

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW ROBERT HULL,

Defendant-Appellant.

UNPUBLISHED

August 14, 2003

No. 237495

Antrim Circuit Court

LC No. 01-003457-FC

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under thirteen years of age), and was sentenced to four to twenty years imprisonment. He now appeals, and we affirm.

Defendant first argues that the evidence presented against him was insufficient to support his conviction for first-degree criminal sexual conduct. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in the 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 Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

Defendant argues that, because there was no DNA or other physical evidence connecting defendant to the offense, the jury could not infer the essential element of penetration for first-degree criminal sexual conduct. A trier of fact may make reasonable inferences from the facts, but may not make inferences completely unsupported by direct or circumstantial evidence. *People v Metzler*, 193 Mich App 541, 547; 484 NW2d 695 (1992), citing *People v Petrella*, 424 Mich 221, 275; 380 NW2d 11 (1985).

Testimony was provided at trial that defendant was naked and seen on top of the victim who was naked below the waist. In addition, testimony was presented regarding a medical examination performed on the victim by Nurse Coen and Dr. Voss. Both witnesses testified that there was a recent abrasion to the hymeneal ring. Thus, the jury could make reasonable inferences from the evidence presented that the elements of criminal sexual conduct were proven beyond a reasonable doubt. We therefore conclude that defendant's challenge to the sufficiency of the evidence is without merit.

Next, defendant argues that he was denied the effective assistance of counsel at trial. We disagree.

In order to preserve issues regarding the effective assistance of counsel for appellate review, a defendant must move for a new trial or a *Ginther*¹ hearing before the trial court. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94, amended 250 Mich App 801 (2002). Defendant failed to move for a new trial or a *Ginther* hearing. Accordingly, this issue was not properly preserved for appellate review. An unpreserved constitutional error is forfeited and will not be reviewed absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In order to avoid forfeiture of an unpreserved constitutional error, a defendant must demonstrate that an error occurred, the error was plain, i.e., clear or obvious, and the error affected the defendant's substantial rights, i.e. affected the outcome of the trial proceedings. *Id.* at 761-764. Because defendant failed to move for a new trial or *Ginther* hearing, our review is limited to mistakes apparent on the record. *Davis, supra* at 368.

“Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise.” *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999), citing *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In order to prove a claim of ineffective assistance of counsel, a defendant must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303, 312; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged actions might be considered sound trial strategy. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). This Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

First, defendant contends that defense counsel's failure to investigate the case affected the outcome of the trial because defense counsel only became aware three days before trial of testimony regarding the possibility that there was another source of the victim's injuries. As a result, defense counsel failed to notify the prosecution about his intent to introduce this new evidence, and the evidence was excluded pursuant to defense counsel's failure to comply with the notice requirements of the rape-shield statute. Defendant has failed to establish that the performance of defense counsel at trial was below an objective standard of reasonableness under prevailing professional norms. Although defense counsel became aware of the new information three days prior to trial, it does not suggest that counsel's performance was ineffective for failing to investigate the case or prepare for trial. The proposed testimony provided by Tracy Potter, the victim's cousin, that there was another possible source of the victim's injury was speculative, and did not provide evidence supporting the victim's injuries. In fact, Tracy indicated that she failed to previously mention the information to defense counsel because she did not believe it was valuable or important to defendant's case. Further, even if the excluded evidence was

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

admitted into trial, it would not have affected the outcome of the case because there was sufficient evidence to convict defendant. Accordingly, defendant has failed to demonstrate that he was prejudiced by defense counsel's alleged failure to investigate the case.

Defendant also claims that defense counsel made an improper argument regarding the rape-shield statute at trial. In his brief, defendant merely announces his position that defense counsel made an improper argument, but he completely failed to set forth an argument as to how defense counsel erroneously interpreted the rape-shield statute. Issues insufficiently briefed are deemed abandoned on appeal. *People v VanTubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002). Therefore, we decline to address this sub-issue.

Defendant further contends that defense counsel was ineffective because he did not request that Nurse Coen or Dr. Voss be qualified as expert witnesses. Defendant has not demonstrated that defense counsel's failure to make such a request to qualify Nurse Coen and Dr. Voss as expert witnesses or to request a "cautionary instruction" prejudiced defendant's right to a fair trial. In addition, defendant has failed to demonstrate that defense counsel's tactics were not trial strategy. Indeed, as the prosecution argues, it may have been reasonable strategy to not highlight the qualifications of these two witnesses by not requiring their qualifications as experts. Thus, defense counsel was not constitutionally ineffective in failing to request that Nurse Coen and Dr. Voss be qualified as experts.

Defendant also argues that defense counsel was ineffective for failing to request that a "cautionary instruction" be given to the jury regarding the "expert testimony." The trial court did not provide the jury with the expert witness instruction. See CJI2d 5.10. Although defense counsel should have requested the expert witness instruction, defendant has failed to demonstrate that, but for his counsel's performance with regard to the cautionary instructions, the result of the proceedings would have been different. Thus, defendant's right to a fair trial was not prejudiced by defense counsel's failure to request the expert witness instruction. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

Defendant's final allegation of ineffective assistance of counsel is raised in connection with defense counsel's failure to object to the prosecutor's questioning of Kristi Potter, defendant's girlfriend and the victim's cousin, regarding defendant's self-inflicted knife. Defense counsel did not err in failing to object to Kristi's testimony. An inference of a consciousness of guilt will be admissible under certain circumstances. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The prosecution is permitted to elicit testimony regarding defendant's "consciousness of guilt," and defense counsel is not required to bring a motion to exclude such evidence, as the motion would be frivolous. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). As Kristi's testimony was relevant to defendant's state of mind, defendant was not unfairly prejudiced by the elicitation of such evidence. Accordingly, defense counsel was not ineffective for failing to bring a motion in limine to exclude this testimony. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We find that defendant has failed to demonstrate that defense counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by defense counsel's performance. Accordingly, defendant has failed to demonstrate a plain error affecting his substantial rights. *Carines, supra*.

Next, defendant argues that the trial court abused its discretion in excluding the proposed testimony that there was another possible source of the victim's injury. We disagree.

This Court reviews a trial court's decision to exclude evidence under the rape-shield statute for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Snider, supra* at 419. Decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The admissibility of evidence of a victim's sexual conduct is governed by MCL 750.520j(2),

which states:

(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.

To the extent that the motion to admit the evidence was denied on the basis of the rape-shield statute, defendant first argues that the trial court abused its discretion because there was a proper legal basis for the admission of the evidence. Defendant asserts that a proper legal basis was established under which Tracy's testimony was admissible as an exception to the rape-shield statute. Although there are two clear exceptions to the rape-shield statute, defendant failed to inform this Court under which exception the proposed evidence falls. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. Failure to brief a question on appeal is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Thus, defendant has abandoned this issue on appeal.

Defendant also argues that while notice of the new evidence was late, the prosecution would not be prejudiced by the late endorsement of a witness. The trial court relied on *People v Lucas*, 193 Mich App 298, 484 NW2d 685 (1992), to exclude Tracy's testimony. The *Lucas* Court held that where a defendant does not comply with notice provisions, a trial court should also consider the timing of a defendant's offer to produce evidence, and the closer to date of trial evidence is offered, the more it suggests willful misconduct designed to create technical advantage, and weighs in favor of exclusion. *Id.* at 303; see also MCL 750.520j(2). Here,

although defense counsel found out about the evidence three days prior to trial, he did not comply with the statutory requirements of the rape-shield. Therefore, we find that the trial court did not abuse its discretion in excluding the proposed evidence based on defendant's failure to comply with the notice requirements of the rape-shield statute.

Finally, defendant argues that the trial court erred when it re-read to the jury the "circumstantial evidence" instruction, and that defense counsel was ineffective for failing to ensure that the trial court properly read the requested supplemental instructions. We disagree.

In order to preserve issues regarding jury instructions, a defendant must raise an objection to the instruction at trial. *Snider, supra* at 420. Defense counsel did not object to the trial court's reply to the jury's second question. Therefore, this issue has not been properly preserved for appellate review. Defendant also argues that counsel was ineffective for failing to ensure that the trial court properly instructed the jury. As previously stated, this sub-issue was not fully preserved for appellate review based on defendant's failure to bring a motion for either a new trial or a *Ginther* hearing. Therefore, defendant failed to preserve both sub-issues raised on appeal. Unpreserved claims of constitutional error are reviewed for plain error. *Carines, supra* at 774.

We find that defendant's challenge to the trial judge's re-reading of the jury instruction is forfeited. The trial court did not err by repeating the circumstantial evidence instruction in response to the jury's request. It was not necessary that the court elaborate or give supplemental instructions beyond those requested by the jury. *People v Panko*, 34 Mich App 297, 301; 191 NW2d 75 (1971). A trial court need not repeat instructions addressing areas not covered by a jury's specific request. *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998). The jury asked the trial court, "Can you explain criminal sexual conduct again and how it can or cannot be used as proof?" The jury's question was vague as to whether they wanted an explanation of the elements of criminal sexual conduct or how criminal sexual conduct can be proven. Since the jury did not specify whether they wanted the elements of criminal sexual conduct or the means used to prove it, it was within the trial court's discretion to interpret the jury's request and determine that the jury wanted clarification regarding what evidence may be used to prove the offense of criminal sexual conduct beyond a reasonable doubt. Further, the jury subsequently asked another question unrelated to the elements of criminal sexual conduct, thus evidencing that the jury was satisfied by the trial judge's answer to its question. Defendant has failed to demonstrate that his substantial rights were affected or the mistakes were outcome determinative.

Regarding defendant's argument that defense counsel was ineffective for failing to ensure that the trial court read the requested supplemental instructions, we find that because there was no error regarding the trial court's supplemental instruction, defense counsel was not ineffective.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray