STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2004
v	No. 247345 Kent Circuit Court
AFSHIN MASHELI, Defendant-Appellant.	LC No. 01-7199-FC

Before: Judges Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f), and third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b). Defendant was sentenced to 5½ to 50 years' imprisonment for the CSC I count and 3 to 15 years' imprisonment for the CSC III count. Following defendant's motion for resentencing, the CSC III conviction was vacated by stipulation. Defendant was resentenced on October 21, 2003 to 2½ to 25 years' imprisonment, with 3 days' credit for time served. His sentence starting date remained December 12, 2002.[1] This case arose when defendant digitally penetrated the victim's vagina with enough force to lift her off the couch and cause a cervical tear. We affirm but remand for correction of the judgment of sentence.

Defendant first argues that the prosecutor's comments regarding undisputed evidence infringed on both his state and federal constitutional rights not to testify. We disagree.

Claims of prosecutorial misconduct are reviewed case-by-case "to determine whether the defendant was denied a fair and impartial trial." *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Because this issue was unpreserved, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A prosecutor may not comment on a defendant's failure to testify. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991), citing *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965). In Michigan a prosecutor's statement regarding undisputed evidence is

[1] The corrected judgment of sentence indicates that defendant's sentence began on February 12, 2002; however, the court indicated during the resentencing that the sentence began December 12, 2002.

generally not considered an improper comment about a defendant's failure to testify. *Guenther, supra* at 177. When a prosecutor remarks that evidence is undisputed, he is properly arguing the weight of the evidence. *Id.*, citing *People v Earl,* 299 Mich 579, 582-583; 300 NW 890 (1941). This is especially true where a witness other than the defendant could have rebutted the evidence. *People v Perry,* 218 Mich App 520, 538; 554 NW2d 364 (1996), aff'd 460 Mich 55 (1999). In the instant case, two witnesses other than defendant and the victim were in the trailer when the incident occurred; someone other than defendant could have rebutted the victim's testimony.

With respect to defendant's federal constitutional rights, the Sixth Circuit Court of Appeals has applied a balancing test to determine whether comments regarding undisputed evidence violated a defendant's right not to testify. *Guenther, supra* at 179, citing *Butler v Rose,* 686 F2d 1163, 1170 (CA 6, 1982). The balancing test considers mainly the number of comments and their nature. *Id.* The nature of the comments is discerned by viewing them in context to determine whether the prosecutor manifestly intended to comment on the defendant's failure to testify or whether the jury would "'naturally and necessarily'" construe them as a comment on the defendant's failure to testify. *Id.* When viewed in context of defendant's trial posture and the prosecutor's closing argument, the comments were in proper response to defendant's argument and indicated that the victim's testimony was consistent with the physical evidence. In other words, the prosecutor merely argued the weight of the evidence. *Id.* at 177-178.

Defendant next argues that his constitutional right to notice was violated where the information was amended on the day of trial to add a charge of CSC I without remand for a preliminary examination. We disagree.

"A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *People v McGee,* 258 Mich App 683, 686-687; 672 NW2d 191 (2003). An abuse of discretion occurs "when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Id.*, citing *People v Jones,* 252 Mich App 1, 4; 650 NW2d 717 (2002). A defendant has a constitutional right to be notified of the nature of the claim against him. *People v Hunt,* 442 Mich 359, 362; 501 NW2d 151 (1993), citing Const 1963, art 1, § 20. MCR 6.112(H) provides, " The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." Prejudice is shown by "unfair surprise, inadequate notice, or insufficient opportunity to defend." *Id.* at 364.

Defendant received sufficient notice on July 9, 2001, when he waived his right to a preliminary examination, that if the matter went to trial the prosecutor reserved the right to add a CSC I charge at that time. Furthermore, "notice to a defendant of an added charge before the presentation of proofs [at trial] may well be adequate." *McGee, supra* at 701, citing *People v Adams,* 202 Mich App 385, 391; 509 NW2d 530 (1993). Counsel did not seek remand for a preliminary examination or a continuance for time to prepare a different defense when she discovered the additional charge. And defendant has not indicated on appeal how additional preparation time or the preliminary examination would have altered the outcome of the case. Therefore, defendant has not established "'unfair surprise or prejudice.'" *McGee, supra* at 693, quoting MCR 6.112(H).

Defendant next argues that he was subject to double jeopardy when he was convicted of both CSC I and CSC III with respect to a single act of penetration. We agree.

A claim of double jeopardy is reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). A defendant's federal rights against double jeopardy are not violated where each offense requires proof of a fact that the other offense does not. *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993). MCL 750.520d(1)(b) provides in relevant part:

> (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:
>
> * * *
>
> (b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v).

Therefore, to be convicted of CSC III, a defendant must have sexually penetrated the victim by force or coercion. Under MCL 750. 520b(1)(f), CSC I requires proof that the defendant sexually penetrated the victim by force or coercion, and the victim was physically injured. Thus the only difference between CSC I and CSC III in the instant case is the injury element in CSC I. Hence, defendant's federal double jeopardy rights were violated. *Dixon, supra* at 696.

Whether a defendant's state double jeopardy rights are violated is determined by legislative intent. *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997). Our Supreme Court has stated that the Legislature did not intend to impose multiple convictions for a single act of penetration. *People v Johnson*, 406 Mich 320, 330; 279 NW2d 534 (1979) (multiple counts of CSC I). "[W]here one statute incorporates most of the elements of the base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes." *People v Ward*, 206 Mich App 38, 42; 520 NW2d 363 (1994), citing *People v Robideau*, 419 Mich 458, 485-486; 355 NW2d 592 (1984).

Because CSC I incorporates all the elements of CSC III, there is no legislative intent to impose a conviction for both CSC I and CSC III arising from a single act of penetration. Thus defendant's state double jeopardy rights were violated. Nevertheless, the normal remedy for conviction of multiple offenses in violation of double jeopardy protections is to vacate the lower charge. *Herron, supra* at 609, citing *People v Harding*, 443 Mich 693, 716; 506 NW2d 482 (1983). The trial court cured any prejudice to defendant when it vacated the CSC III conviction and resentenced defendant pursuant to MCR 7.208(A)(2). Therefore, defendant has no standing to raise this issue on appeal. MCR 7.203(A).

Defendant next argues that the court abused its discretion by instructing the jury that it could find him guilty of both CSC I and CSC III. Misdirection of the jury does not warrant a new trial "unless it appears after examination of the entire record that the error resulted in a miscarriage of justice." *People v Graves*, 458 Mich 476, 484; 581 NW2d 229 (1998), citing MCL 769.26. A miscarriage of justice occurs when after examining the entire case it appears "more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Because there was sufficient evidence to convict

defendant of CSC I, and the court properly vacated the CSC III conviction on the double jeopardy ground, any prejudice to defendant was cured.

Defendant next argues that the prosecutor committed misconduct by charging him with two counts of CSC with respect to a single act of penetration. However, a prosecutor has discretion to "charge in a single information all offenses which do arise out of a single criminal transaction or occurrence." *People v Gould*, 241 Mich App 333, 342-343; 615 NW2d 794 (2000). Therefore, the prosecutor had discretion to charge defendant in the alternative with CSC I and CSC III.

Defendant next argues that he received ineffective assistance of counsel. We disagree.

To maintain a claim of ineffective assistance, a defendant must demonstrate that: counsel's performance fell below an objective standard of reasonableness, but for counsel's error, the result of the proceedings would have been different, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). With respect to the failure to challenge the CSC I charge, our review of the record indicates that sufficient evidence existed to support bindover on CSC I. Counsel need not advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

With respect to defendant's claim that counsel was unprepared for trial, other than a vague reference to failure to investigate and failure to question res gestae witnesses, defendant has not indicated how his counsel was unprepared. Defendant may not simply announce his position and leave it to this Court to search for the factual basis for his claim. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). The failure to interview witnesses, without a showing of prejudice, does not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1991). Moreover, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). And this Court will not second guess matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

With respect to defendant's claim that defense counsel failed to challenge DNA evidence, the record indicated that defense counsel questioned the prosecutor's expert extensively, and argued an alternative reason for the presence of defendant's DNA. Given the fact that DNA identification is a generally accepted scientific practice, *People v Chandler*, 211 Mich App 604, 610-611; 536 NW2d 799 (1995), counsel's decision not to challenge the results was trial strategy. *Rockey, supra* at 76. Further, because defendant has not shown that an expert witness would have testified favorably on his behalf, he has failed to demonstrate prejudice. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

With respect to counsel's failure to challenge the prosecutor's statements that he hoped the jury would convict defendant of both counts, defendant cannot show prejudice where there was sufficient evidence to convict him of CSC I, and the trial court eliminated the prejudice caused by the CSC III conviction by vacating it. Defendant next argues that he received ineffective assistance of appellate counsel because his counsel refused to raise the issues raised by defendant in his supplemental brief on appeal. We disagree. Because defendant has raised

the issues in his supplemental brief, he cannot demonstrate prejudice, and his ineffective assistance of appellate counsel claim fails. *People v Pratt*, 254 Mich App 425, 430-431; 656 NW2d 866 (2002).

Affirmed and remanded for correction of the sentence starting date in the judgment of sentence.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens