

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AVERY ROBERT PARKER,

Defendant-Appellant.

UNPUBLISHED

April 18, 2013

No. 308224

Crawford Circuit Court

LC No. 11-003200-FC

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant, Avery Robert Parker, of first-degree criminal sexual conduct (CSC I), MCL 750.520b; unlawful imprisonment, MCL 750.349b; fourth-degree criminal sexual conduct (force or coercion) (CSC IV), MCL 750.520e(1)(b); and aggravated domestic violence, MCL 750.81a(2). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 20 to 40 years for CSC I, 5 to 15 years for unlawful imprisonment, 3 to 15 years for CSC IV, and 5 to 15 years for aggravated domestic violence. Defendant appeals as of right. We affirm.

I. FACTS

On or about May 20, 2011, the victim went to a bar where she met an acquaintance and her brother-in-law, defendant. After drinks, the victim drove the acquaintance home and then went home herself and went to bed. She testified that she was awoken by defendant, who was drunk, screaming at her, telling her that she liked to perform fellatio on other people, and accusing her of sleeping with the acquaintance. Defendant was living with the victim and her husband, defendant's brother, at the time. Defendant punched the victim in the back of the head and yanked her around. He took her underwear off and stuck his fingers in the victim's vagina with enough force to lift her off the bed. The victim testified that this occurred around three times. Defendant then made the victim go to his bedroom, where he made her grab his penis. He also forcefully stuck his fingers down her throat. Defendant continued the verbal abuse and accusations throughout the encounter. After defendant claimed that he would not hesitate to kill the victim, the victim was able to run out the door, through the woods, and to a neighbor's house where she received assistance.

Defendant testified to a different account of the evening, stating that he went to bed when he arrived home from the bar. Defendant testified that the victim came into his room, touched

him, and tried to have sex with him. He pushed her away, and the victim fell into a heat spacer, a box, and a dresser. Defendant left the house, and the victim followed. Defendant testified that he told her to leave him alone, and she went back to the house, where he heard screaming. He believed that she tripped up the deck and hurt her leg.

II. RIGHT TO PRESENT A DEFENSE

Defendant first argues that the trial court erred by limiting his argument that the victim fabricated the charges because defendant threatened to tell her husband that she was cheating on him. Defendant further argues that this error resulted in a violation of his constitutional right to present a defense.

We review for an abuse of discretion a trial court's evidentiary decisions. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when a trial court chooses an outcome that falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review de novo a claim that a defendant's constitutional right to present a defense was violated. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

The United States and Michigan Constitutions provide a criminal defendant the right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984); Const 1963, art 1 § 13; US Const Ams VI, XIV. The right to present a defense is a fundamental due-process element, but it is not an absolute right. *Hayes*, 421 Mich at 279. "The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

Michigan's rape-shield statute, MCL 750.520j, reads as follows:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy or disease.

(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge

may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

Even if not admissible under MCL 750.520j(1)(a) or (b), prior sexual experiences of the victim may be admissible in certain circumstances. *People v Benton*, 294 Mich App 191, 197; 817 NW2d 599 (2011), citing *People v Hackett*, 421 Mich 338, 334, 348; 365 NW2d 120 (1984). In *Hackett*, our Supreme Court stated,

The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. [*Hackett*, 421 Mich at 348 (citations omitted).]

“When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case.” *Benton*, 294 Mich App at 198.

Defendant has not shown that the trial court abused its discretion by limiting defendant's testimony about the victim's prior sexual acts. Before trial, the trial court properly recognized that defendant could testify about his prior sexual acts with the victim. See MCL 750.520j. The court also properly recognized that the victim's prior sexual acts with others might be admissible to show that she fabricated the charges because “evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge.” *Hackett*, 421 Mich at 348. The trial court even adjourned the trial to allow defendant more time to find witnesses to testify to the victim's prior sexual acts. However, defendant rescinded his revocation of his right to a speedy trial, and the court had to move up the trial date. Defendant still had not procured witnesses to testify. The trial court stated that it wanted to have an in camera hearing on the evidence, but defendant did not want a hearing. At trial, the trial court did not let defendant testify about the victim's sexual acts with others because he did not produce witnesses to support his assertions. Considering this sequence of events, the trial court properly followed MCL 750.520j and the rule set forth in *Hackett*. Accordingly, defendant has not shown an abuse of discretion.

Furthermore, defendant's trial testimony directly contradicts his argument. Several witnesses testified that defendant told them that he found the victim with another person at the house the night of the incident or that the victim was cheating on her husband. However, defendant explicitly testified to a scenario that did not involve him finding the victim with another man. He denied coming home that night and accusing the victim of sleeping with the acquaintance. He also testified that he never told his friend or brother that he caught the victim

with another man the night of the incident. Recognizing that defendant failed to offer witnesses with knowledge of the victim's prior sexual acts, denied accusing the victim of sleeping with the acquaintance, and denied telling other people that the victim was having an affair or that there was another man the night of the incident, there was no basis for defense counsel to argue that the victim fabricated the charges for fear of defendant telling her husband about her affairs. Given the trial judge's broad discretion in controlling proceedings, *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002), defendant has failed to show that the decision to limit defendant's argument was an abuse of discretion.

Moreover, because the trial court did not abuse its discretion by limiting defendant's argument, defendant has failed to show a violation of his constitutional right to present a defense. See *Hayes*, 421 Mich at 279

III. EXPERT TESTIMONY

Defendant next argues that the trial court erred by allowing the testimony of two expert witnesses: a sexual-assault examiner and an emergency-room physician. As previously discussed, we review for an abuse of discretion a trial court's evidentiary decisions. *Unger*, 278 Mich App at 216. However, because defendant failed to object to the physician's testimony, we review that portion of defendant's argument for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750; 763-764; 597 NW2d 130 (1999).

Expert testimony is governed by MRE 702, which provides as follows:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

It is the trial court's obligation to ensure that admitted expert testimony is reliable. *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007). "Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data." *Id.* (citations omitted).

First, defendant argues that the trial court erred by allowing the sexual-assault examiner to testify. At trial, defendant objected, arguing that the examiner did not have personal knowledge of the events, rendering her statistics inappropriate. Defendant argues on appeal that the examiner was not qualified to comment on the intensity of the victim's writings. Defendant asserts that these statements resulted in testimony on whether the victim was actually assaulted. Defendant's assertion mischaracterizes the testimony. The examiner clearly testified that she reviewed the facts and noticed intensity from the victim's writings about the perpetrator. She was then asked whether, hypothetically, rage or anger toward a perpetrator happens during sexual assaults. She responded, "Yes, it definitely can be there." The examiner neither commented on whether the victim was actually assaulted nor purported to give an overall

opinion on this case. Accordingly, defendant's argument that the examiner gave an ultimate opinion on the case has no merit.

Moreover, defendant's underlying argument that the examiner was not qualified to testify because she did not personally observe the victim also fails. Under MRE 702, testimony must be "based upon sufficient facts or data" In addition, "a witness who is qualified as an expert may state his opinion of a person's mental condition on the basis of observation, a hypothetical question, or the testimony of other witnesses." *People v Dobben*, 440 Mich 679, 695; 488 NW2d 726 (1992) (citations omitted). In this case, the examiner testified that she reviewed the facts of the case. She answered general hypotheticals based on the facts. She did not testify that her opinions were based on personal knowledge of the victim, and she did not purport to know whether the victim was actually assaulted. Accordingly, defendant has advanced no argument for this Court to conclude that the trial court abused its discretion by admitting the sexual-assault examiner's testimony.

Second, defendant argues that the trial court erred by allowing the testimony of the emergency-room physician. He argues that the court did not qualify the physician as an expert. However, the record reveals that the trial court qualified the physician "as an expert in the area of internal medicine and emergency room practice."

Defendant also argues that the physician improperly gave an opinion regarding the victim's credibility. Generally, it is "improper for a witness to comment or provide an opinion on the credibility of another witness since matters of credibility are to be determined by the trier of fact." *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); see also *Dobek*, 274 Mich App at 71 ("An expert may not vouch for the veracity of a victim."). In this case, the physician testified in part:

So my general impression was that [the victim] was telling me a genuine story the best that she could. And that's important in cases such as hers, where I have seen situations where I did not believe that the person's discussion was consistent with their behavior.

While it would have been proper for the physician to testify regarding his observations of the victim's behavior while she relayed her experience to him, which might draw a juror to make credibility determinations, it was not proper for the physician to comment on the credibility of the victim. Assuming the admission of this testimony was plain error, however, defendant has not demonstrated prejudice, and we would decline to exercise our discretion to reverse. See *Carines*, 460 Mich at 763-764. There is significant evidence supporting defendant's convictions. The victim testified at trial that defendant sexually assaulted her. The evidence at trial, including photographs, showed that the victim suffered injuries to her legs, neck, mouth, and head. The injuries were consistent with her account of the sexual assault. Notably, the victim suffered injuries to the back of her throat and the top of the inside of her mouth that were consistent with the victim's account of defendant shoving his fingers in her mouth while making comments about her performing fellatio on him. Moreover, the injury to her neck was consistent with someone grabbing her neck and holding it, which conflicted with defendant's testimony that he simply pushed the victim. Defendant himself admitted to the deputy that he "beat [the victim's]

ass.” Accordingly, defendant has failed to demonstrate entitlement to relief under the plain-error framework.

IV. EVIDENCE OF POST-ARREST SILENCE

Defendant argues that a sheriff’s deputy’s testimony about defendant invoking his right to an attorney was a violation of his due-process rights and his privilege against self-incrimination. Defendant failed to preserve this issue for appeal, so we review it for plain error affecting defendant’s substantial rights. See *Carines*, 460 Mich at 763-765.

“The United States Constitution guarantees that no person ‘shall be compelled in any criminal case to be a witness against himself.’” *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009), quoting US Const Am V. The United States Supreme Court created guidelines to protect an individual’s privilege against self-crimination. *Id.* “As a general rule, if a person remains silent after being arrested and given *Miranda*[¹] warnings, that silence may not be used as evidence against that person.” *Id.* “Therefore, in general, prosecutorial references to a defendant’s post-arrest, post-*Miranda* silence violate a defendant’s due process rights under the Fourteenth Amendment of the United States Constitution.” *Id.* at 212-213. Nevertheless, “a single reference to a defendant’s silence may not amount to a violation . . . if the reference is so minimal that ‘silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference. . . .’” *Id.* at 214-215, quoting *Greer v Miller*, 483 US 756, 764-765; 107 S Ct 3102; 97 L Ed 2d 618 (1987).²

When asked whether he interviewed defendant after the Michigan State Police Fugitive Team arrested defendant, the sheriff’s deputy testified, “No, I did not. I attempted to interview. He invoked his rights to have an attorney, and the interview was cancelled. We didn’t have it.” This was the only statement throughout trial about defendant’s post-arrest silence. Any affront to defendant’s constitutional rights was minimal and minute at best. It cannot be said that the prosecutor intentionally elicited this testimony; the prosecutor only asked the deputy whether a post-arrest interview was conducted, not why the interview was not conducted or if defendant chose to remain silent. Once the deputy testified, the prosecution immediately moved on to a new question. And there was no further mention of this throughout trial or any indication that

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² Defendant cites *People v Bigge*, 288 Mich 417, 285 NW 5 (1939), to support his argument. The Supreme Court discussed *Bigge* in *People v Hackett*, 460 Mich 202, 214-215; 596 NW2d 107 (1999), holding that “*Bigge*’s application is limited to tacit admissions, in the form of a defendant’s failure to deny an accusation. Tacit admissions under the *Bigge* rule may not be used as substantive evidence of defendant’s guilt.” The officer’s statement does not involve an admission by defendant; there was no accusation to which defendant did not respond. Instead, there was merely testimony that defendant was not interviewed because he requested an attorney. Accordingly, as a tacit admission is not involved, *Bigge* is not applicable. See *Hackett*, 460 Mich at 214-215. Furthermore, *Bigge* dealt with pre-arrest silence, *id.*; *Bigge*, 288 Mich at 419-420, and defendant was already under arrest at the time the deputy attempted to interview him.

the prosecution sought to use this against defendant in any way. See generally *People v Dennis*, 464 Mich 567, 577-583; 628 NW2d 502 (2001) (holding that a defendant's constitutional rights were not violated by the admission into evidence of the defendant's post-arrest silence where the admission was inadvertent and the prosecution made no effort to use the evidence against the defendant). Defendant provides no support for his assertion that this testimony was used only as evidence of defendant's guilt. The prosecution continued to question the deputy about his investigation, which made the question about the interview a minimal portion of the line of questioning. It cannot be said that this testimony was anything more than a minimal reference to defendant's privilege against self-incrimination, if at all. See *Shafier*, 483 Mich at 214-215. Accordingly, defendant has failed to show plain error affecting his substantial rights. See *Carines*, 460 Mich at 763-765.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he received ineffective assistance of counsel when his trial counsel failed to object to the testimony of the sexual-assault examiner and to the testimony about defendant's invocation of his right to an attorney.

Defendant preserved this issue by moving to remand the action back to the trial court for a *Ginther*³ hearing. However, because this Court denied the motion for failure to meet the requirements of MCR 7.211(C)(1)(a), no *Ginther* hearing was held and review is limited to mistakes apparent on the record. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense. Const 1963, art 1, § 20; US Const, Am VI. In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. [*People v Trakhtenberg*, 493 Mich 38, 51-52; 826 NW2d 136 (2012) (citations omitted).]

As discussed above, there was no error in admitting the sexual-assault examiner's testimony. Defense counsel was not required to raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Furthermore, while the sheriff's deputy should not have mentioned the reason why he did not interview defendant, the remark was unsolicited and isolated, and defense counsel may well have decided not to draw attention to it by objecting. See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995) ("Certainly there are times when it is better not to object and draw attention to an improper comment"). Furthermore, defendant has not established prejudice. Accordingly, defendant's claim of ineffective assistance lacks merit.

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

VI. DISCOVERY VIOLATIONS

Defendant argues that a new trial is required because of the prosecution's failure to timely provide defendant with an expert report and with photographs of a hole in defendant's wall. In his brief on appeal, defendant merely cites the trial testimony, states the reasons provided by trial counsel for a motion for mistrial, and provides this Court with a standard of review that is inapplicable to the question presented. He then claims that a new trial is required without providing any legal analysis to support this claim. In fact, defendant provides no discussion at all. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (alteration by *Watson* Court). As defendant did not provide any rationalization, we consider this issue abandoned. *Id.*

VII. PHOTOGRAPHS AT TRIAL

Defendant's final argument is that the trial court erred by allowing the jury to retain copies of photographic exhibits throughout the trial, resulting in an improper extraneous influence on the jury. As with the last issue regarding discovery violations, we conclude that this issue is abandoned for the same reasons. See *id.* Defendant simply asserts that the photographs were an improper extraneous influence without providing any rationalization or meaningful legal authority for his contention. Notwithstanding defendant's abandonment of this issue, we conclude that the trial court did not abuse its discretion by allowing the jury to retain copies of photographic exhibits throughout the trial.

At trial, the prosecution sought to give the jury copies of the photographs to review while they were discussed. Defendant objected, arguing that it would interfere with the jurors' ability to focus on the witness testimony and take notes. The court allowed the jury to have copies of the photographs during the testimony. Effective September 1, 2011, MCR 2.513(E) provides:

The court may authorize or require counsel in civil and criminal cases to provide the jurors with a reference document or notebook, the contents of which should include, but which is not limited to, a list of witnesses, relevant statutory provisions, and, in cases where the interpretation of a document is at issue, copies of the relevant document. The court and the parties may supplement the reference document during the trial with copies of the preliminary jury instructions, admitted exhibits, and other admissible information to assist jurors in their deliberations.

The recent addition of MCR 2.513(E) provides distinct language that allows the trial court to provide the jury with admitted exhibits. Furthermore, the trial court instructed the jurors on their duties, asking them if they could listen and review the photographs at the same time. The trial judge believed that the jurors would not be looking at exhibits instead of listening to the testimony. Recognizing the trial judge's considerable discretion in conducting a trial, *People v Conley*, 270 Mich App 301, 307-308; 715 NW2d 377 (2006), there is no evidence that the trial

judge abused such discretion by allowing the jurors to view and keep the photographs throughout trial consistent with MCR 2.513(E).

Moreover, the admitted exhibits in the hands of the jurors were not an improper extraneous influence on the jury as defendant claims. In discussing extraneous influences, our Supreme Court stated, “[T]he distinction between an external influence and inherent misconduct is not based on the location of the wrong, e.g., distinguished on the basis whether the ‘irregularity’ occurred inside or outside the jury room. Rather, the nature of the allegation determines whether the allegation is intrinsic to the jury’s deliberative process or whether it is an outside or extraneous influence.” *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997) (citation omitted). There is no support to conclude that giving the admitted exhibits to the jurors constituted an improper extraneous influence. The photographs were admitted exhibits, not extrinsic evidence. *Id.* at 91. Moreover, the prosecutor provided the photographs to the jurors so they could follow along with his witness examination as he moved through multiple exhibits, consistent with MCR 2.513(E).

Accordingly, the trial court did not abuse its discretion by allowing the jury to view the admitted exhibits during trial.

Affirmed.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan