

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOMINIQUE TREVON MAYES,

Defendant-Appellant.

UNPUBLISHED

June 15, 2010

No. 290962

Oakland Circuit Court

LC No. 08-222274-FC

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e), second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(e), unlawfully driving away an automobile (UDAA), MCL 750.413, first-degree home invasion, MCL 750.110a(2), larceny of a firearm, MCL 750.357b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 40 to 80 years' imprisonment for the CSC I conviction, 8 to 20 years' imprisonment for the CSC II conviction, three to five years' imprisonment for the UDAA conviction, 11 ½ to 20 years' imprisonment for first-degree home invasion conviction, three to five years' imprisonment for the larceny of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that error occurred when the trial court admitted prior bad acts evidence under MRE 404(b). We disagree. Defendant failed to object when the prior bad act evidence was introduced, and thus, review is limited to plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Usually, other acts evidence is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on the defendant's history of misconduct. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the con at issue in the case.

To be admissible under MRE 404(b), other acts evidence 1) must be offered for a proper purpose, 2) must be relevant, and 3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). “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.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). MRE 404(b)(2) requires the prosecution to provide notice before trial when it intends to introduce other acts evidence, and MRE 105 provides that upon request, the trial court may provide a limiting instruction.

The prosecution properly filed its notice before trial that it intended to use other acts evidence because it was relevant to show defendant intended to commit the crime, that defendant had knowledge of the victim, and that the crime was part of a common plan or scheme. At trial, there was evidence that defendant committed the charged crimes against the victim; His fingerprints were on the duct tape, and his semen was on the victim’s abdomen. The prosecution used defendant’s prior bad acts against the same victim to show defendant intended to commit the charged crimes, had knowledge of the victim, and to support the inference that defendant’s actions were part of a common plan or scheme. Thus, the other acts evidence was introduced for a proper purpose, it was relevant, and it was more probative than prejudicial. It was not plain error for the trial court to admit the other acts evidence.

Additionally, defendant argues that error warranting reversal occurred when the victim gave a volunteered answer mentioning defendant’s prior incarceration. We review this preserved claim of error for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). The trial court abuses its discretion when its decision is outside the principled range of outcomes. *Id.* 588-589. In a criminal case, nonconstitutional trial error will not warrant reversal unless the defendant meets his burden of establishing that “it is more probable than not that a different outcome would have resulted without the error.” *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Michigan has long recognized that the admission of evidence of a prior conviction may result in unfair prejudice to a defendant. *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988). But, an unresponsive and volunteered answer from a witness to a proper question is not grounds for a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Because the trial court had ruled that the prosecution would be permitted to introduce evidence of defendant’s previous offense against the victim pursuant to MRE 404(b), the evidence of defendant’s prior criminal activity was already properly before the jury, and the jury presumably was aware that defendant may have been incarcerated for the previous offense. In reviewing the trial testimony, the prosecutor did not intentionally elicit the victim’s testimony regarding defendant’s prior incarceration. Further, the prosecution agreed the testimony was irrelevant, and the trial court gave a limiting instruction under MRE 105 specifically instructing the jury that it could not convict defendant of the charged offenses based on his other bad con. Defendant has not established that outcome determinative trial error occurred.

Defendant argues that prosecutorial misconduct resulted from the prosecutor’s failing to correct the victim’s testimony regarding defendant’s prior incarceration and from the prosecutor’s referring to defendant’s prior incarceration in her closing argument. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the

defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To avoid forfeiture under the plain error doctrine, the defendant must show that: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the error affected the defendant's substantial rights. *Id.* To show plain error affected the defendant's substantial rights, the defendant must persuade the appellate court that the error affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. Moreover, reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when, regardless of innocence, the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

In reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecution's remarks in context, to determine whether the defendant received a fair and impartial trial. *Aldrich*, 246 Mich App at 110. The propriety of the prosecution's comments depends on the specific facts of each case because "a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Prosecutors may argue all reasonable inferences that arise from the evidence; they need not confine argument to placid oratory. *Id.*; *Aldrich*, 246 Mich App at 112.

The prosecutor, in her closing argument, stated:

[Defendant] violated the sanctity of [the victim's] home—not on one occasion but on two separate occasions, three-and-a-half years apart. And I submit to you, ladies and gentlemen, that that second time that he violated the sanctity of her home, that that was no accident, it was no routine burglary. It was a planned, thought-out, premeditated attack on [the victim].

And does it have anything to do with the fact that he got in trouble and was prosecuted three-and-a-half years ago for what did [sic]? I don't know. I can't tell you what—what's in his mind. I don't—I don't think anybody can.

* * *

But the evidence absolutely supports that three-and-a-half years—approximately three-and-a-half years ago, [defendant] went away for invading the home of [the victim] and approximately three-and-a-half years later, he came back with a planned attack and what he was going to do to her.

The prosecutor was merely arguing reasonable inferences that arose from the evidence in this case. The prosecutor did not specifically refer to defendant's prior incarceration, but rather, generally stated that defendant "went away." Although not perfect language, in viewing the comment in context, the prosecutor was arguing a reasonable inference from the evidence, and she was not required to use the blandest of all possible terms.

Furthermore, a curative instruction generally eliminates any possible prejudicial effect that may have resulted from prosecutorial misconduct. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). In this case, the trial court properly instructed the jury that defendant was innocent until proven guilty, the prosecution bears the burden of proving each element of

each charged crime beyond a reasonable doubt, defendant had an absolute right not to testify, and the attorneys' statements and arguments were not evidence. Thus, any potential prejudice arising from the prosecutor's misstatement or allegedly improper comment was dispelled. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995); *Callon*, 256 Mich App at 330-331. We conclude, on review of the entire record and evaluating the prosecutor's comments in context, that defendant received a fair and impartial trial. *Aldrich*, 246 Mich App at 110. Defendant cannot show plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

Defendant argues that the information did not provide him sufficient notice of the nature of the CSC II charge. We disagree. Unpreserved constitutional errors are reviewed for plain error affecting substantial rights. *Id.* at 764, 774.

Due process entitles a defendant to reasonable notice of the charges against him and an opportunity to present his defense. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). Thus, the test for sufficiency of the information is whether it notifies the defendant of the nature and character of the crime charged so as to enable him to prepare his defense. *People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994). But "the constitutional notice requirement is not some abstract legal technicality requiring reversal in the absence of a perfectly drafted information." *Darden*, 230 Mich App at 601. Rather, "it is a practical requirement that gives effect to a defendant's right to know and respond to the charges against him." *Id.*

The information alleged defendant engaged in sexual contact with the victim under circumstances making the contact CSC II. During defendant's preliminary examination, the victim testified that defendant penetrated the victim's vagina with his penis and, separately, touched the victim's vagina with a vibrator. Finally, in her opening statement, the prosecutor noted to the jury that defendant was charged with CSC II on the basis of his touching the victim's vagina with a vibrator. Defendant did not deny that he touched the victim's vagina with a vibrator, rather, defendant's only argument was that he did not commit CSC I. Patently, defendant was notified of the nature and character of the crimes charged and was able to prepare his defense. *Weathersby*, 204 Mich App at 101.

Defendant argues error occurred when the trial court read the CSC II jury instructions. The trial court read the jury instructions and then asked both the prosecution and defense if there were any objections. Both parties stated they were satisfied with the jury instructions. Defendant has waived appellate review of this issue, and we decline to address it. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant argues that inadequate jury instructions on the CSC II charge led to his double jeopardy rights being violated. We disagree. If a defendant fails to preserve a constitutional issue by not raising the issue before the trial court, review is limited to plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-764. Defendant bears the burden of showing a plain error affected the outcome of the proceedings. *Id.*

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). This guarantee protects a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *Id.* The purpose of the double jeopardy protection against multiple punishments for the same offense

is to protect the defendant's interest in not enduring more punishment than the Legislature intended. *Id.* at 450-451, quoting *People v Sturgis*, 427 Mich 392, 400; 397 NW2d 783 (1986). Where the Legislature has clearly expressed its intent to impose multiple punishments, there is no violation of double jeopardy. *Id.*; *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009). Otherwise, whether two offenses constitute the "same offense" for purposes of this double jeopardy protection is determined by applying the same-elements test of *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). See *People v Smith*, 478 Mich 292, 295-296, 324; 733 NW2d 351 (2007). Under this test, two offenses do not constitute the same offense for double jeopardy purposes if each offense requires proof of a fact that the other does not. *Id.* at 304, 315-316, 324; *Blockburger*, 284 US at 305.

In this case, the elements of CSC II are: (1) defendant engages in sexual contact with the victim, (2) while defendant is armed with a weapon. MCL 750.520c(1)(e); CJI2d 20.2; CJI2d 20.8. The elements of CSC I, in this case, are: (1) defendant engages in sexual penetration with the victim (2) while defendant is armed with a weapon. MCL 750.520b(1)(e). On the basis of the Legislature's definitions of "sexual contact" and "sexual penetration," each offense requires proof of a fact that the other does not. See *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997) (CSC II is a cognate but not lesser-included offense of CSC I). "Sexual contact" to sustain a CSC II conviction is "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, done for a sexual purpose, or in a sexual manner" for the purpose of revenge, to inflict humiliation, or out of anger. MCL 750.520a(q). "Sexual penetration" to prove CSC I means, "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body" MCL 750.520a(r). Defendant's convictions of both CSC I and CSC II do not violate double jeopardy. *Smith*, 478 Mich 315-316.

Moreover, no error occurred when the trial court read the jury instructions regarding the CSC II charge because the trial court provided the jury with all the elements of the crime charged, it fairly presented the issues being tried, and sufficiently protected defendant's rights. See *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007). Furthermore, the victim testified at trial that defendant penetrated her vagina with his penis and that defendant also touched the victim's vagina with a vibrator. Thus, defendant's convictions of both CSC I and CSC II did not violate his double jeopardy protection; plain error did not occur.

Defendant argues there was insufficient evidence to sustain his conviction of CSC II. We disagree. When reviewing such a claim, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). In reviewing a sufficiency claim, this Court "must not interfere with the jury's role as the sole judge of the facts." *Id.*

In looking at the evidence in the light most favorable to the prosecution, sufficient evidence existed to convict defendant of CSC II. On the basis of the victim's testimony that defendant touched her vagina with a vibrator, and which need not be corroborated, MCL 750.520h, a reasonable jury could find all the elements of CSC II proved beyond a reasonable doubt. We will not interfere with the jury's fact-finding role. *Meshell*, 265 Mich App at 619.

Defendant argues counsel was ineffective because he 1) failed to object to the prosecution's reference during closing argument to defendant's prior incarceration; 2) failed to object to the jury instructions regarding CSC II; and, 3) during closing argument prejudiced the jury against defendant. We disagree. A defendant must make a testimonial record in the trial court with a motion for a new trial that will evidentially support his claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). When there is no evidentiary hearing or motion for a new trial at the trial level, review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different. *Noble*, 238 Mich App at 662. A defendant claiming ineffective assistance must overcome the "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (citation omitted). Counsel's decision concerning whether to request or refrain from requesting a jury instruction is usually a matter of trial strategy, *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986), as is counsel's decision regarding whether to raise objections during closing arguments, *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

With respect to defendant's first two claims of ineffective assistance, we have already concluded that trial error did not occur. Thus, defendant has not proven that counsel's failure to object to the prosecution's comment during closing argument or the jury instructions constituted deficient performance. See *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002) (defense counsel need not bring futile objections). Defendant has not overcome the presumption that counsel's actions constituted sound trial strategy; consequently, defendant has not established that a new trial is warranted. Furthermore, given the evidence against defendant, including the testimony of the victim, who stated defendant attacked and robbed her, defendant's fingerprint that was found on the duct tape placed over the victim's eyes, defendant's DNA that matched the semen collected from the victim's abdomen, and defendant's use of the victim's cell phone and vehicle after the assault, any deficiency in counsel's performance did not prejudice defendant. *Noble*, 238 Mich App at 662. Therefore, defendant's claim fails on either basis.

Additionally, defendant argues that defense counsel was ineffective for admitting during his closing argument that defendant was guilty of all the charged crimes except CSC I and for informing the jury that defendant was "repulsive." In general, "[e]ven if the evidence is overwhelming, defense counsel will often not be allowed to argue the functional equivalent of a guilty plea to the highest possible charges absent any evidence on the record that defendant consented to this tactic." *People v Wise*, 134 Mich App 82, 97; 351 NW2d 255 (1984). But, "arguing that the defendant is merely guilty of the lesser offense is not ineffective assistance of counsel." *Id.* at 98. This Court will not substitute its judgment for that of counsel regarding

matters of trial strategy, *Unger*, 278 Mich App 242-243, including a strategy of admitting guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

Regarding defense counsel's comment that defendant was repulsive, we presume this also to be part of defense counsel's strategy to remind the jury that they should not convict defendant based on their personal feelings towards him, and that the jury must find the evidence in the case proved beyond a reasonable doubt that defendant committed the charged crimes. That a strategy fails does not render it ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Because defendant has not overcome the presumption that defense counsel's actions constituted trial strategy, he is not entitled to a new trial on this basis. Furthermore, given the evidence against defendant, as previously discussed, defendant cannot establish that but for any alleged deficiency in counsel's performance the result of the trial would have been different. Therefore, counsel was not ineffective on this basis.

Finally, defendant argues the trial court abused its discretion in its upward departure from the sentencing guidelines range. We disagree. A trial court's decision to depart from the sentencing guidelines is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when a trial court chooses a minimum sentence that is outside the range of reasonable and principled outcomes. *Id.*; *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The existence of a particular factor supporting a trial court's decision to depart from the sentencing guidelines is reviewed for clear error and the conclusion of whether a reason is objective and verifiable is reviewed de novo. *Id.*

A trial court must impose a minimum sentence within the sentencing guidelines range unless the court determines it has a substantial and compelling reason to depart from the guidelines sentence range, and states the reasons on the record. MCL 769.34(2), (3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The court may depart from the guidelines sentence range for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines, or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a) and (b); *Smith*, 482 Mich at 300. Substantial and compelling reasons for departure exist only in exceptional cases. *Id.* at 299. In determining whether there is a sufficient basis to justify departure, the principle of proportionality applies. *Id.* Proportionality "defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." *Babcock*, 469 Mich at 262. "For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's con and prior criminal history." *Smith*, 482 Mich at 300.

Additionally, the trial court's reasons for departing from the guidelines range must be objective and verifiable. *Abramski*, 257 Mich App at 74. Objective and verifiable has been defined to mean, "the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *Id.* The objective and verifiable facts "must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Smith*, 482 Mich at 299. The trial court may draw inferences about the defendant's behavior from the objective evidence. *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008).

Defendant's minimum sentence guidelines range for his CSC I conviction was 171 to 285 months. The trial court departed by giving defendant a minimum sentence of 480 months, or 40 years. The trial court articulated the particular reasons why it found it necessary to depart from the statutory guidelines range. The trial court relied on several factors, each of which, it stated, could independently warrant departure. First, the trial court stated that this was the second time defendant committed a crime against the victim. Second, the victim suffered severe abuse as a result of defendant's attack. The victim's eyes were taped shut, and she was defenseless. The victim told defendant she could not breathe, that she had a pacemaker, and that he was hurting her badly. Still, defendant aggressively persisted in his sexual assault before robbing the victim. The trial court noted that the nurse examiner testified that the victim's internal vaginal injuries, including trauma to the cervix, were not normally seen. Third, the trial court noted that OV-1 and OV-2 were inadequate in properly scoring defendant's con because defendant carried two weapons, a knife and a gun, but the guidelines only contemplated one. The trial court also found OV-10 inadequate for properly scoring defendant's con because defendant's con was not just predatory, he exploited the victim's age and the fact that she lived alone. Finally, the trial court noted that defendant's OV total of 155 was well above the 100 points needed to reach OV-level VI and that defendant's con was a reprehensible crime that epitomized a nightmare. We find that the evidence presented at trial supports these facts; consequently, the trial court did not commit clear error.

The trial court's reasons are also objective and verifiable. The evidence presented during trial confirmed all the facts the trial court articulated explaining its departing from the guidelines' recommended sentence range. Further, those facts were external to the mind of the judge, *Abramski*, 257 Mich App at 74, and presented exceptional circumstances that keenly and irresistibly grabbed the trial court's attention, *Smith*, 482 Mich at 299. The trial court relied on the fact that defendant had previously attacked the victim, and that defendant knew the victim's age and that she lived alone. Further, defendant continued his aggressive sexual assault on the victim despite the victim's crying out that she could not breathe, she had a pacemaker, and that defendant was badly hurting him. We conclude that the trial court did not abuse its discretion by departing from the sentencing guidelines range and imposing a greater sentence.

Finally, the trial court must not only justify its decision to depart from the sentencing guidelines, but must also justify the magnitude of the departure. *Smith*, 482 Mich at 303-304. A sentence must be "proportionate to the seriousness of the defendant's con and to the defendant in light of his criminal record." *Babcock*, 469 Mich at 262. The trial court's upward departure was proportionate because defendant engaged in similar con with the same victim three and a half years prior. Furthermore, defendant disregarded the victim's continuous pleas to stop and her physical conditions, and defendant's aggressive assault on the victim lead to injuries not normally seen on sexual assault victims. The trial court did not abuse its discretion in determining that there were substantial and compelling reasons to justify the departure in defendant's sentence; those reasons were objective and verifiable, and the sentence imposed was proportionate to the offense and the offender.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Alton T. Davis