

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL OWEN COUTURIER,

Defendant-Appellant.

UNPUBLISHED

December 15, 2005

No. 252175

Bay Circuit Court

LC Nos. 02-010721; 02-010903

ON REMAND

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

This case returns to this Court on remand from our Supreme Court. The remand order requires us to consider the main evidentiary issue (involving the cross-examination of one of the victims) under a plain error standard. Although we believe the cross-examination issue was a preserved constitutional error which would require a reversal of defendant's convictions, under the plain error standard we must affirm defendant's convictions.

I. Underlying Facts and Proceedings

This case arises from allegations that defendant had sexual contact with three students in the first-grade class his wife taught, where defendant occasionally served as a volunteer. The jury found defendant not guilty of charges in connection with one of the complainants, but guilty of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under thirteen), each in connection with the other two. The trial court sentenced defendant to serve four concurrent terms of 71 to 180 months' imprisonment.

Defendant appealed by right, raising eight issues. This Court reversed defendant's convictions over what we regarded as a preserved evidentiary issue, addressed four issues likely to arise on retrial, and declined to reach the three remaining issues as rendered moot by the decision to reverse. *People v Couturier*, unpublished opinion per curiam of the Court of Appeals, issued February 10, 2005 (Docket No. 252157).

Plaintiff sought leave to appeal from the Supreme Court, asserting that the issue over which this Court had granted relief should have been treated as an unpreserved one. In response to plaintiff's application, the Supreme Court vacated this Court's opinion in the case, and remanded to this Court with instructions to reconsider the evidentiary issue concerning the trial court's limitation on cross-examination of one of the complainants under the standard set forth

for unpreserved constitutional issues in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), and to decide also those issues this Court had earlier chosen not to reach. The Supreme Court otherwise denied leave. 474 Mich 876; 704 NW2d 463 (Docket No. 128717, decided October 6, 2005).

II. Analysis on Remand

Because the Supreme Court directed this Court to reconsider the cross-examination issue under a different standard of review, and to consider the issues previously not addressed, while expressing no disagreement concerning our resolution of defendant's other issues, we regard our earlier decisions concerning those other issues as the law of the case, and hereby incorporate by reference those parts of our earlier opinion in this case. We further note that, but for ordering alternative analysis under the plain-error rule, the Supreme Court expressed no disagreement with our analysis of the cross-examination issue.

A. Limitation on Cross-Examination

Defendant argues that the trial court erred in limiting cross-examination of one of the complainants. This issue arises from the following exchange:

Q. And you were scared, is that right?

A. Yes.

Q. Did you send [defendant] notes tellin' him you loved him and missed him after he was no—

[THE PROSECUTOR]. Your Honor,—

[DEFENSE COUNSEL]. —longer in the—

[THE PROSECUTOR]. —I'm gonna—

[DEFENSE COUNSEL]. —classroom?

[THE PROSECUTOR]. —object at this time. I'm not sure what the relevance of that is.

[DEFENSE COUNSEL]. Impeachment, your Honor.

THE COURT. Sustained.

Q. Did [defendant] ever threaten you?

A. No.

Witness credibility is always at issue, and may be attacked on cross-examination. MRE 611(b). Cross-examination of adverse witnesses is a party's right, not a privilege granted at the discretion of the court. *Hayes v Coleman*, 338 Mich 371, 380; 61 NW2d 634 (1953). "A limitation on cross-examination preventing a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes

denial of the constitutional right of confrontation.” *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). See US Const, Am VI; Const 1963, art 1, § 20.

This Court initially concluded that it was error for the trial court to disallow the line of questioning defense counsel offered, and the remand order from the Supreme Court likewise presupposes error in this regard. That the trial court erred in limiting cross-examination in this particular is therefore not at issue.

This Court reviewed this issue as a preserved constitutional one. *Couturier, supra*, slip op at 3. Where such error is determined to have occurred, “[i]f the error is not a structural defect that defies harmless error analysis, the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt.” *Carines, supra* at 774 (appendix), citing *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994). This Court concluded that plaintiff had failed, under this standard, to show the erroneous limitation on cross-examination to be harmless, and so reversed defendant’s convictions. *Couturier, supra*, slip op at 3-4.

The remand order from the Supreme Court expresses no disagreement with this Court’s analysis under the standard of review applied, but requires re-evaluation under the plain-error rule, according to which review is limited to ascertaining whether there was plain error that affected defendant’s substantial rights. *Carines, supra* at 763.¹

¹Although the Supreme Court thus implies that it considers this issue unpreserved, the remand order includes no such explicit holding. In our earlier opinion, we presented this issue as a preserved constitutional one without elaboration. *Couturier, supra*, slip op at 3. In light of our Supreme Court’s command, we will further address the preservation question.

To preserve an evidentiary objection, the same reason must be presented at trial as is argued on appeal. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). See also *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). Where the ruling in question is one excluding evidence, the substance of the evidence must be apparent from the context of the questioning, or the proponent must make it known by offer of proof. MRE 103(a)(2). “Once the court makes a definitive ruling on the record admitting or excluding evidence, . . . a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” *Id.*

We conclude that positing impeachment as the reason for an area of cross-examination well preserves a Confrontation Clause issue. For purposes of testing the truthfulness of an adverse witness, “impeachment” and “confrontation” are near synonyms. What this Court had to say about overly fastidious insistence on formal adherence to certain minutiae of sentencing procedure seems on point here: “To . . . require . . . verbal descriptions of obvious mental processes . . . elevates form over substance . . .” *People v Bowens*, 119 Mich App 470, 474; 326 NW2d 406 (1982) (internal quotation marks and citation omitted). In this case, defense counsel’s question well established the substance of the intended cross-examination, and his explanation that he wished to use it to impeach the witness was a plain assertion of

(continued...)

A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763.

In this case, defendant cannot prove that the complained-of lack of cross-examination would have proved him innocent. A jury could believe that a child could express great affection for a defendant, suffer sexual predations from that defendant nevertheless, and testify truthfully about them. Moreover, although it is not difficult to imagine a lovelorn child turning on the object of her affections, a witness' expressed affection for a defendant would more immediately suggest a disinclination to testify against that defendant. That the young complainant in this instance felt great affection for a person against whom she testified could strengthen, not weaken, her testimony implicating him in sexual misconduct.

Nor can defendant show that the limitation on cross-examination itself threw the integrity of the proceedings into doubt. The subject of the cross-examination did not bear directly on the question of defendant's guilt or innocence, but only offered a prism through which to view one complainant's testimony, which prism could have strengthened *or* weakened the credibility assessment. A criminal defendant is entitled to a fair trial, not a perfect one. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992).

For these reasons, we conclude that there was no plain error affecting defendant's substantial rights.

B. Guidelines Scoring

Defendant argues that the trial court erred in scoring offense variable (OV) 13, which concerns continuing patterns of criminal behavior. MCL 777.43. Defendant was assessed twenty-five points, the amount prescribed where the sentencing offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person" MCL 777.43(1)(b). At sentencing, defense counsel protested that because no single person was victimized three times, defendant should not have received those points. The trial court retained the points on the ground that defendant was convicted of a total of four offenses against persons.

(...continued)

confrontational rights. The trial court's quickness in sustaining plaintiff's objection rendered it impossible for defense counsel to elaborate on his reasons for the desired line of questioning except by standing there and arguing with the court over a decision firmly made. For these reasons, we conclude that the requirements of MRE 103(a)(2) were met, and that defense counsel ably preserved this issue.

Accordingly, despite our Supreme Court's expressed interest in treatment of this issue as an unpreserved one, we respectfully stand by our original determination that it was preserved. But, in recognition of our Supreme Court's explicit command, we must apply the plain-error rule set forth in *Carines*, and, under this standard we affirm defendant's convictions and sentences.

This issue hinges on the proper reading of MCL 777.43(1)(b). The proper application of the statutory sentencing guidelines presents a question of law, calling for review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). See also *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997) (statutory interpretation is a question of law calling for review de novo).

Defendant argues that because the Legislature explicitly prescribed fifty points for OV-13 for crimes involving three or more felonious sexual penetrations against “a person or persons” in § 43(1)(a), it would have used the same language in the instructions for scoring twenty-five points in § 43(1)(b) had it intended that crimes against different persons be aggregated. However, reading subsection § 43(1)(b) in the context of its immediate neighbors suggests that it concerns not crimes against a one person, but rather crimes against a person as opposed to crimes against property. “[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense.” *Gross v General Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995).

MCL 777.43(1)(a) prescribes fifty points where the relevant criminal history involved three or more sexual penetrations of “a person or persons” under thirteen. Subsection (2)(d) further narrows the applicability of this provision to sentencing offenses of first-degree CSC. The subsection here at issue, (1)(b), prescribes twenty-five points where the sentencing offense “was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” The following subsection prescribes ten points where the offense “was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property” MCL 777.43(1)(c).

The provision authorizing the greatest number of points demands narrow application, to CSC I crimes that were part of others against persons younger than thirteen. It thus targets a specific range of crimes involving a specific range of victims. Because the provision is by its nature so specific, the Legislature resorted to use of the words “person or persons” to clarify that it was not narrowed to crimes against a single victim, but could encompass multiple victims.

In contrast, subsection (1)(c) invites much broader application than subsection (1)(a), in that it refers to “felonious activity” in general, against “3 or more crimes against a person or property.” The reference to “crimes against a person or property” clearly indicates two general classes of crime, not three or more crimes against a single person, or against a single piece of property.

The subsection at issue, (1)(b), being intermediate between its neighbors, logically applies more broadly than the preceding one, but less so than the following one. Its reference to “felonious criminal activity involving 3 or more crimes against a person,” then, does not uniquely focus on crimes against one individual, but instead indicates crimes against the person, as opposed to crimes against property or some other classification. See MCL 777.5.

This analysis is bolstered by *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001). The defendant in that case was convicted of four counts of creating child sexually abusive material, MCL 750.145c(2), following from evidence that he took two erotic

photographs each of two fifteen-year-old girls. This Court held that those four offenses, taken in the aggregate, warranted the assessment of twenty-five points for OV 13. *Harmon, supra* at 532.

For these reasons, we conclude that the trial court correctly scored OV 13.

C. Retention of Bond Money for Restitution

Defendant argues that the trial court erred in retaining bond monies against a future determination of restitution, on the grounds that the money in fact belonged to his wife, and that the trial court was obliged to determine while it had jurisdiction of the case precisely what the restitution-eligible expenses were.

The scope of a trial court's powers presents a question of law, calling for review de novo. *Traxler v Ford Motor Co*, 227 Mich App 276, 280; 576 NW2d 398 (1998). "[T]hird parties depositing and retaining title to funds to secure the release of a defendant" are entitled to "retain [their] interest in the funds if the terms of the bond are met." *In re Forfeiture of Bail Bond*, 209 Mich App 540, 549; 531 NW2d 806 (1995), citing MCR 6.106; *Isbell v Bay Circuit Judge*, 215 Mich 364, 371; 183 NW 721 (1921).

However, in this case there was no protestation below that the bond monies came from a third party, and defendant fails to support his bald assertion on appeal that the money came from his wife with any record citations to show that this is so.² We deem these failures of preservation and presentation as abandonment of the issue. A party's unsupported assertion is not a sufficient basis for granting appellate relief. See *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542, appeal dismissed 511 NW2d 684 (November 10, 1993); MCR 7.212(C)(7).

But this Court may hold a party's admissions, supported or not, against that party. See *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 189-190; 650 NW2d 364 (2002); *People v Riggs*, 237 Mich App 584, 589 n 2; 604 NW2d 68 (1999); *People v Cooper*, 166 Mich App 638, 653; 421 NW2d 177 (1987). In this case, by asserting that it is a third party whose money is at stake, defendant admits his lack of standing to litigate its disposal. In both *In re Forfeiture, supra*, and *Isbell, supra*, the appellants were the third parties asserting rights to bond money they had posted, not the criminal defendants on whose behalf they acted. As their example shows, if a third party has posted bond on behalf of a criminal defendant, it is that third party, not the defendant, who has standing to contest how the trial court has disposed of it.

For these reasons, this issue warrants no further consideration.

D. Assistance of Counsel

² Our search of the record reveals but scanty indication that any third party was involved in the payment of defendant's bond, and none specifying a name other than defendant's in connection with bond payments.

Defendant recasts three of his issues under the rubric of ineffective assistance of counsel—one disposed of in our earlier opinion, and two discussed herein—arguing that counsel erred to the extent that counsel failed to preserve them.

“In reviewing a defendant’s claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel’s performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel’s defective performance.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel’s poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

The issue rejected in the earlier opinion concerned an expert witness’ mention of the recent sex scandals in the Catholic Church. We concluded that both the testimony, and subsequent prosecutorial argument referring to it, were proper, and, alternatively, that any error was cured by the jury instructions provided. *Couturier, supra*, slip op at 5 and n 4. Because that aspect of this Court’s earlier opinion remains the law of the case, no claim of ineffective assistance can be predicated on a failure to object. “Counsel is not obligated to make futile objections.” *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

Returning to the issue relating to the trial court’s decision to retain bond monies against future restitution, defendant’s unqualified assertion that the money at issue was in fact provided by his wife effectively shields defendant’s trial attorney from any accusation of failure to fulfill a duty in the matter. Defendant’s constitutional right to effective assistance of counsel did not obligate defense counsel to go beyond his representation of defendant and defend also defendant’s wife’s financial interests.

Returning to the cross-examination issue, because we concluded above that defense counsel did in fact preserve this issue for appellate review, no claim of ineffective assistance can be predicated on any failure to object. To the extent the issue is considered unpreserved, defense counsel’s performance was not objectively unreasonable as his actions were the type of actions which would typically preserve an objection.

Defendant has thus failed to bring any errors on defense counsel’s part to light.

III. Conclusion

We affirm defendant’s convictions and sentences, but only because we were directed to review this case under the *Carines* unpreserved constitutional error standard. If not for this directive, we would again reverse on the ground that defense counsel preserved objections to the trial court’s decision to limit his cross-examination of one of the complainants, that the court erred in this regard, and that plaintiff cannot show that the error was harmless beyond a reasonable doubt. We additionally reiterate that our earlier rejection of four other issues, which aspect of that decision our Supreme Court left undisturbed, remains the law of the case, and that our analysis of defendant’s previously undecided issues shows them to be without merit.

Affirmed.

/s/ Kathleen Jansen

/s/ Christopher M. Murray

/s/ Pat M. Donofrio