

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD ALAN SHORT,

Defendant-Appellant.

UNPUBLISHED

October 25, 2007

No. 266368

Kent Circuit Court

LC No. 05-000708-FH

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(c), and his sentence of 15 to 30 years' imprisonment. We affirm.

Defendant first argues that the trial court erred by failing to give a specific unanimity instruction to the jury. We find that no error occurred because defendant was not entitled to such an instruction.

Criminal defendants are entitled to unanimous jury verdicts. MCR 6.410(B); *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). There are circumstances where a general unanimity instruction is insufficient to protect the defendant's right to a unanimous verdict. *People v Gadowski*, 232 Mich App 24, 30; 592 NW2d 75 (1998). But, a trial court is not required to give a specific unanimity instruction merely because a single charge may be based on more than one underlying course of conduct. *Cooks, supra* at 512. In *People v Cooks*, the Michigan Supreme Court ruled:

[W]hen the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. When neither of these factors is present, as in the case at bar, a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of his right to a unanimous verdict. [*Id.* at 530.]

It is undisputed that the trial court gave a general unanimity instruction in this case. In order for defendant to be entitled to a specific unanimity instruction, the prosecution must have

offered evidence that defendant committed multiple acts, each of which individually could satisfy the actus reus element of the charged offense. See *id.* In the case at bar, defendant was not entitled to a unanimity instruction because the prosecutor did not offer evidence of multiple penetrations, each of which could satisfy the actus reus of third-degree criminal sexual conduct, the charged offense. Rather, the prosecution offered evidence that there was one act of sexual penetration. It is irrelevant what type of penetration occurred, because any type of unconsensual sexual penetration is a violation of the statute, if one of the aggravating circumstances exists. MCL 750.520d. In this case, the general unanimity instruction was sufficient to protect defendant's right to a unanimous verdict. Reversal is not required.

Defendant next argues on appeal that the trial court deprived him of his statutory right to a preliminary examination when it instructed the jury that it could find defendant guilty if the prosecutor proved, beyond a reasonable doubt, that defendant penetrated the victim's genital opening with his penis, finger or tongue. Defendant claims that the instruction violated his right to a preliminary examination because the district court did not hear evidence that the defendant digitally or orally penetrated the victim. We disagree.

In order to bind defendant over on third-degree criminal sexual conduct, the district court had to find probable cause that defendant sexually penetrated the victim's vagina by one of the means listed in MCL 750.520a. See *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301 (2006). Probable cause requires evidence sufficient to make a person of ordinary caution and prudence conscientiously entertain a reasonable belief of the defendant's guilt. *People v Yost*, 468 Mich 122, 125; 659 NW2d 604 (2003). At the preliminary examination, the victim testified that she woke up to find defendant penetrating her with his penis. The victim's identification of defendant and description of the act was sufficient evidence to make "a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt" for the charged offense. *Id.* at 126. Because the evidence presented at the preliminary examination clearly supported the district court's decision to bind defendant over on one charge of third-degree criminal sexual conduct, defendant's right to a preliminary examination was not violated.

Defendant's third issue on appeal is that the trial court implicitly added two additional counts of third-degree criminal sexual conduct to the case when it instructed the jury based on defendant's statements that he orally and digitally penetrated the victim. Defendant further argues that the prosecutor could not prove the existence of these crimes without defendant's confession; therefore, defendant's conviction violated the corpus delicti rule. Defendant's argument is meritless. Defendant was charged, bound over, tried and convicted of one count of third-degree criminal sexual conduct. The trial court never added or amended the charges defendant faced. Moreover, the corpus delicti rule is inapplicable to this case. Defendant's statements to police were factual admissions that did not amount to a confession. Therefore, his statements were properly admitted, and no violation of the corpus delicti rule occurred. *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991).

Next, defendant argues that he is entitled to resentencing because the trial court improperly scored offense variables (OV) 7, MCL 777.37, and 8, MCL 777.38.

It is well settled that we will uphold a scoring decision for which there is any evidence in support. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A preserved challenge to a scoring of the sentencing guidelines is reviewed for an abuse of discretion. *People*

v Sexton, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). Pursuant to MCL 777.37(1)(a), the trial court is to score 50 points if a victim was treated with sadism, torture or excessive brutality or conduct designed to substantially increase the fear and anxiety that a victim suffered during the offense. In this case, the victim testified that she awoke during the sexual assault, and after discovering the assault taking place, she recalled defendant raising his fist in the air and then losing consciousness. The victim testified that when she woke up in the morning she had a big bump on the side of her head. Additionally, the sexual assault nurse examiner testified that she had observed an abrasion and swelling on the left side of the victim's head and pain on the right side of the victim's head near her forehead. Finally, Pierce testified that defendant told him that when the victim woke up during the assault, he "thumped her upside the head and knocked her back out." The trial court's scoring 50 points for OV 7 was within the principled range of outcomes because it clearly met the definition of brutality under the statute.

The trial court's scoring decision for OV 8 is also supported by evidence in the record. MCL 777.38 requires 15 points to be scored when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." The record contains testimony that defendant admitted that he carried the victim into his bedroom, where the criminal act occurred. Even though the trial court did not rely on this testimony to find that defendant asported the victim to his bedroom, the statement is in the record and supports the trial court's scoring decision. "Scoring decisions for which there is any evidence in support will be upheld." *Endres, supra* at 417. Therefore, we conclude the trial court did not abuse its discretion when it scored 15 points for OV 8.

Defendant next alleges that the prosecutor committed misconduct by failing to correct a witness' false testimony and by arguing facts not in evidence. Defendant did not preserve these alleged instances of prosecutorial misconduct for appeal; therefore, his claims are reviewed for plain error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). To establish plain error, a defendant must establish that error occurred, the error was plain and the error affected his or her substantial rights. *Id.* Even if a defendant establishes the elements of plain error, reversal is only merited if the defendant was actually innocent or the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Error requiring reversal will not be found if the prejudicial effect of the prosecutor's remarks could have been cured with a timely instruction. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005).

Defendant contends that the prosecutor knew, or should have known, that defendant's cellmate lied when he testified that defendant had a previous criminal sexual conduct conviction. Indeed, defendant does not have a previous criminal sexual conduct conviction, and the prosecutor did not correct the cellmate's testimony that defendant had such a conviction. Thus, there was error. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). It is unlikely, however, that in light of all the other evidence presented against defendant, that this isolated comment tipped the scale in favor of his conviction. Furthermore, defendant is not entitled to reversal because a curative instruction would have most certainly cured any prejudice he suffered. *Williams, supra* at 70-71.

Defendant also claims that the prosecutor committed misconduct by failing to correct the cellmate's false testimony that he did not take psychotropic medications while incarcerated. It is

apparent from the record that the prosecutor knew that the cellmate took psychotropic medications in jail. It is undisputed that the prosecutor did not correct the cellmate's testimony when he denied taking such medications. Although the prosecutor failed to fulfill his duty to correct testimony he knew was false, *Lester, supra* at 277, defendant has failed to show that a curative instruction could not have cured the prejudice he suffered as a result of the prosecutor's failure to correct the testimony. *Williams, supra* at 70-71.

Defendant's third claim of prosecutorial misconduct is that the prosecutor argued facts outside of evidence when he suggested that defendant drugged the victim with GHB. A prosecutor may not argue facts outside of the evidence but may argue the evidence and all reasonable inferences. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, there were facts in evidence that defendant drugged the victim. The prosecutor's argument, then, constituted proper argument because suggesting that defendant used GHB is a reasonable inference from the testimony that defendant drugged the victim. Additionally, defendant cannot show that a curative instruction would not have cured any prejudice created by the prosecutor's remark, as the remark was not unfairly prejudicial. *Williams, supra* at 70-71. Reversal is not warranted.

Defendant also argues that he received ineffective assistance at trial because trial counsel did not object to the prosecutor's alleged misconduct, trial counsel did not impeach the jailhouse cellmate on cross-examination, and trial counsel failed to question the victim's nurse about the dangers of mixing alcohol and anti-depressants.

To establish ineffective assistance of trial counsel, defendant must show: 1) trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; 2) but for trial counsel's errors, there is a reasonable probability that the result of his trial would have been different; and 3) that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that his trial counsel's performance was deficient, a "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* at 302. Effective assistance is presumed, and a defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant received effective assistance at trial. First, as discussed above, the prosecutor's remarks regarding GHB were neither improper nor prejudicial to defendant. Thus, if defense counsel had objected to the remarks, his objection would have been meritless and futile. Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Second, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," and this Court "will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Trial counsel's decision on how to cross-examine defendant's cellmate is considered trial strategy, which this Court will not second-guess. *Id.* The record does not reveal any error. Third, trial counsel was not ineffective for failing to further question the nurse about the interactions between alcohol and anti-depressants. Again, a decision regarding how to question a witness is trial strategy and this Court will not substitute its own judgment for that of trial counsel on such matters. *Id.* We also note that the nurse repeatedly stated that she was not an expert on drug and alcohol interactions.

There is no indication that had defense counsel pursued the line of questioning, the nurse would have been able to provide the answers defendant wanted. Therefore, no plain error occurred and defendant is not entitled to relief. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

Lastly, defendant argues that he is entitled to a new trial based on newly discovered evidence, specifically two affidavits from fellow jail inmates that undermine the jailhouse's cellmate's testimony. For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial." *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).

Arguably, the affidavits are newly discovered evidence, which are not merely cumulative because defendant obtained them after trial and they contain evidence of the cellmate's potential bias against defendant, which was not introduced at trial. However, defendant cannot fulfill the remaining two elements to merit a new trial. First, we can find no reason why defendant could not have discovered and produced the affidavits or the affiants' testimony at trial, using reasonable diligence. Second, it is unlikely that including the newly discovered evidence on retrial would cause a different result. Although the evidence could have the effect of undermining the cellmate's credibility, it would not undermine the credibility of the victim. The victim's testimony that she woke up to defendant raping her, she told him to stop and remembered seeing him raise his arm to swing at her before she lost consciousness was sufficient to convict defendant; the cellmate's testimony was merely cumulative. Therefore, a different result on retrial is not probable.

Affirmed.

/s/ Christopher M. Murray