STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2001
v	No. 215826 Wayne Circuit Court
GENE T. FAVORS, JR., Defendant-Appellant.	Criminal Division LC No. 98-004497

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping a child under the age of fourteen, MCL 750.350, first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant to concurrent prison terms of forty to sixty years for the kidnapping conviction, life imprisonment for the CSC I conviction, and six to ten years for the assault conviction. The court also ordered defendant to pay a $5,000 fine for the assault conviction. Defendant appeals as of right. We affirm defendant's kidnapping and CSC I convictions and sentences, and also affirm defendant's assault conviction, but vacate the sentence and fine for the assault conviction and remand for resentencing on that offense only.

Defendant abducted a ten-year-old girl from a church in Detroit, led her to a nearby abandoned house, made her undress, and forced her to commit an act of fellatio. He also beat the victim with a stick and with his fist. The victim escaped by running from the house and back to the church wearing only a pair of socks. Two men from the neighborhood had observed a man and a young girl walking past them and then shortly thereafter observed the girl running naked towards the church. The two men captured the fleeing defendant and took him to the church for the victim to identify and to await the arrival of the police.

I

At trial, serologist Stefanie Turek testified for the prosecution that blood found on defendant's shirt was consistent with the victim's DNA. Turek further testified that among African Americans, a population that included both the victim and defendant, one out of every 1,660,000 individuals would have a DNA profile that matched the blood on defendant's shirt. Defendant first contends that he was denied a fair trial because the trial court admitted this DNA

evidence without first ruling on the validity of the DNA testing procedures. Because this issue was not preserved by a defense motion to suppress the evidence or by an objection at trial, the issue is forfeited unless a plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even when these requirements are met, 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." *Id*.

Turek testified at some length about the procedures she used to identify the DNA in the blood found on defendant's shirt. Defendant does not suggest that any error occurred in these procedures, but argues only that the trial court should have established that proper procedures were followed before admitting the evidence. See *People v Chandler*, 211 Mich App 604, 611; 536 NW2d 799 (1995) (before the trial court admits DNA evidence, the prosecution must first establish that generally accepted laboratory procedures were followed). Because defendant does not point to any errors that occurred, however, he cannot establish that his substantial rights were affected by the trial court's failure to review the procedures used before admitting the DNA evidence. We therefore conclude that defendant has forfeited this issue. *Carines*, *supra*.

II

Defendant next argues that the trial court's failure to give the standard jury instruction on expert witnesses, CJI2d 5.10, or otherwise give a cautionary instruction specific to the testimony of expert witnesses, denied him a fair trial. Defendant did not request a jury instruction regarding expert witnesses at trial and did not object to the instructions as given. Therefore, this issue also is forfeited unless plain error occurred that affected defendant's substantial rights. *Carines*, *supra*. Even if somewhat imperfect, jury instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Over several pages of the trial transcript the trial court instructed the jury concerning their duty to decide the credibility of all the witnesses. This charge as a whole covered the substance of CJI2d 5.10, with the exception of the advice to think about the expert's qualifications. However, the facts that the serologist was fairly new at her job, was testifying for the first time, was "very well supervised," and had been accompanied to trial by her supervisor who was prepared to testify if necessary were clearly presented to the jury. Under these circumstances, we find that no plain error occurred and that this issue likewise is forfeited. *Carines*, *supra*.

III

Defendant also claims that prosecutorial misconduct during opening and closing arguments denied him a fair trial. Again, defendant failed to object at trial to the challenged comments. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments, if any, could have been cured by a timely cautionary instruction. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the

relationship they bear to the evidence admitted at trial." *Id*. at 721. "Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel." *Id*.

A

Defendant first challenges instances during the prosecutor's opening and closing arguments where, according to defendant, the prosecutor interjected her personal opinion. Defendant also complains of the prosecutor's use of "I" and "we" throughout her closing arguments. Although prosecutors may not make a statement of fact to the jury that is not supported by the evidence, they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *Schutte*, *supra*. The prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), and may not place the prestige of the prosecutor's office behind a witness. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). Nonetheless, use of the words "we know" or "I know" or "I believe" does not necessarily reflect an attempt to vouch for witnesses or place the credibility of the prosecutor's office behind the case. The propriety of the prosecutor's comments "does not turn on whether or not any magic words are used." *Id*. at 399.

We have examined closely the comments challenged by defendant and find that they show a recitation of the evidence presented at trial as part of the prosecutor's argument to the jury that she had proven the elements of the charged offenses. The prosecutor merely was arguing the evidence and reasonable inferences arising from the evidence as they related to her theory of the case, which is permissible. *Schutte*, *supra*. Accordingly, we find that this portion of defendant's argument does not present any plain error.

B

Defendant further asserts that the prosecutor impermissibly commented on his nontestimonial demeanor at trial. Defendant often sat with his back to the witnesses during trial, a fact that drew several comments from the prosecutor in her efforts to have the eyewitnesses identify him. During her closing argument, the prosecutor commented that defendant made it difficult for the young victim to identify him during trial, which he would not have done were he innocent. Because the identity of the victim's attacker was the primary issue at trial, the prosecutor was obligated to ask the victim whether she recognized defendant as her attacker. The prosecutor also was free to refer during her closing argument to the victim's in court identification of defendant as the man brought back to the church after she was attacked, as well as all reasonable inferences to be drawn from this testimony. *Schutte*, *supra*. We therefore conclude that the prosecutor's proper comments did not impermissibly infringe on defendant's right to be present at trial.

C

Defendant lastly claims as prosecutorial misconduct the prosecutor's comment in her closing statements on his failure to testify, which would be impermissible. MCL 600.2159. However, prosecutorial arguments are considered in light of defense arguments. *People v*

Lawton, 196 Mich App 341, 353; 492 NW2d 810 (1992). Defense counsel during his closing argument asked the jury to consider how they would feel if they went jogging, were apprehended by two citizens, and were wrongly accused of a crime. In her rebuttal closing argument, the prosecutor commented that the jury had heard no testimony that defendant wore jogging clothes because he had been jogging the day of the crime. Because the prosecutor's comment directly rebutted defense counsel's suggestion to the jury, we find the remark proper.

We conclude that defendant has not shown any plain error during the opening or closing statements of the prosecutor, and that he has forfeited his unpreserved claims of prosecutorial misconduct. *Carines*, *supra*.

IV

Defendant next contends that his defense counsel provided ineffective assistance. Because defendant has not preserved this issue for appellate review by raising his claim in a motion for new trial or an evidentiary hearing, we limit our review to the existing lower court record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance fell below an objective standard of reasonableness under prevailing norms, and that a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Pickens*, *supra* at 314, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

A

We first address the prosecutor's argument that defendant waived this issue by electing to represent himself at trial. At the beginning of trial, defendant's court-appointed counsel advised the court that defendant had filed a grievance against him and refused to talk to him. Counsel asked to withdraw from the case. Defendant told the court that counsel had not filed a motion for an independent DNA expert. Defendant also complained that a private investigator hired by counsel had not come to the prison to see him about possible defense witnesses. After the court ordered the trial to continue with defense counsel in place, defendant asked if he could represent himself but stated that he wanted defense counsel to remain to assist him. The court allowed this, and the trial proceeded with defense counsel questioning prospective jurors and all witnesses and making opening and closing statements.

While the right of self representation is secured implicitly by US Const, Am VI and explicitly under Const 1963, art 1, § 13, the right is not absolute. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). A defendant has either a right to counsel or a right to proceed in propria persona, but not both. *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996). A defendant must exhibit an intentional relinquishment of the right to counsel, and the courts should "indulge every reasonable presumption against waiver" of the fundamental right to counsel. *Id*. at 721 (citation omitted). A request for self representation must be unequivocal, and the defendant must assert his right to self representation knowingly,

intelligently and voluntarily. *Id*. at 722. A request to waive appointed counsel and proceed in propria persona does not qualify as unequivocal if conditioned with a request for standby counsel. *People v Dennany*, 445 Mich 412, 446 (Griffin, J.), 458 (Boyle, J.); 519 NW2d 128 (1994).

Defendant did not unequivocally request to represent himself because he asked for counsel to remain with him. Therefore, defendant did not waive his right to representation. Moreover, defendant did not waive a claim of ineffective assistance of counsel, as the prosecution suggests, by responding positively to trial court questioning near the end of trial regarding his satisfaction with counsel's performance. "Because the appropriate inquiry is not the client's evaluation of counsel's performance, but rather whether counsel is a reasonably effective advocate, 'we attach no weight to either respondent's expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction.'" *People v Mitchell*, 454 Mich 145, 151 n 6; 560 NW2d 600 (1997), quoting *United States v Cronic*, 466 US 648, 657 n 21; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

B

Consequently, we consider defendant's allegations of ineffective assistance. Defendant claims several instances of ineffective assistance regarding the DNA identification of the victim's blood on defendant's shirt. He first argues that his counsel ineffectively failed to make a pretrial motion to suppress the DNA evidence. Defendant explains that his counsel had a duty to demand a pretrial hearing on the admissibility of the DNA report and the serologist's testimony, which concluded that the blood found on defendant's shirt was consistent with the victim's blood. According to defendant, his counsel's failure to move for such a hearing relieved the prosecution of its obligation to establish before the serologist testified that she followed generally accepted laboratory procedures.

As noted in our previous discussion regarding defendant's first asserted error, defendant does not make any claims that the forensic laboratory did not follow generally accepted laboratory procedures. Defendant argues only that his counsel had a duty to move for a pretrial hearing on the admissibility of this DNA evidence and that the "need for a showing on the testing procedures before the DNA evidence is admitted is self-evident. Any scientific test is reliable only if it is properly performed and analyzed." Although the DNA evidence constituted an important element of the prosecution's case, defendant does not allege that the procedures followed by the serologist likely lead to a tainted or unreliable result. Because defendant points to no errors in the serologist's procedures that were outlined at trial, we find that even if counsel's failure to move for a pretrial hearing on the admissibility of the DNA evidence fell below an objective standard of reasonableness, defendant has not shown that counsel's failure prejudiced him or that the result of the proceedings would have been different had defense counsel made this motion. *Pickens*, *supra* at 302-303.

C

Defendant also asserts that his counsel inexcusably failed to seek the appointment of an independent DNA expert witness. Defendant maintains that he needed an expert to challenge the prosecution's DNA evidence. However, counsel's failure to call a witness is presumed to

constitute sound trial strategy. *Mitchell*, *supra* at 163; *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *Avant*, *supra*. Because defendant did not move for an evidentiary hearing to develop his claim of ineffective assistance, we do not have defense counsel's testimony regarding this issue. In the absence of any record supporting defendant's claim, we cannot conclude that counsel's decision to forego an independent DNA expert amounted to ineffective assistance of counsel.

D

Defendant further contends that he advanced a misidentification defense, but his trial counsel did not properly investigate and prepare the defense. In particular, defendant alleges that counsel "failed to effectively challenge and discredit" the prosecution's DNA identification evidence. A defendant is entitled to have his counsel prepare, investigate and present all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Contrary to defendant's representation, however, defense counsel did vigorously cross examine the prosecution's DNA expert witness. The fact that counsel's challenge to the DNA evidence was not successful, in that defendant was convicted of the charged offenses, does not render counsel's assistance ineffective. *Id*.

E

Lastly with respect to ineffective assistance, defendant argues that his trial counsel should have objected to hearsay testimony that bolstered the victim's in court identification of defendant.[1] Defendant acknowledges that the victim's grandmother, who testified before her granddaughter and before the two men who captured defendant, stated that when the victim saw her alleged attacker brought into the church, "she started crying harder and shaking and saying, 'That's him. That's him.'" Defense counsel immediately objected, but the trial court ruled the statement admissible as an excited utterance exception to the hearsay rule. Therefore, the trial court had expressed its opinion whether the victim's statements made on first seeing defendant were admissible through the testimony of eyewitnesses, and defense counsel's later failure to make a futile objection to the admission of these statements through the testimony of the two men did not constitute ineffective assistance of counsel. *People v Sabin (On Second Remand)*, 242 Mich App 656, 660; 620 NW2d 19 (2000).

Defendant also complains that counsel did not object to the hearsay testimony of Detroit Police Officer Kevin Eaton. Eaton, who talked to the victim at the church, wrote a preliminary complaint report describing the encounter. Eaton testified that he had not reviewed the report

[1] We note that defendant also mentions in his brief on appeal that defense counsel rendered ineffective assistance by failing to object to the prosecutor's misconduct throughout trial and failing to request a cautionary instruction regarding expert witnesses. We find that defendant has waived these arguments, however, because he failed to adequately brief them or cite any authority supporting them. *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999), aff'd 462 Mich 71; 611 NW2d 783 (2000); *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994).

before trial, and was asked to testify without looking at the report. Eaton relayed to the jury what the victim told him about the crime and noted, on questioning from the prosecution, that the victim appeared to be nervous and upset and was crying when she talked to him. Although defense counsel did not object to any of this testimony, we find that it also would have been admissible under the excited utterance exception to the hearsay rule, MRE 803(2), and that defense counsel did not render ineffective assistance by failing to make another futile objection. *Sabin, supra*.

V

Defendant next raises two claims involving the sentences he received. This Court reviews sentencing issues for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

A

Defendant contends that the concurrent terms of forty to sixty years for the kidnapping conviction and life for the CSC I conviction were disproportionately severe because the trial court did not consider his potential for rehabilitation. Defendant asserts that the court wanted only to punish him and remove him from society, and therefore did not "balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential." *People v Triplett*, 407 Mich 510, 513; 287 NW2d 165 (1980), quoting *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973).

Because the trial court sentenced defendant within the guidelines, his sentences presumptively are neither excessively severe nor unfairly disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). In sentencing defendant, the trial court considered the permissible factors of the severity and nature of the crime and defendant's prior criminal record, including his poor disciplinary record during his previous incarceration. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). The court balanced these factors against the danger defendant posed to the community and the need to protect the community from defendant. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). It was not necessary for the court to articulate its consideration of defendant's potential for rehabilitation. *Id*. Moreover, given the nature of these offenses, defendant's age and prior criminal history, and his poor record during his previous incarceration, it appears highly unlikely that the court would have considered defendant's potential for rehabilitation a mitigating factor. We conclude that the trial court did not abuse its discretion in sentencing defendant for kidnapping and CSC I because the sentences are proportionate. *Milbourn, supra*.

B

Defendant further maintains that the sentence he received for assault with intent to do great bodily harm less than murder, a prison term of six to ten years and a fine of $5,000, was invalid. The statutory maximum punishment for assault with intent to do great bodily harm less than murder consists of "imprisonment in the state prison not more than 10 years, or [a] fine of not more than 5,000 dollars." A sentence that exceeds the statutory limits is invalid, *People v*

Thenghkam, 240 Mich App 29, 70; 610 NW2d 571 (2000), as is a sentence based on a misconception of the law. *People v Thomas*, 223 Mich App 9, 11; 566 NW2d 13 (1997). Although the sentencing hearing transcript reflects some confusion regarding whether defendant could receive both a term of years and a fine for the assault conviction, the judgment of sentence plainly indicates that the trial court imposed both punishments. MCR 6.427; *People v Williams (After Second Remand)*, 208 Mich App 60, 64; 526 NW2d 614 (1994) (noting that the judgment is the final record of a defendant's conviction).

We conclude that the sentence imposed for defendant's assault conviction exceeded the statutorily authorized limits. "The remedy for a partially invalid sentence is a remand for resentencing." *People v Jones*, 168 Mich App 191, 196; 423 NW2d 614 (1988). Because the trial court's error did not extend to the sentences given for defendant's other convictions, we remand for resentencing only on defendant's conviction of assault with intent to commit great bodily harm less than murder.

VI

We next address defendant's argument that he was denied his right to due process because the state destroyed potentially exculpatory evidence. We review this unpreserved claim of constitutional error for plain error that affected defendant's substantial rights. *Carines*, *supra* at 761-764, 774.

At defendant's trial, the emergency room doctor who examined the victim testified that he took both oral and genital cultures from her and sent them to a laboratory for analysis. The doctor received lab results from the genital culture, but did not receive any oral swab results. The manager of Detroit Medical Center University Laboratories testified that swabs and specimens taken from rape victims were handled as patient specimens, with the laboratory staff unaware that the patient had been a rape victim. The lab normally held specimens for approximately forty-eight hours, after which they were taken to a landfill and burned. Before trial the prosecutor called the manager and asked if he could track down the oral swab involved in this case, but the manager could not because the specimen had been destroyed. Lab records indicated that no testing of the oral swab ever occurred.

Defendant insists that (a) the oral swab's loss deprived him of potentially exculpatory evidence and (b) appears deliberate in light of the fact that the irrelevant vaginal swabs were tested.

> [W]hen the state fails to disclose to the defendant material exculpatory evidence, the good or bad faith of the state is irrelevant to a claim based on loss of evidence attributable to the government. Where, however, the state has failed to preserve evidentiary material of which no more can be said than that it could have been subjected to tests the results of which might have exonerated the defendant, the failure to preserve the potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the police. [*People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989), citing *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988).]

Defendant has not shown that testing of the oral swab would have yielded exculpatory results because the evidence presented at trial indicated that the victim's attacker placed his penis in the victim's mouth for only a short while and did not ejaculate. The serologist testified that if an exchange of fluids had occurred an oral swab taken from the victim's mouth might have provided DNA identification of her attacker, but that if none of the attacker's semen entered the victim's mouth DNA identification could not have been made from the oral swab. Under these circumstances, the swab apparently would have provided no exculpatory or inculpatory DNA evidence because the only DNA present would have belonged to the victim. Furthermore, defendant has not shown bad faith on the part of the government in handling the oral swab. Because the exculpatory nature of any test done on the oral swab is at best speculative and because defendant has not shown bad faith on the part of the government, due process does not require reversal of defendant's convictions on the basis of the oral swab's destruction. *Leigh*, *supra*.

VII

Defendant lastly claims that the cumulative effect of trial errors deprived him of a fair trial. However, we have identified no errors that affected defendant's trial. Accordingly, we reject defendant's cumulative error argument. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

We affirm defendant's convictions and affirm defendant's sentences for kidnapping and CSC I, but vacate the sentence and fine for assault and remand for resentencing with respect to that offense. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey