STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIQUALL MOLIC ABRAM,

Defendant-Appellant.

UNPUBLISHED
September 13, 1996

No. 151104
LC No. 91-009572

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MIQUALL MOLIC ABRAM,

Defendant-Appellee.

No. 182809
LC No. 91-009572

Before: Hood, P.J., and Griffin and J. F. Foley,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of felonious assault, MCL 750.82; MSA 28.277. He was sentenced to twelve to thirty years' imprisonment for the criminal sexual conduct convictions and thirty-one to forty-eight months' imprisonment for the assault conviction. Defendant appealed as of right in Docket No. 151104. This Court remanded the matter to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Following a hearing, the trial court granted defendant's motion for a new trial. The prosecutor appeals by

* Circuit judge, sitting on the Court of Appeals by assignment.

leave granted in Docket No. 182809. We reverse the trial court's order granting a new trial and reinstate and affirm defendant's convictions and sentences.

I

Docket No 182809

On appeal, plaintiff contends that the trial court abused its discretion in granting a new trial on the basis that defendant received ineffective assistance of counsel. We agree. The trial court found defense counsel ineffective for failing to challenge a juror who stated at voir dire that she had been a victim of an attempted sexual assault twenty years before trial. The trial court concluded that counsel was ineffective but did not state why the failure to challenge the juror was unreasonable or determine how defendant was prejudiced.

In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), our Supreme Court adopted the federal standard for determining whether a defendant has been denied effective assistance of counsel as set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Pickens, supra* at 312, citing *Strickland, supra,* 691-692; see *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996); *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Eloby, supra,* 476; see *Unites States v Chronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Defendant must also overcome the presumption that the challenged action is sound trial strategy. *People v Reed*, 449 Mich 375, 384; 535 NW2d 496 (1995); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

We hold that the trial court abused its discretion in ordering a new trial. First, we conclude that defendant failed to overcome the presumption that defense counsel's decision was strategic. At the *Ginther* hearing, defendant's experienced trial attorney explained that it is likely that he would not follow his general practice of challenging jurors who were victims of crimes similar to the one charged if he thought the juror may help his case. Also, defense counsel testified that he probably conferred with both defendant and co-defendant's attorney before deciding not to challenge the juror in question. Defendant offers nothing to suggest that counsel's actions were anything but strategic. Therefore, in light of defense counsel's testimony and under the circumstances of this case, we conclude that defendant failed to overcome the presumption that counsel's decision was sound trial strategy.

Second, in light of the strong evidence against defendant in this case, we find that defendant was not prejudiced by defense counsel's decision not to challenge the juror. See *Pickens, supra* at 312. Defendant's argument that the prospective juror was unable to reach a fair verdict is belied by the juror's statements that she could be fair and that the twenty-year-old incident would not taint her ability to base her verdict solely on the evidence presented at trial. Defendant presented no evidence to impeach the professed impartiality of the juror and does not persuasively claim that replacing the juror would have affected the verdict. Accordingly, we conclude that defendant was not prejudiced by trial counsel's decision not to challenge the juror. *Id.*

We reject defendant's argument that prejudice should be presumed in this case. Unlike the cases relied on by defendant, in the present case defendant cannot establish that the juror would clearly have been dismissed for cause. See *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 236; 445 NW2d 115 (1989); *People v DeHaven*, 321 Mich 327; 32 NW2d 468 (1948); *McNabb v Green Real Estate*, 62 Mich App 500, 506-506; 233 NW2d 811 (1975), superseded by statute on other grounds. The fact that the juror fell victim to an attempted sexual assault twenty years before trial does not clearly make the juror "interested" in the outcome of a trial. See MCR 2.522(D)(13). Further, there is no evidence that the attempted assault against the juror was similar to the brutal and grotesque assault involved in this case.

Like the situation in *Pubrat, supra*, where our Supreme Court refused to presume prejudice because the defendant's trial attorney was suspended from the practice of law, *id.* at 596, the present case does not involve necessary correlation of prejudice to defendant. Accordingly, we assess the effectiveness of counsel according to the standard outlined in *Pickens, supra*, and decline defendant's invitation to speculate regarding the mindset of an unchallenged juror.

We also reject defendant's contention that the trial court abused its discretion by refusing to infer ineffective assistance because defense counsel had only two days to prepare for trial. Indeed, the United States Supreme Court has rejected this inferential approach, holding that insufficient preparation time cannot, in itself, signal ineffective assistance, and that defendant can establish ineffective assistance of counsel only by proving specific and prejudicial errors committed by counsel at trial. *Chronic, supra* at 666; *Chambers v Maroney*, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970); see *Pubrat, supra*. Because defendant has not identified specific errors that prejudiced his case and in light of defendant's experienced trial attorney's testimony that he was prepared for trial, the trial court did not abuse its discretion in ruling that defendant did not receive ineffective assistance of counsel due to inadequate preparation time.

II
Docket No 151104

A

In his appeal, defendant first argues that the trial court violated his Sixth Amendment right to a public trial when it cleared the public from the courtroom during voir dire because of insufficient space. We disagree. Had defendant objected to this procedure, the trial court could have devised an alternative way to handle the situation. However, given defendant's failure to object, the trial court's motive for excluding the public, the temporary nature of the exclusion, and defendant's failure to explain how the procedure caused him prejudice, we conclude that defendant's Sixth Amendment right to a public trial was not violated. *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987); *People v Smith*, 90 Mich App 20, 23; 282 NW2d 227 (1979); see generally *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994).

B

Next, defendant asserts that the trial court committed error requiring reversal by admitting into evidence a police report and allowing the prosecutor to rehabilitate the victim with prior consistent statements. We disagree. After a thorough review, we conclude that the errors, if any, are harmless because they did not affect the outcome of the trial. MCR 2.613(A); MCL 769.26; MSA 28.1096; *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992); *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995); see also *Duke v American Olean Tile Co*, 155 Mich App 555, 572; 400 NW2d 677 (1986) ("The erroneous admission of hearsay testimony is harmless error where the same facts are shown by other competent testimony").

C

Next, defendant argues that his double jeopardy rights were violated when he was convicted and sentenced for first-degree criminal sexual conduct and felonious assault. We disagree. See *People v Lugo*, 214 Mich App 699, 705-706; 542 NW2d 921 (1995). The focus of first-degree criminal sexual conduct is on punishing unwanted sexual penetration. MCL 750.520b(1)(c); MSA 28.788(2)(1)(c); *People v Robideau*, 419 Mich 458, 487-488; 355 NW2d 592 (1984). The focus of felonious assault is on punishing the use of a dangerous weapon to injure or place someone in fear of being injured. MCL 750.82; MSA 28.277; *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993). These two crimes are not part of a hierarchy of crimes built upon a single statute. Instead, the Legislature passed distinctive statutes to punish conduct that violates distinct social norms. Accordingly, we find that the Legislature intended the crimes of criminal sexual conduct and felonious assault to be punished separately. Thus, defendant was not subjected to double jeopardy. See *People v Sturgis*, 427 Mich 392, 403; 397 NW2d 783 (1986); *Robideau, supra* at 466; *People v Ward*, 206 Mich App 38, 41-43; 520 NW2d 363 (1994); see also *Lugo, supra* at 709*; People v Swinford*, 150 Mich App 507, 515; 389 NW2d 462 (1986).

D

Next, defendant contends that the trial court's comments and questions caused an unfair trial. However, because defendant failed to object to the trial court's comments and questions at trial, the issue is unpreserved and will be reviewed only for the existence of manifest injustice. *People v Sardy*, 216 Mich App 111; 549 NW2d 23 (1996); *People v Paquette*, 214 Mich App 336, 341; 543 NW2d 342 (1995); *People v Burgess*, 153 Mich App 715, 719-720; 396 NW2d 812 (1986). We find no manifest injustice. After a thorough review, we find that the trial court's conduct, comments, and questions did not deny defendant a fair trial. See *People v Weathersby*, 204 Mich App 98, 109-111; 514 NW2d 413 (1994); *People v Moore*, 161 Mich App 615, 616-617; 411 NW2d 797 (1987); *People v Redfern*, 71 Mich App 452, 457; 248 NW2d 582 (1976).

E

Defendant further claims that the trial court abused its discretion in permitting Dr. Mabon, the emergency room physician who examined the victim, to testify as to what she learned about the victim's injuries from EMS personnel and the triage nurse's report. We disagree. The record shows that both the statements at issue were intended for the purpose of medical treatment and diagnosis. The information described the victim's present symptoms, addressed the external source of her injuries, and was reasonably necessary for diagnosis and treatment. Further, nurses and EMS personnel are motivated to speak truthfully to treating physicians so that the patients may receive proper care. Accordingly, the trial court did not abuse its discretion in admitting Dr. Mabon's testimony pursuant to MRE 803(4). *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992); *Case v Vearrindy*, 339 Mich 579, 582-583; 64 NW2d 670 (1954); see also *Duke, supra* at 572.

F

Finally, defendant argues that he is entitled to resentencing. We disagree. First, defendant claims that the presentence investigation report (PSIR) was inaccurate. However, we conclude that resentencing is not required because the sentencing court clearly was not influenced by the mistake. After defense counsel noted that the "Victim's Impact Statement" portion of the PSIR contradicted the victim's trial testimony that defendant was in another room when someone penetrated her anus with a sausage, the prosecutor admitted that an "unnamed" person had actually penetrated the victim's anus. Defense counsel was apparently satisfied with this concession because he did not remind the sentencing court of the issue once the court addressed the parties' arguments and asked defense counsel if he had anything further. Moreover, by repeatedly emphasizing that defendant's decision to beat the victim immediately before the penetrations occurred aided and abetted the actors who did penetrate the victim, the sentencing court appeared fully cognizant of the fact that defendant did not physically penetrate the victim.

Second, defendant argues that the sentencing court used defendant's claim of innocence as a factor to aggravate his sentence. We disagree. Viewed in context, the sentencing court's statements show that it was considering defendant's refusal to understand or accept that his decision to beat the victim immediately before the rape occurred had any connection to the rape. This legitimate sentencing criterion is clearly distinguishable from the situations in *People v Wesley*, 428 Mich 708; 411 NW2d 159 (1987), and *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977), where the issue was whether a sentence could be increased because the defendant maintained his innocence.

Third, defendant contends that the trial court incorrectly calculated his sentencing score. We disagree. Appellate review of guidelines calculations is very limited. *People v Hernandez*, 443 Mich 1, 16-17; 503 NW2d 629 (1993); *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1991). A particular sentencing score will be upheld on appeal so long as there is some evidence to uphold the score. *Hernandez, supra* at 16; *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994). We find sufficient evidence to support defendant's fifty-point score for OV 2. Here, there was evidence that defendant beat the victim with his fist, slammed her head into a wall, and knocked her over onto a chair. Defendant's initial attack aided and abetted a second attack where the assailants

acting in concert with defendant forced the victim to undress, penetrated her vagina with a broomstick, penetrated her anus with a sausage, and burned her with lighters and cigarettes as she was forced to put her mouth around an unknown man's penis. Further, defendant's initial attack facilitated the conduct of a third wave of attackers, who beat the naked victim after she was forced outside the house. In our view, this evidence clearly supports the sentencing court's conclusion that defendant and the people he aided and abetted subjected the victim to "excessive brutality."

The order granting defendant a new trial is reversed. Defendant's convictions and sentences are reinstated and affirmed.

/s/ Harold Hood
/s/ Richard Allen Griffin
/s/ John F. Foley