

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC K. ROWE,

Defendant-Appellant.

UNPUBLISHED

March 16, 2004

No. 240820

Wayne Circuit Court

LC No. 00-011920-01

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of six counts of first-degree criminal sexual conduct (“CSC-I”), MCL 750.520b(1)(c) and (e), and one count each of armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of twenty-eight to forty-five years’ imprisonment for each of the CSC-I convictions and the armed robbery conviction, and consecutive terms of twenty to forty years’ imprisonment for the carjacking conviction and two years for the felony-firearm conviction. He appeals as of right. We vacate three of defendant’s CSC-I convictions, but affirm in all other respects.

I

Defendant first argues that he was denied the effective assistance of counsel because trial counsel failed to call Christopher Glispie as a witness. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. The court must first determine the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to the effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 578; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed

2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The failure to call a witness may constitute ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). However, decisions regarding whether to call or question witnesses are generally presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To overcome the presumption of sound trial strategy, the defendant must show that counsel's failure to present evidence would have substantially benefited the defendant. *Kelly*, *supra* at 526.

The defense theory of the case as presented in defense counsel's opening statement and closing argument was that defendant was misidentified, that he was coerced into giving false confessions to the police, and that he was falsely arrested and charged because he was an African-American male who happened to be in the vicinity of the bank where the victim was abducted. According to Glispie's affidavit, Glispie would have testified that he saw defendant with "a woman," who defendant now maintains was the victim, at Juanita's Bar sometime "during the mid-summer." To the extent defense counsel made a strategic decision not to call Glispie as a witness, the decision was not unreasonable because Glispie's testimony would not have supported a misidentification theory, and would have placed defendant with the victim. Defendant does not explain how Glispie's testimony would have benefited him. This Court will not second-guess counsel in matters of trial strategy, and the fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The record shows that counsel presented a reasonable, albeit unsuccessful, defense of mistaken identity. Further, defendant cannot demonstrate that defense counsel's failure to call Glispie deprived defendant of a substantial defense. *Daniel*, *supra* at 58. Glispie's affidavit does not identify a specific date, nor does it indicate that the woman who was with defendant was the victim, as defendant now alleges. The vague allegations in the affidavit fail to demonstrate that Glispie's proposed testimony would have made a difference in the outcome of the trial. *Kelly*, *supra* at 526.

II

Next, defendant argues that the trial court abused its discretion by precluding him from questioning Officer Kevin Robinson about the physical condition of the cell in which defendant was held at police headquarters.

Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

In this case, the trial court determined that the proffered testimony was not relevant because it had previously determined, following a *Walker*¹ hearing, that defendant's statements to the police were voluntary. However, even where a court has previously determined that a defendant's statements were voluntary a defendant is still entitled to present evidence at trial of the circumstances attendant to the taking of a confession to impeach its reliability or credibility. See *Crane v Kentucky*, 476 US 683; 106 S Ct 2142; 90 L Ed 2d 636 (1986); *People v Hamilton*, 163 Mich App 661, 665-666; 415 NW2d 653 (1987); *People v Gilbert*, 55 Mich App 168, 172-173; 222 NW2d 305 (1974). We therefore conclude that the trial court abused its discretion in disallowing the proposed cross-examination.

Nonetheless, we conclude that reversal is not required. Error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Reversal is required only if the error was prejudicial. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

The victim in this case testified that defendant took her car at gunpoint and then sexually assaulted and robbed her. She identified defendant at a police lineup. Defendant gave two separate statements to the police admitting that he took the victim's car at gunpoint, and that he then sexually assaulted and robbed her. He also argued to the jury that his statements were involuntary. In view of the evidence presented at trial, it is not more probable than not that testimony concerning the conditions of the detention units at police headquarters would have convinced the jury to ignore his inculpatory statements and affected the outcome. Accordingly, this error does not require reversal.

III

Defendant next argues, and plaintiff agrees, that three of his six convictions for CSC-I should be vacated because he was only convicted of three acts of penetration, under alternate theories for each act.

Defendant was convicted of three counts of CSC-I based on three acts of sexual penetration during the commission of another felony, MCL 750.520b(1)(c). He was also convicted of three counts of CSC-I based on the same three acts of sexual penetration under the alternate theory that he was armed with a weapon, MCL 750.520b(1)(e). Because defendant was convicted of engaging in only three acts of sexual penetration, under alternate theories for each act, he may only be convicted and sentenced for three counts of CSC-I. *People v Johnson*, 406 Mich 320, 331; 279 NW2d 534 (1979) (where a sexual penetration is accompanied by more than one of the aggravating circumstances enumerated in the statute, it may give rise to only one criminal charge for purposes of trial, conviction, and sentencing); *People v Malkowski*, 198 Mich App 610, 612-613; 499 NW2d 450 (1993), overruled in part on other grounds *People v Edgett*,

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

220 Mich App 686; 560 NW2d 360 (1996). Accordingly, we vacate three of defendant's convictions of CSC-I.

IV

Defendant raises five additional issues in a brief filed in propria persona. None of the issues have merit.

First, defendant argues that trial counsel's failure to object to the delay in his arraignment deprived him of the effective assistance of counsel. We disagree. The record discloses that defendant was arrested on October 2, 2000, because he matched the description of the suspect. At the time of his arrest, he had a gun in his possession. On the next day, October 3, 2000, defendant was transported to Detroit Police headquarters, and the police obtained a search warrant for a sample of his blood. Later that day, defendant was placed in a lineup and was identified by the victim. Subsequently, after 10:30 p.m. on October 3, 2000, defendant gave a statement to the police. He later gave a second statement during the early hours of October 4, 2000. Defendant now complains that he was detained several more days to allow the police to investigate him for other crimes before he was finally arraigned on October 7, 2000.

On appeal, defendant argues that his continued detention was unlawful under the Fourth Amendment, and that defense counsel was ineffective for failing to file a motion to suppress the evidence against him. Assuming, however, that defendant was not timely arraigned, he cannot show that he was prejudiced by the objectionable delay. Because his statements were given before any impermissible delay, defendant cannot establish a causal connection between any delay and the giving of his statements. *People v Cipriano*, 431 Mich 315; 429 NW2d 781 (1988); *People v Manning*, 243 Mich App 615; 624 NW2d 746 (2000).

V

Defendant next argues that defense counsel was ineffective for failing to object to testimony that he had a gun in his possession when he was arrested, and that the prosecutor engaged in misconduct by eliciting testimony from police that defendant was arrested for having a gun in his possession. We conclude, however, that the evidence regarding the gun did not affect the outcome of the trial.

VI

Next, defendant argues that the trial court erred when it allowed Erica Farrell, a friend of the victim, to testify about her phone conversation on July 10, 2000. Defendant maintains that the testimony was hearsay.

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). In this case, defense counsel objected to Farrell's testimony only on the ground that the prosecutor provided untimely notice of her appearance as a witness, not on the basis that her testimony was hearsay. Thus, defendant failed to preserve the issue for appellate review and our review is for plain error.

As this Court observed in *Tobin v Providence Hospital*, 244 Mich App 626, 640; 624 NW2d 548 (2001):

“Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c). Hearsay is not admissible except as provided by the rules of evidence MRE 802.

Contrary to what defendant argues, it is not clear or obvious that Farrell’s testimony about the statements of the unidentified man (the declarant) were being offered “to prove the truth of the matter asserted” under MRE 801(c). The fact that the statements were made, regardless of whether they were true, tended to support the victim’s credibility. Thus, defendant has not demonstrated plain error. Furthermore, Farrell’s testimony was cumulative of the victim’s testimony and, therefore, did not affect defendant’s substantial rights.

VII

Finally, defendant has failed to show plain error with regard to his claim that his Fourth Amendment rights were violated on the basis that he was unlawfully detained so that the police could investigate his possible involvement in other crimes and obtain a confession. As previously indicated, defendant has failed to show that he was unlawfully arrested or that any delay in his arraignment resulted in an involuntary confession that was subject to suppression. *Cipriano, supra* at 315; *Manning, supra* at 615.

We vacate three of defendant’s convictions of CSC-I, but affirm in all other respects.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio