inconsistent when it omits a material fact that the witness previously testified to, including when the witness claims not to remember making a prior inconsistent statement.[7] But a witness may not be impeached with extrinsic evidence of a prior statement on a collateral matter.[8]

C. APPLYING THE STANDARDS

Here, Gunn argues that the trial court improperly prevented him asking Officer Pate whether the complainant told him in August 2008 that she went to the party store to flirt with the clerk. We agree, but conclude that the error is harmless and does not warrant reversal.

The trial court ruled that Gunn could not question Officer Pate about the complainant's reasons for going to the party store because the matter was a collateral matter. A collateral matter is "[a]ny matter on which evidence could not have been introduced for a relevant purpose."[9] Evidence that affects the credibility of the victim is relevant.[10]

---

[3] *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001); *People v Steele*, 283 Mich App 472, 478, 488; 769 NW2d 256 (2009).

[44] *Layher*, 464 Mich at 761.

[5] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[6] *Howard v Kowalski*, 296 Mich App 664, 677-678; 823 NW2d 302 (2012).

[7] *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995).

[8] *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007).

[9] *Steele*, 283 Mich App at 488, quoting Black's Law Dictionary (8th ed).

[10] *People v King*, 297 Mich App 465, 476-477; ___ NW2d ___ (2012).

Here, Gunn's counsel asked the complainant if she told police that she went to the party store to flirt with the clerk. The complainant testified that she did not remember. Counsel asked to recall Officer Pate, to question him about several inconsistencies between the complainant's trial testimony and her statements to him in August 2008. The prosecution argued that the reason the complainant went to the party store was a collateral matter. Counsel argued that the complainant's inability to remember the event's details affected her credibility, and thus was not a collateral matter.

The trial court allowed counsel to recall Officer Pate and question her about the inconsistencies concerning complainant's actions at the store, but not her reasons for going there. We conclude that the prior inconsistent statement evidence did not concern a collateral matter because counsel sought to introduce it for the relevant purpose of attacking the complainant's credibility with respect to the factual circumstances of this case.

However, we conclude that this error was harmless. If we conclude that a trial court erred by excluding evidence, we must consider whether the error resulted in a miscarriage of justice.[11] When the evidentiary error is preserved, nonconstitutional error, we presume that the error is harmless unless it appears from an examination of the entire record that it is more probable than not that the error affected the outcome.[12]

Despite the trial court's erroneous ruling on this single statement, the trial court allowed Gunn to recall Officer Pate to question him about several other inconsistencies between the complainant's statement in August 2008 and her testimony at trial. Gunn argued in closing that complainant's testimony was too inconsistent to be believed, and that she would not have confused the details if her testimony was true. The single detail, although it was part of the factual circumstances of the case, did not pertain directly to the sexual assault. Since Gunn presented other evidence that the complainant was not credible for the same reason that he sought to introduce the excluded evidence, and the single improperly excluded detail was minor, we do not think that it is likely that this error affected the outcome of Gunn's case.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

When reviewing an ineffective assistance of counsel claim, this Court reviews for clear error the trial court's findings of fact, and reviews de novo questions of law.[13] When the trial

[11] MCL 769.26; *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

[12] *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

[13] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

court has not conducted a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record.[14]

B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.[15] To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.[16] A defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.[17]

The defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy.[18] We give defense counsel wide discretion in matters of trial strategy because counsel may be required to take calculated risks to win a case.[19] Defense counsel's decisions to call and investigate witnesses are matters of trial strategy.[20] "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work."[21] This Court will not substitute its judgment for that of defense counsel, or review this issue with the benefit of hindsight.[22]

C. APPLYING THE STANDARDS

Gunn first argues that he was deprived of the effective assistance of counsel because he was improperly shackled and trial counsel failed to move the trial court to remove his shackles. We disagree.

---

[14] *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012).

[15] US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

[16] *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[17] *Id*. at 312.

[18] *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007); *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

[19] *Pickens*, 446 Mich at 325.

[20] *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

[21] *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

[22] *Odom*, 276 Mich App at 415.

We conclude that Gunn has not demonstrated that his counsel's performance prejudiced him. A shackling error does not prejudice the defendant as a matter of law if there is no indication that the jury saw the defendant's restraints.[23] The only indication in the lower court record that Gunn was even wearing shackles is in the trial court's statement of precautions it intended to take to make certain that the jury was out of the courtroom while Gunn moved between the defense table and the witness stand. There are no indications that the jury saw Gunn in restraints. We conclude that Gunn has not shown that, but for his counsel's failure to request that the trial court remove his shackles, the results of his proceeding would have been different.

Gunn next contends that trial counsel was ineffective (1) for failing to challenge Ginther's testimony that Gunn's partial palm print matched "a copy of a palm print that was in our system in Lansing[,]" and (2) because on cross-examination he elicited that the palm print matched a photocopy of "the known impressions of an individual in our system[,]" on the basis that these statements were improper propensity evidence under MRE 404(b)(1). We disagree.

