

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL REY CHANDLER,

Defendant-Appellant.

UNPUBLISHED

May 20, 2003

No. 232358

Macomb Circuit Court

LC No. 00-000664-FC

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct ("CSC I"), MCL 750.520b(1)(e), one count of second-degree criminal sexual conduct ("CSC II"), MCL 750.520c(1)(e), two counts of felonious assault, MCL 750.82, and one count of assault with intent to cause great bodily harm less than murder, MCL 750.84. He was acquitted of an additional count of kidnapping, MCL 750.349. He was sentenced to concurrent prison terms of fifteen to thirty years for each of the CSC I convictions, ten to fifteen years for the CSC II conviction, and two to four years for each of the assault convictions. Defendant appeals by right. We affirm defendant's convictions, and affirm his CSC I and felonious assault sentences, but remand for resentencing on the convictions for CSC II and assault with intent to cause great bodily harm.

Defendant was convicted of physically and sexually assaulting his former girlfriend, who was the mother of defendant's son. Defendant admitted striking the victim one time with his hand, but denied physically assaulting the victim to the extent and in the manner she described at trial. Additionally, defendant claimed that the sexual activity between himself and the victim was consensual.

I

Defendant first argues that the jury's verdict was against the great weight of the evidence. In order to preserve an issue regarding the great weight of the evidence, a defendant must raise the issue in a motion for a new trial in the trial court. Defendant failed to move for a new trial; therefore, this issue is not preserved. *People v Hughey*, 186 Mich App 585, 594; 464 NW2d 914 (1990). Where an issue, either constitutional or non-constitutional, is not properly preserved, appellate relief is not warranted unless the defendant shows that a plain error that affected his

substantial rights. The defendant has the burden of demonstrating that he was prejudiced by the error, i.e., that the outcome was affected. Additionally, the reviewing court, may not reverse unless it concludes that the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

A new trial based upon the great weight of the evidence should be granted only where the evidence preponderates heavily against the verdict so that a miscarriage of justice would result if the verdict was allowed to stand. *People v Gadomski*, 232 MA 24, 28; 592 NW2d 75 (1998).

Contrary to defendant's argument, the victim's testimony sufficiently established that the sexual activity in question was not consensual. She testified that she submitted to the sexual activity because defendant repeatedly threatened her and her child both verbally and while armed with a knife. Her testimony further established that defendant had at least constructive possession of a knife during the sexual assaults. *People v Proveaux*, 157 Mich App 357, 361-362; 403 NW2d 135 (1987); *People v Dennis Davis*, 101 Mich App 198, 201-203; 300 NW2d 497 (1980). Although defendant asserts that this case was a credibility contest between him and the victim, to the extent the jury resolved this issue in favor of the victim, defendant has not shown that the jury's verdict was against the great weight of the evidence. Furthermore, we are not persuaded that the jury's acquittal of defendant on the kidnapping charge is inherently inconsistent with a finding of guilt on the CSC I and CSC II charges.

Defendant also argues that his assault convictions are against the great weight of the evidence. We disagree. Defendant was charged with assault with intent to do great bodily harm for striking the victim with a rock. To prove the crime of assault with intent to cause great bodily harm, the prosecution was required to show (1) an assault with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). At trial, evidence was presented that defendant struck the victim in the face with the rock, causing injuries to her head and face, while threatening to kill her. Defendant has not shown that his conviction for this offense was against the great weight of the evidence.

The crime of felonious assault consists of the following elements: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v John Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). At trial, the victim testified that defendant displayed a knife to her when they were first at her home and he told her that if she did not leave with him, he was going to kill both her and their son. Later in the day, defendant held the knife at the victim's throat as she talked to her father on the telephone and again threatened to kill her and her son if she "said something stupid." Again, defendant has not shown that his two convictions for felonious assault were against the great weight of the evidence.

II

Next, defendant argues that trial counsel was ineffective. Because this issue was not raised in an appropriate motion before the trial court, and defendant's motion to remand on this

issue was denied by this Court, our review is limited to mistakes apparent from the existing record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

For this Court to reverse due to ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant claims that his attorney was ineffective for not calling several witnesses, namely, Dr. Kayfan, Jason Chandler, Steven Rush, Adil Haradhvala, Dawn Blanks and Ronnie Gossage. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). It is not apparent from the existing record why trial counsel did not call these individuals, or what favorable information they could have provided. Accordingly, this Court cannot conclude that counsel was ineffective. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999).

