

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EARL PARKS,

Defendant-Appellant.

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UNPUBLISHED

July 31, 2012

No. 303683

Macomb Circuit Court

LC No. 2010-003875-FC

Before: TALBOT, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant Robert Earl Parks appeals by right his bench conviction of first-degree criminal sexual conduct. MCL 750.520b(1)(f). The trial court acquitted him of unarmed robbery. MCL 750.530. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve 25 to 40 years in prison. Because we conclude that there were no errors warranting a new trial, we affirm. However, because the prosecution concedes that defendant did not properly waive his right to have the assistance of counsel at his sentencing and that this error warrants resentencing, we remand for resentencing consistent with this opinion.

**I. BASIC FACTS**

At trial, the prosecution presented evidence that, on the day at issue, defendant argued with CW—his then girlfriend—at their home. There was testimony that defendant struck her several times, dragged her by her hair into their bedroom and shut the door. Once in the bedroom, defendant again began to strike her. CW testified that she thought that he was going to kill her; she said she was crying and asked him to stop hitting her. At some point defendant ordered her to take her clothes off and get on the bed. He then began to penetrate her while she cried and, at one point, wretched. Even after he went to the attached bathroom, she did not move from the bed because she was scared and did not believe she was free to leave. When he returned from the bathroom he ordered her to “stop acting that way” and asked how he was going “to bust a nut with your crying and acting this way.”

After defendant forced CW to have sex, he took her to a cellular telephone store to purchase a cell phone that she had allegedly promised him. An employee saw CW and recalled that she appeared frightened. Defendant purchased a cell phone with his debit card but told CW that she had to reimburse him. He then took her to a bank where he used her debit card to withdraw \$200. After returning to the home, defendant left without CW to withdraw another \$300 from her account. She then went to a neighbor's home and called the police.

Defendant testified at trial and admitted that he slapped CW and dragged her into the bedroom by her hair during an argument. However, he stated that she consented to having sex with him to make up after their argument.

The trial court found defendant guilty of first-degree criminal sexual conduct, but acquitted him of unarmed robbery. This appeal followed.

## II. SUBSTITUTE COUNSEL

Defendant first argues the trial court erred when it refused his request for substitute counsel. This Court reviews a trial court's decision on a motion for substitute counsel for an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). A trial court abuses its discretion when it selects an outcome that is "outside the range of reasonable and principled outcomes." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). In order to warrant the appointment of substitute counsel, the defendant must show good cause for the substitution and that the substitution will not unreasonably disrupt the judicial process. *Mack*, 190 Mich App at 14. "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id.*

Defendant has not identified any disagreement that he might have had with respect to the witnesses to be called or impeachment; and to the extent he disagreed with his trial counsel on matters of trial strategy, those issues would not be sufficient to warrant substitute counsel. See *id.*; *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011) (noting that the defendant did not identify a difference of opinion on a fundamental trial tactic, but instead raised issues concerning trial strategy that did not warrant substitute counsel). Defendant agreed on the record with his lawyer's decision to argue consent. When given an opportunity to further specify the evidence he believed his trial counsel had neglected, defendant did not identify any additional witnesses; instead, he mainly complained about his trial lawyer's failure to share discovery materials and claimed that they disagreed about whether to present evidence that CW had a motive to lie. Given the lack of record evidence that defendant had a serious disagreement with his lawyer and that defendant's request for substitute counsel was untimely and likely to prejudice the prosecution, we cannot conclude that the trial court abused its discretion by declining to appoint a third trial lawyer. See *People v Krist*, 93 Mich App 425, 436-437; 287 NW2d 251 (1979); *Strickland*, 293 Mich App at 399.

### III. SUFFICIENCY OF THE EVIDENCE

Defendant also argues that the evidence was insufficient to convict him of first-degree criminal sexual conduct. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). We review the record evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *Id.*

The prosecution charged defendant with first-degree criminal sexual conduct on the theory that he used force or coercion to accomplish the sexual penetration and CW suffered a personal injury. See MCL 750.520b(1)(f); *People v Mackle*, 241 Mich App 583, 596; 617 NW2d 339 (2000). On appeal, defendant challenges whether there was sufficient evidence to prove that CW suffered a personal injury and whether there was evidence that he used force. Personal injury includes bodily injury or mental anguish. MCL 750.520a(n). Force or coercion includes physical force or violence, or forcing the victim to submit by the use of threats of force or violence. MCL 750.520b(1)(f)(i)-(ii).

Defendant admitted that he slapped CW and dragged her from the living room into the bedroom and then sexually penetrated her—apparently while she cried and wretched. She also testified that she complied with his commands because she feared that he would kill her. This evidence was sufficient to establish that she suffered a personal injury in the form of bodily injury or mental anguish. *Mackle*, 241 Mich App at 598. Contrary to defendant’s argument on appeal, the injury need not occur simultaneously with the penetration to satisfy the personal injury element, nor was it necessary for there to be a visible injury. *Id.* at 598-600; *People v Martinez*, 190 Mich App 442, 444-445; 476 NW2d 641 (1991). Further, with respect to the use of force or coercion, the prosecution did not have to show that the force was simultaneous with the penetration. See *Mackle*, 241 Mich App at 599-600. Here, there was evidence that defendant struck CW multiple times, dragged her into the bedroom, and then forced himself on her as she cried. This evidence established a “backdrop of ongoing physical violence and psychological torment” that persuasively established the elements of force and coercion along with personal injury. *Id.* at 600.

### IV. SENTENCING ISSUES

#### 1. WAIVER OF RIGHT TO COUNSEL

Defendant next argues that he did not validly waive his right to counsel at sentencing. A defendant has the right to represent himself should he so choose. However, before permitting a defendant to proceed without a lawyer, the trial court must determine whether the decision to proceed without a lawyer was knowing, intelligent, and voluntary; and must “determine that the defendant’s acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court’s business.” *People v Anderson*, 398 Mich 361, 368; 247 NW2d 857 (1976). The trial court must also comply with the requirements stated under MCR 6.005(D). *People v Williams*, 470 Mich 634, 649; 683 NW2d 597 (2004). Here, the prosecution concedes that the trial court did not substantially comply with those requirements. As such, defendant is entitled to be resentenced.

## 2. SCORING OFFENSE VARIABLES

Defendant next argues that the trial court improperly scored a number of offense variables. Although we are remanding this matter for resentencing, we shall nevertheless address defendant's remaining challenges to his sentencing in order to avoid having them repeated after resentencing. This Court reviews de novo the proper interpretation and application of the sentencing guidelines. *People v Bemmer*, 286 Mich App 26, 31; 777 NW2d 464 (2009). This Court reviews the findings underlying a trial court's scoring decision for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Defendant first argues that the trial court improperly scored offense variable (OV) 3, MCL 777.33, at five points because there was no evidence of an injury and because OV 3 should not be scored where bodily injury is an element of the sentencing offense. OV 3 is properly scored at five points where "bodily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). However, OV 3 cannot be scored "if bodily injury is an element of the sentencing offense." MCL 777.33(2)(d). We agree that OV 3 should not have been scored because, as charged, bodily injury was an element of the sentencing offense. MCL 777.33(2)(d). Therefore, the trial court erred in scoring OV 3 at five points.

Defendant also argues that the trial court erred in scoring OV 8 at 15 points. OV 8 is properly scored at 15 points where, "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). "The term 'asportation' is not defined in the sentencing guidelines statute," but has been interpreted by this Court to require "some movement of the victim . . . that is not merely incidental" to the underlying offense. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). The trial court did not clearly err when it found that defendant moved CW to a place of greater danger when he dragged her to the bedroom and closed the door. By moving her to the bedroom and closing the door, defendant made it less likely that his nephew—who was in the house at the time—would discover what he was doing. See *id.* at 648. Further, the movement was not merely incidental to the offense. See *Spanke*, 254 Mich App at 647.

Defendant next argues that OV 10 should not have been scored because there was no evidence demonstrating that he exploited CW by using his superior size or strength. A trial court must score OV 10 at five points where, "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). It is clear from the record that defendant exploited CW by using his superior strength to beat her and drag her by her hair into the bedroom. The trial court's decision to score this variable at 5 points was not clearly erroneous.

Finally, defendant argues that the trial court improperly scored OV 11 at 25 points; specifically, he argues that there was no evidence of an additional penetration beyond the sentencing offense. A trial court must score OV 11 at 25 points if it finds that "one criminal sexual penetration occurred" in addition to the penetration that forms the basis for the conviction. MCL 777.41(1)(b). Under OV 11, the trial court must score, "all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). But the trial court may not score points for the one penetration that forms the basis of the offense. MCL 777.41(2)(c).

In the present case, there was evidence of two distinct penetrations. See *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). The first came after defendant forced CW to remove her clothes and get on the bed. The second penetration came after defendant went to the bathroom and returned. The second penetration arises from the sentencing offense; CW was on the bed because of defendant's conduct leading up to the first penetration and there was a temporal break of a short time while he was in the bathroom. See *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). Therefore, the trial court's finding that there was at least one additional penetration was not clearly erroneous.

### 3. SENTENCING REPORT

Defendant next argues that the trial court erred when it refused to correct information in his presentence investigation report (PSIR). Defendant contends the trial court should have stricken information that his ex-wife called his parole agent regarding an alleged domestic violence incident. This Court reviews for an abuse of discretion a trial court's response to a claim that the report is inaccurate. *People v Lucey*, 287 Mich App 267, 275; 787 NW2d 133 (2010). "The information [in a PSIR] is presumed to be accurate, and the defendant has the burden of going forward with an effective challenge, but upon assertion of a challenge to the factual accuracy of information, a court has a duty to resolve the challenge." *People v Waclawski*, 286 Mich App 634, 689; 780 NW2d 321 (2009). Defendant argued before the trial court that the information should be removed because the domestic violence charge was ultimately dismissed. However, the report's author noted that the charge had been dismissed. As such, the report was not inaccurate and, given that a sentencing court may properly rely on charges which did not result in a conviction, see *People v Cross*, 186 Mich App 216, 218; 463 NW2d 229 (1990), the trial court did not abuse its discretion when it declined to strike this information.

### V. STANDARD 4 BRIEF

We shall next briefly address those issues that defendant raised in his brief submitted under standard 4. Defendant first argues the trial court denied him the right to present a defense. We review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). The right to present a defense involves a defendant's right to "put before [the trier of fact] evidence that might influence the determination of guilt." *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006) (quotation marks and citation omitted). On appeal, defendant argues that his trial lawyer should have submitted a variety of evidence; he does not argue that the trial court precluded him or his lawyer from doing so. As such, defendant has not established that the trial court plainly erred.

Defendant next makes a number of unpreserved arguments that the prosecutor committed misconduct. This Court reviews unpreserved instances of prosecutorial misconduct for plain error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Defendant argues that the prosecutor committed misconduct by failing to disclose exculpatory evidence. Specifically, he argues that the prosecutor failed to turn over a laboratory report detailing CW's physical examination and photographs that both purportedly showed that she had no visible injuries. Defendant also argues that the prosecutor suppressed exculpatory evidence in the form of a bed sheet that did not have any vomit on it, which he believes it should have had if CW's testimony

were accurate. “A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant’s guilt.” *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). The defendant must show that the prosecutor withheld favorable evidence that, if disclosed, reasonably could have impacted the outcome of the trial. *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007). With respect to the photographs and sheet, the prosecutor did not withhold the evidence.<sup>1</sup> With respect to the report, defendant has failed to demonstrate the evidence was favorable. Even assuming the evidence relied on by defendant shows that CW did not suffer a physical injury during the attack, the prosecution did not have to prove that CW had a visible injury and any impeachment value would have been slight. There was no plain error warranting relief.

Next, defendant argues that the prosecutor committed misconduct by knowingly using perjured testimony. The prosecutor may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Defendant alleges that CW perjured herself at trial. However, nothing in the record supports that she offered perjured testimony. She testified that her lip swelled a bit and that she had some redness. This testimony was consistent with her testimony at the preliminary examination that she did not have any visible injuries, but might have had some puffiness.

Defendant’s final prosecutorial misconduct argument is that the prosecutor argued facts not in evidence. Defendant challenges two statements by the prosecutor. The first relates to the prosecutor’s statement that CW did not initially report the criminal sexual conduct because a neighbor was present. The second relates to the prosecutor’s comments that defendant’s version of events was incredible because he claimed that police officers allowed him to return home through a blockade. A prosecutor may not argue facts not in evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Having reviewed the record, we conclude that both statements were supported by reasonable inferences from the evidence. *Id.* Further, a prosecutor may “argue that a defendant’s story is unworthy of belief as long as such argument is based on the evidence rather than on matters not of record or the prestige of the prosecutor’s office.” *People v Meissner*, 294 Mich App 438, 457-458; 812 NW2d 37 (2011). There was no misconduct warranting a new trial.

Defendant next makes a series of unpreserved arguments that the trial court erred in various ways. He argues that the trial court erred in failing to hold an evidentiary hearing to determine the admissibility of his prior consensual sexual relations with CW. He also repeats his claim that the trial court denied him his right to present a defense and argues that the trial court’s verdicts were inconsistent, that the trial court failed to ensure that the prosecutor turned over all the evidence, that the trial court should have granted him a continuance, and that it erred in finding that one of CW’s statements was “unrefuted.” After examining each claim of error, we conclude that defendant has not demonstrated that the trial court plainly erred. Therefore, these claims do not warrant relief. *Carines*, 460 Mich at 763.

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<sup>1</sup> The physical bed sheet was not produced, but photographs of it were.

Defendant next argues his trial counsel was ineffective.<sup>2</sup> Because no there was no hearing on this issue, our review is limited to mistakes that are apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish his claim, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that it is reasonably probable that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant first argues his trial counsel was ineffective in failing to conduct a pretrial investigation. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Contrary to defendant's claim on appeal that his trial counsel was not prepared, his trial counsel, on the morning of trial, repeatedly indicated he was prepared and described some of his preparations for trial—including reviewing the discovery and his predecessor's notes. And, after reviewing the transcripts, it is evident that defendant's trial lawyer was familiar with the evidence and defendant's theory of the case and pursued that defense in a professionally competent manner. As such, the record does not support defendant's contention that his trial lawyer was ill-informed or unprepared.

Defendant also contends that the laboratory technician who generated the report after examining CW should have been called as a witness along with one of defendant's friends. The record reflects that defendant's trial lawyer asked defendant what witnesses he wanted to call and defendant failed to provide any names. On the first morning of trial, defendant was again provided an opportunity to name witnesses and failed to do so. And defendant's trial lawyer explained on the record that he had nothing to act on.<sup>3</sup> Defendant has failed to demonstrate that his trial counsel was ineffective for failing to call witnesses. *Frazier*, 478 Mich at 243.

Defendant next argues his trial counsel was ineffective in failing to object to the alleged instances of prosecutorial misconduct. As noted above, none of defendant's prosecutorial misconduct arguments have merit. "Counsel is not required to raise meritless or futile objections . . . ." *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Defendant next argues his trial counsel was ineffective in failing to properly present his defense. With respect to the lack of an opening statement, whether to make "an opening statement is a matter of trial strategy over which counsel is given wide discretion." *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007). Defendant fails to explain how an opening statement would have benefited him at the bench trial; as such, defendant has failed to demonstrate his trial lawyer's failure to give an opening statement fell below an objective

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<sup>2</sup> We note that defendant also requests a remand for a hearing if we do not find his claims meritorious. We previously denied defendant's motion for remand. His request amounts to an untimely motion for reconsideration, which we will not grant. MCR 7.215(I)(1).

<sup>3</sup> Defendant's lawyer stated that he had asked defendant to provide him with names, addresses, and a brief description of what they might testify about, but defendant never gave him the information.

standard of reasonableness. *Frazier*, 478 Mich at 243. With respect to defendant’s argument regarding the failure to present additional witnesses—presumably those he argues should have been called above—“[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy.” *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). And this Court will not second-guess matters of trial strategy with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant has failed to demonstrate, on the record before us, that his trial counsel was ineffective. *Frazier*, 478 Mich at 243.

We further conclude that defendant’s arguments that his trial counsel failed to present physical evidence and failed to properly impeach CW are without merit. Defendant’s trial lawyer successfully impeached CW on a variety of points that were consistent with defendant’s consent defense. He got CW to admit that defendant frequently performed tasks for her and that she had paid him for his efforts. He also got her to admit that she never specifically told him that she did not want to have sex and that they had had sex on a daily basis. Finally, he got CW to admit that she had had sex with defendant after arguments in the past, although she characterized those instances as consensual. Finally, defendant’s trial lawyer called defendant to the stand and he had the opportunity to explain that he had had “make-up” sex with CW and that CW was jealous of another woman and had a motive to fabricate the rape allegation. Thus, the record shows that defendant’s trial lawyer did impeach CW’s version of events. The fact that he chose not to do so in the way that defendant would have preferred does not establish that his decision to proceed in this way fell below an objective standard of reasonableness under prevailing professional norms. Defendant’s trial lawyer might reasonably conclude that the most effective way to impeach CW was to cross-examine her rather than rely on reports that might—at best—show that the physical evidence was not inconsistent with defendant’s version of events. See *People v Gioglio (On Remand)*, 296 Mich App 12, \_\_\_; \_\_\_ NW2d \_\_\_ (2012) (stating that “a reviewing court must conclude that the defendant’s trial counsel’s act or omission fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission.”).

Defendant’s final ineffective assistance argument is that his trial counsel was ineffective in failing to file defendant’s motion to dismiss based on an alleged discovery violation. It is apparent from the record that counsel eventually had the discovery and went over it with defendant. And, given the nature of the evidence, a reasonable trial lawyer might conclude that the circumstances would not warrant any relief and, for that reason, might reasonably conclude that the motion was unnecessary. On this record, defendant has not shown that failure to file the motion fell below an objective standard of reasonableness. See *Frazier*, 478 Mich at 243.

Defendant next argues that even if the individual errors do not warrant reversal, the cumulative effect of those errors does. Because we have found no errors with respect to defendant’s trial, there are no errors to aggregate. *People v LeBlanc*, 465 Mich 575, 592 n 12; 640 NW2d 246 (2002).

Defendant's final argument is that the trial court erred in ordering him to pay attorney costs without first determining his ability to pay. However, our Supreme Court has held that a trial court does not have to assess a defendant's ability to pay at sentencing. *People v Jackson*, 483 Mich 271, 275; 769 NW2d 630 (2009). A defendant is only entitled to have the trial court assess his ability to pay when the fee is enforced. *Id.* at 292. Defendant has failed to demonstrate plain error affecting his substantial rights.

## VI. SUPPLEMENTAL BRIEF

In a supplemental brief, defendant again asserts that his trial lawyer was ineffective for failing to present exculpatory and impeachment evidence. Specifically, he argues that his trial lawyer should have presented the lab reports to show that CW did not have any physical injuries, should have called a nurse witness who would have testified that CW had no injuries, and should have presented evidence that he and CW frequently had "make-up" sex after fighting. However, as already noted, defendant's trial lawyer impeached CW and did elicit testimony about her sexual history with defendant. And, after affirmatively entertaining the range of possible reasons that defendant's trial lawyer might have had for proceeding in this way, we cannot conclude that that decision fell below an objective standard of reasonableness. *Gioglio*, 296 Mich App at \_\_\_\_.

Defendant also claims that his lawyer should have impeached CW with her preliminary examination testimony where she admitted that she had no visible injuries, which he claims contradicted her trial testimony. Although CW testified at the preliminary examination that she had no visible injuries, she clarified on redirect that she had puffiness and pain. This was consistent with her description at trial. As such, defendant's trial lawyer could reasonably conclude that this testimony had little or no impeachment value. *Id.*

Finally, defendant again argues that his trial lawyer was ineffective for failing to object to the prosecutor's "unfair" attack on his credibility. However, as we have already explained, the prosecutor's characterization of the evidence did not amount to misconduct and, accordingly, defendant's trial lawyer cannot be faulted for failing to object to it. *Moorer*, 262 Mich App at 76.

We affirm defendant's conviction, but remand for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot  
/s/ Kathleen Jansen  
/s/ Michael J. Kelly