STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 1999
v	No. 205970 Recorder's Court
DERRICK D. CAIN, Defendant-Appellant.	LC No. 96-008833

Before: Neff, P.J., and Hood and Murphy, JJ.

Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and was sentenced to concurrent terms
PER CURIAM.

Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and was sentenced to concurrent terms of eight to fifteen years in prison. He appeals as of right, and we affirm.

We first address defendant's argument that there was insufficient evidence to prove that he accomplished the sexual acts by force or coercion as required by MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). In reviewing the sufficiency of the evidence in a criminal case, we are required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

A person is guilty of third-degree CSC if he engages in sexual penetration with another person and force or coercion is used to accomplish the sexual penetration. MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Force or coercion includes, but is not limited to, the following circumstances: (1) When the actor overcomes the victim through the actual application of physical force or physical violence; (2) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats; or (3) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any

other person, and the victim believes that the actor has the ability to execute this threat. MCL 750.520b(1)(f)(i)-(iii); MSA 28.788(2)(1)(f)(i)-(iii); MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). "The existence of force or coercion is to be determined in light of all the circumstances *and is not limited to acts of physical violence*." *People v Malkowski*, 198 Mich App 610, 613; 499 NW2d 450 (1993) (emphasis added). The term "force" includes the exertion of strength or power on another person, *People v Premo*, 213 Mich App 406, 409; 540 NW2d 715 (1995), and the term "coercion" includes circumstances that create a reasonable fear of dangerous consequences. *People v McGill*, 131 Mich App 465, 470-472; 346 NW2d 572 (1984).

The victim, seventeen years old at the time of the assaults, testified that she planned to spend the night at the home of a woman for whom she regularly baby-sat. The woman and her children were home when the victim arrived. Defendant and his cousin, codefendant Ramone Jones, came to the home later in the same evening. At one point during the evening, defendant checked that the side door was locked and Jones said "ain't nobody going nowhere". Sometime later, the victim observed defendant handling a knife in a strange manner. When defendant observed the victim trying to spurn Jones' advances, he told her to "give that man a play," which the victim understood to mean that she should respond to Jones' kisses. The victim again rejected Jones, telling him, in defendant's presence, to stop. The victim left the room and Jones followed. Later, after the victim went into the bedroom to sleep, Jones followed her and sexually assaulted her. Defendant observed his cousin having nonconsensual intercourse with the victim and apparently urged him on in his efforts. After Jones finished his assault, defendant remarked, in Jones' presence, that he "wasn't as nice" as Jones, whereupon he commanded the victim to undress and get down on her knees. He told her that she "better" perform fellatio on him. The victim testified that she complied because she felt intimidated by the two older men and was scared. There was also testimony that, at some point when the victim, defendant and codefendant were in the bedroom, defendant whispered to codefendant and made a motion across his neck with a finger, which the victim interpreted as a "slitting throat" gesture. We find that this evidence, when viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the victim submitted to defendant out of a reasonable fear of dangerous consequences and thus, that defendant used coercion to accomplish the first act of fellatio.

The victim also testified that defendant sexually assaulted her a second time, after the woman for whom she baby-sat had left the house and she was alone with defendant and Jones. Defendant told her that she would have to engage in oral sex with him again if she wanted to be allowed to leave. He then pulled her down to her knees and put his penis into her mouth. The victim's testimony evidences that defendant exerted physical strength or power on the victim. Such evidence, if believed, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant used force or coercion to accomplish the second act of fellatio.

We next address defendant's arguments with regard to the defense of consent. Defendant argues that his only theory of defense was that the sexual activity between the victim and himself was consensual. He claims that a new trial is warranted because his consent theory was not presented to the jury and no jury instruction on consent was given. Defendant cites to *People v Hearn*, 100 Mich App

749; 300 NW2d 396, 397-398 (1980) for the proposition that, even where no jury instruction was requested, a consent theory and instruction must be presented to the jury. We disagree.

In *People v Paquette*, 114 Mich App 773; 319 NW2d 390 (1982), aff'd 421 Mich 338 (1984), the defendant argued that the trial court erred by failing to instruct the jury on the defense of consent. As in this case, no request for such an instruction was made. The defendant relied on *Hearn, supra* to support his argument that the consent instruction was necessary and failure to give such an instruction was error requiring reversal. This Court disagreed because *Hearn, supra* did not involve the element of force or coercion:

> Hearn was charged with having committed first-degree criminal sexual conduct by engaging in sexual penetration with another person while armed with a weapon . . . . Hearn had testified that he had engaged in sexual penetration with the complainant with her consent and that he had been armed with a pocket knife which, however, he did not display. Without instruction on the defense of consent, the jury might have believed Hearn's story but nevertheless convicted him.
>
> In contrast, here defendant was charged with having committed first-degree criminal sexual conduct by engaging in sexual penetration with another person while aided and abetted by another person and while using force or coercion to accomplish the penetration, MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii). The trial judge instructed the jury:
>
> "A person is guilty of criminal sexual conduct in the first degree, if he engages in sexual penetration with another person, and the actor is aided or abetted by one or more other persons, and the following circumstances exist. The actor uses force or coercion to accomplish the sexual penetration.
>
> "Force or coercion includes when the actor overcomes the victim through the actual application of physical force, or physical violence, and when the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor as the present ability to execute these threats.
>
> * * *
>
> "The term force or coercion means . . . .
>
> * * *
>
> A jury following such instructions could not have convicted defendant if it believed that the complainant consented to the sexual penetration. [*Id.* at 780-781.]

Thus, this Court has concluded that an instruction on consent is not necessary where the element of force or coercion must be found in order to convict defendant. Similarly, in *People v Jansson*, 116 Mich App 674, 682-683; 323 NW2d 508 (1982), this Court stated:

> Although consent . . . precludes conviction of criminal sexual conduct in the third degree by force or coercion, the prosecution is not required to prove nonconsent as an independent element of the offense. If the prosecution offers evidence to establish that an act of sexual penetration was accomplished by force or coercion, that evidence necessarily tends to establish that the act was nonconsensual. . . .
>
> * * *
>
> [I]f the actor *coerces the victim to submit* by threats of present or future harm, it necessarily follows that the victim engaged in the act nonconsensually. In short, to prove force or coercion as those terms are defined in the statute is to establish that the victim did not consent. [Emphasis in original.]

See also *People v Johnson*, 128 Mich App 618, 623; 341 NW2d 160 (1983) ("The court's instruction requiring the jury to find that penetration was accomplished by force or coercion implicitly required the jury to find that the complainant did not consent to sexual intercourse before it could find defendant guilty."); and *People v Hale*, 142 Mich App 451, 453-454; 370 NW2d 382 (1985) (A trial court's instructions taken directly from the standard jury instructions on the necessary elements of third-degree criminal sexual conduct, implicitly require the jury to find that the victim did not consent to sexual intercourse before the jury may convict.)

We find that there was no error requiring reversal in this case, which involved force or coercion, because the trial court did not need to instruct the jury on the defense of consent[1]. Similarly, we hold that it was not error for the trial court to fail to instruct the jury that the prosecutor needed to disprove consent. *Jansson, supra*.

Defendant next argues that the jury should have been required to find that he knew the sexual act was nonconsensual in order to convict. In other words, defendant contends that there was no evidence to support that he knew or should have known that the victim was not a willing participant and thus, his conviction cannot be sustained. This argument is disingenuous.

In *Jansson, supra* at 681, the defendant, like defendant herein, argued that he "did not know that the sexual relations were nonconsensual and, therefore, could not have intended to engage in those relations by force or coercion." The defendant also argued that without a manifestation of the victim's unwillingness to engage in sexual relations, he could not have known that she was not consenting. This Court rejected that argument:

> Defense counsel . . . would require that there be proved a specific intent to overcome the will of the victim and, as a necessary precondition, knowledge on the part of the actor that the victim was not engaging in the act consensually. In short, defense counsel would have us require some manifestation of nonconsent by the victim. In our judgment, this is simply a suggestion that we require proof that the victim resisted the actor or at least expressed an intent to resist. The express language of the statute precludes any such requirement, MCL 750,520(i); MSA 28.788(9). [*Id.* at 683.]

See also *People v Brown*, 197 Mich App 448, 449-450; 495 NW2d 812 (1992) (The crime is one of general intent and no knowledge is required for the element of force or coercion[2]); and *Hale, supra* at 453 ("No Michigan case law requires the trial court to define consent in terms of a defendant's reasonable and honest belief" that the victim consented.) Similarly, in this case, we reject defendant's argument that the jury should have been required to determine that defendant knew the sexual act was nonconsensual[3].

Defendant next argues that two jury instructions constitute error requiring reversal. We disagree. We review jury instructions in their entirety to determine if there was error that requires reversal. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). Because harmless error analysis applies, a new trial will not be granted based on error in jury instructions unless an examination of the entire record indicates that the error caused a miscarriage of justice. *People v Graves*, 458 Mich 476, 484; 581 NW2d 229 (1998). There is no error as long as the jury instructions "fairly presented the issues to be tried and sufficiently protected a defendant's rights." *Whitney, supra* at 252-253.

The complained of instructions were as follows:

> It is not necessary to prove any of these charges that there be evidence other than the testimony of the complainant. That is, if that testimony proves guilt beyond a reasonable doubt. Also to prove these charges the prosecutor does not have to show that the complainant resisted the defendants.

Defendant did not object to the jury instructions at trial and thus, this error is waived absent manifest injustice. *People v Torres*, 222 Mich App 411, 423; 564 NW2d 149 (1997). In this case, we find no manifest injustice.

The aforementioned instructions were given pursuant to standard jury instructions CJI2d 20.25 and CJI2d 20.26, which mimic statutory language. CJI2d 20.25 is based on MCL 750.520h; MSA 28.788(8), which states that "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g." CJI2d 20.26 follows MCL 750.520i; MSA 28.788(9), which states that "[a] victim need not resist the actor in prosecution under sections 520b to 520g." Defendant here was prosecuted under § 520d. The instructions were in accordance with the statutes and were proper. Thus, there was no error.

Defendant next argues that the verdict was against the great weight of the evidence and the trial court, sitting as the thirteenth juror, should have granted a new trial because of the weight of the evidence in favor of defendant. We disagree. We review the trial court's decision for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 27; 592 NW2d 75 (1998).

The thirteenth juror standard set out in *People v Hebert*, 444 Mich 466; 511 NW2d 654 (1993), the case cited to by defendant, has been rejected. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Recently, in *Gadomski, supra* at 28, this Court looked at the Supreme Court's ruling in *Lemmon* and stated:

> The Michigan Supreme Court has subsequently rejected the "thirteenth juror" standard and explained that a trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. However, neither the former nor the current understanding of the law with respect to such motions [new trial motions based on the great weight of the evidence] provides that this Court may make a credibility determination on appeal. To the contrary, it is well settled that this Court may not attempt to resolve credibility questions anew. [Citations omitted.]

We find no abuse of discretion in the trial court's failure to grant a new trial based on the great weight of the evidence in this case. Defendant's argument on appeal rests on his claim that the victim's testimony was not credible, which argument we may not decide, and on his claim that there was insufficient evidence, an argument we explicitly reject.

Defendant also makes a strained argument that testimony about codefendant's willingness to take a polygraph examination tainted the case because there was no similar evidence that he too was willing to take a polygraph examination. Defendant argues that the jury was left with an inference that he was "not willing to test his credibility through this procedure" and that this inference was so prejudicial, reversal is required. We disagree.

Defendant failed to object to the testimony regarding codefendant's willingness to take a polygraph examination. Our review is therefore "precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice." *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). We find no miscarriage of justice.

> It is well established that evidence that a polygraph examination was conducted and the results of such examination is inadmissible at trial. The reason for exclusion is the lack of trustworthiness of the accuracy of a polygraph examination. [*People v Triplett*, 163 Mich App 339, 343; 413 NW2d 791 (1987), remanded on other grounds 432 Mich 568 (1989).]

In this case, there was no testimony that defendant, or codefendant, took and failed a polygraph examination. Thus, the reason for excluding evidence of a polygraph, lack of accuracy of the result, is not applicable to the situation. Moreover, the references to a polygraph were fleeting and only directed to codefendant. The testimony was admitted by codefendant's counsel in an apparent attempt to bolster codefendant's credibility with the suggestion that he would've taken a polygraph but was never given one.

On appeal, defendant also argues that defendant and codefendant were inextricably linked with regard to their involvement in the case and thus, reference to codefendant as "Psycho" caused reversible prejudice to defendant. Defendant's argument rests on the fact that if the jury perceived codefendant to be a psycho, they would necessarily consider defendant in the same vein and this amounts to reversible prejudice. We disagree that there was any error requiring reversal.

At the beginning of trial, codefendant's counsel expressed concern that he did not wish codefendant to be referred to by his alleged nickname of "Psycho". The judge cautioned the prosecution to instruct its witnesses to refer to codefendant as "Mr. Jones", but also indicated that if the term "Psycho" came out in the development of the story, it would be appropriate for the victim to use it. During trial, the victim testified that she was introduced to codefendant Jones as "Psycho". She thereafter did not refer to codefendant as "Psycho" with the exception of one instance where she referred to him by the nickname but then immediately corrected herself and said, "I mean Ramone". Defendant did not object and did not request a curative instruction. Thus, we review only for a miscarriage of justice, *Mayfield, supra,* and find none. Defendant's argument that these two fleeting references caused reversible prejudice because they could have led the jury to surmise that defendant also possessed psychotic characteristics is speculative at best.

Defendant next argues that the trial court should have granted defendant and codefendant separate trials and that failure to do so interfered with his right to a fair trial. He argues that codefendant portrayed defendant as being "the violent one" during the events and that the defendants were divided in theory. We review for an abuse of discretion. *People v Hana,* 447 Mich 325, 331; 524 NW2d 682, amended 447 Mich 1203 (1994).

> Severance is mandated only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. Severance is required where the defenses are mutually exclusive or irreconcilable, not simply where they are inconsistent. [*People v McCray,* 210 Mich App 9, 12; 533 NW2d 359 (1995), citing *Hana, supra* at 345.]

In this case, prior to trial, codefendant's counsel indicated that his defense may be antagonistic to defendant. Codefendant was going to argue that the victim's sexual activity with codefendant was entirely consensual and that only when codefendant did not protest defendant's requests for fellatio from the victim, did she became upset and go to the police. Neither defendant or codefendant offered a supporting affidavit or made an offer of proof that "clearly, affirmatively, and fully demonstrate[d] that" their substantial rights would be prejudiced if severance was not granted. *Hana, supra* at 346.

On appeal, we find that the trial court did not abuse its discretion in failing to grant defendant and codefendant separate trials. The defenses, as actually presented, were barely antagonistic and, in fact, meshed quite well. Codefendant's defense did not negate or interfere with defendant's defense of lack of force or coercion in any manner. The defenses were certainly not mutually exclusive or irreconcilable, and thus, the requisite prejudice did not occur at trial and reversal is not warranted. *Hana, supra*. See also *People v Cadle (On Remand),* 209 Mich App 467; 531 NW2d 761 (1995) ("[D]efenses must be not only inconsistent, but also mutually exclusive or irreconcilable.)

Defendant next argues that the trial court demonstrated excessive impartiality toward the victim and should have excluded her from the courtroom during trial. We disagree. A party who challenges "on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain v MI Dep't of Corrections,* 451 Mich 470, 497; 548 NW2d 210 (1996). In this case, defendant has failed to overcome the presumption. The incidents, which defendant claims demonstrate the trial court's

impartiality, evidence nothing more than the trial court's respectful posture to both the victim and the parties. Codefendant's counsel complained to the court, at one point during trial, that the victim was making gestures to communicate with a witness on the witness stand. The trial court indicated that it had not noticed the victim engaging in that conduct, but stated that it would take an objection to that conduct under advisement. Later, codefendant's counsel again indicated that he believed the victim was inappropriately by shaking her head in response to testimony. The trial court acknowledged that the attorney had brought it to his attention. He then asked defendant's attorney to continue his cross-examination, which was in progress. When codefendant's attorney protested the lack of warning to the victim, the trial court instructed the victim to not make any signals. While he tempered this comment[4], apparently because he had not witnessed the conduct, there is no indication that he tempered the comment because he was partial to the victim or was attempting to bolster the victim's credibility. Thus, we find no error requiring reversal. We also note that defendant's speculation that by allowing the victim to remain in the courtroom, she "was potentially able to influence testimony and to non-verbally communicate with the jury" does not support reversal. There is no indication whatsoever that the victim influenced testimony or improperly communicated with the jury.

Defendant next argues that hearsay testimony was elicited from a witness and that the testimony improperly reiterated and reinforced the victim's credibility. The testimony at issue was admitted without a contemporaneous objection from either defendant. However, after the testimony was given and a lunch break taken, both defendant's counsel and codefendant's counsel indicated to the court that they were concerned that the prosecutor was eliciting hearsay. Defendant's counsel stated that he did not have any trouble with the prosecution asking questions that fell within hearsay exceptions, i.e. state of mind, but was concerned that other testimony was "rank hearsay". He then specifically indicated that he did not want a curative instruction at that point. The trial court reminded counsel that they needed to object contemporaneously and he would rule appropriately.

Defendant now claims that the testimony, given without objection, requires reversal because not all of it qualified under an exception to the hearsay rule. This issue is not preserved. *People v Jones*, 203 Mich App 384, 390; 513 NW2d 175 (1994). Moreover, we note that even if the issue could be deemed preserved by the late objection, we find no error requiring reversal. The erroneous admission of hearsay evidence is subject to harmless error analysis. *People v Bartlett*, 231 Mich App 139, 158-159; 585 NW2d 341 (1998). Reversal based on preserved, nonconstitutional error is warranted only if '"after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, ___Mich___; ___NW2d___(1999). Defendant has failed to demonstrate that the alleged error was more probably than not outcome determinative.

Defendant next argues that his right to effective assistance of counsel was violated because his theory of consent was not presented to the jury; because his counsel did not object to the hearsay testimony complained about above; because the only request for separate trials came on the day of trial; and because improper character evidence was admitted. Defendant failed to move for a new trial or evidentiary hearing on this issue and therefore, our review is limited to errors that are apparent from the trial court record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant "must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Mitchell, supra.* In this case, defendant's brief argument completely fails to make the requisite demonstration that without the complained of errors, there was a reasonable probability that he would not have been convicted. Further, we find insufficient evidence on the record to support defendant's allegations that he was denied effective assistance of counsel.

Defendant next argues that the closing arguments given by the prosecution and the codefendant were prejudicial to him and that the prosecutor's arguments were unsupported. "[P]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593 596; 296 NW2d 315 (1980). "They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Bahoda, supra*, quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Our review of the record does not reveal that the prosecutor's argument was improper or unsupported. The prosecutor properly argued the evidence and reasonable inferences from that evidence.

Defendant also argues that codefendant, during his closing argument, created three arguments adverse to defendant and that because codefendant's argument followed defendant's closing argument, he could not defend against the accusations. First, defendant fails to elaborate on what these "three (3) adverse arguments" are and does not cite to the record to demonstrate their existence. Second, this argument is unsupported by any legal authority and thus, no relief is required. *Magee v Magee,* 218 Mich App 158, 161; 553 NW2d 363 (1996). Third, and more importantly, our thorough review of the record fails to reveal any arguments made by codefendant's counsel that were prejudicial to the extent that defendant was denied a fair trial.

Defendant next argues that his Fifth Amendment rights were violated by testimony that revealed that he failed to turn himself over to police after he was informed of the warrant for his arrest. We disagree[5]. Because defendant did not object to the testimony at trial, the issue is not preserved. *People v Miller*, 211 Mich App 30, 42; 535 NW2d 518 (1995). However, we may review it because it raises a constitutional issue, which if valid could be outcome determinative. *Id.*

In this case, defendant made a voluntary statement to the police and was released. Later, he learned that there was a warrant for his arrest. He talked to an officer about the warrant, but failed to turn himself in to the police department. Testimony about his failure to turn himself in to the police department did not violate his Fifth Amendment right against self-incrimination.

> The Fifth Amendment and Const 2963, art 1, § 17 provide that no person shall be compelled to be a witness against himself in a criminal trial. The Fifth Amendment privilege has been extended beyond criminal trial proceedings "to protect persons in all

> settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." [*People v Schollaert*, 194 Mich App 158, 64; 486 NW2d 312 (1992) (citation omitted).]

In determining whether the Fifth Amendment is implicated, the "relevant inquiry is whether [the defendant] was subjected to police interrogation while in custody or deprived of his freedom of action in a significant way." *Id.* at 165 (citations omitted). Under the facts of this case, defendant was not arrested at the time he learned of the warrant and he was not under any compulsion to be a witness against himself. His conduct in failing to submit to the warrant for his arrest does not implicate any Fifth Amendment rights and thus, there is no error requiring reversal.

Defendant next argues that he should be resentenced because his juvenile conviction was given too much weight by the trial court. Defendant has waived any review related to his sentence because he has failed to submit a copy of the presentence investigation report as required by MCR 7.212(C)(7). MCR 7.212(C)(7) states that "[i]f an argument is presented concerning the sentence imposed in a criminal case, the appellant's attorney must send a copy of the presentence report to the court at the time the brief is filed." We also note, however, that the trial court properly considered defendant's juvenile convictions when imposing his sentence, *People v Smith*, 437 Mich 293; 470 NW2d 70 (1991); *People v Jones*, 173 Mich App 341, 343; 433 NW2d 829 (1988), and our review of the record does not reveal that the trial court placed too much emphasis on defendant's juvenile record.

Defendant also argues that the cumulative effect of the errors in this case mandates reversal. Only actual errors are aggregated to determine their cumulative effect. *Bahoda, supra* at 292 n 64. Where no errors are found, there can be no cumulative error. See *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

We also note that defendant attempts to advance several other arguments on appeal. We find that these arguments are, however, abandoned.

First, defendant complains about the admission of testimony that codefendant apologized to the victim. In his argument, defendant cites to the testimony from the trial wherein the victim claimed that codefendant apologized to her, stating that he was wrong for "doing what he did". Other than citing to this testimony, defendant simply states:

> This testimony was totally unimpeached and uncontradicted as the Co-Defendant, Ramone Jones, exercised his constitutional right to not testify.Not only was this testimony admitted without objection, there was no limiting instruction prohibiting use of this confession/apology against the Defendant, Derrick Cain.

Defendant provides no other argument to the court on this issue. Because defendant did not object to the testimony below and because he has failed to provide any argument or legal authority to support his position that the testimony was improperly admitted, we deem this issue abandoned. *People v Rollins*, 207 Mich App 465, 468; 525 NW2d 484 (1994)[6].

Second, defendant also claims that impermissible character evidence was admitted through the victim's testimony. He does not provide any argument or legal authority to support that the complained of testimony, to which there was no objection[7], constitutes error. Thus, this issue is also deemed abandoned. *Rollins, supra.*

Finally, defendant argues that the trial court erred because it did not instruct the jury on any lesser included offenses. Defendant failed to request any lesser included instructions at trial and, more importantly, on appeal he completely fails to set forth what instructions he believes should have been given. We will not speculate as to what lesser included instructions may have been appropriate in this case, if any. Moreover, we will not search for authority to support that there were lesser included instructions that could have been given and should have been given. *People v Lynn,* 223 Mich App 364, 368-369; 566 NW2d 45 (1997).

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy

[1] In making our ruling, we note that defendant also cites to *People v Thompson,* 117 Mich App 522; 324 NW2d 22 (1983) to support that a consent instruction should have been given. *Thompson,* like *Hearn, supra,* did not require a finding of force or coercion to convict the defendant. The theory against the defendant in *Thompson* was that the criminal sexual penetration occurred under circumstances involving the commission of a felony. *Id.* at 526-527.

[2] Defendant's citation to *Brown* for the proposition that our Court has stressed that a defendant needs to have knowledge that the sexual act was nonconsensual is a misrepresentation of the ruling and language in that case.

[3] We note that, although not pertinent to a resolution of the issue, defendant's argument that he had no knowledge that the victim was not consenting is completely unsupported by the record. There was testimony that the victim told codefendant Jones that she did not want to engage in sexual activity with him and was crying while he assaulted her. Defendant testified that he watched codefendant Jones engaging in sexual activity with the victim. The victim testified that defendant entered the room while Jones was assaulting her. Thus, there was ample evidence from which to infer that defendant was aware that the victim was not a willing participant when defendant required the victim to submit to perform fellatio on him immediately after Jones' forced assault.

[4] The trial court stated:

> [Victim], and I'm not saying that you're doing anything wrong, but don't try to make any signals, and I'm not suggesting that you are, but don't do anything like that. I don't think that you would, all right. Continue.

[5] Initially, we note that the only authority cited by defendant in support of his argument is *People v Hurd*, 102 Mich App 424; 301 NW2d 881 (1980), which was vacated by the United States Supreme Court, 454 US 807; 102 S Ct 81; 70 L Ed 2d 77 (1981). It has no precedential value.

[6] Defendant also claims that his sixth amendment right of confrontation was violated. He cites to *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968) for the proposition that "where the confession of one defendant contains references to a second codefendant, and the confessor refuses to take the stand, the use of that confession in a joint trial violates the second codefendant's Sixth Amendment right of confrontation." *Bruton* has no bearing on the case at hand. Codefendant's apology to the victim never referenced or implicated defendant in any manner. The victim testified that codefendant apologized for the wrong *he* did. This is not a case where codefendant confessed in a manner that implicated the defendant in any wrongdoing.

[7] The prosecution asked the victim, "Why didn't you care for him [defendant] too much? Is it something that you had seen?" The victim answered, "Yes." The prosecution followed up by asking "What's that?", at which point defendant's counsel objected on the grounds that the prosecution was asking leading questions. The court instructed the prosecution not to lead the witnesses and the examination continued with the prosecutor eliciting information about a prior incident between defendant and the victim. Defendant's counsel did not object to this testimony at all.