

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 18, 2011

v

STEPHEN DUANE GIBSON,
Defendant-Appellant.

No. 299125
Calhoun Circuit Court
LC No. 2010-000245-FH

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

A jury found defendant guilty of domestic assault, third offense, MCL 750.81(4). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 40 to 180 months in prison. We affirm defendant’s conviction, but vacate his sentence and remand to the trial court for resentencing consistent with this opinion.

I. PRELIMINARY EXAMINATION

Defendant argues that the trial court erred in binding him over for trial based on a transcript from a previous preliminary examination hearing. We review a district court’s decision to bind over a defendant for an abuse of discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). The record does not show that the court bound defendant over based on a prior transcript. Rather, the record reflects that defendant waived his right to a preliminary examination. Waiver is “the ‘intentional relinquishment or abandonment of a known right.’” *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). The bindover form signed by the district court states that defendant waived his right to a preliminary examination.¹

¹ Were we to find an error related to the bindover, reversal would not be warranted because any error would have been harmless and there is no showing that a miscarriage of justice occurred.

II. PRODUCTION OF A WITNESS

Defendant claims that his due process and fair trial rights were violated by the prosecution's failure to produce James Guess as a witness and the trial court's failure to provide a missing witness instruction. We "review a trial court's determination of due diligence [in regards to the prosecution's production of an endorsed witness] and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

The 1986 amendments to MCL 767.40a "eliminated the prosecutor's burden to locate, endorse, and produce unknown persons who might be res gestae witnesses" *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005), quoting *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). "The prosecutor's duty to produce witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *Burwick*, 450 Mich at 289. Here, the prosecution was not required to provide reasonable assistance to defense counsel in locating and serving Guess pursuant to MCL 767.40a(5) because defense counsel did not make such a request. See MCL 767.40a; *People v Steele*, 283 Mich App 472, 484; 769 NW2d 256 (2009). Nonetheless, "[a] prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial." *Eccles*, 260 Mich App at 388. "If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988); CJI2d 5.12.

Both parties listed Guess on their witness lists. On April 13, 2010, the prosecution moved to strike Guess from its list. The trial court did not hold a hearing on the motion until the day before trial. At that time, the trial judge did not allow the prosecution to strike Guess, and he indicated that a missing witness instruction would depend on a due diligence inquiry. The next day, the prosecution's investigator testified about his efforts to locate and serve Guess. In its oral ruling, the trial judge implied that he would allow the prosecution to delete Guess from its witness list. However, the court did not enter a written order.

Were we to conclude that Guess was not deleted from the prosecution's list, we hold that the trial court did not abuse its discretion in finding that the prosecution exercised due diligence in attempting to produce Guess for trial. We also hold that the trial court correctly declined to give the missing witness instruction. The prosecution went to Guess's last known address, made contact with multiple people in attempt to locate Guess, and discovered that Guess had moved to Arizona. Due diligence did not require the prosecution to do everything possible to obtain the presence of Guess from Arizona. See *Cummings*, 171 Mich App at 585. Under the circumstances, "[a]n unprejudiced person considering the facts on which the trial court acted would be unable to say there was no justification or excuse for the ruling." See *People v Callon*, 256 Mich App 312, 327-328; 662 NW2d 501 (2003); *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000). In addition, defendant failed to establish that the trial court abused

MCL 769.26; *People v Hall*, 435 Mich 599, 610-611; 460 NW2d 520 (1990). See also *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

its discretion because he did not show prejudice. *Callon*, 256 Mich App at 328 (“[T]o establish that the trial court abused its discretion defendant must demonstrate that the court’s ruling resulted in prejudice.”).

III. ATTEMPTED LARCENY CONVICTION

Defendant contends that the prosecutor and the trial court denied him a fair trial because the prosecutor elicited evidence about defendant’s attempted larceny conviction and the trial court failed to provide a curative instruction. We review allegations of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). “We review a claim of instructional error involving a question of law de novo, but we review the trial court’s determination that a jury instruction applies to the facts of the case for an abuse of discretion.” *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). “The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice.” *Id.*, citing MCL 769.26; *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

The prosecutor did not improperly question defendant about his conviction for attempted larceny. “The test for prosecutorial misconduct is whether, after examining the prosecutor’s statements and actions in context, the defendant was denied a fair and impartial trial.” *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). The plain language of MRE 609 does not specifically require the prosecution to provide pretrial notice of its intent to use past convictions to impeach the credibility of a witness. See *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009).

Under MRE 609, the prosecutor could use defendant’s attempted larceny conviction to impeach defendant on cross-examination because the crime contained an element of theft and was punishable by imprisonment in excess of one year. See MCL 750.92; MCL 750.360; MCL 777.16r. Where the plain language of MRE 609 does not require pretrial notice, the prosecutor’s cross-examination question regarding the attempted larceny conviction was not “clear or obvious” error. See *Carines*, 460 Mich at 763. Furthermore, were we to find an error, it did not affect defendant’s substantial rights. *Id.*; *People v Bartlett*, 197 Mich App 15, 20; 494 NW2d 776 (1992). There was overwhelming evidence of defendant’s guilt in light of Officer Benjamin Clark’s testimony that he witnessed defendant throw the victim on the ground, punch her in the face, and pick her up by the throat. Officer Clark also testified that he had to repeatedly threaten to use a taser on defendant before he was willing to let go of the victim. Defendant also failed to establish that the trial court’s refusal to give the requested curative instruction constituted an error that resulted in a miscarriage of justice. See *Dupree*, 486 Mich at 702. Again, no error occurred and ample evidence supported defendant’s conviction.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to convict him of domestic assault. We review de novo claims regarding the sufficiency of evidence. *Ericksen*, 288 Mich App at 195. At trial, defendant took the position that he did not intend to batter his girlfriend and that his conduct did not place her in reasonable apprehension of a battery. We hold that there was clearly sufficient evidence for a rational jury to find that defendant committed domestic violence based on Officer Clark’s eyewitness testimony. Defendant argues that the jury should have

believed the victim's testimony that defendant did not batter her. However, this Court views the evidence favorably to the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), and makes credibility choices in support of the jury verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

V. SENTENCING

Defendant maintains that he is entitled to resentencing on the ground that the trial court improperly scored offense variables (OV) 7 and OV 10. We review de novo the interpretation and application of statutory sentencing guidelines. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). We also review OV scoring for an abuse of discretion to determine whether the evidence supports a particular score. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

"Offense variable 7 is aggravated physical abuse." MCL 777.37(1). Under MCL 777.37(1)(a), OV 7 is scored at 50 points 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." If "[n]o 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" then OV 7 is scored at zero points. MCL 777.37(1)(b). MCL 777.37(3) defines "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification."

We hold that a score of 50 points for OV 7 was improper. While defendant's conduct was violent and inexcusable, the evidence was not sufficient to support a finding that there was sadism, torture or excessive brutality. See *Apgar*, 264 Mich App at 329. The evidence did not show that defendant subjected the victim to extreme or prolonged pain or humiliation nor did the evidence show that there was torture or excessive brutality. See *People v Elanani*, 485 Mich 876; 771 NW2d 800 (2009). Defendant is entitled to resentencing because the scoring error alters the applicable guidelines range. See *Francisco*, 474 Mich at 89 n 8.

The trial court correctly scored OV 10 because evidence supported the score of five points. See *Apgar*, 264 Mich App at 329. "Offense variable 10 is exploitation of a vulnerable victim." MCL 777.40. Under MCL 777.40(1)(b), OV 10 is scored at five points if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep or unconscious." "'Exploit' means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "[P]oints should be assessed under OV 10 only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion or temptation." *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008). The evidence that the victim was intoxicated and in a dating relationship with defendant at the time of the incident supported that the victim was vulnerable. See *id.* Defendant exploited the victim's vulnerability from intoxication by taking unfair advantage of her susceptibility to physical restraint and his ability to control her. See MCL 777.40(3)(b).

Affirmed, but remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Jane M. Beckering