STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE D. WHITLEY,

Defendant-Appellant.

UNPUBLISHED
March 18, 1997

No. 184259
Oakland Circuit Court
LC No. 91-112727

Before: White, P.J., and Griffin, and D.C. Kolenda,* JJ.

PER CURIAM.

Defendant was convicted following a jury trial of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and subsequently pleaded guilty of habitual offender, second, MCL 769.10; MSA 28.1082. The trial court sentenced defendant to two to 22 1/2 years' imprisonment. We affirm.

Defendant first argues that the trial court erred in refusing to allow him to question Robert Peterson concerning the victim's character, where the victim was the sole eyewitness to the incident, defendant did not testify, and the victim's credibility was a crucial issue. However, defendant did not offer the testimony for as bearing on the victim's credibility. Rather, defendant offered Peterson's testimony to show that in the weeks prior to the alleged incident, the victim had gone uninvited to defendant's residence, yelled and caused arguments. Peterson in fact testified that the victim had come to defendant's residence several times uninvited, that defendant would speak to her outside because he would not invite her in the house, and that she would cause a disturbance. It does not appear that the trial court's ruling curtailed counsel's ability to introduce the testimony he sought to place before the jury.

Next, defendant argues that the trial court improperly instructed the jury as to reasonable doubt and the burden of proof. Defendant also argues that the trial court erred in failing to sua sponte instruct

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* Circuit judge, sitting on the Court of Appeals by assignment.

the jury on lesser-included offenses and in failing to sua sponte give a "*Sullivan*" charge to the jury. See *People v Sullivan*, 392 Mich 324, 335; 220 NW2d 441 (1974); CJI2d 3.11.

By failing to object to the challenged instructions and the trial court's failure to give the *Sullivan* instruction, defendant has waived appellate review absent manifest injustice. *People v Turner*, *supra* at 573. We review jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must include all elements of the charged offenses and must not exclude material issues, defenses and theories if there is evidence to support them. *Id.*

The trial court's instructions were correct and properly apprised the jury as to reasonable doubt and the burden of proof. The instruction defendant challenges as impermissibly shifting the burden of proof to defendant was read verbatim by the trial court from CJI2d 20.27 and concerned the affirmative defense of consent. Additionally, there was no evidence to suggest that third-degree criminal sexual conduct was merely attempted. In fact, defendant advanced at trial that he and the victim had consensual intercourse. See *People v Weatherspoon*, 171 Mich App 549, 555-556; 431 NW2d 75 (1988).

We also conclude that no manifest injustice will result by our not reviewing defendant's argument that the trial court erred in failing to sua sponte give a *Sullivan* instruction. This instruction may be given before the jury begins its deliberations or when a jury returns from deliberation unable to reach a verdict. *People v Goldsmith*, 411 Mich 555, 559-560; 309 NW2d 182 (1981); *People v Larry*, 162 Mich App 142, 149; 412 NW2d 674 (1987). The jury made no indication that it was deadlocked. Rather, it asked the question defendant points to--whether a unanimous decision was needed for a not guilty verdict as well as a guilty verdict--approximately two hours after it began deliberations, and then went on to deliberate for approximately three more hours. Because there is no indication that the trial court forced or threatened to force the jury to deliberate for an unreasonable time or during unreasonable intervals, the *Sullivan* rule was not violated. *People v France*, 436 Mich 138, 165-166; 461 NW2d 621 (1990).

Next, defendant argues that his convictions must be reversed because he was denied effective assistance of counsel. Because defendant failed to move for a new trial or for an evidentiary hearing below pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this issue is unpreserved unless the alleged deficiencies in defendant's trial counsel's performance are apparent from the lower court record. *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991). To establish that his right to effective assistance of counsel has been so undermined that it justifies reversal of his otherwise valid convictions, defendant must show that his attorney's representation fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first argues that his attorney's failure to object to several witnesses' testimony served to prejudicially bolster the victim's credibility and otherwise worked to weaken his defense. Defendant points to counsel's failure to object to various portions of Deputy Sheriff Cigile's testimony and to certain testimony of Detective Tomko. However, on reviewing the record we conclude that defendant is unable to show the requisite prejudice.

Next, defendant argues that his trial counsel's praising of Cigile at the outset of his cross-examination constituted ineffective assistance of counsel. Defense counsel stated "I'm aware of your excellent reputation and I am also here to get to the truth of this matter . . . " We will not second-guess defense counsel as to matters of trial strategy. See *Daniel*, *supra* at 58. Defense counsel could reasonably choose to appear respectful rather than antagonistic toward a police officer while cross-examining him.

Next, defendant argues that his trial counsel had a duty to object when the prosecutor stated in her closing argument that the "defense attorney makes three points that are supposed to raise reasonable doubt." Although it is true that a prosecutor may not make statements implying that the defendant bears the burden of proving his innocence, see *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995), the prosecutor may permissibly disparage defense theories based on the evidence. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). When read in context, the prosecutor's reasonable doubt comment was a segue into a permissible argument.

Next, defendant argues that his attorney should have objected to the trial court's instructions concerning his defense of consent. As discussed above, the trial court's instruction on the affirmative defense of consent issue was correct. Defendant may not base his claim for ineffective assistance of counsel on his attorney's failure to object to substantively correct jury instructions. *Lyles*, *supra*.

Next, defendant argues that his attorney's failure to request jury instructions on the offenses of "simple assault and battery," attempt to commit third-degree criminal sexual conduct, and fourth-degree criminal sexual conduct amounted to ineffective assistance of counsel. Defendant advances that these offenses are lesser included offenses of third-degree criminal sexual conduct and that conviction for any one of these offenses would have resulted in his receiving a shorter sentence of incarceration. Attempt to commit third-degree criminal sexual conduct is not a lesser included offense of third-degree criminal sexual conduct. See *People v Adams*, 416 Mich 53, 58-59; 330 NW2d 634 (1982); *Weatherspoon*, *supra* at 555. Further, no evidence at trial justified instructing the jury on attempt to commit third-degree criminal sexual conduct, as defendant acknowledged that he engaged in intercourse with the victim, but claimed that she consented to it. Similarly, the evidence and theories presented at trial did not support instructing the jury on fourth-degree criminal sexual conduct. The difference between third- and fourth-degree criminal sexual conduct is that the former involves actual penetration, while the latter involves merely criminal sexual contact. *People v Gaines*, 129 Mich App 439, 448; 341 NW2d 519 (1983).

Defendant also argues that his attorney should have requested an instruction on "simple assault and battery." An assault is any unlawful physical force, partly or fully put in motion, creating a

reasonable apprehension of immediate injury to a human being. *People v Worrell*, 417 Mich 617, 622; 340 NW2d 612 (1983). If the other person is a willing partner to the physical act, there can be no assault because there is no apprehension of immediate injury. *Id.* Because an instruction on assault and battery would have conflicted with defendant's theory of consent, we conclude that defense counsel had no obligation to request such an instruction.

Defendant also argues that he was not specifically asked at sentencing whether he pleaded guilty to habitual offender, second offense, and that his attorney's failure to bring this to the trial court's attention rendered his representation inadequate. When reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, we must determine whether the defendant tendered a plea voluntarily and understandingly. *People v Bordash*, 208 Mich App 1, 2; 527 NW2d 17 (1994).

Defendant does not claim that he entered his guilty plea involuntarily or without understanding. Indeed, the record reflects that the trial court fully questioned defendant on the voluntariness of his plea in conformance with MCR 6.302, and that defendant's intention to plead guilty was clear.[1] Defendant is unable to show that his attorney committed a prejudicial mistake in relation to his guilty plea. We thus conclude that defendant received adequate legal representation at trial.

Lastly, defendant argues that he was denied his constitutional right to a speedy trial. Defendant brought two motions to dismiss for lack of speedy trial, each of which were denied. To determine whether a defendant has been denied the right to a speedy trial, this Court must consider (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant. *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993). Whether a defendant's right to a speedy trial has been violated is a question of law, which we review de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995); *Wickham*, *supra*.

We are troubled by the delay of twenty-three months between defendant's arrest and his first trial, which ended in a mistrial, and a subsequent delay of approximately fifteen months before defendant was tried for a second time. The underlying incident occurred on October 3, 1991. Defendant was arrested on or about November 14, 1991. A preliminary examination was held on November 19, 1991, defendant was arraigned on December 2, 1991, and on January 28, 1992, a pretrial was held and the case was placed on standby. On January 7, 1993, the case was called for trial and adjourned because of defense counsel's unavailability. Around the end of March 1993, the assigned judge died; the case eventually went to his successor. On July 19, 1993, the court granted an adjournment, apparently because the court was in trial on a spin-off matter. On July 22, 1993, defendant filed a motion to dismiss for lack of speedy trial. The trial court denied the motion on September 22, 1993, and set a trial date of October 11, 1993. Defendant's first trial began on October 11, 1993, and ended in a mistrial on October 13, 1993.

A date of November 23, 1993 was assigned for appearance. On December 27, 1993, pretrial was held and defendant requested another pretrial hearing. On January 31, 1994, defendant filed a motion for a *Walker* hearing. On April 13, 1994, defendant filed a motion for transcript of the first trial,

which was granted. The transcript was filed on May 13, 1994. On May 23, 1994 another pretrial was held and the case was adjourned. On July 21, 1994 the prosecution's motion for adjournment was granted because the assistant prosecutor was in trial in another court. Defendant's motion to dismiss for lack of speedy trial was denied on that date. December 2, 1994 was assigned as the date for appearance. Defendant's second trial began on January 17, 1995, fifteen months after defendant's first trial ended.

Prejudice will be assumed after an eighteen-month delay in bringing a defendant to trial; after eighteen months the burden of proof shifts to the prosecution to show there was no injury. *Wickham, supra*. Since the delay between defendant's arrest and first trial was over eighteen months, it is presumed prejudicial. This presumptively prejudicial delay triggers inquiry into the other factors to be balanced in determining whether defendant was denied the right to a speedy trial. *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994).

Approximately nine months of the twenty-three month delay between defendant's arrest and his first trial are attributable to defendant's motion to adjourn and motion to dismiss. See *Wickham, supra*. At least eleven of the remaining fourteen months of delay appear to stem from docketing and scheduling delays inherent in the court system and, although we attribute them to the prosecution, that period is given a neutral gloss and minimal weight in the balance. *People v Holland*, 179 Mich App 184, 195; 445 NW2d 206 (1989).

Next, we note that defendant first asserted his right to a speedy trial in July 1993, approximately twenty months after his arrest. Defendant's failure to promptly assert his right to a speedy trial weighs against his subsequent claim that he was denied the right. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987).

Regarding the prejudice prong of the speedy trial inquiry, there are two types of prejudice: (1) prejudice to a defendant's person and (2) prejudice to a defendant's defense. *Wickham, supra* at 112. As defendant does not argue, and there is no indication in the record, that he was incarcerated before trial, he has failed to establish prejudice to his person. *Id.* Although defendant claims to have suffered anxiety because of the delay in his case, anxiety alone is insufficient to establish prejudice. *People v Jackson*, 171 Mich App 191, 201; 429 NW2d 849 (1988). Defendant does not allege that his defense suffered because of the delay of his trial.

We note that seven months of the delay between defendant's first and second trial are attributable to defendant, and the prosecution's requested adjournment accounted for six months. As discussed above, defendant has failed to establish prejudice, and we further note that defendant moved to dismiss eight months after the date assigned for appearance.

Under these circumstances, we conclude that the lengthy and troublesome delay notwithstanding, defendant's right to a speedy trial was not violated. Both sides were responsible for delays, and there is no indication that the delay was the product of prosecutorial bad faith. Moreover, defendant's assertions of his right to a speedy trial were belated. More importantly, defendant does not

allege that his defense was compromised by the delay. Thus we conclude that his right to a speedy trial was not violated.

Affirmed.

/s/ Helene N. White
/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda

[1] The trial court stated "Mr. Whitley, you heard what your attorney said? That you intend to plead guilty to habitual offender second, is that true?" Defendant responded, "Yes, sir." The court also asked defendant if he understood that if it accepted his plea of guilty he would not have a trial of any kind, and defendant responded, "yes." Finally, the court asked defendant if it was his choice to plead guilty, and defendant responded "yes."