

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER JEROME JOHNSON,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 253796

Wayne Circuit Court

LC No. 03-012089-01

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f) (actor causes personal injury and force or coercion is used), and was sentenced to four concurrent terms of eighteen to fifty years' imprisonment. He appeals as of right. We affirm.

On October 8, 2003, defendant and the victim lived together with the victim's four young children. On that date, defendant became upset with the victim when he learned that she saw her ex-husband and kept the matter a secret. Although the victim thought that the issue was resolved after a discussion, the next evening at about 10:00 p.m. defendant confronted her in their bedroom. He made comments about her keeping secrets and subsequently put a white glove on one of his hands and told her that he was going to teach her a lesson. He then told her to remove her clothes and he began insulting her. The victim complied with defendant's demand to remove her clothes because she was afraid defendant would hit her. Defendant thereafter continued to hurl insults at the victim. He also announced that she had until 11:00 p.m. "before he got started."

At 11:00 p.m., defendant started punching the victim. His acts of hitting and insulting the victim continued for several hours. At one point, he punched her in the right eye. At 2:00 a.m., defendant indicated that he was going to have sex with the victim. However, he subsequently lay on the bed and, after instructing the victim not to go to sleep, he began dozing. Although he was dozing, he opened his eyes and looked at the victim every time she tried to move. At 4:00 a.m., defendant got up and taunted the victim by saying, "You thought it was over." He put the white glove back on his hand and ordered the victim to get on her hands and knees. He spoke to her firmly "as if he wanted to hurt" her. After making her get on her hands and knees, he told her that she was going to do everything he told her to do. He handed her a pen shaped like a baseball bat and instructed her to penetrate her own vagina with the pen. The victim complied because

she hoped that defendant would not hit her anymore. When the victim discontinued the penetration with the baseball bat pen, defendant found a hair spray bottle, pried her legs apart, and inserted the bottom of the bottle into her vagina. He then looked for another object. He found a forty-ounce beer bottle and inserted that into her vagina. Finally, he engaged in penile/vaginal intercourse with her. The acts stopped at approximately 5:00 a.m.

When the victim was getting her children ready for school that morning, defendant grabbed her and ordered her to fix her hair. He also told her that she could not walk her three school-aged children to school. The children left for school alone. Defendant then ordered the victim back to her bedroom and instructed her to get undressed. The victim testified that they watched television most of the day. Her four-year-old child was in the room. At one point, defendant made the victim go to her children's bedroom where they engaged in sexual intercourse out of the view of her daughter. Later, the victim's school-aged children arrived home from school, and defendant told the victim that he planned to run the house and care for the children. He would not allow the victim to leave her room. At some point later in the evening of October 10, 2003, the victim seized an opportunity to get out of the house. Three of her children were already outside, and she told the fourth child to go outside. She then followed the child outside, and they ran for help. She ran to a shop and the owner called for emergency assistance. He observed that the victim had been beaten, including having an obvious black eye. She was frightened and very upset. The victim was treated at the hospital for her injuries.

I

On appeal, defendant first argues that there was insufficient evidence to support his convictions for first-degree criminal sexual conduct because there was no personal injury or force or coercion associated with the acts of penetration. He emphasizes the victim's testimony that he slept after the beating and did not commit the acts of penetration until two hours later. When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). This standard applies to bench trials. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

MCL 750.520b(1)(f), the statute under which defendant was charged and convicted, provides in relevant 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. . . .

MCL 750.520b(1)(f) requires proof of penetration, personal injury, and proof of force or coercion to accomplish penetration. The term “personal injury” is defined as “bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.” MCL 750.520a(j). Physical injuries need not be permanent or substantial to satisfy the personal injury element of MCL 750.520b(1)(f). *People v Mackle*, 241 Mich App 583, 596; 617 NW2d 339 (2000). This Court has held that injuries sustained in an initial beating will satisfy the personal injury element for subsequent penetrations. *People v Martinez*, 190 Mich App 442, 444-445; 476 NW2d 641 (1991); *People v Hunt*, 170 Mich App 1, 8; 427 NW2d 907 (1988). Force or coercion is not limited to physical violence but should be determined in light of all of the circumstances. *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992). By definition, it can include the situation where an actor coerces a victim to submit by the threatened use of violence. MCL 750.520b(1)(f)(ii).

In *Mackle, supra* at 599-600, the defendant was convicted of multiple acts of penetration, which occurred over a period of several days. This Court held that acts of penetration need not be considered in isolation. *Id.* One of the acts of penetration was willingly performed by the victim, who thought the defendant would let her go if she complied with his wishes. *Id.* This Court affirmed the defendant’s conviction for that penetration even though it was not accompanied by evidence of attendant personal injury or contemporaneous force. *Id.* The act occurred against a backdrop of ongoing physical violence and psychological torment. *Id.*

In this case, the victim was repeatedly beaten and humiliated by defendant over the course of several hours. Defendant subsequently announced his intention to have sex with her. Before doing so, he dozed on the bed after instructing the victim not to fall asleep. While he dozed, he opened his eyes and looked at the victim whenever she moved. Defendant later awoke and the charged sexual conduct occurred. While the time between the initial beating and the acts of penetration in this case was far lengthier than that in either *Martinez, supra*, or *Hunt, supra*, we nevertheless find sufficient evidence of personal injury. At the time of the charged penetrations, the victim was suffering from the injuries incurred during the prior beatings and believed that the beatings would continue. Moreover, there was sufficient evidence of force or coercion. The evidence supported an inference that the victim was traumatized from the initial beating and was afraid to refuse defendant’s instructions and penetrations. In fact, when he awoke, he taunted the victim by stating, “You thought it was over.” He spoke to her in a manner that caused her to believe that he wanted to continue to hurt her. We find compelling that defendant again put on the white glove that he previously wore while beating the victim. When all of the circumstances are considered, the penetrations occurred against a backdrop of ongoing violence and psychological torment. See *Mackle, supra*. We therefore conclude that the

evidence was sufficient to support the elements of personal injury and force or coercion and thus, was sufficient to sustain defendant's convictions for first-degree criminal sexual conduct.

II

Defendant next argues that the trial court committed error by proceeding with a bench trial. This issue is not preserved because it was never raised before or considered by the trial court. We review unpreserved constitutional errors for plain error. *Carines, supra* at 763-764.

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have 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. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." 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, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [Citations omitted.]

Defendant was initially charged with six counts of first-degree criminal sexual conduct. Two of the counts were later dismissed. After the preliminary examination, wherein the victim testified to substantially the same facts as she did at trial, the district court bound defendant over on four counts of third-degree criminal sexual conduct. An amended information was prepared and filed to reflect the district court's decision. On November 5, 2003, defendant was arraigned by the circuit court.

On November 14, 2003, at a docketing conference, defense counsel indicated that he wanted the prosecutor's pretrial motions heard by an alternate judge because defendant planned to waive his right to a jury trial and wanted a bench trial before the assigned trial judge. The trial court agreed that an alternate judge would hear any motions that the prosecutor filed. The trial court then swore defendant and questioned him with respect to his desire to waive a jury trial. The trial court ascertained that defendant was forty-one years old, understood his right to have a jury trial, and understood that he could choose a bench trial at which the trial court would listen to the evidence and decide the matter. Defendant expressed a desire to waive his right to a jury trial and proceed with a bench trial. He agreed that he was not promised any special result or verdict in exchange for giving up his right to a jury trial. He signed a written waiver.

The prosecutor later moved to amend the information to reinstate the initial charges. She argued that the district court abused its discretion by binding defendant over on charges of third-degree criminal sexual conduct. The alternate trial judge agreed and ordered that the initial charges be reinstated. A second amended information was prepared. Several weeks later, without objection from defendant or a motion to withdraw his jury trial waiver, the bench trial took place.

On appeal, defendant concedes that his waiver was valid, but he argues that it was not valid for the first-degree criminal sexual conduct charges on which he was tried. He argues that the trial court should have ascertained his desire to continue with a bench trial after the information was amended to reinstate the initial charges. While defendant cites significant case law with respect to the purpose and importance of the rules governing the waiver of a right to a jury trial, he fails to cite any authority to support his position that his waiver was invalid with respect to the first-degree criminal sexual conduct charges. By failing to properly support his position with any authority, he has effectively abandoned it. See *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Additionally, even if we considered the issue, defendant has not attempted to persuade this Court that any error affected the outcome of the lower court proceedings. See *Carines, supra*. Defendant bears the burden of persuasion with respect to prejudice when his claim of error is not preserved. *Id.* Because defendant has not met his burden, he has not demonstrated the existence of a plain error requiring reversal. In reaching our conclusion, we observe that the evidence against defendant was overwhelming. The victim testified with respect to the charged conduct. There was evidence to corroborate that she was beaten and, when she escaped from defendant and ran for help, she was visibly injured, frightened, and very upset. In his statement to the police, defendant admitted to hitting the victim in the eye. While he denied allegations of forced or coerced penetration, there was nothing significant in the record that compromised the victim's credibility. Defendant's credibility, however, was compromised because there was evidence that the victim sustained injuries other than one injury to her eye.

We additionally take notice that, even where a defendant can show a plain error and prejudice with respect to an unpreserved error, reversal is warranted only when the plain, forfeited error results in the conviction of an innocent defendant or when it seriously affects the fairness, integrity or public reputation of judicial proceedings, independent of a defendant's innocence. *Carines, supra*. These conditions do not exist in this case where defendant was aware of the allegations against him from the time of the preliminary examination; where the evidence of first-degree criminal sexual conduct was presented at the preliminary examination and was sufficient at trial; where he validly waived his right to a jury trial after indicating that he understood his rights with respect to a jury trial, that he wanted to waive his right, and that no promises were made in exchange for the waiver; and where he never moved to withdraw his waiver and never objected to a bench trial. Both defendant and his counsel understood his right to a jury trial and willingly participated in a bench trial. Only on appeal, after a guilty verdict, does defendant raise this issue. A defendant may not harbor error as an appellate parachute. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003), citing *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Nevertheless, we briefly address this issue. We initially find that the information was properly amended in this case. An information may be amended before, during, or even after trial unless it would unfairly surprise or prejudice the defendant. MCR 6.112(H). An information may even be amended to add an additional charge without an additional preliminary examination and bindover. *People v Fortson*, 202 Mich App 13, 15-17; 507 NW2d 763 (1993). In *Fortson*, the trial court permitted the amendment of the information to add a felony-firearm charge. The defendant was never bound over on this charge but was subsequently tried and convicted of it. *Id.* This Court affirmed because the evidence at the preliminary examination was sufficient to support the charge and the defendant had ample time to prepare to meet the

charge. *Id.* There was no unfair surprise, inadequate notice, or insufficient opportunity to defend. *Id.* In this case, the information was amended because the preliminary examination testimony supported charges for first-degree criminal sexual conduct and the district court was found to have abused its discretion in reaching a contrary conclusion. Although it does not appear from the record that defendant was arraigned again on the information after it was amended, defendant does not argue that he was deprived of any right to arraignment on the amended information. We note that the right to an arraignment is a procedural right and can be waived. *People v Phillips*, 383 Mich 464, 470; 175 NW2d 740 (1970).

Both MCR 6.402 and MCL 763.3 permit a defendant to waive his right to a jury trial after he is arraigned and has had an opportunity to consult with counsel. Both provisions operate to insure that a waiver of the right to a jury trial is voluntarily and understandably made. The trial court complied with both MCR 6.402 and MCL 763.3 when accepting defendant's waiver. Defendant concedes that the waiver was valid. Neither MCR 6.402 nor MCL 763.3 require the trial court to reopen the inquiry of a valid jury waiver based on subsequent developments in the case. Case law is clear, however, that a defendant may move to withdraw a valid waiver. A court may permit withdrawal of a waiver of a jury trial *if the request is timely made and is not made for the purpose of delay or unless the waiver has been acted upon.* *People v Wagner*, 114 Mich App 541, 558-559; 320 NW2d 251 (1982), citing 47 Am Jur 2d, Jury, § 67, pp 684-685. In this case, defendant could have moved to withdraw his jury waiver after the information was amended. He chose not to do so.

In sum, defendant was aware of the allegations against him at all times after the preliminary examination, including when he opted for a bench trial. The fact that the trial court corrected an abuse of discretion in the bindover did not cause any undo surprise or prejudice to defendant. Defendant failed to timely move to withdraw his valid waiver of the right to a jury trial after the amendment of the information and he never objected to the bench trial. Therefore, we find no plain error in the trial court's failure to conduct a sua sponte inquiry into whether defendant still wanted to proceed with a bench trial.

III

Finally, defendant argues that the trial court erroneously scored twenty-five points for offense variable (OV) 13, MCL 777.43, of the sentencing guidelines. He argues that he was scored for his contemporaneous crimes under prior record variable (PRV) 7, MCL 777.57, and thus, he should not have been scored for those same offenses under OV 13. Moreover, he argues that it does not make sense to consider his concurrent crimes when determining whether there was a pattern of crime under OV 13. The latter issue is preserved because it was raised before, and decided by, the trial court at sentencing. The former issue is unpreserved because it was not raised before the trial court. MCL 769.24(10). An objection on one ground is insufficient to preserve an appellate challenge on another ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). The unpreserved issue is reviewed for plain error. *Id.* Issues of law are reviewed de novo. *People v Aguwa*, 245 Mich App 1, 3; 626 NW2d 176 (2001).

Where sentencing guideline variables are directed at different purposes, a trial court's assessment of points under each variable is proper. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996). OV 13 and PRV 7 address different sentencing considerations. OV 13 is scored at twenty-five points where "the offense was part of a pattern of felonious criminal

activity involving 3 or more crimes against a person.” MCL 777.43(1)(b). All crimes occurring in a five-year period, including the sentencing offense, must be counted regardless of whether the offenses resulted in convictions. MCL 777.43(2)(a). Thus, OV 13 accounts for all criminal behavior directed against other people within a five-year period. PRV 7, however, is scored for two or more subsequent or concurrent felony convictions, regardless of their category. MCL 777.57.

Defendant provides no relevant authority to support his position that both variables could not have been scored in his case, and we find that the Legislature plainly intended that both variables be scored under the circumstances presented. “The primary goal of statutory interpretation is to ascertain and give effect to the Legislature’s intent.” *Aguwa, supra*. This Court must look at the specific language of the statute and presume that every word, phrase, and clause has meaning. *Id.* at 3-4. Where a statute is unambiguous, we must enforce it as plainly written. *People v VanHeck*, 252 Mich App 207, 211; 651 NW2d 174 (2002). The statutory language set forth in OV 13 requires consideration of all crimes within a five-year period when scoring that variable. If the Legislature had intended that concurrent convictions not be considered in scoring OV 13, where the same concurrent convictions are used to score PRV 7, it could have done so by writing an exception into the statutory language. It chose not to, and we will enforce the statutory language as written. *Id.* See, also, *People v Morales*, 240 Mich App 571, 576; 618 NW2d 10 (2000) (this Court declines to read an exception into a statute when the Legislature has chosen not to include such an exception). Further, this Court has previously affirmed the scoring of both variables on other occasions. See, e.g., *Harmon, supra* at 532. In *Harmon*, the defendant was convicted of four concurrent offenses, arising from his conduct of photographing two nude fifteen-year-old girls on the same date. *Id.* at 524. He was scored under both PRV 7 and OV 13 based on those concurrent convictions. *Id.* at 532. We similarly affirm the scoring of both variables in this case.¹

Additionally, we disagree with defendant’s unsupported positions that OV 13 should be scored only where the sentencing offense is “just the latest in a string, or pattern of continuing criminal conduct” and that it does not make sense to treat contemporaneous offenses as part of a “pattern” of criminal conduct. As previously discussed, the statutory language of MCL 777.43 requires consideration of *all* crimes within a five-year period, including the sentencing offense. The plain statutory language calls for consideration of all four crimes for which defendant was being sentenced. If the Legislature intended to preclude consideration of concurrent convictions when scoring OV 13, it would have enacted statutory language to that effect.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh

¹ We are mindful of defendant’s discussion of offense variable (OV) 12, MCL 777.42. The discussion is irrelevant to the issue before this Court because defendant was not assessed any points under OV 12.