Defendant also argues that counsel was ineffective for not requesting certain telephone records to show that there was a three-way telephone conversation between him, his roommate, and the victim, during which the victim allegedly admitted lying about the allegations. Once again, the existing record does not establish that such a telephone conversation took place or what was said during any conversation. Moreover, at most, the telephone records would have shown that a telephone call was placed; they would not have established either the parties to that phone call or the content of any conversation. Thus, defendant has not demonstrated that counsel was ineffective for not requesting these records. *Rockey, supra*.

Defendant further claims that his attorney was ineffective in his cross-examination of defendant's roommate and the victim. This was a matter of trial strategy and defendant has not shown that counsel's conduct was unreasonable. *Marcus Davis, supra; Rockey, supra*.

We also decline defendant's request to remand this matter for an evidentiary hearing on this issue. Defendant's offer of proof is insufficient to demonstrate factual support for a finding that counsel was ineffective. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998); *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

III

Defendant argues that his sentences are disproportionate under *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), and that offense variable (OV) 7 of the sentencing guidelines was improperly scored. Defendant was sentenced under the legislative sentencing

guidelines. Accordingly, this Court must affirm a sentence within the guidelines range unless there was an error in scoring the guidelines or inaccurate information was relied on in determining defendant's sentence. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

In scoring the legislative guidelines, "[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). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant argues that the trial court incorrectly scored fifty points for OV 7. Pursuant to MCL 777.37(1)(a), in effect at the time of the instant offenses,¹ a defendant should receive fifty points under OV 7 for aggravated physical abuse if the "victim was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(2)(a) defines terrorism as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense."

In *Hornsby*, *supra* at 468-469, this Court upheld a trial court's scoring of fifty points for OV 7 where in the course of committing armed robbery, the defendant not only produced a weapon and demanded money, but also cocked the weapon and made repeated threats to kill the victims. This Court held that the record supported a finding that the defendant's conduct was designed to substantially increase the victims' fear and anxiety during the offense. *Id.* at 469.

In the case at bar, the victim was subjected to similar abuse. Her testimony established that she was repeatedly threatened with her life by defendant. Additionally, defendant threatened the victim's young child when he held the child while armed with a knife. On these facts, the trial court did not abuse its discretion in scoring OV 7 at fifty points. Defendant's sentences for CSC I and felonious assault were within the guidelines' recommended ranges. Having found no scoring error, we are required to affirm those sentences. *Leversee*, *supra*.

The sentences imposed for defendant's CSC II and assault with intent to cause great bodily convictions represent departures from the applicable ranges under the guidelines, but the trial court failed to state substantial and compelling reasons for the departures, contrary to MCL 769.34(3). Additionally, the trial court imposed a maximum sentence of only four years for the assault with intent to cause great bodily harm conviction, rather than the statutory maximum of ten years. See MCL 750.84; MCL 769.8(1); *People v Frank*, 155 Mich App 789, 791; 400 NW2d 718 (1986). Accordingly, we vacate defendant's sentences for CSC II and assault with intent to cause great bodily harm and remand for resentencing on those offenses. See *People v Thenghkam*, 240 Mich App 29, 70; 610 NW2d 571 (2000).

¹ MCL 777.37 was amended by 2002 PA 137, effective April 1, 2002, to replace the word "terrorism" with its former definition, "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."

IV

Defendant argues that his right to a speedy trial was violated. Because defendant did not preserve this issue by raising it in the trial court, *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999), our review is limited to plain error that affected defendant's substantial rights. *Carines, supra*.

A defendant has the constitutional right to a speedy trial. US Const, Ams VI and XIV; Const 1963, art 1, § 20; *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). See also MCL 768.1 and MCR 6.004(A). In deciding if a defendant has been denied his constitutional right to a speedy trial, this Court considers "(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 Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). A delay of more than eighteen months is presumed to be prejudicial, and the prosecution bears the burden of proving that the defendant was not prejudiced. *Id.* Because the delay in this case was less than eighteen months, defendant had the burden to show prejudice as a result of the delay. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). Defendant has not met this burden.

First, the delay between the date of the crime and trial was approximately eleven months. Although some of the delay may be attributed to the prosecution, the period of delay was not so substantial or out of the ordinary to show prejudice to defendant. *Cain, supra* at 112-113.

Second, the reasons for the delay were not unreasonable. While docket congestion caused much of the delay, and such delay is attributed to the prosecution, delay of this sort is given only minimal weight. *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993). Defendant's pretrial motions and his request for new counsel also contributed to the delay.

Third, while defendant moved for his release from jail under the 180-day rule, he never asserted his right to a speedy trial. A defendant is required to formally demand a speedy trial in order to preserve the issue for review. *Cain, supra* at 111. The failure to request a speedy trial weighs against finding that the defendant was denied this right. *Wickham, supra* at 112.

Fourth, defendant has not sufficiently shown that the delay prejudiced him. His general allegations of prejudice due to lost witnesses and fading memories are insufficient to establish that his defense was prejudiced. *Gilmore, supra* at 462. Moreover, defendant's general allegations of increased anxiety and mental anguish while awaiting trial are also insufficient to show prejudice to his person. *Id.*

Upon balancing each of the foregoing factors, defendant was not denied his right to a speedy trial.

V

Next, defendant argues that the trial court abused its discretion by denying his motion to quash the information. *People v Clement*, 254 Mich App 387, 389; 657 NW2d 172 (2002). We disagree.

First, the trial court properly amended count 6 to change that charge from CSC II to CSC I. Under MCL 767.76, a court may amend an information at any time before, during, or after trial. The court may also permit the prosecutor to amend the information if doing so would not unfairly surprise or prejudice the defendant. MCR 6.112(H); *People v Stacey Jones*, 252 Mich App 1, 4; 650 NW2d 717 (2002). An information may be amended to cure any defect or imperfection. *Id.* at 4-5. Here, the trial court amended count 6 to conform to the district court's announced decision to bind defendant over for trial on three counts of CSC I. Defendant has not shown error.

Second, the trial court properly ruled that there was sufficient evidence to bind defendant over for trial on assault with intent to cause great bodily harm. In order to bind a defendant over for trial, the district judge must find that a felony was committed and that there is probable cause to believe that the defendant committed the crime. MCL 766.13; *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). When reviewing a bindover decision, a circuit court, may only reverse where it appears on the record that the district judge abused his discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). This Court reviews the circuit court's decision on a motion to quash the information de novo to also determine if the district judge abused his discretion. *Id.*

Defendant argues that an assault with intent to do great bodily harm was not shown because the victim did not receive serious injuries. The seriousness of injury is not an element of the offense. See *Bailey, supra*. The evidence at the preliminary examination indicated that defendant hit the victim in the head with a rock and his hands, while threatening to kill her. The victim complained of dizziness and head pain. The evidence was sufficient to infer that defendant assaulted the victim, intending to cause her great bodily harm. Defendant was properly bound over on this charge.

Defendant also argues that he should not have been bound over on a charge of CSC II, because the offense was merged into the CSC I charges. We disagree. The testimony at the preliminary examination established that defendant committed three separate acts of sexual penetration, CSC I, and one act of sexual contact, CSC II. As discussed more fully in part VIII, *infra*, the Legislature intended to impose separate punishments for each act of sexual penetration or sexual contact committed during a single incident. *Wilson, supra* at 608. Accordingly, defendant was properly bound over on the charge of CSC II, in addition to the three counts of CSC I.

VI

Next, defendant argues that the trial court's erroneous instructions require reversal. We disagree.

Claims of instructional error are reviewed by this Court de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998).

This Court reviews 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). Instructions must cover each element of each offense charged, along

with all material issues, defenses, and theories that have evidentiary support. *Id.*
[*People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999).]

During the trial court's final instructions, the court misstated that defendant had the burden of proving the elements of an offense beyond a reasonable doubt. Defendant immediately brought the error to the court's attention, the court immediately corrected its misstatement, and told the jury to disregard the earlier instruction. The court also repeatedly informed the jury throughout its instructions that the burden of proof was on the prosecution. Accordingly, when the court's instructions are reviewed in their entirety, it is patent that no error requiring reversal occurred. *Wess, supra.*

During its instructions, the court also once improperly instructed the jury on the verdict options it could consider in respect to the charges of felonious assault. The court failed to instruct the jury that it could find defendant not guilty. This error was also brought to the court's attention, and the court properly reinstructed the jury. Moreover, all of the available options, including a "not guilty" verdict, were clearly set forth on the verdict form provided to the jury. Again, under these circumstances, the court's initial misstatement does not require reversal. *Wess, supra.*

VII

Defendant argues that he was denied a fair trial due to prosecutorial misconduct. We disagree.

Because defendant failed to object to the prosecutor's conduct below, this issue is not preserved. Therefore, defendant must show a plain error that affected his substantial rights. *Carines, supra; People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first claims that misconduct occurred when a detective was permitted to testify to hearsay statements the victim made. Defendant never objected to the detective's testimony, so the trial court was never asked to rule on its admissibility. Prosecutorial misconduct may be based upon the improper questioning of a witness. The test for whether the misconduct requires reversal is whether the defendant was denied a fair and impartial trial. *People v Harvey*, 167 Mich App 734, 747; 423 NW2d 335 (1988). Prosecutorial misconduct cannot be based on good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). The prosecutor, as an advocate for the state, is entitled to attempt to introduce evidence which he legitimately believes will be accepted by the court, so long as that attempt does not actually prejudice the defendant. Absent a showing of bad faith by the prosecutor, this Court will not reverse simply because defense counsel was required to do his job and object. *Id.* at 328-329.

The prosecutor's questions were not intended to elicit hearsay from the detective, but rather, information about the victim's physical and emotional condition. Moreover, to the extent the detective testified to the victim's out-of-court statements, it does not appear that their purpose was to establish the truth of the matters asserted, but instead to explain at what point during the

interview the victim became emotionally upset. As such, the testimony would not be hearsay. MRE 801(c). We, therefore, find no plain error arising from this testimony.

Defendant also claims that the prosecutor improperly commented on his lack of credibility numerous times during closing argument. Because defendant testified, the prosecutor was free to comment on defendant's credibility. *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The challenged arguments were not improper. Moreover, we disagree with defendant's claim that the prosecutor improperly made an obvious plea to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Nor did the prosecutor vouch for the credibility of the victim or express his personal opinion.

VIII

Defendant argues that his convictions for CSC II and felonious assault violate his double jeopardy protections. We disagree.

Both the federal and state constitutions protect a defendant from twice being placed in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Heron*, 464 Mich 593, 599; 628 NW2d 528 (2001); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Defendant argues that he was subjected to multiple punishments for the same offense when he was convicted of CSC II and felonious assault because these offenses are lesser offenses of CSC I and assault with intent to cause great bodily harm. We disagree.

The Double Jeopardy Clause is not a limitation on the Legislature, which may specifically authorize multiple penalties for what would otherwise be considered a single offense. *People v Lugo*, 214 Mich App 699, 706; 542 NW2d 921 (1995).

Cumulative punishment of the same conduct does not necessarily violate the prohibition against double jeopardy under either the federal system or the state system. The determinative inquiry is whether the Legislature intended to impose cumulative punishment for similar crimes. *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984) . . . [*Lugo, supra.*]

Although CSC II is a cognate offense of CSC I, *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997), the Legislature intended separate punishments for each act of sexual penetration or sexual contact a defendant commits. *Wilson, supra*; see also *Mackle, supra* at 600-601. Because the evidence established three separate acts of sexual penetration, defendant was properly convicted of three counts of CSC I. Moreover, defendant's separate conduct involving his touching of the victim's breasts properly could be punished as a separate act of CSC II.

Further, the evidence at trial established that defendant's two convictions for felonious assault and single conviction for assault with intent to cause great bodily harm were each based on distinct acts. Where one offense is completed before the other occurs, there is no double jeopardy violation even where one of the offenses is a lesser offense of the other. *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002).

IX

In his pro se brief, defendant argues that he was denied due process because the prosecution withheld information from him. We find no merit to this issue.

Because defendant did not raise this issue in the trial court, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra*.

Defendant bases his argument on his due process right to discovery of information in the prosecution's possession under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). This right involves the disclosure of evidence that might lead a jury to entertain a reasonable doubt about the defendant's guilt. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The disclosure requirements of *Brady* apply to records within the prosecutor's possession and which must be turned over regardless of whether the defendant has made a request for the records. *Stanaway, supra* at 666. The prosecutor is not under a duty to allow complete discovery of his files, but is under a duty to disclose any information that would affect the credibility of his witnesses. *Lester, supra* at 281.

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Lester, supra* at 281-282.]

Defendant alleges two discovery violations. First, he argues that the prosecution failed to call Dr. Kayfan as a witness and failed to provide Dr. Kayfan's medical records. Dr. Kayfan was apparently the victim's treating physician. Defendant argues that the records could have helped his defense by showing that the victim did not suffer injuries from a sexual assault.

Although Dr. Kayfan was not called as a witness at trial, his identity was made known to the defense before trial. With regard to Dr. Kayfan's records, defendant has failed to show that they contained exculpatory information. Nothing in the record suggests that the prosecution suppressed this evidence because it favored defendant. Thus, defendant has not shown that a due process violation occurred. *Lester, supra*.

Second, defendant claims that the prosecution should have learned the contents of a three-way telephone conversation that allegedly occurred between the victim, defendant and defendant's roommate. Defendant has failed to show either that this information was under the control of the prosecutor, or that it was suppressed. A prosecutor is not required to perform the defendant's investigative work for him. *People v T aylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Indeed, because defendant alleges that he was a party to this three-way telephone conversation, he cannot legitimately claim that this information was withheld. Defendant has failed to establish that his due process rights were violated.

We affirm in part and remand for resentencing on defendant's convictions for CSC II and assault with intent to do great bodily harm. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra