STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2012
v	No. 303638 Muskegon Circuit Court
WESLEY ALLEN VANBROCKLIN, Defendant-Appellant.	LC No. 10-059149-FH

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 18 to 30 years. Defendant appeals by right. We affirm.

The victim testified that from March 2009 through August 2009, when she was 14 years old, defendant engaged in sexual activity with her on four occasions. During this same period, the victim's father sexually abused her. The police learned of the father's abuse in August 2009, after friends of the victim told their mothers about it. The victim did not disclose the sexual activity with defendant until a month later.

On appeal, defendant argues that the trial court erred in admitting evidence of the sexual relationship between the victim and her father. He claims that the evidence was irrelevant or, if relevant, was unfairly prejudicial. He also claims that the evidence was admitted in violation of the rape shield statute, MCL 750.520j. However, "a party waives the right to seek appellate review when the party's own conduct directly causes the error." *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004). Before trial, defendant wanted evidence of the sexual relationship admitted. After the prosecutor moved in limine to exclude any evidence that the victim engaged in sexual activity with her father, defendant moved for an adjournment. He argued that the evidence the prosecutor sought to exclude was an integral part of his defense and that if the evidence were excluded, his defense would be drastically changed, and he would need

additional time to prepare an alternate defense.[1] Then, at trial, defendant used evidence of the sexual relationship between the victim and her father as the factual predicate for his defense. It was his theory that the victim made the accusations against him because she and her father believed that defendant was the one who told the police about their sexual relationship. Because defendant wanted evidence of the sexual relationship between the victim and her father admitted and because he used the evidence to establish his defense, defendant is precluded from arguing on appeal that the trial court erred in admitting the evidence. *Id.*; see also *People v Jordan*, 275 Mich App 659, 666; 739 NW2d 706 (2007).[2]

Defendant also argues that the trial court erred when it prevented him from introducing evidence of a prior false accusation of rape by the victim. We review a trial court's regarding the admission or exclusion of evidence for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217.

Evidence of a victim's past sexual conduct is generally inadmissible under the rape shield statute, MCL 750.520j. *People v Adair*, 452 Mich 473, 481; 550 NW2d 505 (1996). But the rape shield statute does not preclude the introduction of evidence to show that the victim made prior false accusations of rape. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). But, in order for such evidence to be admissible, an accused must make an offer of proof with "concrete evidence" that the victim made a prior accusation of rape that was, in fact, false. *People v Williams*, 191 Mich App 269, 272-274; 477 NW2d 877 (1991).

Here, the victim made statements to police that she engaged in oral sex with L.D., a 17-year-old female friend. Defendant contends that the statements constitute a false accusation of rape. His offer of proof was L.D.'s denial. However, the mere fact that L.D. denied engaging in oral sex with the victim does not necessarily mean that the victim's statements to the police were false. There are readily apparent reasons why L.D. may have denied the statements, other than that the statements were false. L.D. may have denied the statements to avoid embarrassment of having others know that she engaged in a sexual act with a younger member of the same sex, or L.D. may have denied the statements to avoid criminal charges. Accordingly, L.D.'s denial, while some evidence that the victim's statements were false, was not "concrete evidence" of a false accusation of rape. *Id.* The trial court did not abuse its discretion in preventing defendant from questioning the victim about whether she engaged in sexual activity with L.D.

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[1] The prosecutor subsequently withdrew the motion in limine.

[2] We find no merit to defendant's claim that defense counsel was ineffective for failing to object to evidence of the sexual relationship between the victim and her father. First, this claim was not included in defendant's statement of questions presented on appeal; it is therefore not properly before the Court. See *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Second, defense counsel used the evidence as a matter of trial strategy and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). That a strategy is not successful does not equate to ineffective assistance of counsel. *Id.*

Next, defendant argues that the prosecutor committed misconduct when he asked Karen Gannon whether she was upset at defendant and whether she was no longer his fiancée because he had cheated on her and then when the prosecutor stated that he had asked the question because he thought it was relevant. We review de novo claims of prosecutorial misconduct. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id*.

Defendant objected to the prosecutor's question to Gannon. The trial court sustained the objection, finding that whether defendant had sex with adult women was irrelevant to whether defendant engaged in sexual activity with the victim and then instructed the jury to disregard the prosecutor's question and Gannon's answer. A prosecutor's good-faith effort to admit evidence cannot be the basis for a finding of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 278; 662 NW2d 836 (2003). Additionally, defendant suffered no prejudice from the prosecutor's questioning. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Id.* at 279. The trial court's curative instruction and its instruction at the conclusion of trial that the jury was not to consider any testimony that had been struck were sufficient to cure any prejudice that defendant may have suffered from the question.

In addition, we find nothing improper with the prosecutor's explanation for why he asked the question. The prosecutor did not allude to any details of defendant's alleged cheating, nor did the prosecutor even state why he believed the question was relevant. Defendant was not denied a fair and impartial trial by misconduct of the prosecutor.

Defendant raises numerous challenges to his sentences. We review these unpreserved claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Because defendant's minimum sentences fall within the recommended minimum sentence range under the legislative guidelines, we must "affirm that sentence . . . absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10).[3] Defendant does not claim any error in the scoring of the guidelines. He argues that the trial court relied on inaccurate and incomplete information when it failed to conduct an assessment of his rehabilitative potential through intensive alcohol, drug, and psychiatric treatment. But MCR 6.425(A)(1)(e) only requires a probation officer to include in the presentence investigation report (PSIR) "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report." Thus, contrary to defendant's assertion, the trial court was not required to conduct an assessment of defendant's rehabilitative potential through treatment. Defendant also argues that the trial

[3] We disagree with defendant's assertion that the trial court failed to state how it arrived at defendant's sentences. The trial court stated that it would impose a sentence "between the midpoint and the top" of the sentencing guidelines because defendant's prior record did not justify a sentence at the bottom of the guidelines and the facts of the case did not justify a sentence at the top of the guidelines. Thus, the trial court sufficiently articulated its reasons for the sentence it imposed. See *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

court failed to consider mitigating factors, such as his strong family support and his long and extensive substance abuse history. Again, the PSIR informed the trial court about defendant's family support and his substance abuse history. A PSIR is presumed to be accurate, and it may be relied on by the trial court unless challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant makes no claim that the information contained in the PSIR was inaccurate or incomplete. Accordingly, defendant has failed to show that the trial court relied on inaccurate information.

Defendant makes two constitutional challenges to his sentences which are not prohibited by MCL 769.34(10). *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). First, defendant argues that the trial court engaged in judicial factfinding in contravention of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Second, defendant argues that his sentences violate the constitutional provisions against cruel or unusual punishment, US Const, Am VIII; Const 1963, art 1, § 16. This claim fails because "a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (citations omitted). Defendant has not overcome the presumption his sentences are proportionate. Accordingly, defendant's sentences are not unconstitutional.[4]

Defendant raises six issues in a standard 4 brief. First, defendant argues that the prosecutor failed to file a written notice of his intent to seek an enhanced sentence within 21 days after defendant's arraignment. MCL 769.13(1). Defendant has waived this issue. A defendant waives an issue when he approves the trial court's action. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). At the sentencing hearing, defendant stated that he had reviewed the sentencing information report, which indicated that he was being sentenced as an habitual offender and that he had no additions or corrections to it. In addition, defendant stated that he had no objection to the trial court making a determination whether he was an habitual offender. With these statements, defendant approved the trial court's action of sentencing him as an habitual offender. Defendant's approval extinguished any error. *Id.* at 216.

Additionally, there is no merit to defendant's argument. When defendant waives arraignment on the information, MCL 769.13(1) permits the filing of the required notice, "within 21 days after the filing of the information charging the underlying offense." On April 22, 2010, which was within 21 days of the filing of the information, the prosecutor filed an amended

[4] We find no merit to defendant's claim that defense counsel was ineffective for failing to present mitigating evidence to the trial court and for failing to object to the length of his sentences. Defendant does not identify any mitigating evidence that defense counsel failed to present to the trial court. Therefore, he has not established the factual predicate of the claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In addition, because defendant failed to establish that his sentences violated any constitutional provision, any objection on such grounds would have been futile. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

information that charged defendant as an habitual offender, fourth offense. Accordingly, the prosecutor timely filed a written notice of his intent to seek an enhanced sentence.

Second, defendant argues that the trial court erred in granting the prosecutor's motion to amend the information and then in denying his request for an adjournment. We review for an abuse of discretion a trial court's decision on a motion to amend the information, *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003), and a trial court's decision whether to grant an adjournment, *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002).

The trial court granted the prosecutor's motion to amend the date of the offenses on the information from April 1, 2009, to March 2009 through August 2009. A trial court "before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H). Defendant conceded before the trial court that all the reports, including those in his possession, indicated that the offenses occurred between March 2009 and August 2009. Thus, the amendment did not unfairly surprise defendant. In addition, there is nothing to indicate that the amendment prejudiced defendant. Although defendant stated that he had focused trial preparation on the April 1, 2009 date, he did not identify any additional preparation that he needed to undertake to prepare for the expanded time period. Similarly, on appeal, defendant does not identify any specific prejudice that resulted from the amendment. Accordingly, defendant has not shown that the trial court abused its discretion in granting the prosecutor's motion to amend the information. Moreover, because the amendment to the information did not result in any unfair surprise or prejudice to defendant, the trial court did not abuse its discretion in denying his request for an adjournment to prepare for the expanded time period.

Defendant also requested an adjournment to prepare for the testimony of T.B., another teenage female who had sexual intercourse with defendant. A trial court's denial of a motion for an adjournment is not grounds for reversal unless the defendant demonstrates prejudice. *People v Coy*, 258 Mich App 1, 18-19; 669 NW2d 831 (2003). Because T.B. did not testify at trial, defendant's not having additional time to prepare for the testimony could not have prejudiced him.

Third, defendant argues that the trial court erred when it failed to timely decide his motion in limine to exclude any evidence that he engaged in sexual activity with T.B. He also argues that the trial court erred in allowing the jury to hear evidence of his sexual relationship with T.B. before it ruled on his motion in limine. We review these unpreserved claims for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

Alleged error does not warrant reversal when the aggrieved party purposefully or negligently contributed to it. *Jordan*, 275 Mich App at 666. Here, at the hearing of his motion on January 3, 2011, the parties informed the trial court that they had agreed to an adjournment, and defendant did not request the trial court to rule on his motion in limine. In fact, defendant did not request that the trial court decide the motion until the first day of trial. The trial court heard arguments, and it issued a preliminary ruling, specifically ruling that evidence that defendant engaged in sexual activity with T.B. was admissible if T.B. was under the age of 16 at the time of the activity—but the court required an offer of proof from T.B. regarding her age. The trial court heard the offer of proof on the second day of trial, after which it excluded any

evidence of sexual activity between defendant and T.B. Under these circumstances, defendant's own actions contributed to the trial court's not deciding the motion in limine until the second day of trial. There was no plain error by the trial court.

In addition, contrary to defendant's assertion, the trial court did not permit evidence of a sexual relationship between defendant and T.B. to be admitted through the testimony of the victim and L.D., both of whom testified before the trial court excluded T.B.'s testimony. Neither the victim nor L.D. testified that they saw defendant and T.B. engage in any sexual activity. They only testified that defendant and T.B. went into a bathroom for an extended time period. It would be speculation to conclude from this testimony that defendant and T.B. engaged in sexual activity while they were in the bathroom. Accordingly, there was no plain error.[5]

Fourth, defendant argues that the prosecutor committed misconduct when he introduced the testimony of several witnesses, including M.C., who was a friend of the victim; L.D.'s mother; L.D.'s sister-in-law; and Trooper David Brunsting. According to defendant, the testimony of these four witnesses was irrelevant and was designed to confuse and mislead the jury. We review this unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Fyda*, 288 Mich App at 460-461.

Defendant is casting an evidentiary issue into a claim of prosecutorial misconduct. As previously stated, a prosecutor's good faith effort to admit evidence may not be the basis of a finding of prosecutorial misconduct. *Abraham*, 256 Mich App at 278. The testimony of the four witnesses, along with the testimony of L.D., established that it was not defendant who told the police of the sexual relationship between the victim and her father. Consequently, the testimony was relevant because it made less probable defendant's claim that the victim made the accusations against defendant because she and her father believed it was him who contacted the police. MRE 401. In addition, because the testimony of the witnesses was generally limited to the steps that led to L.D.'s sister-in-law to contact the police and their response and because the prosecutor used the testimony only to argue that defendant had nothing to do with reporting the sexual relationship between the victim and her father to the police, there was no danger that the probative value of the testimony would be substantially outweighed by confusion of the issues. MRE 403. Accordingly, there is no basis to conclude that the prosecutor introduced the testimony in bad faith. There was no prosecutorial misconduct.

Fifth, defendant argues that defense counsel was ineffective for failing to call the principal of the victim's high school as a witness. Because defendant did not move for a

[5] We note that it was defense counsel who asked the victim if she thought defendant and T.B. had sex in the bathroom. "Defendant may not assign error on appeal to something that his own counsel deemed proper at trial." *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Ginther[6] hearing or a new trial, our review of defendant's claim is limited to mistakes apparent on the record. *Fyda*, 288 Mich App at 450.

To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Jordan*, 275 Mich App at 667. The decision whether to call a witness is presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We will not substitute our judgment for that of defense counsel on matters of trial strategy. *Id*. In addition, the failure to call a witness can only constitute ineffective assistance of counsel if it deprived the defendant of a substantial defense. *Id*. This simply means defendant must establish a reasonable probability that the result of the proceedings would have been different with the missing testimony. *Jordan*, 275 Mich App at 667.

The prosecutor listed the principal as a witness. After the prosecutor chose not to call him as a witness, defense counsel stated that he intended to subpoena the principal. Although subpoenaed, defense counsel did not call the principal as a witness. The record contains no explanation for why defense counsel chose not to call the principal as a witness, and, more importantly, it does not contain a summary of the principal's proposed testimony. Accordingly, defendant has not overcome the presumption that defense counsel's decision not to call the principal as a witness was sound trial strategy. Defendant has also not shown counsel's failure to call the principal as a witness deprived him of a substantial defense. Accordingly, defendant was not denied the effective assistance of counsel.

Finally, defendant argues that the cumulative effect of errors was so prejudicial that he is entitled to a new trial. Although the cumulative effect of several errors may be sufficient to warrant reversal even if the errors individually would not, when no errors exist there can be no cumulative effect warranting reversal. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). Here, no errors exist and there can be no cumulative effect warranting reversal.

We affirm.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens

[6] See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).