STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2008
v	No. 277143 Wayne Circuit Court
REYNALDO GARCIA, Defendant-Appellant.	LC No. 06-009152-01

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree criminal sexual conduct (person under 13 years of age), MCL 750.520b(1)(a), and three counts of second-degree criminal sexual conduct (person under 13 years of age), MCL 750.520c(1)(a). Defendant was sentenced to 135 months to 15 years' imprisonment for each of the first-degree criminal sexual conduct convictions, and 3 to 15 years' imprisonment for each of the three second-degree criminal sexual conduct convictions. We affirm.

Defendant's convictions arise from separate incidents of sexual abuse involving two girls, complainant and cocomplainant, who resided with defendant. Defendant first sexually assaulted complainant when she was 10 or 11 years old. On that occasion, in or around the first half of 2004, defendant, while drunk, squeezed complainant's breasts with his hand under her shirt.

Cocomplainant was first sexually assaulted by defendant when she was about nine years old. Cocomplainant was in her bedroom, on the bed, listening to music. Defendant entered her bedroom and approached her. When she tried to get off the bed, defendant thrust her back onto it. Defendant then unbuttoned her pants, pulled her underwear down, and penetrated her vagina with his penis. While doing so, he also touched her breasts with his hands.

Defendant raped cocomplainant a second time before she was 13 years old. Later, defendant raped cocomplainant a third time, in the back seat of defendant's car.

Defendant argues that the prosecutor improperly referred to defendant's consumption of alcohol during closing argument.[1] We review unpreserved claims of prosecutorial misconduct for plain error. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999). To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Carines, supra* at 763. We find no plain error.

As a general rule, "prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1994). Moreover, a prosecutor is "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id.* A prosecutor is not required to present her arguments using only the blandest terms possible. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004).

During closing argument, the prosecution stated, in relevant part:

> [Defendant] was so drunk remember she told you he was so intoxicated he could barely walk. [Complainant] knew she was in for it then. Because what did he do, he hops over her. And [defense counsel] said what do you mean he hops over her. She very calmly explains she sat there and made an effort to explain. He hopped over her that she had explained to me, lied behind her with his face front facing her back. Reached his arm over her and put his hand under her shirt and felt her breasts.

We observe that the prosecutor's argument, that "[complainant] knew she was in for it then," was improper because this statement was unsupported by the evidence. Complainant did not testify that defendant's intoxication made her aware that a sexual assault was imminent. Further, complainant did not testify that she was ever afraid of defendant until after defendant touched her breasts. Accordingly, because the prosecution's statement that complainant knew that defendant intended to assault her because he was drunk was unsupported by the evidence, it constituted improper argument.

Nevertheless, defendant cannot demonstrate that this isolated remark during closing argument affected his substantial rights. *Pipes, supra* at 279; *Carines, supra* at 763. Following the prosecution's closing rebuttal argument, the trial court instructed the jury that: "The lawyer's

[1] In defendant's statement of the issue, he alleges that the prosecutor committed misconduct by improperly eliciting testimony regarding defendant's drinking. However, defendant subsequently failed to further discuss this contention in his brief. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 412, 59; 687 NW2d 342 (2004).

statements and their [sic] arguments are not evidence. They're only meant to help you understand the evidence and each side[']s legal theories." Generally, jurors are presumed to have followed instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 221 (1998). Because defendant cannot show that the jury convicted defendant on the basis of the prosecution's statement during closing argument, defendant has forfeited his challenge to the prosecution's remark, and as such, reversal is not warranted. *Carines, supra* at 763.

Defendant points to a second example of allegedly improper prosecutorial argument:

> [Complainant and co-complainant] aren't some girls that got together with some personal vendetta. Yeah, are they angry about the divorce? What teenager or 11 or 12 year old wouldn't be angry about a divorce with their parents. That's your world when you're that age.
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> But when asked were you angry just at your dad or were you angry at the situation. [Co-complainant] said no I was just angry at the situation. She's a teenage girl of course she's angry that her parents – mommy and daddy don't love each other anymore. So, that's what we're dealing with.
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> Not only that, but . . . their mother is the one that initiated the divorce. She's the one who initiated the divorce. It's not even like Dad ran off with some tramp he found you know. Mom initiated the divorce. Why does mom initiate the divorce? Five years 2001 is when she initiated the separation. Five years before the abuse comes out. Because she's tired of her husband and his drinking. We're not talking about girlfriends and revenge and money and all these other things that might give these girls or the mom motive to make all this up. No, we're talking about a mom who was tired of her husband drinking. So, she initiates the separation. Does she fight visitation, no. Do the girls fight visitation, no. So none of that makes sense.

We conclude that the prosecution's references to defendant's use of alcohol do not constitute improper argument. All of the facts to which the prosecution referred, were supported by testimony, and the focus of the prosecution's argument was not defendant's alcohol consumption. Instead, the focus of the prosecution's argument was that defendant's theory, that complainant and co-complainant sought revenge against defendant (for breaking up the family and fabricated the incidents of sexual abuse in order to affect the outcome of pending child custody proceedings), did not make sense, given the testimony. The prosecution noted that the mother testified that she, and not defendant, initiated the separation and divorce, and that this testimony rebutted defendant's assertion that complainant and co-complainant accused defendant of sexual abuse as retribution for defendant's termination of the marriage. In turn, this argument advanced the prosecution's theory that complainant and co-complainant testified credibly, and were not influenced by improper motives.

Because the record shows that the prosecutor's argument was based upon evidence, and reasonable inferences drawn therefrom, the prosecutor's remarks about defendant's alcohol consumption did not deprive defendant of a fair trial. *Bahoda, supra* at 282. Further, because defendant cannot show that the jury convicted defendant on the basis of the prosecution's statement during closing argument, even if the prosecutor's remarks constituted error, that error

would not have affected defendant's substantial rights. *Carines, supra* at 763. We conclude that defendant has forfeited this challenge to the prosecution's remark, and accordingly, reversal is not warranted.

Defendant next argues that his trial counsel's failure to object to the prosecutor's comments regarding defendant's alcohol use during closing argument constituted ineffective assistance of counsel. We disagree.

Defendant did not bring a motion for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*[2] hearing before the trial court. Accordingly, our review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that sound trial strategy motivated trial counsel's conduct. *Toma, supra* at 302. Additionally, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different, but for the counsel's errors (i.e., prejudice). *Id.* at 302-303.

Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *Matuszak supra* at 58. Failing to advance a meritless argument, or to raise a futile objection, does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

With respect to defendant's first allegation of improper prosecutorial argument, defendant cannot show that, but for his counsel's failure to object to the prosecutor's remark during closing argument, there was a reasonable probability that the result of the proceedings would have been different. *Toma, supra* at 302-303. Complainant testified in detail regarding the incident in which defendant touched her breasts, and nothing in the record shows that the jury was more likely to find her testimony credible on the basis of the prosecution's argument that complainant "knew she was in for it," when she became aware that defendant was intoxicated. Because defendant cannot show that he was prejudiced when his counsel did not object to the

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

prosecution's remark during closing argument, his contention that he was ineffectively assisted at trial fails.

Defendant's ineffective assistance of counsel claim regarding the subsequent references to defendant's alcohol consumption also lacks merit. Because the prosecutor's remarks were based upon the evidence, and reasonable inferences drawn from the evidence, as it related to the prosecution's theory of the case, it did not constitute improper argument, and an objection by trial counsel would have been meritless. Because an ineffective assistance of counsel claim may not be premised on counsel's failure to raise a meritless or futile objection, defendant's argument fails. *Snider, supra* at 425. Moreover, the record does not support defendant's allegations of ineffective assistance of counsel. Accordingly, defendant is not entitled to a new trial.

Defendant next argues that because two of his convictions for first-degree and second-degree criminal sexual conduct arose from the same sexual act, defendant's convictions violate his Double Jeopardy protection against multiple punishments for the same offense. We disagree.

Because a Double Jeopardy question presents a significant constitutional issue, this Court will review the double jeopardy issue on appeal regardless whether the defendant raised it below. *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002). We review a double jeopardy issue de novo. *Id*.

Under both the Federal and Michigan Constitutions, a criminal defendant may not be placed twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The Double Jeopardy clauses protect a defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). The validity of multiple punishments under the Fifth Amendment is determined under the federal "same elements" standard, or *Blockburger*[3] test. *People v Ream*, 481 Mich 223, 227; 750 NW2d 536, 539 (2008). Although the Michigan Supreme Court is not bound in its interpretation of the Michigan double jeopardy clause by any particular interpretation of the Fifth Amendment, the Court has been persuaded in the past that interpretations of the Double Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of the Michigan double jeopardy clause. *Id*. at 227 n 1. Where it is clear that the Legislature intended to impose multiple punishments, the imposition of multiple sentences is proper, regardless of whether the crimes consist of the same elements; and, where the Legislature has not clearly expressed that intent, multiple offenses are separately punishable, if each offense contains an element that the other does not. *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007).

In *Ream*, the defendant was convicted of both felony murder and the predicate felony (first-degree criminal sexual conduct). The Court considered whether these convictions violated the multiple punishments strand of double jeopardy law. The Court held that because each of the offenses of which defendant was convicted contains an element that the other does not, they are not the same offense, and therefore there is no double jeopardy violation. *Ream, supra* at 225-226. We reach the same conclusion here.

[3] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

The elements of first-degree criminal sexual conduct are: (1) that the defendant engaged in sexual penetration with another person; and (2) the other person was under 13 years of age. MCL 750.520b(1)(a); *People v Hammons*, 210 Mich App 554, 557; 534 NW2 183 (1995). Sexual penetration is statutorily defined as "sexual intercourse . . . or any other intrusion, however slight, of any part of a person's body . . . ." MCL 750.520a(o). The elements of second-degree criminal sexual conduct are: (1) that the defendant engaged in sexual contact with another person; and (2) the other person was under 13 years of age. MCL 750.520c(1)(a); *People v Lemons*, 454 Mich 234, 252; 562 NW2d 447 (1997). The Legislature defined sexual contact as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose[.]" MCL 750.520a(n). The different language of these statutes demonstrates that the Legislature intended to specifically criminalize "sexual penetration," and to distinguish it from the separate crime of "sexual touching."

Here, cocomplainant testified that while defendant penetrated her vagina, defendant touched her breasts on top of her clothing with his hands. Defendant argues that his touching of cocomplainant's breasts occurred within the same "transaction" as the sexual penetration, because the sexual touching and sexual penetration occurred concurrently. But the penetration of cocomplainant's vagina, and the touching of her breasts, occurred on different areas of co-complainant's body, and thus were distinct sexual acts. In other words, defendant committed first-degree criminal sexual conduct when he penetrated cocomplainant's vagina, and second-degree criminal sexual conduct when he touched her breasts, regardless of when these distinct acts occurred. Each of these two crimes contains an element that the other does not. Thus, although defendant's sexual penetration of cocomplainant's vaginal area, and his sexual contact with her breasts, were within the same time frame, each was a distinct criminal offense, punishable separately without infringement of Double Jeopardy protections.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Kurtis T. Wilder