

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD ANDREW ERICKSON,

Defendant-Appellant.

UNPUBLISHED

May 26, 2005

No. 252485

Chippewa Circuit Court

LC No. 03-007491-FC

Before: Murray, P.J., and O’Connell and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for one count of first-degree criminal sexual conduct (CSC), 750.520b(1)(f) (use of force and coercion). Defendant was sentenced to life imprisonment. We affirm.

I. Material Facts

On October 12, 2002, the victim awakened in her motel room to find defendant performing oral sex on her. The victim ordered defendant to leave her room. Defendant removed his clothes, and proceeded to get on top of the victim and penetrate her. The victim was screaming and struggling, and tried to lock her legs together; however, defendant pinned her thighs and pushed her legs. Defendant placed his hand over the victim’s mouth to prevent her from screaming. The victim began punching defendant in the face and pulling his hair, at which time, defendant grabbed the victim’s throat with his hands.

When the victim asked to use the bathroom, defendant escorted her while restraining her arms behind her back. While she relieved herself, defendant held her arms out in front of her to prevent her from escaping. Defendant then pushed the victim back onto the bed, and held her down by putting his knees on her thighs. Defendant again attempted to penetrate the victim but was unsuccessful. Defendant told the victim that he would “smash [her] face into the back of [her] head and kill [her].” Defendant later said he was sorry and offered to pay the victim \$50 a week if she would let him have sex with her and not tell anyone what had happened. Defendant then left the victim’s room.

II. Evidentiary Issue

Defendant first argues that the trial court abused its discretion when it excluded evidence of the victim's prior CSC conviction and alleged false CSC accusation. We disagree. A trial court's ruling admitting or excluding evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

We find that the trial court did not err in excluding evidence of the victim's prior CSC conviction and alleged false CSC accusation because defendant failed to make an offer of proof and has failed to demonstrate the relevance of the evidence. According to MCL 750.520j(2), "If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. . . ." Under the rape-shield statute, evidence of bias or motive can be offered against the defendant. *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1984). However, such evidence will only be admitted where a defendant can make an offer of proof to the trial court and demonstrate relevancy. *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991). Defendant did not make an offer of proof during the preliminary hearing, or at trial. Defendant has failed to explain how the proposed evidence was relevant to show that the victim had a bias or motive against defendant. A party may not merely announce his position or assert an error and leave it to the appellate court to discover and rationalize the basis for his claims or unravel and elaborate for him his arguments. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, we find no error in the trial court's decision excluding the evidence.

To the extent defendant argues that his Sixth Amendment right to confrontation was violated, US Const Am VI, we disagree. The right to confrontation does not include the right to question the victim on irrelevant issues. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Since defendant could not make an offer of proof and demonstrate the relevancy of the proposed evidence, defendant's Sixth Amendment right was not violated.

III. Offense Variables 3 and 7

Defendant next argues that the trial court erred in assessing ten points under OV 3 and fifty points under OV 7. While we find that the trial court erred in assessing ten points for OV 3, we find no error in the trial court's scoring of fifty points under OV 7.

The interpretation of the statutory sentencing guidelines and legal questions presented by application of the guidelines are subject to de novo review. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Under OV 3, ten points must be assessed when there has been bodily injury requiring medical treatment. MCL 777.33; *People v Cathey*, 261 Mich App 506, 512; 681 NW2d 661 (2004). Where bodily injury has occurred but medical treatment was not required, the scoring under OV 3 is limited to five points. *Id.* at 512-513.

At sentencing, the court found that the scoring of ten points was appropriate under OV 3 because the victim went to the hospital, received a rape kit, was on pain medication, and had bruises. However, the record lacks any evidence to suggest that the victim required medical treatment. Dr. Ralph Olechowski testified that the victim's pain was not treated and that she did

receive medication. The victim also made no reference to treatment received for any of her injuries or to any request for pain medication during her testimony. Finally, the attending nurse testified that the victim described only an uncomfortable feeling when asked about the swelling in her face. The trial court thus erred in assessing ten points for the scoring of OV 3.

While the victim did not receive medical treatment, a scoring of five points is appropriate given the injuries inflicted to the victim, which include swelling on her face, bruising on her thigh, some pain between her legs, and a cut on her nose.

While the trial court erred in scoring ten points under OV 3, any error was harmless because defendant's sentence is still within the guidelines. See *People v Mutchie*, 251 Mich App 273, 274-275; 650 NW2d 733 (2002) (an error in the scoring of a defendant's sentence under the legislative guidelines does not require reversal where error was harmless).

Defendant further contends that the trial court erred in assessing fifty points under OV 7. We disagree.

Under OV 7, fifty points are to be scored if the "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." MCL 777.37(a)(1). In *Hornsby*, *supra* at 469, the Court found that the defendant's conduct during a robbery of threatening to shoot the supervisor and everyone else in the store was conduct designed to substantially increase the fear and anxiety of the victim. In *People v Wilson*, 252 Mich App 390, 396; 652 NW2d 488 (2002), the Court relied on the defendant's conduct of pointing a gun at the victim's young son in finding conduct designed to increase the fear and anxiety of the victim.

In assessing fifty points under OV 7, the court agreed with the prosecution that defendant's conduct constituted terror¹ and excessive brutality. We agree with the trial court that defendant's conduct constituted conduct that was substantially designed to increase the victim's fear or anxiety. Here, defendant made threats to the victim, stating that he would "smash [her] face into the back of [her] head and kill [her]." The victim testified that she was scared when defendant threatened her. Defendant held the victim down and slapped her in the face during the sexual assault, and bound her hands together when she went to the bathroom. Such actions support the trial court's conclusion that defendant's conduct was intended to substantially increase the fear and anxiety of the victim. Therefore, the trial court properly assessed fifty points under OV 7.

IV. Michigan's Statutory Sentencing Scheme

¹ Effective April 1, 2002, the term "terror" was replaced with its definition under the prior version of the statute, which permits a score of fifty points for "any conduct designed to substantially increase the fear and anxiety of a victim suffered during the offense."

Defendant finally argues that he is entitled to a resentencing based on the United States Supreme Court's decision in *Blakely v Washington*, 542 US __; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant did not properly preserve this issue for appellate review because it was raised for the first time on appeal. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Michigan Supreme Court held that *Blakely* does not affect Michigan's statutory sentencing scheme. Accordingly, defendant failed to demonstrate plain error affecting his substantial rights. *Carines*, *supra*.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Pat M. Donofrio