

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH BRIAN BURTON,

Defendant-Appellant.

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UNPUBLISHED

August 25, 2000

No. 209767

Kent Circuit Court

LC No. 97-007149-FC

Before: White, P.J. and Talbot and R. J. Danhof\*, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(h)(i), MSA 28.788(2)(1)(h)(i). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to fifteen to forty years' imprisonment.<sup>1</sup> He appeals as of right, and we affirm.

Defendant argues that the trial court erred in failing to give the jury an instruction on the issue of consent. We review claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). First, defendant failed to preserve this issue by requesting a consent instruction below. Defendant thus must show plain error that likely altered the verdict, or actual innocence. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). He has shown neither. Defendant was not entitled to an instruction on consent as a defense because there was no evidence to support it, *People v Stull*, 127 Mich App 14, 19; 338 NW2d 403 (1983), and the instruction is inappropriate where the victim is physically helpless, and nonconsent is implied from an inability to communicate. CJI2d 20.27. Further, because defendant was not entitled to the instruction, counsel was not ineffective for failing to request it. *People v Curry*, 175 Mich App 33, 43; 437 NW2d 310 (1989).

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<sup>1</sup> Defendant was also subject to MCL 750.520f; MSA 28.788(6), which requires a mandatory five-year minimum sentence upon conviction of a second criminal sexual offense.

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant also contends that the trial court erred in allowing the late endorsement of a rape trauma expert. We review this issue for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998). Considering that the witness' testimony was admitted for a proper purpose, *Stull, supra*, that the court gave defense counsel an opportunity to interview the witness before he testified, and there has been no claim or showing that defense counsel was unprepared to cross-examine the witness, we find no error. See *People v Lino (After Remand)*, 213 Mich App 89, 92-93; 539 NW2d 545 (1995), overruled in part on other grounds in *People v Carson*, 220 Mich App 662, 674; 560 NW2d 657 (1996).

Defendant also argues that the court erred in failing to grant his request for appointment of substitute counsel. We review this issue for an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Because the reasons cited by defendant in support of his request did not establish a complete breakdown of the attorney-client relationship, *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979), or a legitimate difference of opinion regarding a fundamental trial tactic, *Mack, supra*, we find no abuse of discretion.

Defendant also contends that he was denied a fair and impartial trial because the prosecutor made improper remarks during his opening statement and closing argument. Because defendant did not object to the challenged remarks at trial, this issue is unpreserved. Accordingly, appellate relief is precluded unless a curative instruction could not have eliminated any resulting prejudice or failure to consider the issue would result in manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Having reviewed the record and evaluated the allegedly improper remarks in context, *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995), we conclude that any prejudice caused by the remarks could have been cured by a cautionary instruction upon timely request and that the remarks did not result in manifest injustice. Therefore, appellate relief is not warranted.

Defendant also asserts that the trial court erred in admitting alleged hearsay testimony under MRE 803(2) and in allowing an examining nurse to testify. Because defendant has not shown that the admission of the testimony constituted plain error and because the exclusion of the alleged hearsay testimony would not have altered the verdict, it being cumulative of the victim's testimony, *People v King*, 210 Mich App 425, 434; 534 NW2d 534 (1995), defendant is not entitled to relief on the basis of this unpreserved issue. *Carines, supra*.

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish that a defendant's right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *Stanaway, supra* at 687-688. To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id. People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). The defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Stanaway, supra*.

Defendant's claim that counsel failed to give him complete and accurate information about a plea bargain is not factually supported by the record. Defendant's claim that counsel failed to prepare adequately for trial likewise is not supported by the record. Further, defendant has not shown any prejudice resulting from the alleged lack of preparedness. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Because the prosecutor presented sufficient evidence to prove defendant's guilt beyond a reasonable doubt, counsel was not ineffective for failing to move for a directed verdict. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Finally, defendant has failed to show that he was prejudiced by counsel's failure to impeach the prosecutor's witnesses or to object to other alleged hearsay. Accordingly, defendant's ineffective assistance of counsel claim must fail.

Affirmed.

/s/ Helene N. White  
/s/ Michael J. Talbot  
/s/ Robert J. Danhof