

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL DENNIS HOLDEN,

Defendant-Appellant.

UNPUBLISHED

October 25, 2012

No. 304364

Kalamazoo Circuit Court

LC No. 2011-000087-FH

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for third-degree criminal sexual conduct, MCL 750.520d(1)(c), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(c). We affirm.

One evening in January 2011, the victim visited the apartment of her friend, Christopher Wyzywany. The victim fell asleep on a love seat in the apartment living room. At about 2:30 a.m., defendant entered the apartment with Wyzywany's roommate, Ashley Endres. Sometime thereafter, defendant exposed himself, propped one of the victim's hands up on his erect penis, and digitally penetrated the victim's vagina with one hand while pulling her head toward his penis with the other hand. The victim woke up and pushed defendant away. The victim and Wyzywany called the police, who came to the apartment and arrested defendant that morning.

Defendant first argues that the evidence does not support his convictions, blending the distinct claims of the sufficiency of the evidence and that the verdict was against the great weight of the evidence. For the sake of clarity and fairness, we review the jury's verdict under the standard of review applicable to each claim. On the record before us, neither claim has merit.

We note that defendant does not challenge, or even mention, any of the elements of the crimes of which the jury convicted him. Instead, defendant argues that the victim's testimony, which constituted the only direct evidence of defendant's guilt, "defied physical realities" and was "inherently implausible" in light of the geometric dimensions of the love seat and the physical stature of the victim and defendant. However, in order to support his contentions regarding the specific dimensions of the love seat and the height and weight of the victim and defendant, defendant relies on affidavits, photographs, and documents that were not presented to the jury and are not part of the record on appeal. A party may not enlarge the record on appeal. MCR 7.210(A)(1); *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000).

Consequently, these documents may not be considered by this Court because they are not part of the record properly before this Court. *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004). Defendant also argues that the victim did not recognize him at the preliminary examination where she identified defendant as the perpetrator. This claim likewise is supported only by affidavits attached to defendant's brief on appeal, and has no support in the record properly before this Court. *Id.*; *Williams*, 241 Mich App at 524 n 1. We will not consider defendant's improper expansions of the record on appeal in reviewing the issues presented.

This Court reviews de novo a sufficiency of the evidence claim. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all the elements of the offense were proven beyond a reasonable doubt. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004). In reviewing the sufficiency of evidence, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict. *Id.*; *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

On the basis of the record before this Court, the prosecution presented sufficient evidence to allow a rational trier of fact to find that all elements of the crimes were proven beyond a reasonable doubt. Although the victim's testimony is the only direct evidence of defendant's guilt, a jury may convict on the uncorroborated evidence of a CSC victim. *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998); MCL 750.520h. The victim testified that while she was asleep, defendant digitally penetrated her vagina and caused her to touch his penis. This testimony was sufficient evidence to support defendant's convictions under MCL 750.520d(1)(c) and MCL 750.520e(1)(c). MCL 750.520h; *Lemmon*, 456 Mich at 642 n 22.

In reviewing defendant's great weight of the evidence claim, the test 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 Reid (On Remand)*, 292 Mich App 508, 513; 810 NW2d 391 (2011). Reviewing the record, the only supported arguments challenging the victim's credibility are that she said defendant was wearing a plaid shirt when defendant and another witness said he was not and that the victim did not notice any tattoos on defendant. Generally, arguments attacking witness credibility are insufficient to grant a new trial. *Lemmon*, 456 Mich at 647. There are exceptions, including, as defendant argues here, when "testimony contradicts indisputable physical facts or laws" or when testimony is "patently incredible or defies physical realities." *Lemmon*, 456 Mich at 643 (citations omitted). The record demonstrates no support for defendant's claims that the victim's version of events contradicts indisputable physical facts or laws or was patently incredible or defied physical realities. Defendant has not demonstrated that the verdict was against the great weight of the evidence.

Defendant next argues that trial counsel committed numerous errors that denied him his right to the effective assistance of counsel. We disagree. We review a trial court's findings of fact, if any, for clear error, and review de novo the ultimate constitutional issue of effective assistance of counsel. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). Because

an evidentiary hearing was not conducted in the trial court and this Court denied defendant's motion for remand,¹ our review is limited to errors apparent in the record. *Id.*

"Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise." *Id.* To establish his claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). Defendant must also overcome the strong presumption that the action of his counsel constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

In this case, defendant argues that his trial counsel committed several errors during trial preparation, such as failing to properly investigate the crime scene or the victim's background; failing to obtain a recording of the police interviewing Endres, forensic analysis from Wyzywany's computer, or the victim's medical and therapy records; and failing to move for an order of DNA testing or to suppress the victim's identification of defendant at the preliminary examination. We find that for each of these alleged deficiencies, defendant has failed to meet his "burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). All of defendant's foregoing claims of error, except trial counsel's failure to obtain the recording of the police interview of Endres, rely on affidavits, photographs, and documents that were attached to his motion for remand and his brief on appeal, and were not part of the lower court record or the record before this Court on appeal. As noted already, our review of defendant's claim of ineffective assistance of counsel is limited to errors apparent on the record. *Petri*, 279 Mich App at 410. Therefore, we decline to consider the affidavits submitted with defendant's motion for remand. *Id.*; *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001). Consequently, defendant fails to establish a factual predicate, on the basis of the record properly before this Court, for any of his foregoing claims of ineffective assistance of counsel. *Hoag*, 460 Mich at 6.

Regarding defendant's contention that trial counsel was ineffective for failing to obtain the recording of the police interview of Endres, the record does not support that this recording would have benefitted defendant. The officer who interviewed Endres testified at trial that Endres told him about defendant's whereabouts on the morning in question. Endres testified that she did not remember making the statements to the officer. However, the officer testified that he was certain that Endres made the statements in question, and Wyzywany also testified that he overheard Endres make the statements. In sum, defendant has not shown a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Petri*, 279 Mich App at 410; *Yost*, 278 Mich App at 387.

¹ *People v Holden*, unpublished order of the Court of Appeals, entered November 14, 2011 (Docket No. 304364). We decline to reconsider defendant's request on appeal for a remand to the trial court to permit a motion for a new trial or an evidentiary hearing. See *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Defendant also argues that his trial counsel committed numerous errors at trial, such as failing to use a peremptory challenge to dismiss a juror, failing to prevent the prosecutor from asking witnesses leading questions and eliciting hearsay testimony, and failing to request certain jury instructions. Defendant contends that trial counsel should have used a peremptory challenge to dismiss a particular juror because voir dire revealed that the juror did not understand defendant's presumption of innocence or the prosecution's burden of proof. Generally, an attorney's decisions relating to the selection of jurors involve matters of trial strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Moreover, because we do not share trial counsel's ability to assess a prospective juror based on "facial expressions, body language, and manner of answering questions," we are "disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror." *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008). Here, trial counsel clarified for the juror defendant's presumption of innocence and the prosecution's burden of proof and had the opportunity to observe whether the juror understood these concepts. We will not attempt to second-guess counsel on the basis of hindsight. *Id.* For these reasons, we conclude that defendant has not overcome the strong presumption that counsel's action constituted sound trial strategy under the circumstances. *Toma*, 462 Mich at 302. We also note that the trial court instructed the jury on the presumption of innocence and the prosecution's burden of proof. Given "that jurors are presumed to follow their instructions[.]" *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), defendant cannot show that trial counsel's failure to peremptorily challenge the juror affected the outcome of his trial, *Yost*, 278 Mich App at 387.

Defendant also contends that the prosecutor asked leading questions and elicited hearsay testimony from Wyzywany and that trial counsel was ineffective for failing to object to such questioning. We find that any error in failing to object to the prosecutor's leading questions did not prejudice defendant as these questions elicited answers that were uncontroverted or were cumulative to other evidence presented at trial. Moreover, although the prosecutor did elicit hearsay testimony from Wyzywany by asking him what the victim told him on the morning in question, this testimony was admissible as an excited utterance hearsay exception. MRE 803(2) provides that, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an exception to the rule against hearsay. See *People v Barrett*, 480 Mich 125, 131; 747 NW2d 797 (2008). In this case, the victim testified that immediately after defendant sexually assaulted her, she went upstairs and told Wyzywany that she had just been raped. Thus, the record supported that the victim made her statement while she was still under the stress of a startling event. *People v Smith*, 456 Mich 543, 552; 581 NW2d 654 (1998). Accordingly, because Wyzywany's testimony was admissible under MRE 803(2), any hearsay objection would have been futile and, thus, trial counsel was not ineffective for failing to raise a hearsay objection. *Petri*, 279 Mich App at 415 (defense counsel is not ineffective for failing to make a futile objection).

Defendant's final claim of ineffective assistance is that trial counsel was ineffective for failing to request three specific jury instructions – CJI2d 4.5, CJI2d 7.4, and CJI2d 7.8 – that "would have been helpful" to his case. However, defendant provides no explanation or discussion regarding how the three proffered jury instructions would have been helpful to his case, and he does not cite any authority supporting that trial counsel's failure to request such jury instructions constitutes ineffective assistance of counsel. Accordingly, we find that defendant has abandoned this issue. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534

(2007). Regardless, we have reviewed de novo in their entirety the instructions that were provided to the jury and conclude there is no error requiring reversal because the instructions sufficiently protected defendant's rights and fairly informed the jury of the issues they would be required to determine. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

Because defendant is unable to show that trial counsel's performance either fell below an objective standard of reasonableness, or that any alleged error resulted in prejudice, *Yost*, 278 Mich App at 387, there are no individual errors of counsel that can be aggregated to form a cumulative effect to deny defendant his right to a fair trial. *Unger*, 278 Mich App at 258.

We affirm.

/s/ Jane E. Markey

/s/ Amy Ronayne Krause