STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC OTTO MCCLOUD,

Defendant-Appellant.

UNPUBLISHED
December 13, 2005

No. 257033
Macomb Circuit Court
LC No. 2003-001814-FC

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a), two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1).[1] He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 204 to 420 months for each conviction. He appeals as of right. We affirm.

I. Underlying Facts

Defendant was convicted of sexually assaulting his girlfriend's niece, aged sixteen at the time of trial. Defendant's girlfriend, Margaret Lynette Obey, is the victim's mother's sister, and the victim and Obey's daughter, Jenny See, aged eighteen at the time of trial, frequently slept at each other's houses. Defendant moved into the Obey home in December 1998. According to the victim, all of the assaults occurred in the Obey home, and defendant was "always drunk" during the assaults.

The victim testified that, in 1998, when she was ten years old, defendant "starting touching [her] in places he shouldn't have been." The first incident occurred when the victim and See were in See's bedroom. After See fell asleep, defendant came into the room, got in the bed, and rubbed the victim's vagina "on top of her clothes" "for a while." Neither the victim nor

[1] Defendant was acquitted of one count of second-degree CSC and one count of third-degree CSC, MCL 750.520d(1)(a), and the trial court dismissed two additional charges of first-degree CSC.

defendant said anything, but the victim allegedly told See about the incident on the following day. Subsequently, in 1998, after the victim turned eleven years old, defendant again came into See's bedroom, and rubbed the victim's vagina over her clothing. The victim asked defendant to stop, but he did not say anything and left five minutes later. On a different occasion, the victim was lying on a couch in the living room watching a movie, and See was sitting on the floor. Defendant laid on the couch next to the victim, and put his hand down the victim's pants "[o]n the outside of [her] underwear." The victim also recalled one additional occasion when she was thirteen years old when defendant came into See's bedroom and "rubbed on the outside of her clothes."

The victim testified that, in September 1999, when she was twelve years old, defendant first touched her "without [her] clothes." The victim was resting on the floor in See's bedroom when defendant stuck his hand "inside [her] underwear," "rubbed around for a minute," and put his finger inside her vagina, which "hurt." Defendant left without saying anything. On a different occasion, the victim was in See's bedroom preparing for bed when defendant "put his finger inside of" her. The victim told defendant that it was painful, but he "didn't stop."

The victim indicated that "something else happened" when she was thirteen years old. The victim explained that she was sleeping on See's bedroom floor when defendant came in, "yanked on [her] pants and asked [her] to take them off." While doing this, defendant made a gesture to the victim indicating that "he wanted oral sex." The victim explained that defendant put two fingers up like a V and "[s]tuck his tongue in it." The victim refused, and defendant left.

In early 2003, the victim disclosed to a counselor that a family friend named "Eric" had sexually assaulted her. The victim indicated that although she did not like what defendant was doing to her, she was unaware that his actions were illegal or that the counselor would disclose them. The victim "didn't want [defendant] to get in trouble," and "didn't want to go through all of this." The victim testified that she previously talked to See's friend, Kristyn Diehr, aged nineteen at the time of trial, and See about what was happening, and that in May 2003, Diehr told her that defendant had assaulted her also.

The victim's mother testified that, after she learned of the assaults from the counselor, she telephoned Obey. Obey testified and admitted that she spoke with the victim's mother, and told her that the victim had "come on to" defendant. The victim's mother testified that, on that same day, defendant phoned her, and asked to talk to the victim, who refused. Defendant told the victim's mother "that he was unaware of any time that he'd ever hurt" the victim, but "was sorry if he'd hurt her in any way," and "if he had, he must have been drunk." The victim's mother indicated that defendant called five or six times that day, attempting to speak with the victim.

Defendant was subsequently arrested. According to one of the arresting officers, before being advised of the charges, defendant yelled, "is this about that little bitch?" In response, the officer advised defendant of the charges, and defendant stated that he "can't believe that bitch," and called her "promiscuous." He also stated that he "was a little drunk that night and that he was lying in the bed with her and another girl named Jennifer," that "this little bitch" said that she had "d**k before and that she was on the pill," and that the victim "put his hand on her snatch" and "put his hand on her tit."

Obey, Diehr, and See testified on defendant's behalf. Diehr, who lived in the Obey home at the time of trial, denied ever telling the victim that defendant assaulted her, but admitted that in 2000, the victim talked to her and See about something that had occurred between her and defendant. See testified that she and the victim were always together, that defendant and the victim were not alone, that the victim did not tell her that defendant assaulted her, and that, after defendant was arrested, the victim told her "it never happened." See admitted that she "could've forgotten" a conversation that she had with the victim and Diehr. See also admitted that in February 1999, defendant physically assaulted her.[2]

II. Effective Assistance of Counsel

Defendant first argues that defense counsel was ineffective for failing to present a voluntary intoxication defense for the charge of assault with intent to commit CSC involving sexual penetration. We disagree.

Because defendant failed to raise this issue before the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

The elements of assault with intent to commit CSC involving penetration are "(1) an assault, and (2) an intent to commit CSC involving sexual penetration." *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004). Assault with intent to commit CSC involving sexual penetration is a specific intent crime. *People v King*, 210 Mich App 425, 427; 534 NW2d 534 (1995). At the time of the offense in this case, voluntary intoxication was a defense to a specific intent crime.[3] *People v Langworthy*, 416 Mich 630, 638, 642-645, 653; 331 NW2d 171 (1982). But "[a] defense of intoxication [was] only proper if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent." *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995).

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[2] An officer and Obey confirmed that in 1999, defendant was charged with domestic violence against See.

[3] MCL 768.37, effective September 1, 2002, abolished the voluntary intoxication defense for most crimes committed after August 31, 2002.

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.* Here, defendant correctly notes that there was evidence that he was intoxicated. The victim testified that defendant was "always drunk" during the assaults. When asked how she knew defendant was intoxicated, the victim explained, "because he always just sat in the dining room and drank for hours." The victim's mother also testified that defendant told her that if he had hurt the victim, he must have been drunk. Despite this testimony, there was no evidence, and defendant has not identified any proof on appeal, that defendant's intoxication prohibited him from forming the requisite intent for the charged offense. Consequently, because a defense of intoxication was unlikely to succeed, defendant cannot demonstrate that defense counsel's inaction was prejudicial.

III. Sufficiency of the Evidence

Next, defendant argues that there was insufficient evidence to convict him of assault with intent to commit CSC involving sexual penetration. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find 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). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant challenges only whether there was sufficient evidence to prove an assault.[4] An assault "is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *Nickens*, *supra* at 628 (citation omitted). A battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Id*. "[O]ne is guilty of an assault when one attempts an intentional, unconsented, and harmful or offensive touching." *People v Starks*, 473 Mich 227, 234-235; 701 NW2d 136 (2005), citing *Nickens*, *supra* at 630.

Evidence was presented that defendant sexually assaulted the victim over several years. On one occasion, defendant "yanked on [the victim's] pants and asked [her] to take them off." As he tugged on her pants, defendant made a V with two fingers and stuck his tongue through the fingers, which the victim understood to mean that "he wanted oral sex." From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant committed an assault. Although defendant asserts that evidence supporting an assault was weak, the jury was entitled to accept or reject any of the evidence presented. See

[4] Defendant asserts that "[y]anking on a person's pants does not constitute an assault."

People v Perry, 460 Mich 55, 63; 594 NW2d 477 (1999). The evidence was sufficient to sustain defendant's conviction of assault with intent to commit CSC involving sexual penetration.

IV. Prosecutorial Misconduct

We reject defendant's final argument that he is entitled to a new trial because the prosecutor impermissibly argued facts not in evidence, and appealed to the jurors' civic duty. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). But because defendant failed to object to the prosecutor's conduct below, we review his unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A. Facts Not in Evidence

Defendant contends that in the following emphasized portion of the prosecutor's closing argument, she impermissibly argued facts not in evidence:

> Now, counsel indicated [Obey] sided with [defendant]. She trusts her children with him. How - - how could she not trust her niece? How could she not side with her niece? Before she even talked to her niece, before she even got her niece's account of what happened, she was already siding with him. She was already telling her sister, it's her fault. She came on to him. It's not his fault. She hadn't even talked to her sister yet. Unfortunately, it is not unusual for people to discard their family members for someone like [defendant]. That's not an isolated incident. Unfortunately it happens all too often.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Although the prosecution asserts that the prosecutor's remark was responsive to defense counsel's argument that the victim was not credible because her family members, e.g., Obey and See, did not believe her, there was no evidence to support an inference that people often "discard" their family members for "someone like [defendant]." But as previously indicated, defendant did not object to the remark and, therefore, our review is limited to plain error affecting substantial rights. *Carines, supra*.

Viewed in the context of the complete closing and rebuttal arguments, the prosecutor's remark did not affect defendant's substantial rights. The remark involved only a brief portion of the prosecutor's arguments, was of comparatively minor importance considering the totality of the evidence against defendant, and was not so inflammatory that defendant was prejudiced. Moreover, any prejudice that may have resulted could have been cured by a timely instruction. *Schutte, supra* at 721. Indeed, the trial court instructed the jurors that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633

NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, reversal is not warranted on the basis of this unpreserved issue.

We reject defendant's claim that the prosecutor argued facts not in evidence when she made the following emphasized remark during rebuttal argument:

> And counsel wants you to believe there's someone else out there. There's someone else that may - - may have done this. There's no evidence to that effect . . . . *And the thing they can't get past is people knew it was [defendant] before [the victim] went to counseling. The family knew that it was [defendant] before she went for counseling*.

During closing argument, defense counsel suggested that "somebody else sexually assaulted [the victim]," and that the victim impetuously accused defendant during a 2003 counseling session. During trial, the victim testified that, after the first incident in 1998, she told See what had occurred. Also, Diehr testified that in approximately 2000, the victim told her and See that something had occurred between herself and defendant. Viewed in context, the prosecutor's remark that the victim's family knew that defendant was the victim's assailant before the victim's counseling session was a fair inference from the evidence and, thus, not improper. A prosecutor is free to argue reasonable inferences arising from the evidence as they relate to her theory of the case, and is not required to phrase arguments and inferences in the blandest possible terms. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

B. Civic Duty Argument

Defendant also contends that the prosecutor impermissibly appealed to the jurors' civic duty when she stated:

> While things like this happen between family members a lot, it is not a family matter. This is a criminal matter. It is something that is done in society everyday and it's something that needs to be dealt with. Not within the family unit, but with law enforcement and with the prosecutor to address it.
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> This defendant has walked through this for long enough. He's had the protection of people; he - he certainly doesn't deserve that protection of; [sic] he's gotten that. It's time to lift that protection. Hold him accountable for what he's done to [the victim] and find him guilty to [sic] six counts that he's charged with.

Prosecutors should not resort to civic duty arguments that appeal to the prejudices of jurors. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Here, the prosecutor's comments were made during rebuttal argument and occurred after a lengthy and detailed discussion of the evidence. To the extent the prosecutor's remarks could be considered improper, they involved only a brief portion of her closing and rebuttal arguments, and were not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Moreover, the trial court's instructions that the jury should not be influenced by sympathy or prejudice, that the lawyers' comments are not evidence, and that the

case should be decided on the basis of the evidence were sufficient to dispel any possible prejudice. *Long*, *supra*. Defendant is not entitled to a new trial.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder