

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 19, 2011

V

No. 295324
Oakland Circuit Court
LC No. 2008-224240-FC

LUIS ALBERTO QUINTANA,

Defendant-Appellant.

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b, assault with intent to do great bodily harm less than murder, MCL 750.84, and aggravated stalking, MCL 750.411i. He was sentenced to concurrent prison terms of 135 to 360 months each for the first-degree CSC convictions, two to ten years for the assault conviction, and one to five years for the stalking conviction. Additionally, the Judgment of Sentence provides that defendant is subject to lifetime electronic monitoring. He appeals as of right. We affirm in part and vacate in part.

Defendant was convicted of sexually assaulting the victim, a former friend, in her apartment on November 21, 2008. The victim testified that defendant sexually assaulted her after first physically assaulting her and repeatedly threatening to kill her. Defendant testified that the sexual acts were consensual, and that the victim initiated a physical altercation because she was upset that defendant did not provide her with cocaine.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that defense counsel was ineffective for introducing evidence of defendant's status as an illegal alien. We disagree. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would

have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant argues that defense counsel was ineffective for introducing his status as an illegal alien during jury voir dire. Counsel stated:

There was one other thing that I wanted to tell you about [defendant]. We have an interpreter here. English is not his first language. He's not an American citizen. He's actually from Argentina. He's here in this country illegally. It's a big issue in our country and has been for a number of years now. There's quite a bit of discussion about it in the public press and, and people have feelings about that. And what I need to know is whether any of you would hold that against him the fact that he is what we would call in the law an illegal alien? He gets that same presumption of innocence. The People have the same burden of proof as it would be if he were an American citizen. But I'm telling you that now because I need to know whether that will have any effect on your ability to be fair and impartial in this trial.

Defendant further complains that defense counsel unreasonably elicited testimony concerning defendant's illegal alien status during defendant's direct-examination.

The record shows that defendant's status as an illegal alien was injected as a matter of trial strategy, and defendant has not overcome the presumption of sound strategy. The defense theory throughout trial was that the sexual acts were consensual and that the victim was not credible. The defense attacked the victim's credibility through defendant's testimony that the victim exchanged sex for cocaine, and that she threatened to report his status as an illegal immigrant when he refused to give her money. Thus, defendant's status as an illegal alien was part of his defense theory, and was used to assist in undermining the victim's credibility. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Further, before eliciting defendant's illegal alien status for defense purposes, defense counsel attempted to protect defendant's rights by questioning the prospective jurors during voir dire to test their reaction to illegal aliens. The prospective jurors indicated that they could be fair and impartial, and would not allow defendant's status as an illegal alien to affect their verdict. The purpose of voir dire is to expose potential juror bias so that a defendant may be tried by a fair and impartial jury. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). The trial court instructed the jurors that they were to be fair and impartial, and not be influenced by prejudice or bias. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because there is no evidence of jury bias based on defendant's status as an illegal alien, there is no reasonable probability that defense counsel's decision to use this information to support the defense theory affected the outcome of the trial. *Frazier*, 478 Mich at 243. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

II. IMPROPER TESTIMONY

Next, defendant argues that Detective Mark Bradley was impermissibly permitted to comment on the victim's credibility. A trial court's decision to admit evidence is generally reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Where evidence is improperly admitted, the defendant bears the burden of establishing that the evidentiary error resulted in a miscarriage of justice. MCL 769.26 and *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999).

In response to the prosecutor's inquiry on direct examination, Detective Bradley testified that the purpose of the detective bureau is to follow up on cases. He met with the victim on November 24, 2008, to confirm that the statement she gave to the initial officer would be the same statement that she provided to the detective bureau. Defendant argues that Detective Bradley then impermissibly expressed his opinion regarding the truthfulness of the victim's account when he made the following emphasized remarks:

Q. Based on the information that you received from her what did you do next?

A. Sergeant Hamlin and I discussed the matter additionally and *we determine that the, the—we believed that an assault did take place.*

Defense counsel: Well objection. That is a decision for the jury to make. The witness cannot give an opinion on what he believes.

* * *

The court: You may take an answer. That is for you to decide, ladies and gentlemen, but the preliminaries of it we're going to walk through a little bit of.

* * *

A. Based upon the conversations that Sergeant Hamlin and I had with Miss Graham *we believe that an assault did take place.* Therefore, I completed my portion of the report and forwarded that to the prosecutor's office seeking a warrant. [Emphasis added.]

It is improper for a witness to provide an opinion regarding the credibility of another witness because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Contrary to what defendant argues, however, the challenged testimony was not an "expert opinion" that the victim was credible. As observed by the trial court, the challenged testimony was intended to explain preliminary or background information regarding the course and chronology of the case. Regardless, to the extent that the testimony violated the rule, defendant has not established that any error affected the outcome of trial. MCL 769.26; *Lukity*, 460 Mich at 495-496. Because Detective Bradley was called as a prosecution

witness and a criminal prosecution was instituted against defendant, the jurors would have understood that the detective may have considered the victim's account fairly believable even without the disputed testimony. See *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). The trial court instructed the jury, both during the detective's testimony and in its final instructions, that the jury was to decide what to believe. Also, in the final instructions, the court instructed the jury that defendant was presumed innocent, that the prosecution had to prove the facts beyond a reasonable doubt, and that testimony of police officers should be judged by the same standards the jurors used to evaluate the testimony of any other witness. The trial court's instructions protected defendant's right to a fair trial. Consequently, the challenged testimony does not require reversal.

III. PROSECUTOR'S CONDUCT

Defendant next argues that the prosecutor impermissibly shifted the burden of proof and improperly referenced his use of an interpreter during trial. We disagree. Because defendant did not object to the challenged comments below, this issue is unpreserved and we review the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A prosecutor may not imply that a defendant must prove something or present a reasonable explanation because such an argument tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). During rebuttal argument, the prosecutor remarked that "defendant had to take the stand. He had to. His defense was consent. So by law he has to take the stand." Although the prosecutor's remark was intended as a response to defense counsel's assertion during closing argument that defendant took the stand to tell his account even though he had no obligation to testify, the remark was improper because it incorrectly stated the law. However, defendant has not established that his substantial rights were affected. *Carines*, 460 Mich at 752-753, 763-764. As previously indicated, defendant bears the burden of showing actual prejudice, *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006), and reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Carines*, 460 Mich at 752-753, 763-764.

Viewed in context, the prosecutor's improper remark was not a substantial factor in defendant's conviction. As observed by plaintiff, defendant asserted a defense of consent and thus was required to introduce evidence of consent to support a consent instruction. See CJI2d 20.27. As a practical matter, had defendant not testified, there would have been no evidence of consent and the jury would not have been instructed on consent. In fact, defense counsel acknowledged this fact to the court when he indicated that defendant would be called as a witness because "[i]t's a defense consent so he's obligated to testify." Moreover, a timely objection could have cured any prejudice by obtaining an appropriate cautionary instruction. See *Watson*, 245 Mich App at 586. Even though defendant did not object, the trial court instructed the jury that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt. The

instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant also argues that the prosecutor improperly referenced his use of an interpreter in the following emphasized remark made during rebuttal argument:

The defendant conceded a lot of points. But the most important point was that [the victim] doesn't speak Spanish. *So perhaps the biggest lie of all is the lie of when he's speaking Spanish on the stand because he understands English.* And he understood that she wanted to get up free. [sic] And she—he understood that she never wanted to be stalked. Never wanted to be physically injured. Never wanted to be sexually assaulted and more importantly never wanted this to happen. [Emphasis added.]

Viewed in context, the challenged remark did not create bias against defendant based on his use of an interpreter. The prosecutor's argument responded to the defense implication and assertion during trial and closing argument that defendant should be believed on the principal issue of consent. During closing argument, defense counsel argued that defendant should be believed because he admitted several "bad acts," including choking the victim, removing a rug from her car, taking her panties and photographs, and having a vodka bottle on the night of the incident. He indicated that defendant was credible, and that if he was going to lie, he would not admit a fact that confirmed what the victim stated. In responding to defense counsel's argument, the prosecutor pointed out defendant's "biggest lie" was speaking in only Spanish at trial, given the victim's testimony that defendant always spoke English, that she had no problem understanding defendant, and that he had no problem communicating with her. The prosecutor's remark was not patently designed to create bias against defendant, and was based on evidence introduced during trial. A prosecutor is free to argue the evidence and reasonable inferences from the evidence as they relate to his theory of the case, including that a witness is not worthy of belief, *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996), overruled in part on other grounds in *People v Houthoofd*, 487 Mich 568, 583; 790 NW2d 315 (2010), and the prosecutor is not required to phrase his arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Thus, there was no clear error by the prosecutor.

IV. SCORING OF OFFENSE VARIABLE 7

Next, defendant argues that he is entitled to resentencing because the trial court erroneously scored 50 points for offense variable (OV) 7 of the sentencing guidelines. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

Fifty points should be scored for OV 7 if "[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.” MCL 777.37(1)(a); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). During the criminal episode, defendant went to the victim’s house on two separate occasions. After finally gaining entry, defendant ignored the victim’s request to leave and then used derogatory language toward her, choked her, and stated that he was going to kill her. As the victim struggled, defendant continued to choke her to the point that she was incapable of speaking, pinned her down on the floor, and repeatedly threatened to kill her if she did not have sex with him. After the victim agreed to have sex, defendant kept his hand around her neck and dragged her by the neck down the hallway into her bedroom to sexually assault her. As a result of defendant’s actions during the criminal episode, the victim had a swollen black eye, a scratch on her chin, marks on her neck, and significant bruising on various parts of her body, including her arms and knees. Defendant’s conduct was contemporaneous with the sexual assaults and was designed to increase the fear and anxiety the victim was suffering as a result the assaults. Consequently, the record supports the trial court’s 50-point score for OV 7.

V. LIFETIME ELECTRONIC MONITORING

Finally, defendant asserts that the Judgment of Sentence improperly provides for lifetime electronic monitoring. We agree.

Defendant's challenge to the lifetime electronic monitoring presents an issue of statutory interpretation. This Court reviews de novo questions of the applicability or interpretation of a statute. *People v Martin*, 271 Mich App 280, 286–287; 721 NW2d 815 (2006).¹

When defendant was sentenced, the trial court did not reference electronic monitoring. However, the Judgment of Sentence explicitly provides that defendant is subject to lifetime electronic monitoring. The parties agree that the propriety of lifetime electronic monitoring in this instance is dependent on the meaning of MCL 750.520b(2)(d), which provides:

(d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.

MCL 750.520n(1) provides:

A person convicted under section 520b or 520c [FN1] 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 as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285.

¹ In reviewing this issue de novo, we are treating defendant's challenge as preserved. However, even if we were to conclude that this issue was unpreserved, our conclusion would not differ as the imposition of lifetime electronic monitoring in this case would also constitute plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

On appeal, defendant asserts that lifetime electronic monitoring is only proper where the defendant is 17 years of age or older and the victim is younger than 13 years of age. There is no contention that the victim in this case was younger than 13. In contrast, the prosecution contends that the legislature intended all individuals convicted of first-degree CSC to be subject to lifetime electronic monitoring.

We conclude that although the legislature may have intended to subject all individuals convicted first-degree CSC to lifetime electronic monitoring, the legislature's intent is irrelevant to our determination because the statutory language is unambiguous. MCL 750.520b(2)(d) explicitly references MCL 750.520n, which only applies where the victim is younger than 13. For this Court to accept the prosecution's interpretation of MCL 750.520b(2)(d), it would essentially be required to ignore that provision's reference to MCL 750.520n. Stated differently, if the legislature desired to subject all individuals convicted of first-degree CSC to lifetime electronic monitoring, the controlling statute would not have included the language that we emphasize below:

In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring **under section 520n.**

Under the rules of statutory interpretation, we cannot simply disregard the specific language utilized by the legislature. As a result, the portion of the Judgment of Sentence requiring lifetime electronic monitoring is vacated.

Affirmed in part and vacated in part.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens