# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 22, 2016 |
| v<br><br>GARY WALTER SOWA, JR.,<br><br>Defendant-Appellant. | No. 325268<br>Saginaw Circuit Court<br>LC No. 14-039702-FC |

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | |
| v<br><br>STEVEN LEE JACKSON,<br><br>Defendant-Appellant. | No. 325725<br>Saginaw Circuit Court<br>LC No. 14-039993-FC |

Before: GLEICHER, P.J., and MURPHY and OWENS, JJ.

PER CURIAM.

After a hung jury resulted in a mistrial in 2013, defendants were tried jointly before a single jury. The jury found both defendants guilty of one count each of kidnapping, MCL 750.349, conspiracy to commit kidnapping, MCL 750.157a; MCL 750.349(1)(c), and conspiracy to commit first-degree criminal sexual conduct (CSC I), MCL 750.157a; MCL 750.520b(1)(d)(*i*) (sexual penetration involving incapacitated victim by actor aided or abetted by another), along with three counts each of CSC I under MCL 750.520b(1)(d)(*i*). The trial court sentenced defendant Gary Walter Sowa, Jr., as a fourth-offense habitual offender, MCL 769.12, to life imprisonment for each offense, with the CSC I sentences to be served consecutively to the remaining sentences. Defendant Steven Lee Jackson was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 50 to 80 years in prison for each of the CSC I convictions, to be served consecutively to the remaining sentences imposed of 50 to 80 years' imprisonment for the kidnapping conviction and life imprisonment for the two conspiracy convictions. Both defendants appeal as of right and their appeals have been consolidated. See

*People v Sowa, Jr*; *People v Jackson*, unpublished order of the Court of Appeals, entered December 23, 2015 (Docket Nos. 325268 and 325725). We affirm defendants' convictions but remand to the trial court for a determination of whether resentencing of both defendants is required pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), and *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005).

## I. FACTUAL BACKGROUND

Complainant, her sister, and two of her sister's friends attended a corporate-sponsored event at Dixie Motor Speedway in August 2011. Complainant, who was the designated driver for the group, disappeared from the racetrack after the races were halted due to a rainstorm. Police later located complainant at defendant Jackson's house. Complainant testified that she had no memory from when it began raining until she "woke up" on the bedroom floor at the house, with police officers standing over her. Sperm cells were found in complainant's vagina, rectum, and mouth; DNA matching defendant Jackson was found in the sperm cells in complainant's vagina and rectum. The prosecution argued that defendant Sowa placed GHB, a date-rape drug, in complainant's unattended drink at the racetrack, followed her around until it took effect, and then drove her to defendant Jackson's house where both men sexually assaulted her. Jackson had accompanied Sowa at the racetrack. Alternatively, the prosecutor argued that even if defendants had not drugged the complainant, the evidence reflected that the complainant was "physically helpless" when defendants sexually assaulted her.

## II. DOCKET NO. 325268

Defendant Sowa first argues that his retrial violated the double jeopardy clauses of the United States and Michigan Constitutions. "A double jeopardy challenge presents a question of constitutional law reviewed de novo on appeal." *People v Ackah-Essien*, 311 Mich App 13, 30; __ NW2d __ (2015). This issue is not preserved because Sowa did not raise an objection on that basis in the trial court. *People v Bosca*, 310 Mich App 1, 41; 871 NW2d 307 (2015). In *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008), this Court observed:

> We review an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights, that is, the error affected the outcome of the lower court proceedings. Reversal is appropriate only if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. [Citations omitted.]

The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. "The state and federal constitutional guarantees are substantially identical and should be similarly construed." *Ackah-Essien*, 311 Mich App at 31. "The Double Jeopardy Clause precludes the prosecution from making repeated attempts to convict a defendant for the same offense." *Id*. at 31-32. Thus, "[o]nce jeopardy has attached, the accused has a valuable right in having his or her trial concluded by the jury sworn to hear the case." *Id*. at 32. Further,

> jeopardy [generally] attaches in a jury trial once the jury is empaneled and sworn. Once jeopardy attaches, the defendant has a constitutional right to have his or her case completed and decided by that tribunal. If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity. A jury's inability to reach a unanimous verdict is one circumstance that constitutes a manifest necessity permitting retrial. Indeed, a hung jury is the prototypical example of a situation when the manifest necessity standard is satisfied with respect to granting a mistrial and permitting retrial. Necessarily intertwined with the constitutional [double jeopardy] issue . . . is the threshold issue whether the trial court properly declared a mistrial. [*Id*. (quotation marks and citations omitted; latter alteration and ellipsis in original).]

Citing *Oregon v Kennedy*, 456 US 667, 673; 102 S Ct 2083; 72 L Ed 2d 416 (1982), Sowa argues that double jeopardy protections were violated by the prosecutor's "overreaching," where Sowa was not retried on the amended charges until almost one and one-half years after the mistrial. Overreaching conduct that is of concern is that which occurs during the trial that ended in a mistrial, not to actions which occurred subsequent to the mistrial. See *id*. at 674 (stating that the Double Jeopardy Clause protects against "governmental actions *intended to provoke mistrial requests*") (emphasis added; quotation marks and citation omitted).

In this case, the trial court declared a mistrial on its own motion when the jury indicated for a second time that it was deadlocked. There is no suggestion in the record that Sowa requested the mistrial because of prosecutorial overreaching, and defendant Sowa fails to cite any authority to support his claim that the prosecutor's procedural actions following the mistrial and the delay in his retrial were improper or violated double jeopardy protections. " '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 with little or no citation of supporting authority.' " *Bosca*, 310 Mich App at 16 (citation omitted). Thus, we consider the issue abandoned. Even if this panel did not conclude that it was abandoned, the issue is without merit. It is clear from the speedy-trial motion hearing in this case that the multiple adjournments were mainly due to defendants' requests and motions. In sum, there was no double jeopardy violation.

Next, defendant Sowa argues that he was denied his right to a speedy trial when his retrial did not begin until 21 months after his initial arraignment. This issue is preserved because defendant Sowa made a request at a status conference on May 19, 2014, that the scheduled trial date be a date certain because of the delay in the case. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999); *People v Rogers*, 35 Mich App 547, 551; 192 NW2d 640 (1971). Whether a defendant was denied his right to a speedy trial is an issue of constitutional law, which we review de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

The United States and Michigan Constitutions both guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. Michigan also enforces this right by statute, MCL 768.1, and by court rule, MCR 6.004(A).

Our Supreme Court explained in *Williams* the test to be applied when determining whether a defendant has been denied a speedy trial:

> The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest. In contrast to the 180–day rule, a defendant's right to a speedy trial is not violated after a fixed number of days. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). This Court adopted the *Barker*[ *v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972)] standards for a speedy trial in [*People v*] *Grimmett*, [388 Mich 590, 606; 202 NW2d 278(1972), overruled on other grounds in *People v White,* 390 Mich 245; 212 NW2d 222 (1972), overruled on other grounds in *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004)]. In determining whether a defendant has been denied the right to a speedy trial, we balance the following four factors: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant. Following a delay of eighteen months or more, prejudice is presumed, and the burden shifts to the prosecution to show that there was no injury. Under the *Barker* test, a presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial. [*Williams*, 475 Mich at 261-262 (quotation marks and citations omitted).]

Unexplained delays in the prosecution and inexcusable delays caused by the trial court are attributed to the prosecution. *People v Lown*, 488 Mich 242, 262; 794 NW2d 9 (2011). If the delay is less than 18 months, the defendant must demonstrate actual prejudice. *People v Holtzer*, 255 Mich App 478, 492; 660 NW2d 405 (2003).

Applying the *Barker* test, we conclude that defendant Sowa was not deprived of his right to a speedy trial. Defendant Sowa is correct that 21 months elapsed from the time he was arraigned on December 18, 2012, until his *retrial* began in October 2014. However, the 18-month-delay presumption of prejudice does not apply in this case. The relevant time span is the delay between the day the mistrial was declared and the day his retrial began—here, August 5, 2013, and October 14, 2014, respectively, a fourteen month delay. See *People v Bennett*, 84 Mich App 408, 411-412; 269 NW2d 618 (1978) (holding that the defendant was denied his right to a speedy trial where there was a 32-month delay *between the mistrial and retrial* and, although the defendant did not expressly assert his right to a speedy trial, the prosecutor caused or was not able to adequately explain the reason for the delay as to at least 20 of those months). Thus, Sowa must show actual prejudice, which he has failed to do. *Holtzer*, 255 Mich App at 492. Sowa was in jail from his original arraignment until his conviction following retrial, 715 days. However, while he argues (without identifying concrete witness statements) that the trial was replete with witnesses' memories having faded, he also notes that their memories were refreshed with prior testimony, which negates any determination of prejudice because there is no indication that witness testimony or evidence was actually lost because of the delay. See *id.* at 493 (noting that the defendant failed to show prejudice by the delay of his trial in part because he was unable to point to any evidence that was lost because of the delay). In addition, defendant Sowa fails to show how his defense was degraded in any way by the delay. See *id*. at 494 (stating that "in

determining prejudice to a defendant, [a reviewing court] do[es] not look at how the prosecutor's case was improved during the delay, but to whether the defendant's defense was degraded"). Defendant Sowa has simply not established a speedy trial violation under the factors set forth in *Williams*.

Defendant Sowa next argues that he was denied a fair trial when he and defendant Jackson were tried by a single jury. This issue is not preserved because defendant failed to object in the trial court to a joint trial or file a motion to sever. See *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Unpreserved constitutional issues are reviewed for plain error that affected a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). We reverse for plain error only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 774. This Court has stated that "a failure to move for severance precludes review of that issue, except to remedy a miscarriage of justice." *People v Dunlap*, 87 Mich App 528, 530-531; 274 NW2d 62 (1978) (quotation marks and citation omitted).

MCL 768.5 provides that "[w]hen 2 or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court." MCR 6.121(C) mandates severance "only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Id*. at 346-347. That defenses are inconsistent is not enough to mandate severance; instead, the defenses must be mutually exclusive or irreconcilable. *Id*. at 349. "The tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *Id*. (quotation marks and citation omitted).

Sowa did not file a motion to sever the 2014 retrial, did not join in defendant Jackson's motion for severance, and has not established error, plain or otherwise, nor manifest injustice. Defendant Sowa has not offered a factual basis to support his claim that he was prejudiced by the joint trial. Defendants' defenses were not irreconcilable: defendant Sowa argued that he did not drug complainant or have sexual intercourse with her, while defendant Jackson argued that complainant was drunk (by her own actions) and that he had consensual sexual intercourse with her. On these facts, it was unnecessary for the jury to believe one defendant at the expense of the other. *Hana*, 447 Mich at 349. Further, "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice" to mandate severance. *Id*. (quotation marks and citation omitted; alteration in original). Here, the only prejudice Sowa points to is that joinder appeared to associate him with Jackson, which is the incidental prejudice the *Hana* Court determined was not sufficient to mandate severance.

In tandem with this argument, defendant Sowa claims that he was denied effective assistance when his trial counsel failed to file a motion requesting severance. Because Sowa's ineffective assistance of counsel claim is unpreserved, this Court's review "is limited to errors apparent on the record." *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

Whether a defendant received the effective assistance of counsel is a mixed question of fact and law that we review, respectively, for clear error and de novo. *People v Ackley*, 497 Mich 381, 388; 870 NW2d 858 (2015). "To obtain relief for the denial of the effective assistance of counsel, the defendant must show that counsel's performance fell short of . . . [an] objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the outcome . . . would have been different." *Id.* at 389 (citations and quotation marks omitted). A defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy, but an appellate court is not permitted to insulate the review of counsel's performance by simply calling it trial strategy – the strategy must be sound, with decisions being objectively reasonable. *Id.* at 388-389. We must determine whether strategic choices were made after less than complete investigation or if a reasonable decision made an investigation unnecessary. *Id.* at 389. A "defendant has the burden of establishing the factual predicate for [a] claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The record in this case is insufficient to overcome the strong presumption that trial counsel's decision not to file a motion to sever was sound trial strategy or to establish that the decision fell below an objective standard of reasonableness. The trial court denied defendant Jackson's motion to sever and the record does not establish that the trial court would have granted such a motion if brought by defendant Sowa. Moreover, given the reconcilable nature of the defenses proffered by defendants, severance was not justified. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Defendant Sowa is also unable to demonstrate that there is a reasonable probability that, but for counsel's failure to seek severance, the result of the proceeding would have been different.

Next, defendant argues that the trial court abused its discretion by allowing testimony regarding the date-rape drug GHB and that its admission denied him a fair trial. Defendant Sowa preserved this issue by objecting on this basis at trial. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review for an abuse of discretion a preserved challenge to the admission of evidence. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id*. at 588-589. Any preliminary questions of law, e.g., whether a rule of evidence precludes the admissibility of evidence, are reviewed de novo, bearing in mind that a court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Under MCL 750.520b(1)(d)(*i*), a defendant is guilty of CSC I if "he or she engages in sexual penetration with another person and . . . [t]he actor is aided and abetted by 1 or more other persons and . . . [t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." The term "mentally incapacitated" is defined as meaning "that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent." MCL 750.520a(k). "Circumstantial evidence and reasonable inferences arising

therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

In this case, the prosecution's theory was that defendants worked together to drug, kidnap, and sexually assault complainant. As such, testimony related to complainant being drugged was highly relevant because it was material, in that it related to a fact of consequence, i.e., whether she was mentally incapacitated by a drug, and because it was probative, in that it tended to make it more probable that she was mentally incapacitated by a drug. MRE 401; *People v Crawford*, 458 Mich 376, 388-390; 582 NW2d 785 (1998) (under "MRE 401, evidence is relevant if two components are present, materiality and probative value," with materiality pertaining to the requirement that the evidence be related to a fact that is of consequence in the action, and with probative value pertaining to whether the evidence tends to make the existence of any consequential fact more or less probable). Complainant and other witnesses testified that complainant only drank two Long Island Iced Teas and that her second drink was watered down, as she was the designated driver. Several witnesses also testified that complainant and one companion, KM, left their drinks unattended when they went to the bathroom together. When they returned, complainant saw defendant Sowa standing near their table. Another companion testified that she saw defendant Sowa in the same location, staring at her like he was trying to intimidate her. Complainant was later described as "barely being able to stand up" and unable to communicate. Importantly, complainant and KM both experienced memory loss that night, complainant did not remember anything after it started raining, and KM did not remember how she got to her house later or why she was soaking wet. Although the emergency room physician did not test complainant's blood for GHB, he testified that the decision was made because he believed it would not show up due to the passage of time. Further, he described the side effects of GHB and opined that while there was no physical evidence that she had ingested GHB, he suspected that complainant's memory gap was caused by something more than alcohol. Significantly, KM's actions and physical symptoms after the race matched some of the side effects discussed by both the emergency room physician and defense expert Karl V. Ebner, uncontrolled shaking or muscle tremors and headache. There existed circumstantial evidence sufficient to give rise to a reasonable inference that GHB, or some other comparable type of drug, was employed by defendants to render the complainant mentally incapacitated, and the challenged testimony was probative and material. *Crawford*, 458 Mich at 388-389. That the evidence damaged Sowa's case does not make its admission unfairly prejudicial for purposes of MRE 403 analysis. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). As the trial court correctly pointed out, Sowa's challenge went to the weight of the evidence, not its admissibility, and weighing the evidence was a task for the jury. *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991) (evidence need only meet the minimum requirements for admissibility; beyond that, "our system trusts the finder of fact to sift through the evidence and weigh it properly"). The jury heard testimony regarding complainant's blood-alcohol level as well as circumstantial evidence of ingestion of a date-rape drug and it was up to the jury to decide which, if either, to believe. We recognize that a defendant has a constitutional right to a fair and impartial trial. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). However, because there was no evidentiary error, there was no denial of the due process right to a fair trial.

It is also important to recognize that, as accurately stated by the prosecutor during closing argument, the prosecution was not required to prove the specific or precise drug that was used by

defendants relative to its "drug" theory, but only that the complainant was rendered temporarily incapable of appraising or controlling her conduct due to the influence of a narcotic, anesthetic, or some other substance administered to her absent her consent. MCL 750.520a(k). Moreover, the prosecution's case did not entirely hinge on the theory that the complainant was drugged by defendants. In her closing argument, the prosecutor remarked:

> So whether she's under the influence of drugs or whether you believe the defenses' theory – that she was . . . ripsnorting drunk off her butt at the racetrack, based on what she drank herself, . . . [s]he's still physically unable to communicate that she didn't want to take part in the alleged act. And, furthermore, by the time it goes on, she's unconscious.

Along with being instructed on the definition of "mentally incapacitated," the jury was instructed on the statutory definition of "physically helpless," which "means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act." MCL 750.520a(m). There was strong evidence showing that, regardless of how she came to be in the state, the complainant was physically helpless. There was testimony by two witnesses that defendants were observed carrying the unconscious complainant into Jackson's house where she was sexually assaulted, and another witness who was in Jackson's home testified that the complainant was unconscious. Plus, there was overwhelming evidence that the complainant was in a state of physical helplessness earlier at the racetrack. Ultimately, we can only speculate with respect to whether the jury relied on the "drug" theory for purposes of mental incapacitation or the "physically helpless" theory regardless of any drug utilization, or a combination of both theories. The GHB testimony provides no basis for reversal.

## III. DOCKET NO. 325725

Defendant Jackson first argues that the trial court abused its discretion by admitting certain testimony and that its admission denied him a fair trial. As discussed earlier, the trial court did not abuse its discretion by admitting testimony related to GHB, because the use of a drug could reasonably be inferred from the circumstantial evidence, it was relevant, MRE 401, and because its probative value was not substantially outweighed by the danger of unfair prejudice, MRE 403. We also conclude that the trial court did not abuse its discretion by admitting a police officer's testimony that one of the bruises photographed on complainant's back appeared to him to be from a bite mark. Defendant Jackson's theory of the case was that complainant consented to have sexual intercourse with him. All the bruises and marks on her body were circumstantial evidence that she did not consent, making testimony related to the bruising relevant to a fact in issue. MRE 401. The officer's opinion that the bruise on her back appeared to be a bite mark was not offered as an expert opinion. The testimony was admissible under MRE 701 (opinion testimony by lay witness) because it was rationally based on his perception, was helpful to the determination of a fact in issue (consent), and was not based in scientific, technical, or other specialized knowledge within the scope of MRE 702 (testimony by experts). Finally, defendant Jackson claims that the trial court abused its discretion in admitting testimony by one of Jackson's neighbors that during a group conversation in which the night of the incident was discussed, Sowa stated that he had "drugs" that night. The testimony was material, in that it related to a fact of consequence, i.e., whether complainant was mentally

incapacitated by a drug, and it was probative, in that it tended to make it more probable that she was mentally incapacitated by a drug. Thus, the testimony was relevant. *Crawford*, 458 Mich at 388-390. The testimony was not unfairly prejudicial under MRE 403 simply because it supported the prosecution's theory and may have damaged defendant Jackson's case. *Vasher*, 449 Mich at 501. We note that there was no Confrontation Clause problem, considering that, while Sowa did not testify at trial and was effectively unavailable, Sowa's alleged statement was certainly not testimonial in nature. See *People v Nunley*, 491 Mich 686, 697-698; 821 NW2d 642 (2012). It would also appear that there was no hearsay problem with Sowa's statement about drugs. See MRE 804(b)(3) (declarant unavailable and statement was against Sowa's interest, tending to subject him to criminal liability). That said, the trial court still instructed the jury that defendant Sowa's statement could not be used to implicate defendant Jackson and only applied to defendant Sowa. And a jury is presumed to follow its instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Moreover, defendant Sowa's purported statement was extremely vague, and the circumstantial evidence indicating that the complainant had been drugged was strong, such that we cannot conclude that defendant Jackson was prejudiced by Sowa's statement. MCL 769.26 (harmless error); *Lukity*, 460 Mich at 495. And again, there was a great deal of evidence showing that the complainant was physically helpless, regardless of whether any drugs were employed by defendants. Reversal is simply unwarranted on this issue.

Defendant Jackson next argues that he was denied due process of law by the prosecutor's failure to investigate, disclose, and analyze physical evidence during the course of the investigation. Defendant Jackson did not preserve his constitutional claim that his due process right to a fair trial was violated because he did not raise the objection on the same grounds in the trial court. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). As stated earlier, an unpreserved constitutional issue is reviewed for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich App at 763-764, 774.

A defendant's due process right to evidence has been recognized in cases such as *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). In *Brady*, 373 US at 87, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To establish a *Brady* violation, a defendant must prove that: (1) the state possessed evidence of exculpatory or impeachment value to the defendant; (2) the prosecution suppressed the evidence; and (3) the evidence, viewed in its totality, was material, meaning that had the evidence been disclosed to the defense, a reasonable probability exists that the result of the proceedings would have been different. *People v Chenault*, 495 Mich 142, 150-151, 155; 845 NW2d 731 (2014). In *Youngblood,* 488 US at 58, the Court held that the failure to preserve potentially useful evidence does not constitute a denial of due process absent a showing of bad faith by the police. To establish a *Youngblood* violation, "the defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; and (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonably available means." *United States v Jobson,* 102 F3d 214, 218 (CA 6, 1996).

"Absent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Further,

> due process [does not] require that the prosecution seek and find exculpatory evidence. Although the prosecution bears the burden of proving guilt beyond a reasonable doubt in a criminal trial, it need not negate every theory consistent with defendant's innocence, nor exhaust all scientific means at its disposal. As our Supreme Court noted, neither the prosecution nor the defense has an affirmative duty to search for evidence to aid in the other's case. [*Id.* (citations omitted).]

As explained by this Court in *People v Stephens*, 58 Mich App 701, 705-706; 228 NW2d 527 (1975):

> The crucial distinction is between failing to disclose evidence that has been developed and failing to develop evidence in the first instance. When the police fail to run any tests, the lack of evidence will tend to injure their case more than defendant's since the prosecution has the burden of proving guilt beyond a reasonable doubt. Whether or not to run fingerprint tests is a legitimate police investigative decision. Defendant's [due process] rights were not violated.

In this case, complainant's blood and urine were not tested for the presence of GHB because the emergency room physician thought that too much time had elapsed, making it unlikely that GHB would show up in a toxicology screen, as it would have metabolized in complainant's system by then. Although Jackson presented evidence from his expert that the presence of GHB could have been detected for a lengthier amount of time in blood and urine samples and for up to three months after ingestion by hair analysis, defendant fails to present any evidence that the prosecution or the police suppressed evidence related to complainant's ingestion of GHB, or that the lack of testing was the result of intentional misconduct or bad faith by either. *Coy*, 258 Mich App at 21. Similarly, Jackson fails to allude to any evidence showing that the police suppressed DNA evidence on some beer cans or showing that the failure to test the beer cans for DNA was the result of intentional misconduct or bad faith. *Id*. Thus, the failure of the prosecution or the police to test for GHB in complainant's system and to test for DNA evidence on the beer cans did not deny Jackson a fair trial.

Defendant Jackson next argues that the evidence was insufficient to support his convictions. We disagree. We review de novo the issue regarding whether there was sufficient evidence to sustain a conviction. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, this Court must view the evidence – whether direct or circumstantial – in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012); *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A jury, and not an appellate court, observes the witnesses and listens to their testimony; therefore, an appellate court must not interfere with the jury's role in assessing the weight of the evidence and the credibility of the

witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *Carines*, 460 Mich at 757. The prosecution need not negate every reasonable theory of innocence, but need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Defendant was convicted of three counts of CSC I involving vaginal, anal, and oral penetration. As stated earlier, under MCL 750.520b(1)(d)(*i*), a defendant is guilty of CSC I if "he or she engages in sexual penetration with another person and . . . [t]he actor is aided and abetted by 1 or more other persons and . . . [t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." And the term "mentally incapacitated" is defined as meaning "that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent." MCL 750.520a(k).

First, DNA evidence indicated that sperm cells were found in complainant's vagina, rectum, and mouth. Two security guards, who also worked in law enforcement, testified that after seeing two men with a woman acting inappropriately at the racetrack, they were asked to leave; they saw the two men walk out of the racetrack with their arms interlocked with complainant's arms. It can reasonably be inferred that the security guards were referring to defendants because defendant Jackson testified that he and defendant Sowa both kissed complainant at the racetrack and that security guards ordered them to leave the racetrack. There was a great deal of circumstantial evidence admitted with regard to the mentally incapacitated element. Specifically, several witnesses testified that complainant and KM left their drinks unattended. Complainant and another witness saw defendant Sowa standing near their table. Complainant was later described as "barely being able to stand up" and unable to communicate. Complainant and KM both experienced memory loss that night. Further, the emergency room physician described the side effects of GHB and opined that while there was no physical evidence that she had ingested GHB, he suspected that complainant's memory gap was caused by something more than alcohol. KM's actions and physical symptoms after the race matched some of the side effects of GHB. Viewing the evidence in a light most favorable to the prosecution, a rational jury could reasonably conclude that the elements of CSC I were proven beyond a reasonable doubt. While Jackson asserts that the evidence presented at trial better supported his theory that complainant drank too much alcohol and that the sex was consensual, it was the jury's task to decide whether to believe defendant Jackson's blood-alcohol-level theory relative to consent or whether to believe the circumstantial evidence that defendant Sowa drugged complainant's drink with a date-rape drug. *Berkey*, 437 Mich at 52. Furthermore, as explained earlier, regardless of whether defendants drugged the complainant, there was overwhelming evidence that she was physically helpless at the point of the sexual assaults.

Under MCL 750.349(1)(c), a person is guilty of kidnapping if "he or she knowingly restrains another person with the intent to . . . [e]ngage in criminal sexual penetration or criminal sexual conduct . . . with that person." The term "restrain" "means to restrict a person's

movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority[,] [and] [t]he restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts." MCL 750.349(2). Circumstantial evidence was presented that defendant Sowa placed a date-rape drug in complainant's drink, and that once complainant was mentally incapacitated by the drug, Jackson and Sowa took her from the racetrack to Jackson's house, where she was sexually assaulted. Sperm cells were found in complainant's vagina, rectum, and mouth. There was no evidence in the record that complainant consented to the placement of a drug in her drink. In addition, the emergency room physician testified that GHB coupled with complainant's blood-alcohol level would result in complainant being consciously sedated, which is consistent with multiple eyewitness accounts of complainant's condition and supports a finding that Jackson interfered with complainant's liberty absent her consent or legal authority. And the kidnapping conviction was equally sustainable regardless of whether defendants drugged the complainant. On these facts, there was sufficient evidence to find defendant guilty beyond a reasonable doubt of kidnapping.

With respect to the crime of conspiracy, in *People v Justice (After Remand)*, 454 Mich 334, 345-346; 562 NW2d 652 (1997), our Supreme Court observed:

> Conspiracy is defined by common law as a partnership in criminal purposes. Under such a partnership, two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense. Establishing that the individuals specifically intended to combine to pursue the criminal objective of their agreement is critical because the gist of the offense of conspiracy lies in the unlawful agreement meaning the crime is complete upon formation of the agreement.
>
> The specific intent to combine, including knowledge of that intent, must be shared by two or more individuals because there can be no conspiracy without a combination of two or more. This combination of two or more is essential because the rationale underlying the crime of conspiracy is based on the increased societal dangers presented by the agreement between the plurality of actors. Accordingly, there must be proof demonstrating that the parties specifically intended to further, promote, advance, or pursue an unlawful objective.
>
> Identifying the objectives and even the participants of an unlawful agreement is often difficult because of the clandestine nature of criminal conspiracies. Thus, direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties. Inferences may be made because such evidence sheds light on the coconspirators' intentions. [Citations, ellipses, alteration brackets, and quotation marks omitted.]

We conclude that there was sufficient evidence to establish beyond a reasonable doubt that defendants conspired to commit kidnapping and CSC I. As discussed above, there was sufficient evidence to establish the predicate offenses of kidnapping and CSC I. With respect to conspiracy to commit kidnapping, there was testimony that defendant Sowa was standing by

complainant's drink when she went to the restroom with KM. One of the security officers testified that he saw two men and a woman kissing under the grandstand after it rained, and that they were earlier walking single file up into the grandstands. It is reasonable to infer that defendants were tracking complainant's movements after defendant Sowa placed the drug in her drink. Defendants were both seen at various times kissing or sexually touching complainant, and then were seen working together to walk her to Jackson's car. Defendants were also seen basically carrying complainant into Jackson's house from his car. These circumstances and defendants' actions established that they conspired to drug complainant to allow them to transport her from a public place to a private location without her consent. With regard to conspiracy to commit CSC I, evidence was introduced showing that complainant was given a date-rape drug, that defendants kissed and sexually touched her at the racetrack, that defendants transported her to a private residence, that Jackson told an acquaintance that both he and Sowa had sex with complainant, who was unconscious on a chair in Jackson's house when seen by the acquaintance, and that Sowa told the acquaintance that he should "go get that." These circumstances and defendants' actions established that defendants conspired to drug complainant in order to allow them to take her from a public place to a private location for the purpose of sexually assaulting her. Additionally, as to both conspiracy to commit CSC I and conspiracy to commit kidnapping, the employment of a drug was not an indispensable component of the prosecution's case. There was evidence that the complainant was physically helpless, and regardless of how the complainant came to be physically helpless, there was evidence that defendants reached an agreement and jointly intended to exploit her helplessness by removing her from the racetrack and taking her to Jackson's house in order to sexually assault the complainant.

Defendant Jackson also argues that his convictions were against the great weight of the evidence. This argument is not preserved because defendant failed to make a timely motion for a new trial on this basis. MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich 718, 729; 571 NW2d 764 (1997). We review for plain error affecting the defendant's substantial rights an unpreserved challenge based on the great weight of the evidence. *People v Lopez*, 305 Mich App 686, 695; 854 NW2d 205 (2014). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003) (citation omitted). "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *People v Lemmon*, 456 Mich 625, 645–646; 576 NW2d 129 (citation omitted). Following a review of the record, we conclude that the evidence did not heavily preponderate against the verdict, and Jackson has failed to demonstrate a plain error.

Next, defendant Jackson argues that he is entitled to resentencing because his sentencing guidelines were calculated on the basis of judicially-found facts, which were used to mandatorily increase the floor of the guidelines minimum sentence range in violation of his right to a jury trial. We agree. Defendant Jackson was assessed 150 offense variable (OV) points as follows: 10 points for OV 3, MCL 777.33(1)(d) (bodily injury requiring medical treatment); 10 points for OV 4, MCL 777.34(1)(a) (serious psychological injury requiring professional treatment); 15

points for OV 8, MCL 777.38(1)(a) (asportation to greater place of danger or captivity beyond time needed to commit offense); 5 points for OV 10, MCL 777.40(1)(c) (exploitation of vulnerable victim); 50 points for OV 11, MCL 777.41(1)(a) (two or more criminal sexual penetrations); 25 points for OV 12, MCL 777.42(1)(a) (three or more contemporaneous felonious criminal acts); 25 points for OV 13, MCL 777.43(1)(c) (pattern of felonious criminal activity involving three or more crimes); and 10 points for OV 14, MCL 777.44(1)(a) (leader in a multiple offender situation).

Defendant did not raise this precise issue below; therefore, "our review is for plain error affecting substantial rights." *Lockridge*, 498 Mich at 392.[1] In *Lockridge*, our Supreme Court recently held:

> Because Michigan's sentencing guidelines scheme allows judges to find by a preponderance of the evidence facts that are then used to compel an increase in the mandatory minimum punishment a defendant receives, it violates the Sixth Amendment to the United States Constitution under *Alleyne.* We therefore reverse the judgment . . . . To remedy the constitutional flaw in the guidelines, we hold that they are advisory only.
>
> To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her [offense variable] OV level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant's OV score to account for the error would change the applicable guidelines minimum sentence range. If a defendant makes that threshold showing and was not sentenced to an upward departure sentence, he or she is entitled to a remand for [sic] the trial court for that court to determine whether plain error occurred, i.e., whether the court would have imposed the same sentence absent the unconstitutional constraint on its discretion.[2] If the trial court determines that it would not have imposed the same sentence but for the constraint, it must resentence the defendant. [*Lockridge*, 498 Mich at 399.]

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[1] Even if we deem some of defendant Jackson's objections below as meeting preservation requirements, it ultimately has no impact for purposes of our *Lockridge* analysis. See *People v Stokes*, __ Mich App __, __; __ NW2d __ (2015); slip op at 11 ("we believe our Supreme Court [in *Lockridge*] intended that the *Crosby* procedure would apply to both preserved and unpreserved errors").

[2] The Court referred to such remands as "*Crosby* remands" after the procedures outlined in *Crosby*, 397 F3d 103. *Lockridge*, 498 Mich at 395-399. "*Crosby* remands are warranted only in cases involving sentences imposed on or before July 29, 2015 . . . ." *Id.* at 397. Defendant Jackson was sentenced before July 29, 2015.

A review of the record here reveals that the trial court relied on facts beyond those admitted by defendant Jackson or found by the jury relative to a number of the OVs, including, but not necessarily limited to, OVs 3, 4, 8, 12, and 14, resulting in a reduction of Jackson's total OV score by more than 50 points and thereby lowering his OV level and guidelines minimum sentence range, MCL 777.62. Accordingly, defendant Jackson is entitled to a *Crosby* remand.[3] We note that defendant Sowa did not raise any sentencing issues in his appellate brief; however, at oral argument, Sowa, who received life sentences, asked this Court to give him the benefit of *Lockridge*. We have examined the scoring of Sowa's OVs, which scores are identical to Jackson's scores, except with respect to OV 14, for which Sowa was assessed zero points, along with Sowa's current OV level and placement on the class A grid, MCL 777.62, and conclude that application of *Lockridge* would call for a *Crosby* remand. Exercising our discretion to allow consideration of the issue, we grant defendant Sowa a *Crosby* remand pursuant to *Lockridge.*

## IV. DEFENDANT JACKSON'S STANDARD 4 BRIEF

Defendant Jackson raises several issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order, No. 2004-6, Standard 4. We have reviewed all defendant Jackson's arguments and conclude that they lack merit.

First, defendant Jackson claims that he was denied a fair trial because of instances of prosecutorial misconduct. These claims are unpreserved because defendant failed to contemporaneously object and request a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 MW2d 627 (2010). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Unpreserved issues are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764, 774. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Following a review of the record, we conclude that defendant Jackson is unable to establish plain error and was not denied a fair and impartial trial by the alleged misconduct.

First, defendant Jackson argues that the prosecutor committed misconduct when, in arguing that she should be allowed to introduce date-rape drug testimony at trial, she allegedly misrepresented that KM was not able to remember anything after the clouds rolled in at the racetrack. There is no record support for Jackson's assertion that the prosecutor misstated facts at the motion in limine. And the testimony at trial revealed that KM started acting bizarrely not

[3] Defendant Jackson also maintains on appeal that his sentences were disproportionate to the seriousness of the crime and constituted cruel and unusual punishment. To the extent that resentencing does not occur, we hold that the consecutive 50-to-80 year terms of imprisonment, while effectively a life sentence absent the possibility of parole, are not cruel and unusual nor disproportionate to the offense or the offender, given Jackson's extensive criminal record and the horrific nature of the criminal acts committed against the complainant. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990).

long after returning to her unattended drink. There is no basis to conclude that absent the prosecutor's challenged statement, the trial court would not have allowed testimony at trial regarding GHB; therefore, even if the prosecutor misspoke, defendant Jackson cannot establish the requisite predjudice. Moreover, as repeatedly mentioned above, the prosecution's case did not solely rest on the use of GHB to drug the complainant.

Next, the prosecutor's questions on cross-examination of defendant Jackson regarding Jackson and Sowa both kissing complainant at the racetrack were relevant to whether they colluded to both have sex with her, a fact in issue at the trial. MRE 401; see also MRE 611(c) (providing that "[a] witness may be cross-examined on any matter relevant to any issue in the case"). Thus, Jackson cannot demonstrate that the prosecutor's cross-examination on this point constituted prosecutorial misconduct.

Next, the prosecutor's comments during opening statement were based on reasonable inferences from the facts. During opening statement, "[a] prosecutor is not limited to merely reciting physical facts; he may properly relate and draw reasonable inferences from such information." *People v Nard*, 78 Mich App 365, 375; 260 NW2d 98 (1977). In this case, the prosecutor could reasonably infer from the evidence that defendants planned to drug a woman at the racetrack and take her back to defendant Jackson's house to sexually assault her.

Relative to closing argument, prosecutors have wide latitude in their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Id*. (quotation marks and citation omitted; alteration in original). Here, the prosecutor properly argued during closing that a security officer saw defendants walking on either side of complainant before the rain and that defendants were with her because they had drugged her. During the trial, the security officer testified that he saw the same three people he saw making out after the rain began, walking out of the stands in a single line before the rain began. It was reasonable for the prosecutor to infer and argue that defendants and complainant were the three people the security officers had observed making out and told to leave, given Jackson's testimony that he and Sowa both kissed complainant at the racetrack and left after being ordered to do so by security guards. As stated above, the prosecutor also reasonably inferred from the evidence that Sowa gave complainant a date-rape drug. The prosecutor's closing argument was thus based on reasonable inferences from the evidence and did not constitute misconduct.

Finally, defendant argues that the prosecutor improperly vouched for complainant's health and state of mind when she argued that when Jackson had his hand up complainant's skirt at the racetrack, complainant appeared to have no idea where she was or what was going on and was not touching Jackson, even though one security officer testified that complainant's arms were around his neck. This argument is also without merit. The security officer testified that while complainant had her arms around Jackson's neck, the woman appeared unable to focus on his words when he ordered them to leave and that she did not speak with the officer; the other security officer testified that complainant appeared intoxicated. The prosecutor's argument was thus based on reasonable inferences arising from the evidence and did not constitute misconduct.

Defendant Jackson next argues that he was denied effective assistance because trial counsel failed to object to the alleged prosecutorial misconduct. Considering that we have ruled that the prosecutor did not commit any misconduct, counsel's failure to object to the alleged misconduct cannot sustain the ineffective assistance argument. *Ericksen*, 288 Mich App at 201 (failing to raise a futile objection does not constitute ineffective assistance of counsel). For the same reason, Jackson is unable to establish that but for trial counsel's lack of objection the outcome would have been different. *Ackley*, 497 Mich at 389.

Finally, defendant Jackson argues that the cumulative effect of the errors deprived him of his right to due process. Because he failed to establish his prosecutorial misconduct and ineffective assistance of counsel claims, there can be no cumulative effect of the errors requiring reversal. *Dobek*, 274 Mich at 106.

In Docket Nos. 325268 and 325725, we affirm defendants' convictions but remand to the trial court for a determination of whether resentencing as to both defendants is required pursuant to *Lockridge*, 498 Mich 358, and *Crosby*, 397 F3d 103. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ William B. Murphy
/s/ Donald S. Owens