STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 29, 2002
v	No. 226718 Kent Circuit Court
CECIL RAYMOND HAWKINS, JR., Defendant-Appellant.	LC No. 99-002089-FC

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

This case centers upon the kidnapping and sexual assault of a female victim. After a five-day trial, the jury convicted defendant on three counts of first-degree criminal sexual conduct (CSC), MCL 750.520(b)(1)(c), and one count of kidnapping, MCL 750.349. The trial court sentenced defendant to a term of thirty-three to fifty years' imprisonment for each of the CSC convictions, as well as life imprisonment for the kidnapping conviction. Defendant appeals as of right from his convictions and sentences. We affirm.

Defendant first asserts that the trial court abused its discretion when it failed to subpoena a newspaper reporter to testify regarding an article which appeared in a local newspaper after the jury had rendered its verdict. Defendant argues that the article raised the possibility that the jury had been exposed to unadmitted evidence, during trial. In *People v Morris*, 12 Mich App 411, 416; 163 NW2d 16 (1968), this Court made clear that a trial court has discretion over whether to subpoena a witness requested by a criminal defendant. Further, in *People v Riley*, 156 Mich App 396, 403; 401 NW2d 875 (1986), overruled on other grounds by *People v Lane*, 453 Mich 132, 138-139; 551 NW2d 382 (1996), this Court held that a trial court does not abuse its discretion to subpoena witnesses where it does not prevent a defendant from issuing a subpoena and does not otherwise interfere with a defendant's right to compulsory process. In this case, the trial court noted that the newspaper reporter was unwilling to voluntarily present himself for examination, but that the reporter would be available if subpoenaed. Defendant did not move the court to issue a subpoena, and did not exercise his right to compulsory process. Therefore, under *Morris* and *Riley*, we cannot say that the trial court abused its discretion in failing to subpoena the witness *sua sponte*.

Further, the trial court had good reason to believe that the reporter's testimony was unnecessary. Both jurors who testified after trial denied that they gained any knowledge of the unadmitted evidence during trial. Juror Horstmann testified that her comments in the newspaper

article related to evidence which was admitted at trial. Detective Peters testified that the other, unadmitted evidence alluded to in the article was not physically present in the courtroom during trial. This statement confirmed Horstmann's testimony that she had not seen any exhibits lying on the prosecution's table during the trial. Given the absence of a motion by the defense to subpoena the reporter as a witness, combined with the above testimony, we cannot say the trial court abused its discretion in this regard.

Defendant also asserts that the jury improperly gained knowledge regarding his criminal history, during trial. As evidence of this exposure, defendant points to a juror's comment in the above-referenced newspaper article that defendant was "frightening, not only for what he did . . . but also for the plans he appeared to be making to do the same to more women." However, the juror testified that her comments related to a sheet of notebook paper which contained a plan of how defendant would prepare for his attack, as well as a notebook listing names of other companies which offered exotic dancing services. Both of these items were properly admitted into evidence at trial. Given the lack of evidence that the jury was improperly exposed to defendant's criminal history during trial, defendant is not entitled to relief on this basis.[1]

Defendant next argues that the prosecutor made improper remarks during his closing and rebuttal arguments. We find no record support for defendant's contention that the prosecutor either referred to him a serial rapist or suggested that defendant would commit rapes in the future. The closest any of the prosecutor's comments come to what defendant alleges are the following rebuttal comments:

> [Defendant] tells her he'll get away with it. He tells the police on the 22nd when he's panicking – he found out that we searched his house – and he tells the police, there's no way the victim could find me.
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> * * *
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> But he gets away with this. It absolutely is unsolved. And he's free to do it again if the mood strikes him. He has reason to feel confident. He's done a lot of planning. He has no need to rush and get rid of evidence; he's not going to get caught. And he wouldn't have gotten caught except that Rachel Dornak had caller ID.

These comments do not rise to the level of referring to defendant as a serial rapist. In context, these comments refer to defendant's state of mind regarding the crime and explain why so much incriminating evidence was found in defendant's home. Moreover, the prosecutor's comments were supported by evidence admitted at trial, including evidence that defendant had names and telephone numbers of other exotic dancing companies, which tended to show that

[1] Because defendant failed to present evidence that the jury actually gained knowledge regarding his criminal history during trial, we need not address defendant's argument that his trial counsel rendered ineffective assistance when he failed to move for a new trial based on the jurors' exposure to newspaper articles. Because defendant was not prejudiced by his counsel's failure to raise this issue in the trial court, defendant's ineffective assistance claim is without merit. *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989).

defendant might have been planning to commit similar crimes in the future. A prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence, as it relates to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Given the supporting evidence for the prosecutor's comments, no error occurred.[2]

Defendant next argues that the prosecutor exposed the jury to extraneous evidence when he displayed white, nylon rope found inside the duffel bag seized at defendant's home. However, defendant did not file a contemporaneous objection in the trial court. "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).

