STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WINSTON PARRISH,

Defendant-Appellant.

UNPUBLISHED
June 20, 1997

No. 180312
Washtenaw Circuit Court
LC No. 94-002176 FH

Before: Wahls, P.J., and Young and J.H. Fisher*, JJ.

PER CURIAM.

Defendant Winston Parrish appeals by right his jury trial conviction of two counts of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). The court initially sentenced defendant to a term of imprisonment of two to ten years for each count. Upon defendant's guilty plea to being an habitual offender, second offense, MCL 769.10; MSA 28.1082, the court vacated defendant's earlier sentence and imposed a term of imprisonment of three to fifteen years. We affirm.

Defendant first contends that the trial court erred in failing to instruct the jury on third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5). Defendant did not object to the omission of these instructions at trial.[1] Failure to object to jury instructions at trial waives appellate review of this issue absent manifest injustice. *People v Curry*, 175 Mich App 33, 39; 437 NW2d 310 (1989). We find no manifest injustice here for the reasons discussed below.

Defendant argues that the court should have instructed the jury on CSC III and CSC IV because they are necessarily included offenses of assault with the intent to commit CSC involving penetration. CSC III is not an included offense. Under the language of MCL 750.520d; MSA 28.788(4), a defendant may be found guilty of CSC III only if he *engaged* in sexual penetration with another person. Defendant was charged with assault with *intent to commit* criminal sexual conduct involving penetration, which does not require actual penetration. CSC III therefore cannot be deemed

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

to be a lesser included offense. Indeed, in one case, Justice Boyle noted that assault with the intent to commit criminal sexual conduct involving sexual penetration was a lesser

included offense to CSC III. *People v Worrell*, 417 Mich 617, 635; 340 NW2d 612 (1983) (Boyle, J., dissenting). Further, CSC III carries a greater penalty than assault with intent to commit criminal sexual conduct involving sexual penetration.

Next, CSC IV, criminal sexual conduct involving sexual contact, is a misdemeanor offense, as compared to assault with intent to commit criminal sexual conduct involving penetration, which is a felony. When a defendant is charged with a felony, a court may not give an instruction on a lesser included misdemeanor offense unless a rational view of the evidence adduced at trial supports that instruction. Also, proof of the elements differentiating the misdemeanor from the felony must be sufficiently in dispute so that the jury may be consistent in finding the defendant innocent of the greater offense and guilty of the lesser. *People v Stephens*, 416 Mich 252, 263; 330 NW2d 675 (1982). Assuming arguendo that CSC IV is a lesser included offense, no dispute existed over the element of intent to commit penetration, which differentiates the felony from the misdemeanor. Defendant did not dispute his intent to commit penetration; rather, he claimed that the alleged incident never occurred. Plaintiff presented evidence to demonstrate that the incident occurred and that defendant intended to commit penetration. Therefore, the element of intent to commit penetration was not sufficiently in dispute such that the jury could consistently find defendant innocent of assault with intent to commit criminal sexual conduct involving penetration and guilty of CSC IV. The court thus did not err in refusing to give the instructions for CSC III and IV as lesser included offenses.

Defendant next asserts that the trial court erred by qualifying Detective Ghent of the Ann Arbor Police as an expert and admitting his opinion testimony about victims of sexual assaults.[2] To preserve an evidentiary issue for review, a party must object at trial and specify the same ground for objection that it asserts on appeal. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Defendant did not preserve this issue because he failed to object to Ghent's testimony at trial. Appellate preservation requirements are designed to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice. *People v Mayfield*, ___ Mich App ___ (Docket No. 178956, issued February 21, 1997), slip op p 2. Because defendant did not preserve it, we decline to address the issue on appeal.

Next, defendant asserts that the circuit court improperly admitted statements he made to the police without the benefit of *Miranda*[3] warnings. We review for clear error a court's determination of the voluntariness of a statement allegedly made in violation of the Fifth Amendment right against self-incrimination. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992).

The *Miranda* standards apply to statements made by an accused while in custody.[4] Custody occurs when a person is deprived of his freedom in a meaningful way. *People v Marbury*, 151 Mich App 159, 162; 390 NW2d 659 (1986). In this case, defendant was not in custody when he made the statements. The unrefuted testimony established that two detectives interviewed defendant at his workplace, a neutral and nonhostile environment. The detectives informed defendant that he was not under arrest and did not have to respond to their questions. Therefore, the court did not err in finding that defendant freely made his statements and it properly admitted them into evidence.

Defendant next alleges that the circuit court failed to advise him adequately of his full rights upon accepting his guilty plea to habitual second offender.[5] We review the acceptance of a guilty plea under

MCR 6.302 to determine if the plea was knowingly, intelligently, and voluntarily given. *People v Gonzalez*, 197 Mich App 385, 391; 496 NW2d 312 (1992). After reviewing defendant's plea, we conclude that defendant made it knowingly and voluntarily.

For a plea to be constitutionally valid under the Due Process Clause, a defendant must make the plea voluntarily, knowing the consequences of the plea. *People v Schluter*, 204 Mich App 60, 66; 514 NW2d 489 (1994). A court must advise a defendant of the constitutional rights that he is waiving. *People v Jaworski*, 387 Mich 21, 24-26; 194 NW2d 868 (1972).

Defendant contends that he was not fully advised of the constitutional rights that he was waiving. We disagree. Before accepting defendant's guilty plea to habitual second offender in this case, the court advised defendant that he had the right to a jury trial on the habitual offender charge, that by waiving his rights, he waived the right to be presumed innocent, the right to have the prosecution prove his guilt beyond a reasonable doubt, that a guilty plea would subject him to a sentence of up to fifteen years, and that anything he said at the plea hearing was admissible against him. Defendant stated that he understood and agreed.

Defendant's claim on appeal is based upon the court's imprecise wording of his rights. See *In re Guilty Plea Cases*, 395 Mich 96, 122-124; 235 NW2d 132 (1975); *People v Hall*, 195 Mich App 460; 491 NW2d 854 (1992) (court's omission of the statutory consequences did not affect the defendant's substantial rights). Since this is not a case of omission, defendant is not entitled to relief. *Guilty Plea Cases*, *supra*. This case is distinguishable from a case such as *People v Quinn*, 194 Mich App 250, 254; 486 NW2d 139 (1992) where the court failed to advise the defendant of any rights before accepting his guilty plea. Accordingly, we affirm defendant's conviction and sentence as a habitual offender, second offense.

Finally, defendant argues that he was denied the effective assistance of counsel. In reviewing a claim of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). We conclude that defendant was not denied the effective assistance of counsel.

Defendant contends that trial counsel should have objected: to the court's failure to give jury instructions on lesser included offenses, to Detective Ghent's opinion testimony, and to the court's admission of defendant's statements to the police. As indicated, the court did not err in its rulings on these matters; thus, any objection by defense counsel would have been meritless. Because counsel is not required to argue a frivolous or meritless motion, a claim of ineffective assistance cannot be based on counsel's failure to object. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant also contends that counsel was ineffective by not objecting to the lower court's failure to advise him properly of his rights under MCR 6.302 upon accepting defendant's guilty plea to habitual second offender. This issue is moot given our disposition of defendant's habitual offender conviction. *People v Ben Williams*, 212 Mich App 607, 611; 538 NW2d 89 (1995).

Defendant finally claims that defense counsel was ineffective by failing to call three coworkers of the complainant and defendant as potential witnesses. Generally, the decision whether to call a witness is a matter of trial strategy, and, on review, we refuse to substitute our own judgment for that of counsel in trial strategy matters. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994); *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The failure to call a witness constitutes ineffective assistance only when it deprives a defendant of a substantial defense. *Daniel*, *supra* at 58. Here, the record discloses that counsel stated that he did not call these witnesses because their testimony would have been hearsay. Further, the record is void of evidence that the absence of the witnesses' testimony deprived defendant of a substantial defense or that their testimony would have produced a different result. Accordingly, defendant was not deprived of the effective assistance of counsel.

Affirmed.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ James H. Fisher

[1] The prosecution requested an instruction on assault with intent to commit sexual contact (CSC II) to which defense counsel objected. The court explained that if the prosecution's request was granted that it would also instruct the jury on assault and battery, a misdemeanor. Defense counsel stated that he understood but maintained his objection the CSC II instruction. The prosecution then withdrew its request as it did not want the misdemeanor instruction. The court then asked if either party was requesting lesser included offenses, and both parties stated that they did not.

[2] We note that the record reflects that the court actually did not qualify Ghent as an expert and that Ghent's testimony pertained to his own experiences when dealing with victims of sexual assaults.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] Before a prosecutor may use statements made by an accused during custodial interrogation, the prosecutor must demonstrate that, before questioning, authorities warned the accused that he had the right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[5] Contrary to the prosecutor's assertion on appeal, defendant preserved this issue in his motion for a new trial, where in he argued that the court had not advised him of his rights at the guilty plea proceeding.