

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WESLEY A. RIPLEY,

Defendant-Appellant.

UNPUBLISHED

August 25, 1998

No. 196154

Eaton Circuit Court

LC No. 95-000262 FC

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and two counts of felonious assault, MCL 750.82; MSA 28.277. He was subsequently convicted of being an habitual offender, second offense, MCL 769.10; MSA 28.1082, and was sentenced to serve an enhanced prison term of twenty-three to forty-five years for the CSC conviction, and four to six years for each of the assault convictions. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in refusing to give a requested jury instruction on the cognate lesser offense of assault with intent to commit first-degree CSC. We disagree. The sole charge of first-degree CSC was based on the complainant's allegation that defendant penetrated her vaginal area with his tongue. Defendant's theory at trial was one of general denial of the charges. He did not contend that an assault occurred with intent to commit penetration. Although a defendant in a criminal matter may advance inconsistent claims and defenses, the trial court is obligated to instruct on a cognate lesser offense only where it would be consistent with the evidence and defendant's theory of the case. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). Accordingly, because the requested instruction was neither supported by the evidence nor consistent with defendant's theory of the case, defendant has not established error by the trial court's refusal to give the instruction. See *People v Draper*, 150 Mich App 481, 489; 389 NW2d 89 (1986).

Defendant next raises numerous allegations of prosecutorial misconduct. Because defendant did not raise timely, specific objections to any of the alleged instances of prosecutorial misconduct, appellate

review is precluded unless the prejudicial effect could not have been eliminated by a curative instruction or failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Having reviewed the challenged instances of misconduct in context, we find only one instance of improper argument by the prosecutor. In closing rebuttal argument, the prosecutor implied that the defense was the source of an instruction on the lesser offense of second-degree criminal sexual conduct. See *People v Carter*, 387 Mich 397, 412; 197 NW2d 57 (1972). Although this was improper, we conclude that the error was not of such magnitude that it denied defendant a fair trial. *People v Marrow*, 210 Mich App 455, 466; 534 NW2d 153 (1995). Moreover, had defendant made a timely objection, a prompt curative instruction to the jury could have cured any prejudicial effect. *Stanaway, supra*.

Defendant next alleges that he was denied effective assistance of counsel. To establish a claim of ineffective assistance of counsel, defendant bears a heavy burden of showing that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced his defense as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). After reviewing the record, we conclude that counsel's performance was arguably deficient in only one instance. Counsel's questions on cross-examination of the complainant regarding prior incidents of defendant striking her and her sibling cannot be considered sound trial strategy. However, defendant has not shown that, but for this error, the outcome of the trial was likely to have been different. Substantial evidence of defendant's guilt was presented. Therefore, defendant has not established that he was denied the effective assistance of counsel.

Defendant next claims that the trial court's reasonable doubt instruction denied him a fair trial. Because defendant did not object to the instruction below, review is foreclosed absent manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997). This Court has held that the language of CJI2d 3.2(3), which was read to the jury in this case, adequately conveys to the jury the concept of reasonable doubt. *Id.*; *People v. Hubbard (After Remand)*, 217 Mich App 459, 488; 552 NW2d 493 (1996); *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). Accordingly, no manifest injustice will result from our failure to review this issue.

Defendant next argues that the trial court erred in finding that his inculpatory statements to the police were voluntarily made. At the pretrial evidentiary hearing, defendant denied making any inculpatory statements to the police, and further alleged that the statements attributed to him had been fabricated. In *People v Neal*, 182 Mich App 368, 371-372; 451 NW2d 639 (1990), this Court held that the question whether a statement was in fact made is separate from the voluntariness issue, and that the former issue is for the trier of fact to determine. Cf. *People v Weatherspoon*, 171 Mich App 549, 554; 431 NW2d 75 (1988). Here, the trial court determined, following an evidentiary hearing, that the interrogating detective was a credible witness, that no evidence of police coercion was shown, and that under the totality of the circumstances defendant's statement was voluntary. On cross-examination at trial, defendant again denied making any inculpatory statements to the police, and accused his interrogator of fabricating the statements. Consistent with *Neal*, the trial court instructed the jury that, before considering defendant's out-of-court statement as evidence, they must first determine whether he in fact made the statement. By their verdict of guilt, it may be presumed that the jury found that defendant made

the statement and that it was true. On this record, the trial court's finding that defendant's statement was voluntary was not clearly erroneous. See *People v Cheatham*, 453 Mich 1, 29-30, 44; 551 NW2d 355 (1996).

Defendant also argues that the cumulative effect of the errors alleged above denied him a fair trial. Because no outcome determinative errors occurred at trial, the cumulative effect of the alleged errors does not require reversal. *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Finally, defendant argues that he is entitled to resentencing because the prosecutor's notice of intent to seek enhanced sentencing pursuant to MCL 769.13; MSA 28.1085 was defective. Failure to strictly comply with the procedural dictates of a statute or court rule is treated as any other trial error. *People v Lane*, 453 Mich 132, 140; 551 NW2d 382 (1996). Plain, unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome. *Id.*; *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Here, the prosecution's notice of intent to seek enhanced sentencing was timely filed, yet defective because it alleged that defendant had been previously convicted of "Fireman-Obstructing in violation of MCL 750.2411." In fact, as indicated in defendant's presentence report, defendant's sole prior felony conviction was in 1992 for obstruction of justice. At sentencing, defense counsel did not challenge the accuracy of the habitual offender notice, as required by MCL 769.13(4), (6); MSA 28.1085(4), (6), but did challenge the trial court's scoring of the sentencing guidelines with respect to defendant's prior conviction of obstruction of justice. In imposing sentence, the court stated that it considered, among other things, the presentence report and the sentencing guidelines, but did not expressly state that it was imposing an enhanced sentence. The judgment of sentence, however, indicates that an enhanced sentence was imposed.

We deem the defect in the notice to be waived as a result of defendant's failure to challenge its accuracy below. For purposes of § 13 of the habitual offender statute, the trial court properly determined by unchallenged information in the PSIR that defendant had been previously convicted of obstruction of justice. MCL 769.13(5); MSA 28.1085(5) (the existence of a prior conviction may be established by any evidence that is relevant for that purpose, including information in a presentence report or a statement of the defendant). Unlike in *People v Ellis*, 224 Mich App 752; 569 NW2d 917 (1997), in which this Court held that the prosecutor may not amend an otherwise timely supplemental information to allege *additional* prior convictions, the defect in the notice here was waived by defendant and did not "materially alter the potential consequences" to defendant. *Id.* at 757, quoting *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982). Accordingly, because defendant's substantial rights were not affected, his enhanced sentence is valid. *Lane, supra*.

Affirmed.

/s/ David H. Sawyer
/s/ Martin M. Doctoroff

I concur in result only

Michael J. Kelly