

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 20, 2012

v

MARCUS JOHN MENDE,

Defendant-Appellant.

No. 305558
Oakland Circuit Court
LC No. 2010-232900-FH

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of third-degree criminal sexual conduct (use of force or coercion), MCL 750.520d(1)(b), and two counts of fourth-degree criminal sexual conduct (CSC) (use of force or coercion), MCL 750.520e(1)(b).¹ He was sentenced to 7 and a half to 15 years' imprisonment for each third-degree CSC conviction and one to two years' imprisonment for each of his fourth-degree CSC convictions. For the reasons set forth below, we affirm, but remand for correction of the judgment of sentence.

I. BASIC FACTS

On the night of May 30, 2010, the sixteen-year-old complainant went to the home of John and Rebecca Lyle to babysit their children while they went out for the evening. The Lyles were family friends whom the complainant had known for four to five years. The complainant, who had a restricted driver's license, intended to spend the night at the Lyles's. The Lyles and their

¹ The Judgment of Sentence states that defendant was convicted of fourth-degree CSC under MCL 750.520e(1)(a), which applies when the complainant is at least 13, but less than 16, years old. However, defendant was charged under MCL 750.520e(1)(b), which applies when force or coercion is used to accomplish the sexual contact. In addition, the jury was instructed on fourth-degree CSC under MCL 750.520e(1)(b). Thus, it appears that the Judgment of Sentence is incorrect and MCL 750.520e(1)(b) is the correct statutory citation.

friend, defendant in this case, then left to go out. Two or three hours later, the complainant fell asleep on a couch in the living room.

The complainant testified that she woke up briefly when she heard the Lyles and defendant return but she quickly went back to sleep. She woke again and moved to the living room floor to sleep. At this time, defendant was sleeping on a second, smaller couch in the Lyles's living room. The complainant heard defendant move to the bigger couch. He then began to touch her feet. No words were exchanged. The complainant was laying on her stomach and side on the floor with her legs bent and a pillow under her head. She woke up again when she felt defendant lying behind her and grabbing her chest, first grabbing over her clothing and then underneath her t-shirt and bra. The complainant testified that she froze and did not do anything in response because she was scared and could not believe what was happening.

Defendant asked the complainant if she was sleeping. She did not respond. Her blankets had been kicked down to her feet. Defendant got behind the complainant and pulled her sweatpants down to about her knees and tried to put his penis inside her vagina several times. He inserted his fingers in the complainant's vagina. During parts of this incident, defendant pushed the pillow that the complainant's head was on up in front of her face so that she could only see the pillow. Defendant eventually stopped, pulled Kimberly's pants up, and left the house. Defendant's semen was discovered on the complainant's sweatpants.

At trial, defendant did not dispute that the sexual conduct took place; instead, defense counsel argued that the complainant had consented. Defendant pointed to the fact that he never threatened the complainant or tried to stop her from leaving, nor did the complainant say or do anything during the incident to indicate she did not consent. The jury convicted defendant and he was sentenced as outlined above. He now appeals as of right. On appeal, defendant argues that the trial court abused its discretion in denying his request for a jury instruction on the defense of consent. In his Standard 4 Brief, defendant argues that prior record variable seven (PRV 7) and offense variable 13 (OV 13) were improperly scored, prosecutorial misconduct requires a new trial, and both his trial and appellate counsel were ineffective.

II. ANALYSIS

A. JURY INSTRUCTION

Defendant argues that the trial court abused its discretion in denying his request for a jury instruction on the defense of consent. We disagree.

“We review a claim of instructional error involving a question of law de novo, but we review the trial court's determination that a jury instruction applies to the facts of the case for an abuse of discretion.” *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). To determine if there was an instructional error requiring reversal, this Court reviews the jury instructions in their entirety. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). “There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights.” *Id.*

The standard jury instruction requested by defendant, CJI2d 20.27, reads:

(1) There has been evidence in this case about the defense of consent. A person consents to a sexual act by agreeing to it freely and willingly, without being forced or coerced.

(2) It is not necessary to show that [*name complainant*] resisted the defendant to prove that this crime was committed. Nor is it necessary to show that [*name complainant*] did anything to lessen the danger to [himself/herself].

(3) In deciding whether or not the [*name complainant*] consented to the act, you should consider all of the evidence. It may help you to think about the following questions:

(a) Was [*name complainant*] free to leave and not take part in the sexual act?

[(b) Did the defendant threaten (*name complainant*) with present or future injury?]

[(c) Did the defendant use force, violence, or coercion?]

[(d) Did the defendant display a weapon?]

[(e) *Name any other relevant circumstances.*]

(4) If you find that the evidence raises a reasonable doubt as to whether [*name complainant*] consented to the act freely and willingly, then you must find the defendant not guilty.

“In the context of the CSC statutes, consent can be utilized as a defense to negate the elements of force or coercion.” *People v Waltonen*, 272 Mich App 678, 689; 728 NW2d 881 (2006).²

However, a defendant is entitled to a jury instruction on an affirmative defense only when there is evidence “from which a reasonable jury could conclude that the elements of the defense have been met.” *People v Kolanek*, 491 Mich 382, 411; 817 NW2d 528 (2012). “If, for example, a defendant raises a defense but fails to present evidence from which a reasonable jury could conclude that the elements of the defense have been met, then the defendant is not entitled to the defense instruction and the jury is precluded from considering the defense. Conversely, if a defendant produces sufficient evidence of the elements of the defense, then the question whether defendant has asserted a valid defense is for the jury to decide.” *Id.*

² However, “[t]he notes to this instruction and the decision in [*People v Stull*, [127 Mich App 14] *supra* at 20–21, 338 NW2d 403, make clear that consent is an affirmative defense and that lack of consent is not an element of the crime to be proven by the prosecution.” *Id.* at 689 n 4.

In this case, the record is totally devoid of any evidence that the complainant consented. The defense of consent “impliedly comprehends . . . a willing, noncoerced act. . . .” *People v Khan*, 80 Mich App 605, 619 n 5; 264 NW2d 360 (1978). There was no evidence that the victim did anything to communicate to defendant that she consented. She testified that she did not move or say anything. When defendant began touching her breasts and buttocks, she pretended that she was sleeping because she did not know what to do and was scared. She never turned around, voluntarily touched defendant, or took any steps to remove her own clothing. She testified that she never gave defendant permission to have sexual contact with her. Neither the lack of action nor the failure to resist constitutes consent. MCL 750.520i (“A victim need not resist the actor in prosecution under sections 520b to 520g”); *People v Phelps*, 288 Mich App 123, 132; 791 NW2d 732 (2010); *People v Jansson*, 116 Mich App 674, 683; 323 NW2d 508 (1982).

In addition, this Court reviews the jury instructions in their entirety to determine if there was error requiring reversal. *Heikkinen*, 250 Mich App at 327. In this case, the jury was instructed on the elements of third-degree and fourth-degree CSC, involving the use of force or coercion. The court told the jury, “Force or coercion means that he [defendant] either used physical force or did something to make [the victim] reasonably afraid of present or future danger.” The existence of force or coercion implies a lack of consent. See *Khan*, 80 Mich App at 619 n 5. Therefore, the jurors were implicitly instructed that they could not convict defendant if the victim consented; they were told they could only convict defendant if there was evidence, beyond a reasonable doubt, that defendant forced or coerced the victim. See MCL 750.520d(1)(b); MCL 750.520e(1)(b); *Khan*, 80 Mich App at 619 n 5. Read in their entirety, the jury instructions “fairly present[ed] the issues to be tried and sufficiently protect[ed] the defendant’s rights.” See *Heikkinen*, 250 Mich App at 327.

B. SCORING OF PRV 7 AND OV 13

Defendant argues that the trial court erred when it considered his two fourth-degree CSC convictions as felonies for purposes of scoring prior PRV 7 and OV 13. We disagree.

“The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo.” *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). “This Court reviews a sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Defendant was scored 20 points for PRV 7, pursuant to MCL 777.57(2), for two or more subsequent or concurrent felony convictions. Defendant was also scored 25 points for OV 13, pursuant to MCL 777.43(c), as “part of a pattern of felonious criminal activity involving 3 or more crimes against a person.”

In the Penal Code, a fourth-degree CSC conviction is considered “a misdemeanor punishable by imprisonment for not more than 2 years. . . .” MCL 750.520e(2). However, the Code of Criminal Procedure, MCL 761.1(g), defines a felony as “a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment

for more than 1 year or an offense expressly designated by law to be a felony.” The Code of Criminal Procedure includes the sentencing guidelines. MCL 777.1 *et seq.* Our Supreme Court has concluded that the legislature intended two-year misdemeanors to be considered felonies “for purposes of the Code of Criminal Procedure’s habitual-offender, probation, and consecutive sentencing statutes.” *People v Smith*, 423 Mich 427, 434; 378 NW2d 384 (1985). Therefore, a fourth-degree CSC conviction, which is punishable by up to two years’ imprisonment, is a felony for purposes of sentencing. See MCL 750.520e(2); MCL 761.1(g). Defendant’s fourth-degree CSC convictions were properly considered felonies for sentencing and so PRV 7 and OV 13 were properly scored at 20 and 25 points, respectively.

C. PROSECUTORIAL MISCONDUCT

Defendant argues that he is entitled to a new trial based on prosecutorial misconduct. We disagree.

This issue is unpreserved because defendant did not “contemporaneously object and request a curative instruction” when the prosecution made the allegedly improper statements. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *Bennett*, 290 Mich App at 475. “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Reversal is not proper where a curative instruction could have alleviated any prejudicial effect. *Id.*

Claims of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). The prosecutor’s statements are reviewed as a whole and in context with the evidence presented and the defendant’s arguments. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Prosecutors are generally “accorded great latitude regarding their arguments and conduct” and “are free to argue the evidence” as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal citations and quotations omitted). However, it is improper for the prosecutor to ask the jury to sympathize with the victim. See *People v Akins*, 259 Mich App 545, 563 n 16; 675 NW2d 863 (2003); *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Reversal is not required when such a statement is isolated, “not so inflammatory as to prejudice defendant,” and the jury is told to be uninfluenced by sympathy or prejudice. See *Watson*, 245 Mich App at 591-592. It is also improper for a prosecutor to misstate the law or facts but “proper jury instructions cure most errors because jurors are presumed to follow the trial judge’s instructions.” See *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

In this case, defendant points to four statements made by the prosecutor that he alleges improperly appealed to the jury’s sympathies.

First, defendant cites to the following remark from the prosecutor’s opening statement:

And I ask when you listen to all the evidence in this case, I'm going to ask you to *be her voice*. *Be her voice* of what she went through that night and find the defendant guilty of all four counts of criminal sexual conduct . . . [Emphases added.]

Although this statement does improperly ask the jury to be the victim's advocate, it was made in isolation, following the prosecutor's lengthy description of what she expected the evidence to show. The jury was instructed right before the prosecutor's opening statement that the attorneys' statements are not evidence. In fact, the jurors were told on four occasions before testimony was taken that the attorneys' statements are not evidence. Jurors are presumed to follow the court's instructions. *Mesik*, 285 Mich App at 542.

Second, defendant cites to the following statements made by the prosecutor during her closing argument:

[The victim] was scared and what did she do? She stood still. That was her defense mechanism. No – no one – until you're in that situation, *what would you do?* Well, I stood still. I didn't move.

* * *

But we know she's afraid. We know that she's afraid 'cuz *we're in that moment with her* when she was telling (indiscernible) – telling you what had gone on in that home.

* * *

Think about that. Think about that moment, her having to tell her mom what she had gone through. [The victim's mom] says, I could barely understand her. I got – Mark [defendant] hurt me. She was crying hysterically, I didn't know how to get her home. *Imagine that?* [Emphases added.]

These three statements were not significantly inflammatory and did not imply that the jurors should convict defendant because they feel sorry for the victim. Rather, it appears that the prosecutor was attempting to explain the victim's inaction when defendant touched her. The jurors were instructed before closing arguments that the attorneys' statements are not evidence. The court told the jury this again after closing arguments, during jury instructions. The court also instructed the jurors that they should not allow sympathy or prejudice to influence their decisions and it was their job to decide the facts. Again, jurors are presumed to follow the court's instructions. *Mesik*, 285 Mich App at 542.

Defendant also argues that the prosecutor made statements of fact that were not supported by the evidence. A prosecutor is not permitted to argue facts not in evidence or mischaracterize the evidence. *Watson*, 245 Mich App at 588. However, a prosecutor "may argue reasonable inferences from the evidence." *Id.* Defendant's first example is the prosecutor's statement:

The fact that he [defendant] has a sense of entitlement to every woman he comes in contact with is not the fault of [the victim].

This statement was made during the prosecutor's rebuttal, in response to defense counsel's discussion of defendant's sexual relationships with the complainant's mother and Rebecca Lyle during her closing argument. Defense counsel argued that defendant was "having all kinds of sex," and implied that defendant did not need to force himself upon a girl in order to have sex. Defense counsel also questioned the credibility of Rebecca Lyle and the victim's mother, asking the jury to consider what motives they might have given their sexual relationships with defendant. On rebuttal, a prosecutor can respond to an issue that is raised by the defendant in closing argument. *Brown*, 279 Mich App at 135. In addition, the jury was repeatedly instructed that the attorneys' statements are not facts.

Defendant's second example of the prosecutor arguing facts not in evidence is the statement that defendant was running from police. However, this was a reasonable inference from the evidence presented. See *Watson*, 245 Mich App at 588. Rebecca Lyle testified that she and her husband, John Lyle, spoke with defendant after the police left the Lyles's home. According to Rebecca, defendant said he was "running because he was scared," and he was scared because "he was going to get in trouble for messing with a little girl." John testified that he could hear a truck engine running and thought defendant was driving.

Finally, because defendant's claims of prosecutorial misconduct are not preserved, this issue is reviewed for plain error. See *Bennett*, 290 Mich App at 475. Reversal is only warranted if defendant is actually innocent or the prosecutor's conduct "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 475-476. The prosecutor's statements do not amount to plain error where there was ample evidence to support defendant's conviction, including the complainant's testimony of what occurred, John's and Rebecca's testimony that defendant admitted to engaging in sexual conduct with the complainant, and the physical evidence that semen from defendant was recovered from the complainant's sweatpants and anus. Moreover, reversal is not proper when the error could have been alleviated by a curative instruction. *Id.* at 476. The errors in this case not only could have been, but actually were, alleviated by the judge's instructions that the attorneys' statements are not evidence and that the jurors should not allow sympathy or prejudice to affect their decision.

D. EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant argues that his trial counsel was ineffective. We disagree.

When this Court reviews a claim of ineffective of assistance of counsel, it is limited to the facts on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *Id.* (internal quotations and citations omitted); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, AM VI; Const 1963, art 1, § 20. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different.” *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, a defense lawyer has discretion over his method of trial strategy, and this Court will not substitute its own judgment or evaluate counsel’s performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant argues that trial counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct. We disagree. Not objecting may have been a strategic decision, as “there are times when it is better not to object and draw attention to an improper comment.” *Bahoda*, 448 Mich at 287 n 54. Furthermore, any improper statements by the prosecutor were cured by the trial court’s repeated instructions to the jury that the attorneys’ statements are not evidence. See *Bennett*, 290 Mich App at 476; *Mesik*, 285 Mich App at 542.

In addition, defendant claims that he was offered a three-year plea deal but his trial counsel erroneously calculated his sentencing guidelines and told him that he would receive a three-year sentence, at most, so there was no benefit in accepting the prosecutor’s offer. Defendant argues that he relied on this advice in rejecting the plea deal, and was subsequently found guilty and sentenced to a minimum of seven and one-half years.

A defendant’s Sixth Amendment right to counsel extends to the plea-bargaining process. *Lafler v Cooper*, 566 U.S. —, —, 132 S Ct 1376, 1384, 182 LEd 2d 398 (2012). A claim of ineffective assistance of counsel may be based on counsel’s failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer. *Hill v Lockhart*, 474 US 52, 57–58, 106 S Ct 366, 88 LEd 2d 203 (1985). As for ineffective-assistance-of-counsel claims generally, if a defendant’s claim is based on counsel’s failure to properly advise the defendant with respect to a plea offer, the defendant must show that his or her attorney’s performance “‘fell below an objective standard of reasonableness”” and that “‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”” *Padilla v Kentucky*, 559 US —, 130 S Ct 1473, 1481–1482, 176 LEd 2d 284 (2010), quoting *Strickland v Washington*, 466 US 668, 688, 694, 104 S Ct 2052, 80 LEd 2d 674 (1984). “In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.” *Lafler*, 566 US at —, 132 S Ct at 1384. Counsel’s assistance must be sufficient to enable the defendant “to make an informed and voluntary choice between trial and a guilty plea.” *People v Corteway*, 212 Mich App 442, 446, 538 NW2d 60 (1995). [*People v Douglas*, 296 Mich App 186, 205-206; 817 NW2d 640, lv granted (2012).]

However, there is no evidence in the record that defendant was offered a plea deal or that he rejected it at the advice of trial counsel, other than an affidavit composed by defendant that is attached to his Standard 4 Brief. Appeals in this Court are heard on the original record, which consists of “the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced.” MCR 7.210(A). Accordingly, we decline to consider the affidavit. In his Standard 4 Brief, defendant also requests that the case be remanded to expand the record. A motion to remand for development of a factual record must be filed within the time provided for filing the appellant’s

brief, or within 21 days after the entry of the judgment appeal from. MCR 7.211(C)(1)(a)(ii). Therefore, defendant's request is untimely.

A review of the record in this case reveals that there is no evidence to support defendant's claim of ineffective assistance of trial counsel. Defendant maintained his innocence throughout the proceedings. He readily admitted that the sexual contact took place, but argued that it was consensual. Defense counsel was very effective during trial in attempting to show that the complainant's behavior was reasonably interpreted by defendant as consent. Defendant's argument is without merit.

F. EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Finally, defendant argues that his appellate counsel was ineffective for failing to raise the issues that he raises in his Standard 4 brief – improper scoring of PRV 7 and OV 13, prosecutorial misconduct, and ineffective assistance of trial counsel. We disagree.

The test for determining if trial counsel was ineffective also applies to appellate counsel. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). To establish ineffective assistance of appellate counsel, a defendant must demonstrate that counsel's performance "fell below an objective standard of reasonableness and prejudiced his appeal." *Id.* "Appellate counsel may legitimately winnow out weaker arguments in order to focus on those arguments that are more likely to prevail." *Id.* at 186-187.

For the reasons discussed above, we find that there is no merit to these arguments. Appellate counsel reasonably focused on stronger arguments. In addition, defendant has suffered no prejudice from appellate counsel's failure to raise these issues on appeal because these arguments do not warrant a new trial or resentencing. Furthermore, there is no prejudice because defendant has brought up these issues to this Court in his Standard 4 Brief. See *People v Pratt*, 254 Mich App 425, 430-431; 656 NW2d 866 (2002).

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Kirsten Frank Kelly

/s/ Pat M. Donofrio