STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 7, 2001
v	No. 223795 Oakland Circuit Court
WILLIAM LESLIE SMITH, Defendant-Appellant.	LC No. 99-167204-FC

Before: Saad, P.J., Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

The prosecutor charged defendant with first-degree criminal sexual conduct, MCL 750.520b(1)(f), and first-degree home invasion, MCL 750.110a(2). The jury found defendant guilty of the lesser offense of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and not guilty of first-degree home invasion. The trial court sentenced defendant as a habitual offender to 10 to 30 years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant argues that he received ineffective assistance of counsel at trial. "In order to prevail on a claim of ineffective assistance of counsel, a defendant must present a record which supports his claim and 'excludes hypotheses consistent with the view that his trial lawyer represented him adequately.'" *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989), quoting *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). "Typically, this burden requires a defendant to seek an evidentiary hearing in order to develop the record." *Calhoun, supra* at 523. Defendant filed a motion to remand this case for development of the record which another panel of this Court denied. Accordingly, our review of defendant's ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

"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 Lee*, 243 Mich App 163, 184-185; 622 NW2d 71 (2000). "A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Id*. at 185.

Defendant claims that defense counsel was ineffective for failing to use statements made in police reports, medical reports, and a statement made in a nursing report to impeach witness

testimony at trial. Specifically, defendant claims that the reports conflict with: (1) the victim's trial testimony regarding where she was in her condominium when defendant walked in, uninvited, (2) one another regarding how long before the sexual assault she engaged in sexual intercourse, (3) the testimony of police officers regarding who discovered the victim's nightgown in her bathroom after the assault, (4) the victim's neighbor's trial testimony regarding whether she remembered what awakened her on the night of the incident and whether she heard screaming, (5) the victim's neighbor's testimony regarding whether the victim awoke her at 3:00 a.m. or 3:30 a.m.

Though defendant attached copies of the police and medical reports to his appellate brief, they were not part of the lower court record. Because our review of defendant's claim is limited to the lower court record, we will not consider documents filed with his appellate brief that were not part of the record below to decide whether defense counsel provided ineffective assistance. MCR 7.210(A)(1); *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998).

Moreover, were we to consider defendant's proferred evidence, none of the inconsistencies he alleges establish a reasonable probability that its introduction would have affected the outcome of defendant's trial. The slight discrepancies are not so significant that they would have affected the jurors' assessment of the evidence or the credibility of the witnesses. Furthermore, the record reflects that any variations in testimony were immaterial to the essential issues in the case and defendant has failed to affirmatively demonstrate how defense counsel's failure in this regard deprived him of a fair trial.

Defendant also alleges that defense counsel was ineffective for failing to investigate or call Raymond Mayo and Vicki Hoffman as witnesses. The decision whether to call particular witnesses is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant attached to his appellate brief copies of a subpoena, a police report, a statement by Mayo, and affidavits from appellate counsel regarding conversations with defense counsel. Again, these documents were not part of the lower court record and we will not consider them in resolving the issue. Further, the lower court record is silent regarding Hoffman's potential testimony and defendant has, therefore, failed to show "a reasonable probability that the result of the proceeding would have been different." *Lee, supra* at 184-185. Accordingly, there is no basis for our review of this issue.

Defendant says that defense counsel was ineffective for failing to subpoena telephone records and bank statements to impeach the victim's credibility regarding the nature of her relationship with defendant. Again, the telephone records and bank statements were not part of the lower court record. Moreover, were we to consider them, defendant has not established how the information would have affected the outcome of his trial. Evidence at trial established that defendant called the victim, that defendant dated the victim, that defendant and the victim engaged in consensual sexual intercourse and that they shared a joint bank account. The evidence, therefore, was merely cumulative and its probative value minimal. Accordingly, there is no basis for finding that defense counsel's alleged failure prejudiced defendant.

Defendant also claims that the prosecutor committed misconduct during closing arguments. Specifically, defendant contends that the prosecutor improperly shifted the burden of proof to defendant during his rebuttal argument, vouched for the credibility of the victim, and argued issues not raised by defendant in his closing argument.

"We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Read in context, the prosecutor did not improperly shift the burden of proof or vouch for the credibility of the victim, but merely argued from the evidence that the victim was credible. Such argument is not improper. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Moreover, the prosecutor clearly made the arguments in response to defense counsel's assertions that the victim lacked credibility and should not be believed. The prosecutor's remarks, made in direct reply to defense counsel's argument regarding the victim's credibility, were clearly appropriate and did not deny defendant a fair and impartial trial. See *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000); MCR 6.414(E).[1]

Defendant says that he is entitled to resentencing because the trial court erroneously relied on multiple prior convictions arising from a single transaction to enhance his sentence under the habitual offender statute, contrary to *People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987), holding modified by *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990).

We review a trial court's sentence imposed on an habitual offender for an abuse of discretion. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). "This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse of the ruling made." *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

The habitual offender statutes, MCL 769.10-769.12, provide for increasing penalties for persons repeatedly convicted of felonies. In *Stoudemire* our Supreme Court held that "multiple convictions arising out of a single incident may count as only a single prior conviction for purposes of the statute." *Stoudemire, supra* at 278. On the other hand, when the convictions arise from separate criminal incidents, they may be counted separately. *Preuss, supra*, 717.

In *Preuss, supra*, 717, the defendant was sentenced on the same day for two of the prior convictions that were used to enhance his sentence under the habitual offender statute. The defendant argued that the two prior convictions for which he was sentenced on the same day should only count as one prior conviction. *Id.* at 718. Our Supreme Court held that because the convictions arose from separate criminal incidents, the defendant was properly punished as an

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[1] Furthermore, were we to find that the prosecutor's comments constituted misconduct, any error was cured when the trial court sustained defendant's objections and when the trial court instructed the jury that the lawyers' arguments do not constitute evidence. See *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991), and *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

habitual offender. *Id.*, 739. In *People v Finstrom*, 186 Mich App 342, 343-344; 463 NW2d 272 (1990), overruled on other grounds *People v Edgett*, 220 Mich App 686 (1996) this Court stated:

> Although defendant's three prior convictions occurred on the same day, the conviction did not arise out of a single transaction. Rather, the three transactions occurred over approximately a two-week period, and then all three charges were tried together. Since defendant's prior convictions arose from separate criminal incidents, defendant could have been charged as a fourth offender under the habitual offender statute.

Here, the general information for the assault with intent to commit sexual penetration indicates that the crime occurred "on or about June 29, 1993." The general information for the assault with intent to do great bodily harm less than murder indicates that the crime was committed "on or about July 3, 1993." Therefore, contrary to defendant's argument, and similar to *Preuss* and *Finstrom*, the crimes were not part of a single incident. Therefore, defendant's argument is without merit and the trial court did not abuse its discretion in sentencing defendant.

Finally, defendant says he is entitled to resentencing because the trial court failed to exercise its discretion when the it assessed the maximum sentence under the habitual offender statute. The trial court made the following statement when sentencing defendant.

> Well, Mr. Smith, nobody ever wants to throw the key away on anyone, but I will tell you, presiding over the trial, listening to the evidence, and I would say that Mr. Basch saved you because I thought that jury was going to come back probably first degree criminal sexual conduct, which meant that we would have probably thrown the key away. So the talents of your lawyer and not your talents saved you.
>
> In any event, I have carefully reviewed the Michigan Department of Corrections Bureau of Probation, I have listened to both of your lawyers, I have listened to the victim and the prosecutor. I find you're 47 years old, and your record consists of three prior felonies, one misdemeanor. You were on parole when you committed this offense. It should be noted that your conduct in the instant case is almost identical to the behavior which resulted in your imprisonment term. It would appear that this defendant acts out violently when confronted with difficulties.
>
> It's the sentence of this Court that you be incarcerated with the Department of Corrections for a minimum of 10 years and a maximum of 30 years, and that you receive no credit for time served.

In *People v Turski*, 436 Mich 878; 461 NW2d 366 (1990), our Supreme Court, relying on the habitual offender statute and *People v Mauch*, 23 Mich App 723; 179 NW2d 184 (1970), held that "[a] trial court, when sentencing a defendant as an habitual offender, must exercise its discretion in setting the maximum sentence, that is, it is not required by law to increase the maximum sentence." In *Turski*, our Supreme Court ruled that, because the trial court held that it was required as a matter of law to enhance the defendant's sentence, it failed to exercise its discretion in sentencing the defendant. *Turski, supra* at 878. Similarly, in *Mauch*, this Court

held that the trial court failed to exercise its discretion because it ruled that the maximum term was mandatory. *Mauch, supra* at 730.

In *People v Beneson,* 192 Mich App 469, 481 NW2d 799 (1992), the defendant argued that the trial court failed to exercise its discretion under *Mauch* in determining the maximum sentence under the habitual offender statute. This Court distinguished *Mauch*, however, because, in *Beneson*, "the trial court . . . never stated that it had no discretion in setting the maximum sentence." *Id.*

Similarly, here, the trial court never stated that it had no discretion in setting the maximum sentence. In *People v Knapp,* 244 Mich App 361, 389; 624 NW2d 227 (2001), this Court stated that "nothing in the record demonstrates that the trial court believed it lacked discretion when it sentenced defendant . . . ." As a result, this Court held that "absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *Id.* See also *People v Alexander,* 234 Mich App 665, 675; 599 NW2d 749 (1999).

The trial court's remarks do not demonstrate that it failed to recognize its sentencing discretion. Therefore, pursuant to *Knapp*, the presumption that the trial court knows the law must prevail and defendant's claim is without merit.

We affirm.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck