Order

Michigan Supreme Court
Lansing, Michigan

October 3, 2017

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

150010

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 150010
COA: 313524
Midland CC: 12-005145-FC

BRIAN PAUL THOMPSON,
Defendant-Appellant.
_____/

By order of April 28, 2015, the application for leave to appeal the July 15, 2014 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Lockridge* (Docket No. 149073), and by order of January 31, 2017, the case was held in abeyance pending the decision in *People v Comer* (Docket No. 152713). On order of the Court, the cases having been decided on July 29, 2015 and June 23, 2017, respectively, *People v Lockridge*, 498 Mich 358 (2015), and *People v Comer*, 500 Mich ___ (2017), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE that part of the Court of Appeals judgment holding that the trial court's failure to impose lifetime electronic monitoring, as statutorily mandated by MCL 750.520b(2)(d), was a clerical error that could be corrected by the trial court on its own initiative. In *Comer*, we held that such an error results in an invalid sentence, but that the error is substantive and may only be corrected by the trial court on its own initiative before judgment is entered. MCR 6.435; MCR 6.429. In this case, the trial court did not have authority to amend the judgment of sentence after entry to add a provision for lifetime electronic monitoring. Therefore, we VACATE the December 14, 2012 amended judgment of sentence, and we REMAND this case to the Midland Circuit Court to reinstate the November 19, 2012 judgment of sentence.

In addition, the Midland Circuit Court shall determine whether the court would have imposed a materially different sentence under the sentencing procedure described in Part VI of our opinion in *Lockridge*. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it

shall resentence the defendant. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

s0925

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 3, 2017

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2014
v	No. 313524 Midland Circuit Court
BRIAN PAUL THOMPSON, Defendant-Appellant.	LC No. 12-005145-FC

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of three counts of criminal sexual conduct in the first degree, MCL 750.520b(1)(f) (personal injury). The victim testified that defendant, her husband, violently assaulted her in August 2011. The trial court sentenced him to 10 to 30 years' imprisonment. We affirm.

Defendant first argues that the victim's statements contained in a nurse's report were inadmissible. We disagree. Defendant failed to preserve this issue by objecting to the admission of the evidence at trial. Thus, our review is for plain error affecting substantial rights. *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012). Under the plain-error standard of review, "a defendant is not entitled to relief unless he can establish (1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*.

Defendant posits essentially two arguments under this issue. First, he argues that the victim's statements that were recorded in the nurse's report were hearsay inadmissible under any exception. This argument is contrary to well-settled law. MRE 803(4) provides that the following are not precluded by the hearsay rule:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

In *People v Mahone*, 294 Mich App 208, 215; 816 NW2d 436 (2011), we concluded that "a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment." The victim's statements contained in the report fit squarely within the holding of *Mahone* and were thus admissible under MRE 803(4). Further, the Confrontation Clause was not implicated because the victim testified at trial. See *People v Walker*, 273 Mich App 56, 60; 728 NW2d 902 (2006).

Second, defendant argues that the report was inadmissible because it was a prior consistent statement that improperly bolstered the victim's credibility. For this proposition he cites cases that address whether otherwise inadmissible hearsay is admissible under the prior-consistent-statement exception, now contained in MRE 801(d)(1)(B). See, e.g., *People v Hallaway*, 389 Mich 265, 276-277; 205 NW2d 451 (1973). Again, the report was *admissible* under MRE 803(4) as a statement made for purposes of medical treatment or medical diagnosis; the "bolstering" argument fails.

Defendant also argues that trial counsel rendered ineffective assistance by not objecting to the evidence. To establish that his counsel did not render effective assistance, "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "'Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.'" *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009), quoting *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Because no error occurred, defense counsel was not ineffective. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel").

Defendant argues next that there was insufficient evidence to sustain his convictions. We disagree. When examining whether there was sufficient evidence to support a conviction, we review the evidence de novo in the light most favorable to the prosecution to determine "whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id.* at 196. We do not interfere with the role of the trier of fact to determine "'the weight of the evidence or the credibility of witnesses.'" *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012), quoting *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Indeed, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

MCL 750.520b provides, in pertinent part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

* * *

> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:
>
> (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

Defendant argues that there was insufficient evidence of force or coercion and personal injury. Whether a defendant used force or coercion to accomplish a sexual penetration "is to be determined in light of all the circumstances . . . ." *People v Premo*, 213 Mich App 406, 410; 540 NW2d 715 (1995). "'Personal injury' means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a. "[B]odily injuries need not be permanent or substantial." *People v Himmelein*, 177 Mich App 365, 377; 442 NW2d 667 (1989). Bruises or marks to the body are sufficient. *Id*. The Michigan Supreme Court has defined mental anguish as "extreme or excruciating pain, distress, or suffering of the mind" that occurs during or as a result of the sexual assault. *People v Petrella*, 424 Mich 221, 227, 276-277, 278 n 25; 380 NW2d 11 (1985).

The facts of the assaults are horrific. Regarding the incident that occurred on state-owned land, notwithstanding whether the victim initially consented to sexual relations with defendant as a condition of her returning home, she testified that when she knew that defendant was going to penetrate her anally, she tried to get up but defendant held her down. She testified that she was "screaming" and "in a lot of pain." She testified that she "told [defendant] to stop," but he did not. Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant used force to accomplish a sexual penetration and that the victim suffered mental anguish.

Regarding the incident that occurred on a Friday night, the victim testified that defendant entered their bedroom and told her "that he needed to hurt [her] again." She testified, "I asked him why. Because he told me that it wasn't going to happen anymore." She testified that defendant "just said he needed to do it." She testified that they then began having vaginal intercourse. She testified, "He started getting rough. He moved faster and harder. And when it would start to hurt, I would grab at his hands" because she "wanted him to stop." She testified, "That kept going on until he flipped me over" and resumed vaginal intercourse. She testified that he subsequently removed his penis from her vagina and began hitting her "on [her] rear end" and then bit her "[o]n [her] rear end" and "pull[ed] [her] hair hard." The victim testified, "I remember crying." She testified that she was "[s]creaming and crying" and that she "asked him to stop," but that defendant did not respond and "just kept going." Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant used force to accomplish a sexual penetration and that the victim suffered mental anguish.

Regarding the incident that occurred on a Monday, the victim testified that defendant "penetrated [her] vaginally." She testified, "And I remember trying to push him off of me and grabbing his hands, because he was scaring me." She testified that defendant "was being rougher . . . . And he just had this look in his eyes." She testified that defendant then grabbed her by her hips, "flipped [her] over," and "started hitting" her on her "rear end." "And he was hitting me very hard," she recounted. She stated, "I remember trying to put my hands up and covering myself so he wouldn't hit me, but he would grab my hands away." She continued, "I remember crying. And he bit me on the rear end, and I was screaming into the pillow. And it hurt so bad." She testified that defendant told her, "I want you to hurt and I'm going to make you hurt worse than you've ever felt before." She stated that she "got so scared." The victim testified that she subsequently found bruises on her body and that she was bleeding from her anus. Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence of force and personal injury in the form of both mental anguish and bodily injury.

Defendant argues next that the trial court erred by allowing improper rebuttal testimony. "Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

"Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the opposing party." *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). In addition, "[t]he prosecution cannot introduce evidence on rebuttal unless it relates to a substantive rather than a collateral matter." *Id.* "[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Figgures*, 451 Mich at 399.

At trial, defendant presented a home healthcare provider who stated, among other things, that he had administered drugs to defendant on August 25, 2011, that were designed to "put a person out for eight to ten hours." The provider testified that he could not remember what time he administered the drugs to defendant on that day. Over defendant's objection, the trial court allowed a police officer who had interviewed defendant at approximately 10:45 p.m. on the same day to testify on rebuttal that defendant did not appear to be under the influence of drugs.

Even if we were to agree that admission of the evidence was error, we find it harmless in light of the overwhelming evidence of defendant's guilt. A preserved and nonconstitutional evidentiary error does not warrant reversal "'unless it affirmatively appears that, more probably than not, it was outcome determinative.'" *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010), quoting *People v Krueger*, 466 Mich 50, 54; 643 NW2d 233 (2002). In light of the

evidence presented establishing defendant's guilt—particularly the testimony of the victim and the medical evidence—any error with regard to this testimony was not outcome-determinative.[1]

Defendant also argues that the trial court erred by giving a jury instruction regarding uncharged sexual conduct. Defendant contends that the instruction was unwarranted given the evidence in the case. A trial court's determination that a jury instruction "is applicable to the facts of a case" is reviewed for an abuse of discretion. *People v Guajardo*, 300 Mich App 26, 34; 832 NW2d 409 (2013).

At trial, there was evidence that before the events that gave rise to this case, defendant had sexually abused the victim. She testified that at the beginning of their marriage, defendant "started getting rough with" her. She explained, "He would start to hold me down. Throw me around." She testified that she "told [defendant] that [she] didn't like it, it hurt, and it scared" her. She testified that defendant told her that "[h]e had an urge and he didn't know why" and "that he didn't know how to control it." When asked, "And did this continue on during your relationship," she responded, "Yes." One witness testified that defendant had admitted that he sexually abused the victim.

The prosecution requested that CJI2d 20.28 be read to the jury. That instruction reads:

> (1) You have heard evidence that was introduced to show that the defendant has engaged in improper sexual conduct for which the defendant is not on trial.
>
> (2) If you believe this evidence, you must be very careful to consider it for only one, limited purpose, that is, to help you judge the believability of testimony of *[name complainant]* regarding the act(s) for which the defendant is now on trial.
>
> (3) You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that the defendant is likely to commit crimes. You must not convict the defendant here because you think [he / she] is guilty of other bad conduct.

"This instruction is for use when evidence of other acts has been introduced to show that there existed similar sexual familiarity between the defendant and the complainant to help the jury in judging the credibility of the complainant's testimony." CJI2d 20.28, use note. The trial court removed the word "improper" from the first paragraph of the instruction. Defendant objected to the instruction, but acknowledged support for the removal of "improper."

[1] We note that the healthcare provider did not testify that defendant could not ever have been lucid on August 25. The rebuttal testimony, simply, was not particularly impactful.

"[T]he general rule is that evidence tending to show the commission of other criminal offenses by the defendant is inadmissible on the issue of his guilt or innocence of the offense charged." *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). However, in sexual assault cases, evidence of prior improper sexual conduct is admissible "to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." *Id*. The rationale is that the charged acts might appear "unnatural or improbable . . . without reference to the facts preceding and inducing the principal transaction . . . ." *Id*. at 413 (internal quotation marks and citation omitted).

In this case, defendant did not object to the testimony regarding his sexual relationship with the victim before the charged acts, nor would such an objection have been sustained given *DerMartzex*. The evidence went to the issue of credibility and helped to explain the context in which the crimes occurred, especially given defendant's contention that the acts were consensual and consistent with the history of his relationship with the victim. The court's removal of the word "improper" from the standard instruction minimized any implication that the prior sexual conduct was criminal, thereby helping to assure that the jury would use the evidence as instructed.

Defendant's contention that the evidence of uncharged sexual conduct should not have been admitted without the pretrial notice required by MRE 404(b)(2) is also without merit. MRE 404(b)(2) provides:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

Defendant argues, "[h]ad the defense known, counsel could have objected and moved to suppress the prior conduct as prior bad acts." However, as discussed above, such an objection would have been meritless given *DerMartex*, which established that evidence of prior uncharged sexual conduct between a victim and a defendant is admissible for a limited purpose. The prosecution was not arguing to admit the evidence under the rationale of MRE 404(b)(1). Defendant has failed to establish that the failure to give notice prejudiced him. See, generally, *People v Dobek*, 274 Mich App 58, 87; 732 NW2d 546 (2007).

Defendant presents several arguments regarding his sentencing. Defendant first argues that he should not have been assessed 10 points under offense variable (OV) 3 and OV 10. Defendant did not object to the scoring of these variables below, but preserved the issue by filing a motion to remand in this Court, MCL 769.31(10), which was denied. This Court reviews sentencing decisions as follows:

> [T]he circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the

> application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (citation omitted).]

MCL 777.33(1)(d) provides for an assessment of 10 points under OV 3 if "[b]odily injury requiring medical treatment occurred to a victim[.]" "'[B]odily injury' encompasses anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). MCL 777.33(3) states, "As used in this section, 'requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." There was ample evidence supporting the assessment of 10 points under OV 3. The victim testified that before going to the hospital, she told a friend "that [she] was in so much pain that it hurt to walk, to sit, even to lay [sic] down. It felt like something had ripped and that [she] was in so much pain." Defendant admits on appeal that Cheryl was given pain medication. In light of the facts, we find no basis for a reversal or remand with regard to the scoring of OV 3.[2]

MCL 777.40(1)(b) provides for an assessment of 10 points under OV 10 if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status[.]" In addition, there must be a finding that the victim was vulnerable to score points under OV 10. *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008). "'Exploit' means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "'Vulnerability' means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). The evidence clearly supports a score of 10 points under OV 10. Indeed, defendant exploited "a domestic relationship," and the victim was vulnerable in that the defendant told her that she "could come home, but . . . would have to endure the worst pain of [her] life." We find no basis for a reversal or remand with regard to the scoring of OV 10.

In addition, it was appropriate for the trial court to amend defendant's judgment of sentence to include lifetime electronic monitoring. At sentencing, the trial court did not state that it was sentencing defendant to lifetime electronic monitoring. The trial court's original judgment of sentence did not contain a notation regarding lifetime electronic monitoring. The trial court later amended the judgment of sentence sua sponte to include lifetime electronic monitoring.

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[2] We acknowledge that MCL 777.33(2)(d) states, "Do not score 5 points if bodily injury is an element of the sentencing offense." "Personal injury" was an element of the offense in this case, but this phrase is not limited to "bodily injury." MCL 750.520b(1)(f); MCL 750.520a. Moreover, MCL 777.33(2)(d) is directed at the score of "5 points" (applicable when "bodily injury not requiring medical treatment occurred to a victim," see MCL 777.33[1][e]), whereas here the applicable score was 10 points. MCL 777.33(2)(d) does not impact our decision regarding OV 3.

MCL 750.520b(2)(d) requires a defendant convicted under that section to be sentenced "to lifetime electronic monitoring under section 520n." MCL 750.520n(1) states, "A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . . ." In *People v Brantley*, 296 Mich App 546, 558-559; 823 NW2d 290 (2012), this Court held that MCL 750.520n(1) requires a trial court to sentence a defendant convicted of criminal sexual conduct in the first degree (under MCL 750.520b) to lifetime electronic monitoring, "regardless of the age of the defendant or the age of the victim . . . ." The Court noted that the age specifications in MCL 750.520n(1) applied only to convictions under MCL 750.520c. *Brantley*, 296 at 557-559. Thus, the trial court was required to sentence defendant to lifetime electronic monitoring.

MCR 6.435 provides, in pertinent part:

> **(A) Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.
>
> **(B) Substantive Mistakes.** After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

Under the present circumstances, a hearing was not required for the trial court to amend the sentence, because the trial court did not have discretion to decline the imposition of lifetime electronic monitoring and its failure to impose the monitoring initially was nothing but an oversight falling within the purview of MCR 6.435(A). See *People v Howell*, 300 Mich App 638, 646-650; 834 NW2d 923 (2013).

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter