

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ACY HARDRICK,

Defendant-Appellant.

UNPUBLISHED

January 30, 1998

No. 196700

Recorder's Court

LC No. 95-012433

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e) (weapon), and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. The trial court sentenced defendant to ten to twenty years' imprisonment for each criminal sexual conduct conviction and five to ten years' imprisonment for the assault with intent to do great bodily harm less than murder conviction. The trial court then vacated these sentences and sentenced defendant as an habitual offender, third offense to fifteen to thirty years' imprisonment. MCL 769.11; MSA 28.1083. We affirm.

Defendant first argues the prosecutor improperly expressed his personal opinion concerning facts and the veracity of complainant during his rebuttal argument. We disagree. Because defendant failed to object to the comments at trial, our review is precluded absent manifest injustice. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). We review the prosecutor's remarks in context to determine whether defendant was denied a fair and impartial trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

All of the comments that defendant now challenges were made in response to comments initially made by defense counsel during closing argument. Considering the prosecutor's arguments in light of defense counsel's arguments, they are not improper. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). Further, the prosecutor's response to defense counsel's expression of disbelief in complainant's testimony was merely a statement of his belief that complainant did not have a motive to

fabricate. This was not an attempt on the part of the prosecutor to vouch for complainant's veracity. *People v Jackson*, 125 Mich App 251, 257; 335 NW2d 673 (1983).

Next, defendant argues the trial judge erred in failing to instruct the jury on the lesser included offense of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). We disagree. This Court reviews jury instructions in their entirety. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). Even if the instructions are imperfect, reversal is not required if they fairly presented the issues and sufficiently protected the defendant's rights. *Id.* Although defense counsel asked the trial court whether it would "give a lesser on the CSC counts," he never requested an instruction on second-degree criminal sexual conduct and did not object when the instruction was not given. Accordingly, this Court is precluded from reviewing this issue absent manifest injustice. *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Manifest injustice is not present in this case. The trial court did not err in failing to sua sponte give the instruction. *People v Larry*, 162 Mich App 142, 152; 412 NW2d 674 (1987). Further, after consideration of the jury instructions as a whole, the instructions fairly presented the issues to be tried and sufficiently protected defendants rights.

Defendant next raises two challenges to his sentence. First, defendant contends he was denied due process when the trial court sentenced him as a third habitual offender where he had not pleaded guilty to the offense and the prosecutor had not proved he was guilty of the offense. We disagree. Since defendant was convicted after May 1, 1994, the existence of his prior convictions can be determined by the court either at sentencing or at a presentencing hearing. MCL 769.13(5); MSA 28.1085(5). There is no longer a right to a jury trial in an habitual offender proceeding or a right to be proven guilty of being an habitual offender beyond a reasonable doubt. *People v Zinn*, 217 Mich App 340, 347; 551 NW2d 704 (1996). Further, due process is satisfied if the sentence is based on accurate information and the defendant had a reasonable opportunity to challenge the information at sentencing. *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996). At sentencing, defendant challenged the number of misdemeanor convictions listed in the presentence investigation report, but he did not challenge the two prior felony convictions on which the habitual offender sentence was based. Defendant does not now challenge the accuracy of these convictions. Accordingly, there has been no violation of defendant's right to due process. *Id.*

Defendant also contends that his sentence was impermissibly ordered by the court to run consecutively. Defendant's argument is without merit. Although the trial judge initially stated that defendant's sentences were to run consecutively, she later corrected herself and stated that the sentences were to run concurrently. Moreover, according to the judgment of sentence, defendant was sentenced to fifteen to thirty years' imprisonment pursuant to MCL 769.13, MSA 28.1085. A court speaks through its written judgments and orders rather than oral statements or written opinions. *People v Stackpoole*, 144 Mich App 291, 298; 375 NW2d 419 (1985). The trial court's written judgment indicates defendant was not sentenced to serve consecutive sentences.

Finally, defendant argues he was denied the effective assistance of counsel at trial. We disagree. There is a presumption that defendant received effective assistance of counsel, and defendant must carry the heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App

472, 476; 547 NW2d 48 (1996). To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Because defendant failed to move for a new trial or evidentiary hearing before the trial court, our review of his claim is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant first claims trial counsel was ineffective because he failed to object to improper argument by the prosecutor. We have already found that the prosecutor's remarks were proper. Accordingly, defendant was not prejudiced by the remarks and counsel's failure to object did not amount to deficient performance. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant next claims trial counsel was ineffective for failing to object when the trial court did not instruct the jury on the lesser included offense of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). Again, counsel was not deficient for failing to make this objection because there would have been no basis for such an objection. Second-degree criminal sexual conduct is a cognate lesser included offense of first-degree criminal sexual conduct rather than a necessarily included lesser offense. *People v Wilhelm*, 190 Mich App 574, 577; 476 NW2d 753 (1991). The trial court is not required to instruct the jury on a cognate lesser included offense where the evidence presented at trial would not support a conviction of the lesser offense. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994); *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). After reviewing the record, we conclude there was no evidence to support a conviction of second-degree criminal sexual conduct.¹ See *Wilhelm*, *supra* at 577. Accordingly, there was no basis for an instruction on second-degree criminal sexual conduct to be given to the jury, and counsel was not deficient by failing to request such an instruction or object to its omission.

Defendant's final claim is that trial counsel was ineffective for failing to object to defendant being sentenced as an habitual offender and to consecutive sentences. Defendant's argument is without merit. Nothing in the record suggests that defendant did not have notice he was going to be sentenced as an habitual offender, that the information regarding defendant's prior offenses was inaccurate, or that defendant did not have an opportunity at sentencing to challenge the information. Accordingly, trial counsel's objection to the sentencing enhancement would have been meritless, and trial counsel is not required to raise a meritless objection. See *Gist*, *supra* at 613. Further, as we have already discussed, defendant was not sentenced to consecutive terms.

In any event, even if counsel's performance had been deemed deficient, defendant could not establish the requisite prejudice to sustain his ineffective assistance claim. In light of the overwhelming evidence of defendant's guilt, we could not find that absent the alleged errors, the result of the trial would have been different. *Stanaway*, *supra* at 687-688.

Affirmed.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski

¹ MCL 750.520c; MSA 28.788(3) provides that a person is guilty of second-degree criminal sexual conduct if he or she engages in “sexual contact” with another person under certain circumstances.