

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 16, 2014

v

ANTOINE PIERRE FLETCHER,
Defendant-Appellant.

No. 316184
Ingham Circuit Court
LC No. 12-000075-FC

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the sentences he received for his guilty plea convictions of armed robbery, MCL 750.529, criminal sexual conduct, first-degree, MCL 750.520b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of 400 to 900 months for the armed robbery and criminal sexual conduct convictions and to a consecutive two-year term for the felony-firearm conviction. We affirm.

With his application for leave, defendant filed a motion to remand for resentencing, which this Court granted. *People v Fletcher*, unpublished order of the Court of Appeals, entered July 5, 2013 (Docket No. 316184). Following a hearing, the trial court denied resentencing. Now, on appeal, defendant argues that the trial court erred in the original scoring of his sentencing guidelines, that he was denied the effective assistance of counsel when his trial counsel failed to object to the scoring of the sentencing guidelines before the imposition of his sentences, and that the trial court erred, exhibited bias, and allowed prosecutorial misconduct by accepting new evidence at the hearing on his post-judgment motion when defendant was not present and appellate defense counsel had not received a copy of the evidence.

For a challenge to the scoring of sentencing guidelines to be preserved for appellate review, the issue must be raised at sentencing, in a motion for resentencing, or in a motion to remand. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Because defendant challenged the sentencing guidelines scoring in his application for leave to appeal, motion for resentencing, and motion to remand, we find that these sentencing challenges have been preserved for appellate review. 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). Here, there was evidence submitted that the victim suffered tenderness or soreness as a result of the sexual assault. Thus, the trial court’s finding that the victim suffered a bodily injury was supported by a preponderance of the evidence and was not clearly erroneous. Defendant argues, however, that such an injury did not *require* medical treatment, as is necessary to score 10 points under OV 3. Defendant claims that the victim only received medical attention for the sole purpose of collecting evidence. But our review of the record indicates that this was not the sole purpose. As a result of the sexual assault, the victim was prescribed three STI prophylactics and received a Plan B emergency contraceptive. The victim was also referred for HIV testing. Thus, the examination was for medical treatment, which, under the circumstances, was required. Accordingly, the trial court did not err in scoring OV 3 at 10 points.

Moreover, even if OV 3 was improperly scored at 10 points because the bodily injury did not “require” medical treatment, the remedy would be to score OV 3 at 5 points instead. MCL 777.33(1)(e). With OV 3 at 5 points, defendant’s total OV score would have been reduced from 130 down to 125, which does not affect his sentencing grid or guidelines calculation. And “[w]here a scoring error does not alter the appropriate guidelines range, resentencing is not required.” *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Regarding OV 8, MCL 777.38(1)(a) states that when “a victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense” this variable should be scored at 15 points. Defendant asserts that he did not “asport” the victim in this case. A victim can be considered to be “asported” when she is “secreted from observation by others.” *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). The 19-year-old victim in this case was moved at gunpoint into another room away from her mother and the other perpetrator so that defendant could sexually assault her and thus clearly was “asported” under this variable.

OV 10 is to be scored at 15 points if predatory conduct is involved in the offense. MCL 777.40(1)(a). Predatory conduct is defined as an offender’s “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). The trial court properly scored OV 10 at 15 points because defendant’s conduct before and during his initial contact with the victim was intended to victimize her. Defendant argues that, because he had no prior relationship with the victim, his conduct toward her cannot be considered as predatory. However, a prior relationship between the victim and the defendant is not required. *People v Huston*, 489 Mich 451, 454-456; 802 NW2d 261 (2011). Defendant followed the victim home and then chased her once she left her vehicle. He then approached her with a gun, with a partner, in the dark. Furthermore, the victim’s mother stated in her victim impact statement that defendant told the victim, “I bet you won’t be coming home late at night anymore,” and told the

victim “to thank her friend for tipping him off.” Defendant’s conduct clearly was predatory and exploited a vulnerable victim under MCL 777.40, and 15 points were properly scored under OV 10.

Under OV 11, an offense is scored 25 points if one criminal sexual penetration occurred and zero if no criminal sexual penetration occurred. MCL 777.41(1)(b), and (c). However, points are not scored for the one penetration that forms the basis of the criminal sexual conduct offense. MCL 777.41(1)(c). Here, OV 11 was properly scored 25 points. The trial court accurately found that defendant inserted his penis into the victim’s vagina, removed it to lubricate the victim’s vagina with his wet fingers, and then reinserted his penis. In criminal sexual conduct cases, “sexual penetration” is defined as “sexual intercourse . . . or any other intrusion, however slight, of any part of a person’s body.” MCL 750.520a(r). Thus, defendant’s re-penetration of the victim’s vagina was in addition to the penetration upon which his criminal sexual assault conviction was based, and defendant was properly scored 25 points under OV 11.

Defendant also claims that his trial counsel was ineffective for failing to challenge the improper scoring of the sentencing guidelines. As already noted, defendant’s challenges to the scoring lack merit. His trial counsel cannot be considered ineffective for failing to make futile objections. *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012).

Finally, defendant argues that the trial court erred, exhibited bias, and allowed prosecutorial misconduct by accepting new evidence at the hearing on his post-judgment motion for resentencing when defendant was not present and appellate defense counsel had not received a copy of the evidence. This Court reviews constitutional issues and issues of law de novo. *People v Krueger*, 466 Mich 50, 52; 643 NW2d 223 (2002); *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). Generally, this Court also reviews allegations of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

The record is devoid of any evidence of prosecutorial misconduct or judicial bias. This Court’s order of remand stated that “[t]he trial court is to make findings of fact and a determination on the record and if appropriate, resentence appellant.” This order is at odds with defendant’s contention that the trial court was limited to the existing record when ruling on the resentencing motion. The prosecutor submitted the victim’s medical record in response to appellate defense counsel’s assertion that the victim failed to suffer any physical injury requiring medical treatment. Appellate defense counsel seemed to argue that the prosecutor was responsible for providing her with the all of the discovery that had previously been provided to defendant’s trial counsel. However, MCR 6.005(H)(5) states that one of a trial lawyer’s responsibilities is to make a defendant’s file, including all discovery materials, available to any appellate counsel for copying. Here, there is no evidence, nor does appellate defense counsel allege, that defendant’s trial counsel did not make defendant’s file available to her. Thus, there is no basis for any claim of prosecutorial misconduct.

Further, there is no evidence of judicial bias. The trial court properly admitted the victim’s medical record and reviewed the record before ruling on defendant’s motion for resentencing. There is no other allegation that the trial court was biased against defendant nor does the record indicate any bias.

Finally, there is no evidence of plain error or that defendant's due process rights were violated. Defendant claims that it was improper for the medical record to be received by the trial court at the motion hearing. However, counsel admitted that she waived defendant's appearance at that hearing. Accordingly, we perceive no error. Further, we note that the medical record introduced at the hearing had previously been provided to defendant's trial counsel before defendant was sentenced.

Accordingly, we hold that the trial court did not err in scoring the sentencing guidelines, defendant's trial counsel was not ineffective, and there was no prosecutorial misconduct, judicial bias, or violation of defendant's due process rights during the post judgment hearing.

Affirmed.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello