

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL BENJAMIN WERNER,

Defendant-Appellant.

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UNPUBLISHED

November 30, 2001

No. 220747

Grand Traverse Circuit Court

LC No. 98-007739-FC

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant, who was accused of using a knife to engage in nonconsensual sex with his former girlfriend, appeals by right from his conviction by a jury of first degree criminal sexual conduct, MCL 750.520b(1)(e). The trial court sentenced him to twenty-five to forty years in prison. We affirm.

Defendant first argues that the trial court erred in giving the following jury instruction:

Now with respect to the Defendant's alleged possession of a weapon, possession means either the person had actual physical control of the weapon – as I do the pen I'm now holding – or the Defendant has reasonable access to the weapon, that is the person need not have the weapon in his hands while committing the offense charged, so long as he has knowledge of the weapon's location and the weapon is reasonably accessible to the actor. It does not matter whether or not the Defendant was holding the weapon at the time of the sexual assault. If you find that the Defendant began the assault with a weapon at any time putting the victim in fear or traumatizing her, you may find that the Defendant used the weapon with the purpose of committing criminal sexual conduct.

Defendant contends that this instruction was inadequate because the trial court should have explicitly informed the jury that in order for defendant to have "possessed" the knife in question, he must have "demonstrate[d] some indicia of control" over it. We first note that defendant did not object to the instruction as given. Accordingly, this issue is unpreserved, and we will review it only for plain error. To warrant relief, defendant must show (1) that an error occurred; (2) that

the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights, i.e., that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

As noted in *People v Davis*, 101 Mich App 198, 202; 300 NW2d 497 (1980), a defendant can be found guilty of using a weapon during a sexual assault if the defendant “ha[d] knowledge of the weapon’s location and the weapon [wa]s reasonably accessible to the actor.” See also *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989) (“a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant”), and *People v Proveaux*, 157 Mich App 357, 361; NW2d (1987). The trial court’s instruction adequately covered this legal test, and thus no clear or obvious error occurred. *Carines*, *supra* at 763.

Defendant additionally contends that the instruction was inadequate because it allowed the jurors to convict defendant for using the knife without explaining that in order for them to do so, the knife must have been used as part of a continuing event culminating in the sexual assault. Again, we discern no clear or obvious error. As noted in *Proveaux*, *supra* at 362:

It is enough that defendant began the assault with a knife, putting the victim in fear and traumatizing her. The sexual penetration was part of a continuing event beginning with the armed assault. Undoubtedly, the Legislature intended to discourage the use of weapons by elevating forcible sexual penetration to a first-degree offense when the offender is armed. The possession of a weapon makes the sexual assault more reprehensible, increases the victim’s danger, and lessens the victim’s chances of escape. *People v Hurst*, 132 Mich App 148, 152; 346 NW2d 601 (1984).

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A policy that prevents conviction of the first-degree offense merely because at some point during the criminal transaction the offender lost his weapon would not be consonant with the Legislature’s intent. A rule requiring actual or constructive possession of the weapon through the course of the sexual assault would mean that a defendant could first subdue the victim with a weapon and then discard it before actual penetration. Such a rule would mean that the victim’s actions in defending herself lessened the crime’s seriousness.

Here, the trial court stated, “If you find that the Defendant *began the assault with a weapon . . .* you may find that the Defendant used the weapon with the purpose of committing criminal sexual conduct.” Therefore, the jury essentially was informed that in order to find defendant guilty, they must conclude that the sexual assault began with a weapon and culminated in penetration. This instruction was correct in light of *Proveaux*. We discern no clear or obvious error, and reversal is therefore unwarranted. *Carines*, *supra* at 763.<sup>1</sup>

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<sup>1</sup> Based on our analysis of the jury-instruction issue, we reject defendant’s argument in his  
(continued...)

Defendant next argues that the trial court imposed a disproportionate sentence. We review sentencing decisions for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993), overruled on other grounds sub nom *People v Edgett*, 220 Mich App 686 (1996). If the principle of proportionality – which dictates that a sentence be proportionate to the seriousness of the crime and the defendant’s prior record and circumstances – is violated, an abuse of discretion has occurred. *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). When imposing a sentence, a trial court may consider the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant’s attitude toward his criminal behavior, the defendant’s social and personal history, and the defendant’s criminal history. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). It may also consider the effect of the crime on the victim. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

The judicial sentencing guidelines<sup>2</sup> in this case provided a range of ten to twenty-five years’ imprisonment. Therefore, defendant’s sentence, although at the high end of the guidelines, nonetheless fit within the guidelines and was presumptively proportionate. *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000). Defendant has failed to overcome this presumption. Indeed, defendant had a prior felony conviction and five prior misdemeanor convictions. Moreover, defendant broke into his former girlfriend’s home at night, held a knife to her throat, and sexually assaulted her. As noted by the trial court, “It is one of the most heinous crimes that a human being can commit on another, to invade her home, to violate her sexually, and to have this occur in a deliberate, thoughtful fashion.” In light of defendant’s violation of his former girlfriend in such a terrifying manner, we cannot say that the trial court abused its discretion in sentencing defendant.

Next, defendant argues that the trial court erred by giving the following jury instruction:

There has been evidence in this case about the defense of consent. A person consents to a sexual act by agreeing to it freely and willingly, without being forced or coerced. It is not necessary to show that [the victim] resisted the Defendant to prove that the crime was committed, nor is it necessary to show that [the victim] did anything to lessen the danger to herself. In deciding whether or not [the victim] consented to the act, you should consider all the evidence. It may help you to think about the following questions: a. Was [the victim] free to leave and not take part in the sexual act. b. Did the defendant threaten [the victim] with present or future injury. Did the defendant use force, violence or coercion, and

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(...continued)

supplemental brief that the disputed jury instruction “so infused the trial with unfairness” to warrant relief under the United States Constitution.

<sup>2</sup> Because of the date of the offense in this case, the judicial sentencing guidelines applied. See, e.g., *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). We reject defendant’s implication that the new statutory guidelines should apply to this case because it is still pending after the inception of the new guidelines. The statutory guidelines are expressly prospective in application and apply only to crimes committed on or after January 1, 1999. *Id.* at 253-254; MCL 769.34(2).

did the defendant display a weapon. If you find that the evidence raises a reasonable doubt as to whether [the victim] consented to the act freely or willingly then you must find the defendant not guilty.

Defendant contends that this instruction shifted the burden of proof to defendant because it did not inform the jury that the prosecutor was required to prove the element of nonconsent. Again, however, defendant failed to object to this instruction below. Accordingly, review for plain error is appropriate. We find no plain error with respect to the instruction. Indeed, this court has expressly approved a virtually identical instruction. See *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Next, defendant argues that the prosecutor committed misconduct requiring reversal by eliciting on cross-examination and stating in closing arguments that defendant “has a character trait of making mistakes of judgment and action when under stressed [sic].” However, defendant did not object to the prosecutor’s allegedly improper conduct. “Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant’s claim for plain error.” *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 310 (2000). Accordingly, to warrant relief defendant must yet again show (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights, i.e., that it affected the outcome of the proceedings. *Carines*, *supra* at 763.

“Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor’s remarks in context.” *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). We find no basis for reversal in this case, because it was defendant who first injected into the trial the fact that he had attempted suicide twice, that he was hospitalized in a psychiatric unit, that he can act out when he is angry or stressed, and that he had prior convictions for bad checks. The prosecutor’s conduct in eliciting cumulative testimony and commenting on the evidence introduced at trial by defendant did not constitute a clear or obvious error and did not reasonably affect the outcome of the case. Reversal is unwarranted under *Carines*, *supra* at 763.<sup>3</sup>

Finally, defendant argues that his attorney rendered ineffective assistance of counsel by failing to object to (1) the jury instructions regarding possession of a weapon and consent and (2) the alleged prosecutorial misconduct discussed above. To establish ineffective assistance of counsel, a defendant must show that his attorney’s performance was deficient under an objective standard of reasonableness and that the deficiency reasonably affected the outcome of the case. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). An attorney is presumed to provide effective assistance; therefore, a defendant bears a heavy burden of proving otherwise. *Stanaway*, *supra* at 687.

We cannot say that trial counsel’s failure to object to the jury instructions or to the

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<sup>3</sup> We additionally note that reversal is unwarranted because an immediate objection and a cautionary instruction could have cured any potential prejudice resulting from the prosecutor’s actions. See *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995).

prosecutor's conduct reasonably affected the outcome of the case. Indeed, the instructions were sufficiently appropriate such that any objection by counsel properly would have been denied. With regard to the prosecutor's conduct, an objection would not have altered the outcome of the case because defendant himself first elicited the evidence about which he complains. We do not believe that the prosecutor's elicitation of cumulative testimony or his comments about the testimony were so powerful so as to alter the course of the trial. Defendant has failed to establish that his attorney rendered ineffective assistance or that a remand for an evidentiary hearing on the issue is warranted.<sup>4</sup>

Affirmed.

/s/ Donald E. Holbrook, Jr.  
/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter

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<sup>4</sup> Moreover, this Court previously denied defendant's motion for a remand, and we decline to revisit that decision.