

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA CAINE HEISS,

Defendant-Appellant.

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UNPUBLISHED

November 20, 2008

No. 278790

Kent Circuit Court

LC No. 06-009247-FC

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f), and one count of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to 12 to 25 years' imprisonment for each of the first-degree criminal sexual conduct convictions, and 5 to 10 years' imprisonment for his assault with intent to do great bodily harm conviction. We affirm.

The incident giving rise to the charges against defendant occurred on the night of April 24, 2006. The victim is the mother of defendant's child and maintained a sporadic relationship with defendant over a five year time period. The victim and defendant were involved in an altercation after attending a comedy show at the Crazy Horse Saloon with two friends. Initially, the victim told her mother, the police, and the doctor in the hospital emergency room, and the nurse examiner at the YWCA that defendant beat, choked, and forced her to perform fellatio and engage in sexual intercourse. The victim later recanted her allegations and instead claimed that she consented to, and even suggested, that the couple engage in both acts of sexual penetration in order to get the defendant calm down and prevent any further escalation of their verbal and physical conflict. The evidence at trial consisted of testimony and photographs of the injuries sustained by the victim, including bruises to her eyes, lip, arms, neck, and chest, a puncture wound on her breast, and hemorrhage spots in her eyes, consistent with choking.

Defendant first argues that his due process rights were violated because the trial court permitted the prosecution to add a separate count of assault with intent to do great bodily harm, instead of including it as an alternative offense. Defendant did not properly preserve this issue because he failed to argue in the trial court that the amendment deprived him of adequate notice. However, defendant did request a preliminary examination with respect to the added offense. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). A trial

court's decision to amend the information is reviewed for an abuse of discretion, *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). Unpreserved issues are reviewed for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). We review defendant's preserved procedural claim concerning the preliminary examination for harmless error. *McGee, supra* at 687, 697; MCL 769.26; MCR 2.613(A).

We find that the trial court did not err in permitting the added charge of assault with intent to do great bodily harm. *McGee, supra* at 693. The lower court file contains a letter dated March 27, 2007, from the prosecution to defense counsel informing him of the added charge. This letter indicated that the prosecutor previously sent a letter to defendant's former counsel regarding the same matter on January 12, 2007. Further, as the matter was discussed at a motion hearing before trial, it was obvious that the assault charge was a possibility based on the victim's recantation of her rape allegations. The prosecution's letter and statements did not indicate that assault with intent to do great bodily harm would be an alternative charge. Defense counsel acknowledged that he received, by facsimile, an amended information before trial, on April 16, 2007. The amended information does not indicate that the assault charge is an alternative offense.

Clearly, based on defendant's conviction of the assault offense the prosecutor would have successfully established probable cause at a preliminary examination. Thus, defendant cannot demonstrate that he was prejudiced by the failure to conduct a preliminary examination. *McGee, supra* at 696, 698. "Because defendant has not established that the amended information otherwise affected the fairness of the trial or the reliability of the verdict, the alleged error, if any, in amending the information was harmless error relating to 'pleading or procedure' that did not '[result] in a miscarriage of justice.'" *McGee, supra* at 698-699, quoting MCL 769.26.

Defendant next asserts that the trial court's initial instruction to the jury before presentation of the proofs that, "sexual assaults really aren't sexual crimes. They're crimes that are outrageous and violent," minimized the sexual penetration element of the crime. Defendant's unpreserved claim is reviewed for plain error. *People v Cornell*, 466 Mich 335, 363 n 16; 646 NW2d 127 (2002), overruled on other grounds in *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003).

We find that the challenged, extraneous remark by the trial court merely explained to the jury that there is no requirement that the charged offense be sexual in the normal sense, i.e., sexually gratifying or involving orgasm. Rather, the focus in establishing the elements of this offense is on the parts of the body involved and the use of force or coercion. The comment, even if unnecessary and somewhat confusing, did not shift the focus to the force or coercion element of the offense and minimize the sexual penetration element. The trial court never stated that a showing of penetration was not required. In fact, the trial court repeatedly instructed the jury on the elements of first-degree criminal sexual conduct and defined sexual penetration under the statute. Consequently, defendant has failed to show the existence of a plain error affecting his substantial rights. *Carines, supra* at 763-764.

Defendant further argues that the trial court's final instructions to the jury favored the prosecution's theory of the case and effectively removed from the jury's consideration the defense of consent and the element of force or coercion. Because defendant objected to the trial

court's instructions, this preserved constitutional claim is reviewed under the harmless error standard. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). This Court must determine whether any error exists and, if so, whether it was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

The trial court instructed the jury on all of the relevant elements of first-degree criminal sexual conduct, explained the examples of force or coercion that are provided in the statute, noting they did not comprise an exhaustive list, and discussed the defense of consent. The trial court further instructed that “the words ‘used to accomplish’ have a much broader meaning” than provided in the statute. Within the instructions, the trial court reiterated that consent is a defense, “but only if the consent was freely given, not given out of fear that something was going to happen to that person then or in the near future or something was going to happen to something else.” Consent “induced by fear generated by the person with whom sexual penetration occurs” is not “genuinely free” and consent “has to be genuinely free.” “If it is genuinely free, it’s an absolute defense.” For example, consent is not valid where “a victim says later on that he or she consented. Obviously what they say later on is a factor to be used to decide whether they consented back at the time the incident happened, but it’s consent when it happened, not people’s perceptions of it later.” Additionally, the trial court explained that the jury verdict form contained three alternatives, which included: “induced submission by physical violence,” “induced submission by verbal threats,” and “taking advantage of or exploiting the fact that the person was fearful of significant harm.” The trial court reiterated that “if you don’t find any of them, then we can’t even have criminal sexual conduct, period.”

The trial court’s instructions, although extensive and repetitive, presented all of the elements of the charged offenses and the defense of consent. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Consent involves a willingly engaged in act that is not the product of coercion. *People v Khan*, 80 Mich App 605, 619 n 5; 264 NW2d 360 (1978). The model jury instruction, CJI2d 20.27, explains that the defense of consent, in part, is where “[a] person consents to a sexual act by agreeing to it freely and willingly, without being forced or coerced.” The trial court explained that consent must be freely given. In addition, force and coercion in MCL 750.520b are not limited to “raw physical force or threats of physical violence.” *People v Reid*, 233 Mich App 457, 469 n 5; 592 NW2d 767 (1999). Coercion may also be “implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse.” *Id.* at 469, quoting *People v Premo*, 213 Mich App 406, 411; 540 NW2d 715 (1995). Coercion may “extend[] far beyond the direct use of raw physical force or threats of physical violence.” *Reid, supra* at 469 n 5. The trial court’s statements that the sexual penetration could be accomplished by circumstances that were similar to using physical force and coercion, such as “taking advantage of or exploiting the fact that the person was fearful of significant harm,” is consistent with the definitions of coercion and force under MCL 750.520b.

Although a trial court commits error requiring reversal when it instructs the jury that an element of an offense is established as a matter of law, *People v Reed*, 393 Mich 342, 349; 224 NW2d 867 (1975), we conclude that the trial court’s instructions in this case did not cross this boundary. While the trial court may have overstated its instructions in not merely defining consent, but in further explaining that “freely given” consent does not include circumstances where the victim later changes her mind and claims she consented, or forgives the defendant

after the fact and no longer wishes to pursue charges, the trial court never stated that an element of the offense was established as a matter of law, or that defendant's defense was precluded as a matter of law. See *People v Gaydosh*, 203 Mich App 235, 236-237; 512 NW2d 65 (1994). The jury remained free to decide whether the victim's consent, at the time of the incident, was freely given. Further, the trial court's use of examples of force or coercion did not specifically include the exact same factual scenario involved in this case. See *People v Edwards*, 206 Mich App 694, 696-697; 522 NW2d 727 (1994). Viewed in their entirety, the trial court's instructions did not provide an erroneous definition of consent or impermissibly remove an element of the charged offenses from the jury's consideration. Therefore, the record does not support defendant's claim of error. *Duncan, supra* at 51.

Defendant also argues that there was insufficient evidence regarding the element of force or coercion to sustain his first-degree criminal sexual conduct convictions. We review the evidence de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Due process requires that the prosecution introduce sufficient evidence to justify a jury's decision that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

We find that there was sufficient evidence presented to enable a rational trier of fact to conclude, beyond a reasonable doubt, that defendant "engaged in sexual penetration" with the victim, causing her personal injury, and used force or coercion to accomplish the sexual penetration. *People v Petrella*, 424 Mich 221, 238-239; 380 NW2d 11 (1985); MCL 750.520b(1)(f). Viewing the evidence in the light most favorable to the prosecution, the record shows that defendant repeatedly hit, beat, and choked the victim. The victim sustained extensive injuries; and claimed, initially, that she was afraid for her life and forced to engage in both acts of penetration.

We resolve the victim's conflicting testimony and statements to the police and medical examiners in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). The jury chose not to believe the victim's trial testimony that she consented to sexual intercourse with defendant, and instead found more credible the version of events she related to the authorities and her mother on the night of the incident. It is solely within the jury's purview to determine what weight and credibility to give the evidence. *Wolfe, supra* at 514-515, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). Defendant's contention regarding the victim's credibility in light of her alleged intoxication and conflicting testimony is also unavailing.

Defendant next asserts that he was denied the effective assistance of counsel because defense counsel lacked sufficient time to prepare his case, only visited defendant six days before trial, and failed to present specific evidence and witnesses. Review of defendant's unpreserved claim is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant must demonstrate that defense counsel's performance fell below an objective standard of reasonableness given prevailing professional norms, and that there is a reasonable probability that the outcome of the trial would have been different absent counsel's error, and the result was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407,

415; 740 NW2d 557 (2007). Defense counsel's performance is presumed effective and to constitute sound trial strategy. *Id.*

The record shows that defense counsel moved to adjourn the trial not because he required additional time or was unprepared, but because he sought to have the trial court either exclude the prosecution's expert testimony or allow him additional time to retain a rebuttal expert. While defense counsel's motion was denied, the record does not support an assertion that his actions were in any way deficient. *Odom, supra* at 415. Contrary to defendant's claim, his counsel's objection assisted defendant, because the trial court ultimately decided to limit the expert's testimony. Defendant fails to specify how the outcome of the trial would have been different had counsel obtained an adjournment. Defendant has also failed to provide factual support for his assertion that defense counsel only visited him six days before trial began. Consequently, defendant has not met his burden of demonstrating ineffective assistance of counsel. *Id.*

Defendant next asserts that his appointed counsel's performance was deficient because he did not call the witnesses defendant requested and did not pose the questions that defendant desired. Defense counsel is afforded deference regarding matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Failing to call a witness will only constitute ineffective assistance where it deprives defendant of a substantial defense. *Id.*

We find that defense counsel's decision not to call Renae Heiss or Rachael Kreplick to testify constituted sound trial strategy and did not deprive defendant of a substantial defense. Defense counsel repeatedly presented defendant's theory that the victim consented to, and even suggested, both acts of sexual penetration, and provided several explanations for the victim's recantation. The victim testified favorably for defendant, supporting his theory and claiming that she consented to sexual intercourse. Because Renae's testimony would have been cumulative to the victim's testimony, defense counsel did not deprive defendant of a substantial defense by failing to call her as a witness. *Dixon, supra* at 398. Kreplick's testimony was irrelevant to defendant's theory at trial that the victim consented to the sexual penetration. Thus, defense counsel's decision not to call Kreplick did not deprive defendant of a substantial defense and should be afforded deference as a matter of trial strategy. *Id.* Defense counsel's decision not to introduce certain evidence regarding the victim's motives to concoct a rape allegation, for which defendant has failed to provide factual support, also deserves deference as a reasonable strategic decision. *Id.*

Defendant's claim of ineffective assistance of counsel based on counsel's failure to introduce as evidence certain letters at trial also fails. On the limited record available, we cannot conclude that defense counsel's decision fell below an objective standard of reasonableness. *Odom, supra* at 415. Defendant has failed to overcome the presumption that defense counsel's decision not to present this evidence constituted reasonable trial strategy. *Dixon, supra* at 398. As a result, defendant's assertion that defense counsel's errors cumulatively constitute ineffective assistance of counsel also fails because there were no errors by defense counsel to "aggregate[] to form a cumulative effect." *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008).

Defendant next argues that the prosecutor engaged in misconduct during his opening statement when he told the jury that the victim was going to lie to assist defendant. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People*

*v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). The record reflects that the prosecution's statements were ultimately supported by the evidence admitted at trial. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). The prosecutor did not blatantly call the victim a liar or attempt to inflame the jury's prejudices, and was not required to phrase his statements in the blandest possible terms. *Moss, supra* at 32. In addition, the trial court instructed the jury that the lawyer's statements were not evidence, curing any potential prejudice. *Unger, supra* at 234-235.

Defendant's argument that the prosecution failed to lay a proper foundation for introduction of letters that the victim wrote to defendant is also unavailing. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). The prosecution laid a proper foundation by asking the victim to identify the letters. The prosecution's questioning properly authenticated the letters pursuant to MRE 901(b)(1), through testimony of a witness with personal knowledge. As a result, defendant's contention that defense counsel's performance was deficient because he failed to object to the prosecution's alleged misconduct is unavailing because the prosecution's actions were proper and any objection by defense counsel would have been futile. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Affirmed.

/s/ Joel P. Hoekstra  
/s/ William C. Whitbeck  
/s/ Michael J. Talbot