As defendant asserts, the record contains no indication that the rope was admitted into evidence at trial. While the duffel bag itself was admitted, along with a photograph that showed some of the bag's contents, the transcript does not indicate which contents were revealed in the photo. We conclude that plain error occurred because it does not appear that the rope was admitted into evidence during trial. However, once plain error has been shown, a defendant must establish that this plain error affected his substantial rights. This "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant fails to establish such prejudice. The prosecutor made only brief reference to the rope, in context of other comments regarding properly admitted evidence, such as a notebook containing a description of the victim, a ski mask used when kidnapping the victim, a hood used by defendant when photographing the victim, and flex cuffs used to bind the victim's hands. We conclude that the presence of the rope in the duffel bag and the prosecutor's display of the rope to the jury did not create any real possibility that the verdict would have been different without reference to this unadmitted evidence.

Defendant next argues that he was denied the effective assistance of counsel during trial. To establish that his right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that his 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. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Further, because no *Ginther*[3] hearing was held in this case, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant asserts that his trial counsel rendered ineffective assistance when he advised defendant to exercise his constitutional right to testify on his own behalf. US Const, Am XIV; *People v Solomon*, 220 Mich App 527, 533; 560 NW2d 651 (1996). On the record before us,

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[2] Because the prosecutor did not commit misconduct with regard to his comments, we need not address defendant's claim that his trial counsel was ineffective for failing to object to those comments. Defense counsel is not required to raise a meritless objection, and the failure to do so does not constitute ineffective assistance. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

there is no evidence that would allow us to determine whether defendant independently decided to exercise his constitutional right, or trial counsel urged defendant to take advantage of this right. However, even assuming that it was trial counsel's decision, we do not believe that this denied defendant the effective assistance of counsel.

Defendant's testimony was consistent with a trial strategy of showing that defendant and the victim had consensual sex. In light of the victim's testimony, along with the corroborating evidence produced at trial, it was imperative for the defense to present some explanation of the events that occurred on the evening in question. Defendant was the only witness, other than the victim, who was present during the evening and his explanations were needed to support the defense theory. Accordingly, we conclude that trial counsel's representation did not fall below an objective standard of reasonableness, even if counsel did urge defendant to testify on his own behalf.

Defendant next claims that he was denied effective assistance by his trial counsel's failure to "move to quash based on a defective bind-over." Defendant claims that the evidence used to support his bindover was inadmissible and that he should not have been charged with these crimes. However, defendant fails to indicate what evidence he believes to be inadmissible. Indeed, the preliminary examination evidence used to support defendant's bindover consisted of the victim's testimony regarding the kidnapping and sexual assaults, as well as Detective Peters' testimony that the victim was kidnapped from a location within the jurisdiction of the 63rd District Court. Therefore, we find no merit in defendant's argument.

Defendant next argues that he was denied effective assistance by his trial counsel's failure to investigate and produce the two res gestae witnesses who worked at the gas station where defendant stopped on the evening of the kidnapping. Defense counsel's failure to call a particular witness is presumed to be trial strategy, and this Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Moreover, the record is silent as to what these two proposed witnesses would have testified. Accordingly, defendant has not shown a reasonable probability that, if defendant counsel had called these witnesses, the outcome of the proceedings would have been different. *Id*.

Defendant also argues that he was denied the right to have witnesses testify on his behalf because the prosecutor did not produce the two above-referenced witnesses. However, defendant does not assert that he requested police assistance in locating these witnesses, and does not assert that the witnesses were unknown to him. The prosecutor does not have a duty to produce res gestae witnesses. Rather, the prosecutor has a duty to provide notice of known witnesses and to render reasonable assistance to locate witnesses on defendant's request. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). Because defendant knew of the witnesses and did not request assistance in producing them for trial, defendant is not entitled to relief on this basis.

Defendant next asserts that Kent County Sheriff Detectives illegally arrested him in Mecosta County. We disagree. An officer from the Mecosta County Sheriff's Department made the initial traffic stop, and Kent County detectives then arrested defendant. We conclude that the arrest was legal because Kent County detectives were working "in conjunction with" the Mecosta County Sheriff's Department when they arrested defendant. MCL 764.2a.

Defendant next contends that police performed an unconstitutional search of his vehicle during the a roadside stop. Defendant argues that during the traffic stop by Mecosta County police, two Kent County officers shined their flashlights into defendant's vehicle and noted that a tissue box was inside. This, defendant complains, constitutes a warrantless, unreasonable search of the car. We disagree. Both the Michigan and United States Constitutions prohibit unreasonable searches and seizures. Const 1963, art 1, § 11; US Const, Am IV. In order to enjoy a protected privacy right under either of these constitutional provisions, a defendant must have a reasonable expectation of privacy in the object of the search and seizure. *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999). In this case, there is no allegation that the officers entered defendant's vehicle. They simply shined their flashlights into the interior of defendant's vehicle and noted a tissue box on the floor. Given that the tissue box was not hidden, but was in plain sight from outside the vehicle, defendant did not have a reasonable expectation of privacy. See *People v Valoppi*, 61 Mich App 470, 479; 233 NW2d 41 (1975). Therefore, no search took place and no error occurred.

Defendant next contends that the Mecosta County police officer who stopped defendant lacked a particularized and objective basis for suspecting defendant of criminal activity. In determining whether reasonable suspicion exists to perform an investigatory stop, we must examine all the facts and circumstances supporting the stop. *People v Oliver*, 464 Mich 184, 192-193; 627 NW2d 297 (2001). Here, the police had information that defendant worked for Advantage Electric, from which the attacker had placed the telephone call setting up the meeting with the victim. Further, the manager of Advantage Electric told police that defendant fit the attacker's description. Finally, defendant was driving erratically on the highway and seemed to be distracted by the vehicles following him. As noted by our Supreme Court, "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Id*. at 197, quoting *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000). Given these circumstances, the stop was supported by reasonable suspicion. Moreover, adding the discovery of the tissue box inside defendant's vehicle – which corroborated the victim's statements – the police also had probable cause to arrest defendant without a warrant. See MCL 764.15(c); *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998).[4]

Defendant next argues that police violated his constitutional right to counsel because he requested the assistance of counsel during his interrogation, yet he was not provided counsel until after his arraignment. Defendant's argument confuses the distinct protections of the Fifth and Sixth Amendments, which are not necessarily coextensive. *People v Marsack*, 231 Mich App 364, 372-373; 586 NW2d 234 (1998). As defendant argues, if an individual "states that he wants an attorney, the interrogation must cease until an attorney is present." However, that principle flows from the Fifth Amendment right against compelled self-incrimination. If no interrogations occur after defendant's invocation of that right, defendant's right to counsel does

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[4] Although defendant also argues that he was subjected to searches and seizures not supported by probable cause, he relies upon facts outside the record to support his contentions. Our review is limited to the record of the trial court and we will allow no enlargement of the record on appeal. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), aff'd in part, rev'd in part on other grounds 462 Mich 415; 615 NW2d 691 (2000). Thus, we decline to review this issue.

not attach until adversarial proceedings begin. See *People v Crusoe*, 433 Mich 666, 687-688; 449 NW2d 641 (1989). Therefore, defendant is not entitled to relief on this basis.[5]

Defendant next asserts that he was denied his right to a speedy trial. When the delay is less than eighteen months, a defendant must prove prejudice in order to establish a violation of the right to a speedy trial. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). In this case, defendant has failed to make such a showing. He does not assert that his civil liberties were constrained by his pretrial incarceration and he does not assert that his defense was compromised by the delay between arrest and trial. Without any proof of prejudice, defendant is not entitled to relief, and any failure of defense counsel to file a motion based on this issue would have been futile. Because defense counsel is not required to make frivolous or meritless motions, defendant was not denied the effective assistance of counsel. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Next, defendant claims that that his kidnapping conviction was based upon insufficient evidence because the asportation of the victim was merely incidental to the criminal sexual conduct. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Asportation of a victim is a judicially required element of the crime of kidnapping by forcible confinement or imprisonment. *People v Green*, 228 Mich App 684, 696-697; 580 NW2d 444 (1998). "To establish the element of asportation, there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime." *Id*. at 696-697. We conclude that the asportation element was met because defendant forced the victim into a car, drove her to another location, sexually assaulted her, and then drove the victim back and released her. See *People v Sawyer*, 222 Mich App 1, 5-6; 564 NW2d 62 (1997). Further, in *People v Barker*, 411 Mich 291, 300 n 5; 307 NW2d 61 (1981), our Supreme Court indicated that increased threat or danger to the victim is one factor to consider in determining whether asportation took place. In the present case, the movement added a threat of increased danger to the victim, due to the extent of the movement and the fact that the victim was unable to see during that time. We conclude that the prosecutor presented sufficient evidence of asportation and the jury could have reasonably found that the asportation was not merely incidental to the criminal sexual conduct. Therefore, defendant is not entitled to relief on this basis.[6]

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[5] Defendant also contends that police violated his right against compelled self-incrimination by questioning him in the back seat of a police vehicle, after he had asserted his right to counsel. We decline to address this contention because it was not raised below and there is no record to review. *Warren, supra* at 356.

[6] Because defendant's kidnapping conviction was based on sufficient evidence, we need not address defendant's claim that his trial counsel was ineffective for failing to move for dismissal of that charge. *Darden*, *supra* at 605.

Defendant next argues that his convictions for kidnapping and first-degree criminal sexual conduct violate the double jeopardy protections contained in the Michigan and United States Constitutions because the criminal sexual conduct conviction is based upon the crime of penetration under circumstances involving another felony. Const 1963, art 1, § 15; US Const Am V; MCL 750.520b(1)(c). Because our Supreme Court rejected this argument in *People v Robideau*, 419 Mich 458, 489-490; 355 NW2d 592 (1984), defendant is not entitled to relief on this basis.

Defendant next contends that he is entitled to resentencing based on the prosecutor's failure to file a notice of intent to seek an enhanced sentence under the habitual offender statute. MCL 769.13(2). In *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999), this Court found that failure to file a sentence enhancement notice under the habitual offender statute can constitute harmless error. In this case, as in *Walker*, defendant does not contend that he did not receive notice of the intent to seek enhancement; he argues only that the notice was not filed in the lower court record. However, because the felony complaint indicated that the prosecutor would seek enhanced sentences, and because defendant did not object to his status as an habitual offender during sentencing, the failure to file the notice of intent in this case was harmless error.

Defendant next challenges the sentences imposed by the trial court.[7] The trial court sentenced defendant to a term of thirty-three to fifty years' imprisonment for each of the CSC convictions, as well as life imprisonment for the kidnapping conviction. The guidelines, as scored by the trial court, indicated a minimum sentence range of 225 to 562 months (18 years, 9 months to 46 years, 10 months), or life imprisonment. Thus, defendant's minimum sentences fall within the appropriate guideline ranges. MCL 769.34(10) provides, in pertinent part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Defendant argues that the trial court erroneously scored Offense Variables 3, 4, 7, 8, 10, 11, and 12. We disagree. First, defendant's contention that the trial court improperly scored OV 3 is without merit because the trial court adjusted OV 3 to reflect zero points. Second, defendant's contention that the trial court improperly scored OV 4 is without merit because the guidelines instructions clearly state, "the fact that [psychological] treatment has not been sought is not conclusive." Given defendant's treatment of the victim in this case, we conclude that ten points were appropriately scored under OV 4 because the victim suffered "serious psychological injury [that] *may require* professional treatment." [Emphasis added.]

Third, we believe the score for OV 7 was correct. Defendant assaulted the victim while wearing a mask and dark clothing. He covered her head and drove her to an undisclosed location, where he bound her hands and covered her eyes with duct tape. Defendant then sexually assaulted the victim, while still preventing her from seeing. These circumstances amply

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[7] Because the instant offenses occurred on February 13-14, 1999, the statutory sentencing guidelines apply, rather than the previous judicial sentencing guidelines. MCL 769.34(2).

support a finding that defendant engaged in "terrorism," which is defined in the guidelines instructions as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." The record clearly supports a score of fifty points for OV 7.

Fourth, defendant's contention that the trial court improperly scored OV 8 is without merit, because the guidelines state that fifteen points should be scored when the "victim was asported to another place of greater danger or was held captive beyond the time necessary to commit the offense." Given the length of time that defendant held the victim captive, fifteen points were clearly appropriate under OV 8 for the CSC offenses.[8]

Fifth, according to the guidelines for OV 10, fifteen points should be scored if "predatory conduct" was involved in the crime. Predatory conduct means "pre-offense conduct directed at a victim for the primary purpose of victimization." Defendant asserts that this variable was incorrectly scored because there was no evidence that his pre-offense conduct was directed exclusively at the instant victim. Contrary to defendant's argument, the variable does not state that the pre-offense conduct be directed at a specific victim chosen before the offense occurs. Rather, the variable states that the pre-offense conduct be "directed at a victim." We conclude that the record supports a score of fifteen points for OV 10.

Sixth, the trial testimony supported a finding that at least six acts of sexual penetration or sexual touching occurred in the present case. However, defendant's convictions were based on only three acts of sexual penetration. Thus, fifty points were appropriately scored under OV 11 for more than two charged penetrations, and twenty-five points were appropriately scored under OV 12 for three contemporaneous felonious acts which will not result in a separate conviction. Because the trial court correctly scored the guidelines and because defendant's minimum sentences fall within the guidelines ranges, we must affirm his sentences. MCL 769.34(10); *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000).

Finally, defendant argues that his appellate counsel was ineffective because appellate counsel: "(1) failed to acquire a full record for review; (2) failed to investigate potentially meritorious claims of error, (3) failed to move for necessary evidentiary hearings, and (4) failed to assert claims of error which are supported by facts of the record." Defendant's claims are simply too general to support a conclusion that he was denied the effective assistance of appellate counsel. Without more specificity, it is impossible to determine whether the alleged error would have been outcome determinative. A defendant may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Thus, defendant is not entitled to relief.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski

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[8] We note that the trial court correctly scored zero points under OV 8 for the kidnapping offense.