STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORIO RAMIREZ,

Defendant-Appellant.

UNPUBLISHED
July 20, 2001

No. 217841
St. Clair Circuit Court
LC No. 98-002578-FC

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to ten to thirty years' imprisonment for the first-degree CSC conviction and ten to fifteen years' imprisonment for the second-degree CSC conviction. He appeals as of right. We affirm.

Defendant first argues that his convictions violated double jeopardy protections. We disagree. Defendant was convicted of first-degree criminal sexual conduct for digitally penetrating the victim. He was convicted of second-degree criminal sexual conduct for the distinct act of rubbing the victim's breasts with the palms of his hands. Both occurrences took place during a single criminal episode and were prosecuted at the same trial. Whether defendant could be convicted of both crimes requires a review of whether the Legislature intended multiple punishments. *People v Ward*, 206 Mich App 38, 41-42; 520 NW2d 363 (1994); *People v White*, 168 Mich App 596, 600; 425 NW2d 193 (1988).

> In determining legislative intent, the Court [*People v Robideau*, 419 Mich 458, 486; 355 NW2d 592 (1984)] specified two factors. The first factor is whether the two statutes prohibit conduct which is violative of distinct social norms. If so, the statutes can generally be viewed as separate and amenable to permitting multiple punishments. [*Id.* at 600-601.]

In *Ward*, this Court specifically noted that the first-degree criminal sexual conduct statute focuses on penetration. *Id.* at 42. The second-degree criminal sexual conduct statute focuses on sexual

contact. *Id.* Each statute prohibits conduct that is violative of distinct social norms. *Id.* Thus, defendant's convictions for the two separate crimes in this case did not violate double jeopardy.

Defendant next argues that a witness' use of the phrase "sexual assault kit" was unduly prejudicial. We disagree. The prosecutor apparently agreed to instruct his witnesses not to use the term "rape kit" during trial. The emergency room physician who examined the victim testified, on cross-examination, that some of his notes pertained to the "sexual assault kit." Defendant objected and moved for a mistrial. The trial court denied the motion, finding that the testimony was not unduly prejudicial. The trial court did not abuse its discretion in this regard.

"Evidence presents the danger of unfair prejudice when it threatens the fundamental goals of MRE 403: accuracy and fairness." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Unfair prejudice inures when marginally probative evidence would be given undue or preemptive weight by the jury. *People v Rice*, 235 Mich App 429, 441; 597 NW2d 843 (1999). Here, nothing in the record suggests that the use of the term "sexual assault kit" by the examining emergency physician was given undue or preemptive weight by the jury. The jury was well aware that they were involved in an alleged sexual assault trial. The doctor testified, without objection, that he was examining the victim for possible sexual assault. When describing a certain written note for defense counsel, the doctor merely indicated that the note was made in reference to the sexual assault kit. The term "sexual assault kit" was an accurate term for the special kit used by the doctor when conducting his examination. The physician avoided using the inflammatory word "rape," as defendant's counsel's had requested. The use of the accurate term was therefore not unduly prejudicial and defendant has not demonstrated to the contrary.

Defendant next argues that he was denied a fair trial because of the method of jury selection utilized by the trial court. This issue is unpreserved because defendant did not object to the method of jury selection at trial, failed to use all of his peremptory challenges, and did not refuse to express satisfaction with the jury. *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981); *People v Colon*, 233 Mich App 295, 300, 303; 591 NW2d 692 (1998); *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998). Unpreserved issues are reviewed pursuant to the plain error standard set forth in *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." . . . To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "`seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [Citations omitted.]

The trial court allowed defendant to exercise peremptory challenges, if he wished, after the prosecutor had a turn but before a new juror was seated. It also allowed defendant to use two peremptory challenges in a row without seating a new juror after the first challenge. This method does not comply with MCR 2.511(F), which mandates that a new juror be seated after the exercise of a peremptory challenge. However, reversal is not required. On appeal, defendant makes no showing of prejudice. A showing of prejudice is necessary to sustain an unpreserved claim of plain error. *Carines, supra.* Even if we presumed prejudice, *Miller, supra* at 326, however, reversal on the basis of an unpreserved issue is required only if the error resulted in the conviction of an actually innocent defendant or if it "seriously affected the fairness, integrity or public reputation" of the judicial proceeding. *Carines, supra.* Here, nothing in the record supports the conclusion that the error resulted in the conviction of an innocent defendant or that the error affected the fairness, public reputation or integrity of the proceeding in any way.

Defendant next argues that the prosecutor improperly vouched for the victim's credibility during closing argument. We disagree. We review preserved claims of prosecutorial misconduct by evaluating the prosecutor's allegedly improper comments in the context in which they were made to determine if defendant was denied a fair and impartial trial. *People v Truong (After Remand),* 218 Mich App 325, 336; 553 NW2d 692 (1996).

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." [*People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted).]