We conclude that Gunn has not shown that counsel's actions fell below an objective standard of reasonableness. The defendant must demonstrate that "counsel made an error so serious that counsel was not functioning as an attorney[.]"[24] This case is simply not similar to the cases to which Gunn attempts to analogize it. In *McCartney*, a fingerprint expert volunteered that the fingerprint card contained the defendant's inmate number.[25] In *Wallen*, the witness testified that he met the defendant while they were both imprisoned.[26]

Here, Ginther testified that he compared the palm print recovered from the complainant's car to "a copy of a palm print that was in our system in Lansing[.]" On cross-examination by defense counsel about the copy, Ginther testified that he received the copy from "the AFIS, Automated Finger Identification System, where we have access to obtaining the known impressions of an individual in the system."

The defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy.[27] Because defense counsel re-raised the issue in cross-examination, it seems clear to this Court that counsel's decision not to challenge Ginther's direct examination testimony about source of the comparative fingerprint was the result of a calculated risk. We do not agree that Ginther's reference to "the known impressions of an individual in the system" implied by its very nature that Gunn had a criminal history. Fingerprints obtained in

---

[23] *Horn*, 279 Mich App at 37.

[24] *People v Briseno*, 211 Mich App 11, 16-17; 535 NW2d 559 (1995); see *People v McGraw*, 484 Mich 120, 142; 771 NW2d 655 (2009).

[25] *People v McCartney*, 46 Mich App 691, 693; 208 NW2d 547 (1973).

[26] *People v Wallen*, 47 Mich App 612, 614; 209 NW2d 608 (1973).

[27] *Odom*, 276 Mich App at 415; *Mitchell*, 454 Mich at 150.

several other contexts are stored in AFIS.[28] We conclude that Gunn has not overcome the presumption that defense counsel's decision to attack the reliability of the source of Gunn's photocopied palm print on cross-examination was sound trial strategy.

Because Gunn has not shown that defense counsel's decision not to challenge Ginther's testimony was objectively unreasonable, his ineffective assistance of counsel claim fails.

IV. SENTENCING

A. STANDARD OF REVIEW

This Court reviews the sentencing court's scoring of a sentencing guidelines variable for clear error.[29] The proper interpretation and application of the sentencing guidelines is a question of law that this Court reviews de novo.[30]

B. AGGRAVATED PHYSICAL ABUSE, OV 7

The trial court should score offense variable (OV) 7 if the following circumstances apply:

> (a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.....50 points
>
> (b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense..... 0 points[31]

The Legislature has defined "sadism" 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."[32]

Relying on this Court's holding in *Glenn*,[33] Gunn argues that this case is no more brutal than other CSC I cases and involved only circumstances inherent in the crime. In *Glenn*, this Court determined that the two victims were not subject to excessive brutality when the defendant struck each struck victim one time with a sawed-off airsoft shotgun while he committed an

---

[28] MCL 722.115k (fingerprints obtained under child care licensing act); and MCL 400.713 (fingerprints obtained under the adult foster care licensing act); MCL 330.1134a (fingerprints of employees in covered health care facilities).

[29] *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

[30] *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

[31] MCL 777.37(1).

[32] MCL 777.37(3).

[33] *People v Glenn*, 295 Mich App 529; 814 NW2d 686 (2012).

armed robbery.[34] The defendant did not injure either of the victims, and neither of them required medical treatment.[35]

This Court held that the defendant should have been scored zero points for OV 7 under those circumstances because, though his conduct was reprehensible, he did not engage in conduct designed to substantially increase the victims' fear and anxiety.[36] We reasoned in part that the elements of robbery are only met if a defendant uses force against a person or assaults and places the person in fear.[37] We concluded that the conduct did not substantially increase the victim's fear beyond what occurs in most armed robberies.[38]

We do not think that trial court clearly erred when it scored 50 points for OV 7 under the facts in this case, because they are not substantially similar. In *Glenn*, there was no evidence that the robbery took place over a prolonged period. Here, there was evidence that Gunn placed his hand on the complainant's neck and kept it there for a prolonged period, while instructing her to drive. In *Glenn*, the defendant struck each victim once and they did not suffer any injuries. Here, Gunn jerked the complainant's head around and battered the complainant repeatedly, including with her cell phone. The complainant's injuries included extensive bruising, tenderness, and a laceration on her face that required stitches. The complainant testified that when she recognized Gunn's photograph nearly two years after the incident, she began to cry. From the facts in this case, we conclude that it was not clear error for the trial court to find that (1) Gunn subjected the complainant to prolonged pain or humiliation for his gratification, or (2) Gunn intended his conduct to substantially increase the complainant's fear and anxiety. Under either of these circumstances, the trial court properly scored 50 points for OV 7.

Gunn also argues that counsel was ineffective for failing to challenge the trial court's score for OV 7. Counsel is not ineffective for making futile challenges.[39] We have concluded that the trial court did not err when it scored 50 points for OV 7. Thus, Gunn's ineffective assistance claim based on OV 7 must fail.

C. ASPORTATION, OV 8

Gunn raises this additional issue in his pro per supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

The trial court appropriately scores 15 points 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

---

[34] *Id*. at 531.

[35] *Id*.

[36] *Id*. at 533-534.

[37] *Id*. at 535-536.

[38] *Id*. at 536.

[39] *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

time necessary to commit the offense."[40] "Asportation" has the same meaning for the purposes of OV 8 and kidnapping.[41]

Gunn argues that because the jury acquitted him of kidnapping, the trial court erred when it scored him 15 points for asporting the complainant. We disagree because evidence in the record adequately supported the trial court's score.

The jury acquitted Gunn of kidnapping, but this does not mean that Gunn did not asport the victim for the purposes of his sentencing guidelines score. A jury must find the elements of a crime beyond a reasonable doubt, but the sentencing court must find only that a preponderance of the evidence supports a sentencing guideline score.[42] The trial court is not bound by the jury's determination, as long as the record evidence adequately supports its score.[43]

We conclude that the record adequately supported the court's determination that Gunn asported the victim. Asportation only requires that the defendant move the victim, with or without force.[44] A victim is asported to a situation of greater danger if the victim is asported to a place that a person is less likely to see the defendant commit the crime.[45] The complainant testified that Gunn forced her to drive from the party store to a location near a school where busses would pick up or drop off students. Donald also testified that Gunn drove the complainant to the same location. It is much more likely that a witness will observe a crime occurring in a liquor store parking lot at midnight than in a school bus lane at midnight. Thus, the record supported the trial court's determination that Gunn moved the complainant to a location of greater danger, since there was evidence that Gunn either moved the victim or forced the victim to move to a location that was more secluded.

V. EX POST FACTO

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

A defendant must raise a strictly legal challenge to the court's imposition of fees and costs in the trial court to preserve it.[46] Gunn did not argue at sentencing that the $130 Crime Victims' Rights assessment violated the ex post facto clause, and thus this issue is not preserved.

---

[40] MCL 777.38(1)(a).

[41] *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003); *Steele*, 283 Mich App at 490.

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

[43] *People v Williams*, 191 Mich App 269, 276; 477 NW2d 887 (1991).

[44] *Spanke*, 254 Mich App at 648.

[45] *Steele*, 283 Mich App at 491.

[46] See *People v Jackson*, 483 Mich 271, 291 n 17; 769 NW2d 630 (2009).

This Court reviews unpreserved constitutional challenges for plain error affecting a defendant's substantial rights.[47] An error is plain if it is clear or obvious, and the error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.[48]

B. LEGAL STANDARDS

Gunn concedes that this Court held in *Earl*[49] that the sentencing court does not violate the ex post facto clauses of the United States or Michigan Constitutions when it applies the Legislature's increase of the Crime Victims' Rights Assessment fee from $60 to $130 effective December 16, 2010, to crimes committed before that date. A trial court must follow a published decision of this Court until this Court or the Michigan Supreme Court overturns it.[50] An error is only plain if it is clear or obvious.[51] Thus, even if the prior panel of this Court wrongly decided *Earl*, we conclude that the trial court did not plainly err.

Further, we do not agree with Gunn's argument that this Court wrongly decided *Earl* because the assessment is a form of restitution. A statute violates the Ex Post Facto Clause if it is (1) retrospective, and (2) disadvantages the offender.[52] A statute disadvantages the offender if it "(1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence."[53] The assessment "is not intended to be a form of restitution."[54] Thus, we would reject Gunn's argument that the assessment violates the ex post facto clauses on that ground.

We conclude that the trial court did not plainly err by relying on this Court's decision in *Earl*. Even if we agreed with Gunn's underlying argument about the validity of *Earl*—which we do not—the trial court does not plainly err when it follows a published decision of this Court.

We affirm.

/s/ Kathleen Jansen
/s/ William C. Whitbeck
/s/ Stephen L. Borrello

---

[47] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[48] *Id*.

[49] *People v Earl*, 297 Mich App 104; ___ NW2d ___ (2012).

[50] *In re Hague*, 412 Mich 532, 552; 315 NW2d 524 (1982).

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

[52] *Weaver v Graham*, 450 US 24, 29; 101 S Ct 960; 67 L Ed 2d 17 (1981); *People v Stevenson*, 416 Mich 383, 397; 331 NW2d 143 (1982).

[53] *Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996); see *Collins v Youngblood*, 497 US 37, 46; 110 S Ct 2715; 111 L Ed 2d 30 (1990).

[54] *People v Matthews*, 202 Mich App 175, 176; 508 NW2d 173 (1993).