

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FAROUK HANI AL-JIBORY,

Defendant-Appellant.

UNPUBLISHED

November 24, 2009

No. 288702

Wayne Circuit Court

LC No. 08-004618-FH

Before: Talbot, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

After a jury trial, defendant Farouk Hani Al-Jibory was convicted of one count of assault with intent to commit sexual penetration, MCL 750.520g(1), and was sentenced to 18 to 180 months’ imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the testimony regarding the subsequent assault on the victim’s brother was inadmissible because it was irrelevant to establish the elements of the crime and was unduly prejudicial. We disagree. Because defendant failed to object to the admission of this evidence at trial, our review is limited to a finding of plain error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Contrary to defendant’s position, to be material, evidence need not relate to an element of the charged offense. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). The credibility of witnesses is always a material issue, and evidence that shows bias or prejudice of a witness is always relevant. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005). “‘The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted govern the relevance of evidence.’” *People v Yost*, 278 Mich App 341, 403; 749 NW2d 753 (2008), quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993).

Here, the defense theory was that the sexual assault charges were trumped up in retaliation for the beating the victim’s brother received. Since the evidence went to the credibility of many of the witnesses and to the theory of the defense, the testimony regarding the assault was relevant and admissible. Defendant has failed to establish the existence of plain error requiring reversal of his conviction. Moreover, defense counsel’s failure to object to this evidence did not constitute ineffective assistance of counsel where this evidence was crucial to

the defense theory. Although the strategy did not work out as defense counsel would have liked, that failure does not equate with performance that fell below an objective standard of reasonableness. *People v Payne*, 285 Mich App 181, 190; ___ NW2d ___ (2009).

Finally, defendant contends that the trial court abused its discretion in scoring Offense Variable (OV) 10 and OV 12. We disagree. “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).

When scoring OV 10, a court must determine whether a defendant exploited a vulnerable victim. MCL 777.40(1). “‘Vulnerability’ means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(c). A victim may be deemed vulnerable where there is exploitation of the victim’s youth. MCL 777.40(1)(b). Exploitation requires the defendant to have manipulated a victim for selfish or unethical purposes. MCL 777.40(3)(b). The statute does not state that to be vulnerable a victim must have been injured or physically restrained. Rather, the statute states that to be vulnerable a victim need only possess the “readily apparent susceptibility” to injury or physical restraint, in this case due to his youthfulness. The evidence showed that the victim was only 13 years old and alone in the house at the time of the assault. When the victim, who knew defendant and considered him to be a family friend, let defendant into the home, defendant grabbed the victim, threw him to the ground, and temporarily restrained him until the victim managed to extricate himself from defendant’s hold. Accordingly, the trial court did not abuse its discretion in scoring ten points for OV 10.

When scoring OV 12, the court must determine whether defendant engaged in any “contemporaneous felonious criminal acts.” MCL 777.42(1). A felonious criminal act is contemporaneous if the act occurred within 24 hours of the sentencing offense and the act has not and will not result in a separate conviction. MCL 777.42(2)(a). If a contemporaneous felonious criminal act involves a crime committed against a person, five points are to be scored for OV 12. MCL 777.42(1)(d). In the present case, there was testimony that defendant was involved in the violent assault on the victim’s brother that occurred about two hours after the charged crime. This act did not result in charges being brought against defendant and otherwise satisfied the statutory requirements for a score of five points. The trial court did not abuse its discretion in its scoring decision for OV 12.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O’Connell
/s/ Alton T. Davis