In addition, a prosecutor is not required to state inferences or conclusions in the blandest terms possible. *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996). A prosecutor is, however, prohibited from vouching for the credibility of his witnesses "*to the effect that he has some special knowledge concerning a witness' truthfulness." Bahoda, supra* at 276 (emphasis added). Here, the prosecutor's arguments, read in context, were simply that common sense and reason support that the victim did not lie and, if she was lying, she would have embellished the circumstances. It is proper for a prosecutor to invoke common sense and argue that a jury should utilize its common sense when deciding issues of credibility. See *People v Lawton,* 196 Mich App 341, 355; 492 NW2d 810 (1992). See also *People v Fisher,* 220 Mich App 133, 160-161; 559 NW2d 318 (1996). Further, a prosecutor may "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard,* 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor's comments about which defendant complains did not constitute improper vouching or deprive defendant of a fair trial.

Defendant next argues that the trial court should have instructed the jury on the lesser offenses of third-degree criminal sexual conduct and fourth-degree criminal sexual conduct. We find this argument to be wholly devoid of merit.

> The trial court has a duty to instruct the jury with respect to the law applicable to the case. MCL 768.29; MSA 28.1052. This duty depends on the evidence presented at trial. [*People v Sullivan,* 231 Mich App 510, 517; 586 NW2d 578 (1998), aff'd 461 Mich 992; 609 NW2d 193 (2000).]

In this case, defendant was charged with first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), penetration of a victim under the age of thirteen. A person is guilty of first-degree criminal sexual conduct if the victim is under thirteen and there is sexual penetration. *People v Cash*, 419 Mich 230, 243; 351 NW2d 822 (1984). MCL 750.520d(1)(a); MSA 28.288(4)(1)(a), on the other hand, provides that a person is guilty of third-degree criminal sexual conduct if there is penetration and the victim is between the ages of thirteen years and sixteen years. In this case, the evidence was undisputed that the victim was under the age of thirteen years. The only issue was whether there was penetration. A charge of third-degree criminal sexual conduct was therefore not warranted by the evidence.

Similarly, defendant's argument that the jury should have been instructed on fourth-degree criminal sexual conduct has no merit. Defendant was charged with second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.288(3)(1)(a), sexual contact with a person under the age of thirteen. The evidence at trial was undisputed that the victim was under the age of thirteen. Fourth-degree criminal sexual conduct contains different elements than second-degree criminal sexual conduct, including that the sexual contact is accomplished by force and coercion or under circumstances where the victim is mentally incapacitated or physically helpless. MCL 750.520e; MSA 28.288(5). The elements to sustain a charge of fourth-degree criminal sexual conduct were not charged by the prosecutor or supported by the evidence. Further, fourth-degree criminal sexual conduct is not a necessarily included offense of second-degree criminal sexual conduct. *People v Norman,* 184 Mich App 255, 260-261; 457 NW2d 136 (1990).

Finally, defendant argues that he was deprived of the effective assistance of counsel. We disagree. In order to establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that his 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 Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant has to overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Moreover, defense counsel is not required to make frivolous or meritless motions, *People v Darden*, 230 Mich App 597, 604-605; 585 NW2d 27 (1998), or objections, *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant first claims that his counsel was ineffective for failing to raise the double jeopardy and instructional errors. Because those issues have no legal merit, trial counsel's failure to raise them was not objectively unreasonable.

Defendant next claims that his trial counsel was ineffective for failing to timely seek and hire an expert to testify in his defense. We disagree. Defendant has offered no evidence, either here or in the trial court, about what testimony an expert in sleepwalking would have offered, which would have provided a basis for acquittal in this case. There was no evidence that the victim was sleepwalking at the time of the incident. The evidence demonstrated that when the victim sleepwalked, she was easily awakened and that she never recalled anything that occurred

while she was sleepwalking. There was no testimony that she ever dreamed, fantasized, or made up incidents while sleepwalking. Defendant has not met his burden of proof that but for defense counsel's failure to obtain a sleepwalking expert, the result of his trial would have been different.

Finally, defendant argues that his counsel was ineffective because he failed to communicate a plea offer that was made on the first day of trial. Because there was no evidentiary hearing, we are limited to a review of errors apparent in the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to demonstrate that counsel was ineffective in this regard, defendant has the burden of proving that a plea offer was made and that it was not communicated by counsel to defendant. *People v Williams*, 171 Mich App 234, 241-242; 429 NW2d 649 (1988). It also appears that defendant must demonstrate that he would have accepted the plea bargain and was thus prejudiced by counsel's failure to communicate the offer. See, e.g., *People v Carter (On Rehearing)*, 190 Mich App 459, 461; 476 NW2d 436 (1991), vacated 440 Mich 870; 486 NW2d 740 (1992). In this case, there is no evidence other than defendant's self-serving affidavit, which was not before the trial court at the time it ruled on the motion for new trial or the necessity of an evidentiary hearing, that a plea bargain was made and not communicated to defendant. In addition, there is no evidence at all that defendant was prejudiced, i.e. that he would have accepted the plea offer. On the record before us, it is unclear what the terms of the alleged plea offer were and thus, it would be pure speculation for this Court to determine that defendant would have accepted any offer.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad