

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO JACKSON,

Defendant-Appellant.

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UNPUBLISHED

March 6, 2014

No. 311557

Wayne Circuit Court

LC No. 11-012637-FC

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a, and first-degree criminal sexual conduct, MCL 750.520b. The court sentenced defendant to 10 to 20 years' imprisonment for the first-degree home invasion conviction, and 30 to 50 years' imprisonment for the first-degree criminal sexual conduct conviction. We affirm defendant's conviction for first-degree criminal sexual conduct, but vacate defendant's first-degree home invasion conviction and remand for resentencing.

This case arises from events that occurred in 1997, though no charges were filed until 2011. According to the victim, an unknown man wielding a firearm entered the apartment where she was staying with her sister and sexually assaulted her as she lay in bed between her two young children. After the man left, the victim and her sister called 911, and the victim was taken to the hospital, where a rape kit was collected. In 2011, DNA analysis was performed on the evidence collected in the rape kit, and defendant was identified from the analysis. The charges were filed in September 2011. At trial, the issue was consent. Defendant claimed that he had consensual sexual intercourse with the victim after they met in a parking lot and discussed a payment of \$500 for sex. He claimed that this occurred in a different apartment and that he never went to the apartment where the victim was staying with her sister. Apparently to explain the claim of sexual assault when the act was consensual, defendant testified that he left without paying and never saw the victim again.

Defendant first argues that he was denied due process by the state's failure to preserve evidence from the apartment where the alleged sexual assault and home invasion occurred. We disagree. We review a defendant's claim of a constitutional due process violation de novo. *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011). In *People v Heft*, 299 Mich App 69, 79; 829 NW2d 266 (2012), this Court explained:

A criminal defendant can demonstrate that the state violated his or her due process rights under the Fourteenth Amendment if the state, in bad faith, failed to preserve material evidence that might have exonerated the defendant. However, “[t]he prosecutor’s office is not required to undertake discovery on behalf of a defendant.” If the defendant cannot show bad faith or that the evidence was potentially exculpatory, the state’s failure to preserve evidence does not deny the defendant due process. [Footnotes omitted.]

Here, defendant fails to explain what evidence may have been found in the apartment bedroom or how it could have been potentially exculpatory. He claims that “the exculpatory value of the scene was obvious before [its] destruction,” but does not delineate any specifics. It is difficult to imagine how any evidence—or lack thereof—in the bedroom could have been exculpatory or would have provided significant support for defendant’s claim in light of his assertion that he was never in the victim’s sister’s apartment. In the situation most favorable to defendant, the bedroom would have showed no sign of disruption and no fingerprints or other physical evidence that could be linked to defendant. The DNA evidence, however, physically linked defendant to sexual contact with the victim, and the police testimony about the condition of the living room suggested forced entry into the apartment and tended to corroborate the testimony of the victim, the victim’s son, and her sister. In any event, defendant completely fails to explain how any evidence found in the bedroom would have been exculpatory, or explain his claim that the exculpatory value of the evidence was obvious and that the police therefore acted in bad faith. Defendant “may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims.” *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (citation omitted). This claim of error does not entitle him to appellate relief. Defendant’s related issue, asserting that trial counsel was ineffective for failing to request an adverse inference instruction regarding the unpreserved and unidentified evidence, also fails. Counsel is not ineffective for failing to raise a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Next, defendant contends that his first-degree home invasion conviction must be vacated because the ten-year statute of limitations had expired when the charges were filed. The prosecutor concedes that this conviction must be vacated because the statute of limitations expired before this charge was filed. Accordingly, we vacate defendant’s first-degree home invasion conviction and do not address his claim of ineffective assistance of counsel claim with regard to this issue.

Fourth, defendant alleges that he was denied a fair trial on the first-degree criminal sexual conduct charge as a result of the admission of evidence concerning the first-degree home invasion, felon in possession of a firearm, and felony-firearm charges, which he argues were barred by the statute of limitations. We disagree.

A defendant must raise an issue in the trial court in order to preserve it for appellate review. *Heft, supra* at 78. Defendant did not raise this issue in the trial court, so it is unpreserved. An unpreserved argument is reviewed for plain error affecting substantial rights. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). In order to establish plain error, defendant must show that a clear or obvious error occurred and that the error affected his substantial rights. *Id.*

There was no error in the admission of the evidence about which defendant complains. This evidence would have been admissible even if defendant had been charged only with first-degree criminal sexual conduct. The evidence concerning home invasion was relevant to the issue of consent, as was the testimony regarding the presence of a firearm. Moreover, the basis for criminal sexual conduct *in the first-degree* was sexual penetration under circumstances involving the commission of another felony. MCL 750.520b(c). Nor does the expiration of the limitations period on an underlying felony preclude a conviction of first-degree criminal sexual conduct on this basis. See *People v Seals*, 285 Mich App 1, 15; 776 NW2d 314 (2009) (holding the same for felony-murder). Furthermore, evidence of other criminal events are admissible when so blended or connected to the other crime of which the defendant is accused such that proof of one incidentally involves or explains the circumstances of the other. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).

Lastly, defendant argues that he should not have been scored 25 points for Offense Variable (OV) 2 under the judicial sentencing guidelines because there was no evidence of bodily injury or “terrorism.” We disagree.

“Appellate review of [judicial] guidelines calculations is limited, and a sentencing court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score.” *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997). An appellate court reviews a sentence imposed under the judicial guidelines for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). “[A] given sentence can be said to constitute an abuse of discretion only if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *Id.*

As the trial court acknowledged at sentencing, the former judicial sentencing guidelines, rather than the legislative sentencing guidelines, apply here because the crimes were committed before January 1, 1999. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000); MCL 769.34(2). Under the judicial guidelines, a defendant was scored 25 points for OV 2 if the victim suffered bodily injury or was subjected to terrorism. *Dilling*, 222 Mich App at 54-55. As for “bodily injury,” defendant correctly notes that the emergency room physician who examined the victim testified that he did not observe any physical injury. “Terrorism” is defined by the guidelines as “conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense.” *Id.* at 55. Given the victim’s testimony that the assault occurred in the apartment where she was staying, in the bed she was sharing with her two young children, and at gunpoint, the trial court did not abuse its discretion in imposing 25 points for “terrorism.”

Defendant's first-degree criminal sexual conduct conviction is affirmed. Defendant's first-degree home invasion conviction is vacated, and this case is remanded for resentencing. We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ Karen M. Fort Hood  
/s/ Deborah A. Servitto