

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY TODD TROTTER,

Defendant-Appellant.

UNPUBLISHED

March 21, 2013

No. 306458

Wayne Circuit Court

LC No. 11-004621-FC

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of kidnapping, MCL 750.349, first-degree criminal sexual conduct (CSC 1), MCL 750.520b, unarmed robbery, MCL 750.530, and second-degree criminal sexual conduct (CSC 2), MCL 750.520c. He was sentenced to 35 to 60 years' imprisonment on both the kidnapping and CSC 1 convictions and 12½ to 20 years' imprisonment on both the unarmed robbery and CSC 2 convictions, all to be served concurrently. We affirm.

This case stems from the random and violent kidnapping, forcible rape, and robbery of a 15-year-old girl, who was held captive for approximately three hours. The assailant did not attempt to shield his identity during the ordeal, and the victim identified defendant as the assailant in a photograph array and at trial. The victim was also able to inform the police regarding the location of the house, and the room within the house, where defendant had taken and raped her after he had abducted the victim from a nearby street. The owner of the house testified that he had known defendant for about a year and that defendant had been helping him fix up houses, including the house where the sexual assault occurred. The home's owner was making repairs to the house, but not actually living there, and he testified that defendant had a bed in the room where the assault took place. According to the home's owner, defendant would stay in the house to watch it at nighttime, and he asserted that defendant was staying at the house during the time that the kidnapping and rape took place. Furthermore, DNA analysis of a vaginal swab taken from the victim showed a match with defendant's DNA. A forensic scientist for the Michigan State Police testified that the probability of selecting a random unrelated individual in the African-American population with the same DNA profile was one in 4.277 quintillion

people; there are approximately .77 quintillion people in the world according to the forensic scientist.¹ The evidence of defendant's guilt was overwhelming.

Defendant first argues that the victim's pretrial identification of him in the photo array was unduly suggestive. We disagree. "Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Generally, physical differences affect the weight given to an identification and not its admissibility. *Id.* The fact that defendant was the only person in the array who was smiling did not substantially distinguish him for purposes of identification, and the other men pictured shared similar physical characteristics with defendant. All of the men in the array, including defendant, are African-American, have similar complexions, have short hair, have some kind of facial hair, and appear to be around 40 to 50 years old. The photo array did not violate defendant's due process rights, given that it was not so impermissibly suggestive that it gave rise to a substantial likelihood of misidentification. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). Moreover, even if the photo array was unduly suggestive, the victim had an independent basis to identify defendant in court, where she was able to observe defendant for approximately three hours in close proximity, where the victim never failed to identify defendant as her assailant, and where her description of defendant was generally accurate. *People v Gray*, 457 Mich 107, 114-116; 577 NW2d 92 (1998).

Next, defendant argues that a police officer's search of the room wherein the sexual assault occurred was unconstitutional, considering that the home owner's consent to the search was invalid, as he did not have the authority to give consent to search the room used by defendant; only defendant could give such consent, which was not given, and there was no search warrant. We fail to see how this unpreserved claim of error affected defendant's substantial rights, i.e., that it prejudiced him, nor can it be said that defendant is actually innocent or that any presumed error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The search did not impact the DNA or photo array evidence, nor did it affect the home owner's testimony identifying defendant as the person who was using the room at the time of the abduction and rape. Moreover, the home owner consented to the search, and there was evidence indicating that he had, minimally, common authority over the room, or in other words, joint access and control, thereby providing him with the authority to consent to the search. *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008). The evidence did not suggest that defendant had exclusive use of the room. Furthermore, under the circumstances presented, the officer's belief in the home owner's authority to consent was objectively reasonable, rendering the search constitutionally sound. *Id.*² Defendant bootstraps an ineffective assistance of counsel

¹ Defendant is African-American, and he did not claim that he and the victim engaged in an act of "consensual" sex.

² We also note that there was no evidence of police misconduct; therefore, application of the exclusionary rule would not have been appropriate, assuming a constitutional violation. *People v*

claim because of the failure to preserve the search argument; however, any effort by counsel to suppress evidence of the search would have been futile, and counsel is not ineffective for failing to make futile or meritless arguments. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Additionally, the requisite prejudice has not been established. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Next, defendant argues that he was denied a fair trial when the prosecutor, during closing argument, stated facts not in evidence that constituted inadmissible hearsay and when, also during closing argument, the prosecutor improperly bolstered the victim's credibility by using the victim's prior hearsay statements. Defendant relies on a brief snippet of the prosecutor's closing argument. To the extent that the prosecutor made any improper remarks, we cannot conclude, given the mountainous evidence of guilt, that this unpreserved claim of error prejudiced defendant, nor can it be said that defendant is actually innocent or that any presumed error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich at 763-764. Furthermore, the trial court's cautionary instructions that arguments and statements by counsel are not evidence and that the jurors must only consider properly admitted evidence alleviated any prejudicial effect of the prosecutor's remarks. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Defendant's associated ineffective assistance claim likewise fails, as the requisite prejudice has not been established. *Carbin*, 463 Mich at 600.

Defendant next argues in a Standard 4 brief that the DNA evidence was improperly admitted because there were problems with the foundation regarding his buccal (mouth) swab. He also contends that defense counsel was ineffective for failing to object to the DNA evidence on this basis. MRE 901(a) provides that the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." A perfect chain of custody is not required for the admission of real evidence. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). "[A]ny deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims." *Id.* at 130-131.

Here, the prosecution established that the buccal swab used to compile a DNA profile for defendant was the same buccal swab that an officer had collected from defendant in open court at his preliminary examination. The officer testified that he collected the buccal swab from defendant, placed the swab in an envelope, filled out evidence tag E38394304, and gave it to another officer in the courtroom, who then transported the envelope to the Michigan State Police. An employee of the state police, qualified as an expert in serology at trial, testified that she received a sealed envelope with defendant's buccal swab from the officer who had transported it from the courtroom. The serology expert testified that the buccal swab from defendant was never near the rape kit and that everything was kept in separate sealed containers. She did not cut part of defendant's buccal swab for DNA testing on the same day as she tested the rape kit for seminal fluid. A forensic scientist with the state police, who was qualified as an expert in

Hill, __ Mich App __; __ NW2d __, issued February 5, 2013 (Docket No. 301564), slip op at 5-7.

DNA analysis, received a cutting from defendant's buccal swab and conducted a DNA analysis on it. The DNA profile from defendant's buccal swab matched the DNA from the seminal fluid on the victim's vaginal swab.

It appears that the officer who collected the buccal swab from defendant at the preliminary examination made a mistake in his trial testimony when he said that he labeled the swab with evidence tag number E38394304, as this was the evidence tag number for the rape kit. Except for this discrepancy, a complete chain of custody for defendant's buccal swab was established at trial. This mistake went to the issue of weight and did not render the DNA evidence inadmissible. Furthermore, it is highly unlikely that the officials with the Michigan State Police mixed up defendant's buccal swab and the victim's rape kit, as defendant seems to imply. The envelope with defendant's buccal swab contained only that swab, and the victim's rape kit contained two buccal swabs, one vaginal swab, two vaginal smears, one microscopic vaginal swab, two rectal smears, and a bag labeled undergarments. Defendant has not shown that the admission of the DNA evidence was improper. Additionally, defense counsel was not ineffective for failing to object to the DNA evidence, as any objection would have been futile and meritless. *Ericksen*, 288 Mich App at 201.

Finally, defendant presents a couple of arguments relative to sentencing. He first maintains that the trial court penalized him for failing to admit guilt. While a court may not base a sentence, even in part, on a defendant's refusal to admit guilt, *People v Conley*, 270 Mich App 301, 314; 715 NW2d 377 (2006), it may consider a lack of remorse in determining a sentence, *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). The trial court never made any statements about defendant refusing to admit guilt; rather, the court noted that defendant's "lack of remorse [was] reprehensible." It is not even clear that lack of remorse played a role in the sentence, where the court appeared to be focused more on the facts of the case in imposing sentence, noting that the victim, a 15-year-old girl, was snatched off the streets by defendant and raped and held captive for several hours, with DNA evidence establishing defendant's guilt. Resentencing is not warranted.

Defendant's second sentencing argument is that he was sentenced on the basis of inaccurate information. Defendant complains that the presentence investigation report (PSIR) indicated that he told the agent who prepared the PSIR that two other women had accused him of rape, that they were crackheads who traded sex for crack, that he operated a crackhouse, and that they wanted to have sex with him. Defendant's own attorney stated at sentencing that the comments by defendant in the PSIR about the other two women being crackheads and trading sex for crack were true.³ Defendant himself then indicated that he never said that he operated a crackhouse or that he traded drugs for sex. The court then stated that defendant and his counsel

³ Counsel stated, "Also, in terms of the statement that they were crack heads trading sex for crack. One of them occurred in a crack house and the woman there was using crack. The fact that he [defendant] says she's a crack head is something supported by the record given to me by the prosecutor[.]" The information about the other two women who accused defendant of rape apparently pertained to a separate prosecution.

would have a chance to speak, and while the court proceeded to sentence defendant, defense counsel thereafter made some comments, but said nothing more about PSIR inaccuracies. To the extent that defendant's argument was not entirely waived for appellate review, considering defense counsel's statements, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), the issue was forfeited, and we find no plain error affecting defendant's substantial rights, *Carines*, 460 Mich at 763-764.

Affirmed.

/s/ William B. Murphy

/s/ Peter D. O'Connell