

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 28, 2012

v

BRANDON JERROLD JOHNSON,

Defendant-Appellant.

No. 304459
Oakland Circuit Court
LC No. 2010-234100-FH

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant Brandon Jerrold Johnson digitally penetrated a 17-year-old member of his extended family. For his crime, a jury convicted him of third-degree criminal sexual conduct (CSC) in violation of either MCL 750.520d(1)(b) (sexual penetration accomplished by force or coercion) or (c) (sexual penetration of a “mentally incapable, mentally incapacitated, or physically helpless” victim). The court then sentenced defendant as a fourth habitual offender, MCL 769.12, to 7 to 30 years’ imprisonment. We agree with defendant that his trial counsel should have objected to the improper admission of the victim’s hearsay statement, taken from her medical records, that she was afraid because she knew defendant carried a gun. Given the record evidence of defendant’s guilt, however, we find this error harmless. Defendant’s remaining claims lack merit. Accordingly, we affirm.

I. BACKGROUND

On the night of September 18, 2010, the victim spent time in her bedroom, listening to music with her 16-year-old nephew and defendant, her nephew’s 23-year-old cousin from the other side of his family tree. Defendant and the victim were not related by blood, but the victim considered defendant as family and she had known him her entire life. The trio fell asleep in the victim’s bedroom. The victim testified that defendant woke her several times that night, offering to give her a back massage, moving her legs onto the bed, and asking if she was a virgin. Around dawn, the victim awoke when she felt defendant move her shorts and penetrate her vagina with his finger. The victim pulled away and became hysterical. Defendant fled and the victim telephoned her mother, who had left early that morning.

The prosecutor charged defendant with alternative counts of third-degree CSC (penetration) and fourth-degree CSC (sexual contact), each on alternative theories that defendant

accomplished the offense by force/coercion or on a physically helpless (sleeping) victim. The jury ultimately convicted defendant of third-degree CSC but did not indicate under which theory.

II. FAILURE TO OBJECT TO INADMISSIBLE HEARSAY

Defendant first argues that his trial counsel was ineffective for failing to object when the nurse examiner testified regarding the victim's summary of the incident, particularly the victim's statement that defendant "carries a gun so I was scared."¹ Because defendant did not request a new trial or an evidentiary hearing, review of his ineffective assistance claim is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish an ineffective assistance claim, a defendant must show that "(1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). The decision whether to object is a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). "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 victim's summary of the incident was contained in the nurse examiner's records, which were admitted into evidence under MRE 803(6), the "business record exception" to the hearsay rule. When a business record contains a hearsay statement, that statement must also come within a hearsay exception to be admissible. MRE 805. Hearsay within hearsay must be excluded if the proponent fails to establish a foundation for its admission. *Solomon v Shuell*, 435 Mich 104, 129; 457 NW2d 669 (1990). The victim did not make the challenged statement concerning the gun "for the purpose of medical treatment or medical diagnosis." MRE 803(4). It was not "reasonably necessary [for] diagnosis or treatment." *Id.* Rather, it was an unnecessary comment having nothing to do with the victim's injuries and counsel should have objected to its admission.

Relief is unwarranted, however, as there is no reasonable likelihood that the lone statement that defendant "carries a gun" affected the outcome of the proceedings. Contrary to defendant's assertion, the evidence could not have swayed the jury to convict defendant of third, rather than fourth, degree CSC; one involves sexual penetration and the other contact. The offense degree has nothing to do with the use of a weapon.

III. SENTENCING GUIDELINES

Defendant argues that the court improperly scored offense variable (OV) 10 at 10 points, and that defense counsel was ineffective for failing to object. The interpretation and application of the sentencing guidelines present questions of law that we review de novo. *People v Huston* 489 Mich 451, 457; 802 NW2d 261 (2011). "A sentencing court has discretion in determining

¹ This was the sole reference to a firearm in the record.

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).

OV 10 takes into account “exploitation of a vulnerable victim.” MCL 777.40(1). Defendant was assessed 10 points, which is warranted when “[t]he offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). The instructions define the term “exploit” as “to manipulate a victim for selfish or unethical purposes,” MCL 777.40(3)(b), and the term “vulnerability” as “the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c).

A “domestic relationship” is “a familial or cohabiting relationship.” *People v Jamison*, 292 Mich App 440, 447; 807 NW2d 427 (2011). Although defendant was not related to the victim by blood, the evidence showed that he was a member of her extended family.² Absent that relationship, defendant would not have been permitted to spend the night with the victim in her bedroom. Defendant manipulated that relationship to sexually assault the victim. That conduct merits a 10-point score. Moreover, a sentencing court must assign the highest number of points possible when scoring OV 10. MCL 777.40(1). Accordingly, the court was precluded from assigning only five points based on defendant’s exploitation of a sleeping victim. MCL 777.40(1)(c). The evidence supported a 10-point score for OV 10 and defense counsel had no ground to object. Defendant’s claims of scoring error and ineffective assistance must therefore fail. See *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

IV. SUFFICIENCY OF THE EVIDENCE

In a *pro se* brief filed pursuant to Supreme Court Administrative Order 2004-6 Standard 4, defendant argues that the prosecutor presented insufficient evidence to support his conviction. In relation to sufficiency challenges, we review the record de novo and, viewing both the direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). It is for the jury to determine what inferences may be fairly drawn from the evidence and the weight to be accorded the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Also, we must defer to the jury’s assessment of witness credibility. *People v Hill*, 257 Mich App 126, 140-141; 667 NW2d 78 (2003).

As noted, we cannot discern whether the jury convicted defendant of engaging in sexual penetration accomplished by force or coercion, MCL 750.520d(1)(b), or on a physically helpless, mentally incapable, or mentally incapacitated victim, MCL 750.520d(1)(c). The prosecutor presented sufficient evidence to support defendant’s conviction under either theory.

² The term “familial” means “of, involving, or common to a family” and the term “family” includes “a group of people related by blood or marriage.” Webster’s New Twentieth Century Dictionary, Unabridged (2d ed, 1979).

“Force or coercion” as proscribed by MCL 750.520d(1)(b) includes overcoming a victim through the use of actual physical force or violence, MCL 750.520b(1)(f)(i), and overcoming the victim through concealment or surprise, MCL 750.520b(1)(f)(v). Force or coercion includes the exertion of strength or power on another person to compel an act against that person’s will. *People v Premo*, 213 Mich App 406, 409-411; 540 NW2d 715 (1995). As explained in *People v Carlson*, 466 Mich 130; 644 NW2d 704 (2002), the force need not be so great as to overcome the victim. It is sufficient that the actor “seize[s] control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim’s wishes.” *Id.* at 140.

The record evidence supports that defendant accomplished penetration through the use of physical force or violence, by overcoming the victim through surprise. At trial, the victim testified that she fell asleep and awoke only because she felt defendant’s hand “inside of” her. The victim then discovered that her shorts had been pulled down. She explained that she was in “shock and panic” and asked defendant what he was doing, after which she left the room. The victim’s testimony was sufficient to enable the jury to find beyond a reasonable doubt that defendant accomplished the sexual penetration by overcoming the victim through the element of surprise while she was sleeping, thereby establishing the force or coercion element.

The evidence was also sufficient to prove that defendant knew or had reason to know that the victim was physically helpless. A person is physically helpless when she “is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.” MCL 750.520a(m). “[T]he essence of physical helplessness is that the victim is unable to communicate unwillingness to an act.” *People v Perry*, 172 Mich App 609, 622; 432 NW2d 377 (1988). A case of third-degree CSC predicated on sleep-induced helplessness is made out where the victim is penetrated while asleep and awakens during that process from the sensation of being penetrated. *Id.* It is not made out where the victim is awake when the penetration occurs and is physically able to communicate her unwillingness to act, e.g., the defendant engages in sexual penetration after waking the victim. *Id.* at 612-613, 622.

Both during direct and cross-examination, the victim testified that she was asleep and awoke only when she felt defendant penetrate her. The victim described her state as being “asleep but [not] fully asleep.” Defense counsel impeached the victim with her prior statement to the police that she had “blacked out,” and with her preliminary examination testimony that she was “halfway asleep.” The victim reiterated at trial that she was halfway asleep and was not aware of what was going on around her. A person who is not fully awake and has some sensory perception may nevertheless be physically helpless because “common experience tells us that sleep is not an all or nothing condition.” *Woodward v Commonwealth*, 12 Va App 118, 121; 402 SE2d 244 (1991). Viewed in the light most favorable to the prosecution, the victim’s testimony that she was halfway asleep or not fully asleep created a factual issue for the jury. The jury was free to consider from the evidence whether the victim was physically helpless and unable to communicate her lack of consent.

Defendant alternatively argues for the first time on appeal that the victim was incompetent to testify because “[b]eing asleep is an essential element of” the offense and yet the victim “did not have an adequate understanding of what it means to be asleep.” However, a sleeping victim is not an essential element; a physically helpless victim is the essential element of third-degree CSC under § 520d(1)(c). Physical helplessness may be caused by any condition

or circumstance that renders the victim “physically unable to communicate unwillingness to an act.” Moreover, a witness’s competency to testify does not depend on her understanding or ability to clearly articulate the elements of the offense. A lay witness is competent to testify if she has personal knowledge of the matter to which she testifies unless the court finds that she “does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably[.]” MRE 601; MRE 602. The victim had personal knowledge of defendant’s actions and expressed herself sufficiently to be understood. The fact that she was unable to clearly articulate her state of consciousness did not render her incompetent to testify.

V. PROSECUTORIAL MISCONDUCT

Defendant further contends that the victim’s inability to clearly state whether she was half asleep, fully asleep, or “blacked out” rendered her trial testimony false and misleading. Defendant accuses the prosecutor of committing misconduct by securing a conviction based on the victim’s false testimony. Defendant did not object to the prosecutor’s conduct at trial, leaving the issue unpreserved. Unpreserved issues of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Goodin*, 257 Mich App at 431. “The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted).” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

A prosecutor may not knowingly use false testimony to obtain a conviction and has a duty to correct false evidence and advise the defendant and the trial court if a government witness lies under oath. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). “[A] conviction obtained through the knowing use of perjured testimony offends a defendant’s due process protections guaranteed under the Fourteenth Amendment.” *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). A conviction obtained after the knowing use of perjured testimony must be set aside if the false testimony could have affected the judgment. *Id.*

There is no record indication that the victim committed perjury, much less that the prosecutor knowingly presented perjured testimony. Defense counsel did attempt to create doubt about whether the victim was truly asleep by cross examining her regarding her mental status. But it was the jury’s duty to gauge the victim’s credibility and determine whether she was physically helpless at the time. *Hill*, 257 Mich App at 140-141.

Defendant also makes a fleeting reference to the victim having offered improper rebuttal testimony. Rebuttal evidence is admissible to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken or impeach it. *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996). The victim testified as part of the prosecutor’s case in chief. Defendant rested without presenting any evidence and the victim was not recalled. Therefore, the victim did not offer any rebuttal testimony, let alone improper testimony. Defendant also refers to the prosecutor’s failure to disclose exculpatory or impeachment evidence, but fails to explain what evidence was withheld.

VI. FAILURE TO PRESENT POLICE STATEMENT INTO EVIDENCE

Defendant argues *pro se* that his trial counsel was ineffective because she impeached the victim with her prior police statement, but did not offer that statement into evidence. As a result,

the trial court had to deny the jury's request to see the statement during deliberations. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Rockey*, 237 Mich App at 76-77 (citations omitted). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 236 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record shows that defense counsel impeached the victim with her prior police statement, but failed to offer that statement into evidence. When the jury requested the witnesses' original police statements during deliberations, the court instructed the jury that those statements had not been admitted into evidence and that it should "consider only the evidence admitted during the trial and rely on your collective memory regarding witness testimony." A witness may be questioned about a prior statement without that statement being admitted into evidence. *People v Avant*, 235 Mich App 499, 509-511; 597 NW2d 864 (1999). There is no indication that the jurors were unable to recall the victim's testimony regarding her prior statement. Therefore, defendant has not shown that the jurors' inability to read the victim's prior statement affected the outcome of the trial.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly