

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EARL HACKNEY,

Defendant-Appellant.

UNPUBLISHED

February 24, 2005

No. 249216

St. Joseph Circuit Court

LC No. 02-011244-FC

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for sexually assaulting a twelve-year-old girl. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 40 to 75 years in prison. We affirm.

Defendant first argues that his Sixth Amendment right to confront a witness against him was violated when the trial court allowed into evidence the videotaped deposition of an emergency room doctor who examined the victim. US Const, Ams VI and XIV; Const 1963, art I, § 20. However, at the deposition taken five days before trial, both defense counsel and defendant affirmed that they had no objection to a video deposition being “used in the event there is a trial in this case.” Further, at trial, defendant stipulated to the admission of the videotaped deposition. It is well settled that a party cannot request a certain action of the trial court, stipulate to a matter, or waive objection and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001); *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). By intentionally relinquishing a known right, defendant waived the issue on appeal and any error was extinguished. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next argues that he was denied the right to an impartial jury drawn from a fair cross-section of the community. Specifically, defendant claims that African-Americans were systematically excluded from jury venires in St. Joseph County at the time of his trial. US Const, Am VI; Const 1963, art 1, § 14. We disagree. We review de novo questions of systematic exclusion of minorities from jury venires. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003); *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

“A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community.” *Id.* “In order to establish a prima facie violation of the fair-cross-section requirement, a defendant must show, among other things, that the underrepresentation of the distinctive group, in this case African-Americans, was due to systematic exclusion.” *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Here, defendant’s motion to challenge the array merely alleged that “the selection process excludes African-American citizens from the jury,” and stated that defendant “knows and understands that panels brought to the St. Joseph County Circuit Court for jury selection have a disproportionately small number of African-American jurors and frequently no African-American jurors.” Defendant proffered no evidence regarding underrepresentation of African-Americans in his particular jury array or jury venires in general.¹ And “it is well settled that systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate.” *Id.* Defendant’s “‘bald assertion’ that systematic exclusion must have occurred is insufficient to make out a claim of systematic exclusion.” *People v Williams*, 241 Mich App 519, 527; 616 NW2d 710 (2000), quoting *Flowers, supra* at 737. Defendant has not met his “burden of demonstrating a problem inherent within the selection process that results in systematic exclusion.” *Williams, supra* at 527. Defendant has failed to establish a prima facie violation of the Sixth Amendment fair-cross-section requirement, and he is not entitled to relief on this issue.²

Defendant alternatively argues that his right to equal protection under the Fourteenth Amendment was violated. Specifically, defendant claims that he has demonstrated a prima facie case of discrimination against African-Americans. “To make out a case for systematic discrimination, a claimant must (1) show that the group excluded is a recognizable, distinct class capable of being singled out for different treatment under the laws, (2) prove the degree of underrepresentation by comparing the proportion of the excluded group in the total population to the proportion actually called to serve on the venire over a significant period, and (3) show that the selection procedure is either susceptible of abuse or not racially neutral.” *Id.* at 527-528. Again, defendant has failed to make out a prima facie case under the Fourteenth Amendment: he has failed to show either that the jury selection system was subject to abuse or that African-

¹ On appeal, defendant supports his argument with the trial court’s comment that jury selection is “intended to be a random system, and unfortunately, there are not enough African-Americans who hold driver’s licenses, so African-Americans are disproportionately represented.” However, the trial court denied defendant’s motion to challenge the array, and such an offhand remark does not constitute sufficient proof that African-Americans were underrepresented due to systematic exclusion so as to make out a prima facie violation of the fair-cross-section requirement.

² To the extent defendant now requests a remand for an evidentiary hearing for an opportunity to demonstrate systematic exclusion, we note that MCR 7.211(C)(1)(a)(ii) provides that within the time provided for filing a brief, an appellant may move to remand to the trial court by identifying an issue sought to be reviewed on appeal, showing that development of a factual record is required for appellate consideration of the issue, and supporting the motion by an affidavit or offer of proof regarding the facts to be established at a hearing. While defendant moved for a remand in propria persona, demonstrating systematic exclusion was not one of the issues defendant sought to be addressed on remand, and, in any event, this Court denied the motion because it was not filed within the time required by MCR 7.211(C)(1)(a) and did not identify an issue sought to be reviewed on appeal.

Americans were underrepresented over a significant period. Defendant is not entitled to relief on this issue.

Defendant next argues that his right to due process was violated where the police failed to investigate and procure, and the prosecutor failed to present, potentially exculpatory evidence. Specifically, defendant argues that the police should have processed the van where the sexual assault occurred for physical evidence, seized the clothing the victim wore during the assault, and established the exact location of the assault. Because defendant failed to raise the issue below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"A criminal defendant has a due process right of access to certain information possessed by the prosecution." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). However, because defendant concedes that the police and prosecutor did not possess exculpatory evidence, he cannot establish a violation of his due process rights under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Rather, defendant argues that the police and prosecutor did not possess exculpatory evidence because the police did not adequately investigate the crime. However, "due process does not require that the prosecution seek and find exculpatory evidence." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Additionally, "[a]lthough the prosecution bears the burden of proving guilt beyond a reasonable doubt in a criminal trial, it need not negate every theory consistent with defendant's innocence." *Id.* Defendant has failed to demonstrate plain error affecting his substantial rights; therefore, he is not entitled to relief on this unpreserved issue.

Defendant next argues that the trial court erred in scoring fifty points for offense variable 7 (OV 7), on the basis that the young victim was sexually assaulted at an isolated, remote location. "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). Further, "scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). "This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." *People v Leverage*, 243 Mich App 337, 348; 622 NW2d 325 (2000); MCL 769.34(10).

We find that the trial court did not abuse its discretion in scoring fifty points for OV 7, where there was evidence to support a finding of aggravated physical abuse. MCL 777.37(1)(a) provides that fifty points should be scored where "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Here, the victim testified that defendant drove her to a remote location where he sexually assaulted her. Additionally, the investigating police officer testified that the victim became visibly upset when they were attempting to locate the crime scene. This evidence supported the trial court's finding that defendant treated the victim with "terrorism," i.e., "conduct designed to substantially increase the fear and anxiety [the] victim suffered during the offense." Accordingly, the trial court did not abuse its discretion in assessing fifty points for OV 7, and defendant's minimum sentence of 480 months properly fell within the minimum sentencing guidelines range of 225 to 750 months for a fourth-offense habitual offender.

Defendant next argues that he was denied the effective assistance of counsel. Specifically, defendant claims that defense counsel failed to adequately prepare for trial and failed to adequately impeach the victim and her mother. We note that before the trial court entered the judgment of sentence, defendant moved in propria persona to “overturn the verdict,” partially on the basis that his attorney failed to ask the examining doctor certain questions concerning the injuries sustained by the victim. The trial court did not hear the motion, but indicated that, pursuant to the parties’ agreement, the issues raised by defendant were preserved for appeal. Additionally, after defendant filed the instant appeal, he moved for a *Ginther*³ hearing in the lower court; however, the motion was never heard. While the issue of ineffective assistance of counsel is typically preserved by a timely motion for a new trial or for a *Ginther* hearing, the trial court in this case did not hear either of defendant’s motions; therefore, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.* at 663-664. “The defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy,” and “this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant claims that defense counsel failed to adequately prepare for trial where he failed to obtain a surveillance camera videotape from a gas station where defendant allegedly stopped with the victim on the date of the incident. However, the record reveals that while defense counsel attempted to procure the videotape, because the gas station recycles its surveillance tapes every 1 to 4 weeks, the video from the date of the incident was no longer in existence at the time defendant was charged in the instant case, and consequently, before counsel had been appointed. “When making a claim of defense counsel’s unpreparedness, a defendant is required to show prejudice resulting from lack of preparation.” *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Here, defendant was not prejudiced due to lack of defense counsel’s preparation; instead, the evidence he sought was simply no longer in existence at the time he was charged with the crime and counsel was appointed. A claim of ineffective assistance of counsel cannot be predicated on a failure to procure evidence that does not exist; therefore, defendant is not entitled to relief on this issue.

Defendant also claims that defense counsel failed to adequately impeach the victim and her mother regarding the source of the victim’s injuries. However, the victim’s mother admitted

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

that she “whooped” her daughter with an extension cord on the date of the incident, and the victim corroborated this account. “‘Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy,’ which we will not second-guess on appeal.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), quoting *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, defense counsel cross-examined both the victim and her mother regarding the injuries the victim sustained from her mother’s beating following the sexual assault. Defendant fails to demonstrate how further exploration of this topic would have yielded evidence that would have provided him with a “substantial defense,” i.e., one which “might have made a difference in the outcome of the trial.” *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). Defendant received effective assistance of counsel and he is not entitled to relief on this issue. *Id.* at 711.

Defendant next argues that the prosecutor failed to prove venue. We disagree. We review de novo a trial court’s determination regarding the existence of venue. *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996). “Venue is a part of every criminal case and must be proved by the prosecutor beyond a reasonable doubt.” *Id.* However, whether venue is proper is a question of fact for the jury that may be proven with circumstantial evidence. *People v Andrews*, 360 Mich 572, 575; 104 NW2d 199 (1960); *People v Watson*, 307 Mich 596, 603; 12 NW2d 476 (1943).

Here, the investigating police officer testified that when he took the victim to help him find the location of the assault, she indicated that an intersection looked familiar. He testified that when they reached an area that matched the victim’s initial description of the location, she responded by crying, trembling, and acting fearful. We defer to the jury’s apparent acceptance of this testimony: “[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Accordingly, we find no error.

Finally, defendant argues that the prosecutor presented insufficient evidence to sustain his conviction of first-degree criminal sexual conduct. Specifically, defendant contends that there was insufficient evidence that he digitally penetrated the victim’s vagina. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

Defendant maintains that no medical evidence existed to support the jury’s determination that he digitally penetrated the victim’s vagina. However, the doctor who examined the victim discovered superficial abrasions and tears on the exterior of her vagina that appeared to be twenty-four hours old. In the doctor’s opinion, the injuries were consistent with digital penetration and the timeframe provided by the victim. Moreover, the victim testified that defendant put his fingers into her vagina twice. This testimony alone was sufficient for the jury to find that penetration occurred. *People v Robideau*, 94 Mich App 663, 674; 289 NW2d 846

(1980). Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. There was sufficient evidence to support defendant's conviction of first-degree criminal sexual conduct, and he is not entitled to relief on this issue.

We affirm.

/s/ Bill Schuette

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra