

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHESTER GARDNER,

Defendant-Appellant.

UNPUBLISHED

October 30, 2012

No. 304449

Wayne Circuit Court

LC No. 10-008460-FH

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant Chester Gardner appeals as of right from his bench trial conviction of two counts of third-degree criminal sexual conduct involving force or coercion (CSC III)¹ and one count of assault and battery.² The trial court sentenced Gardner as a fourth habitual offender³ to serve concurrent terms of 17 to 27 years' imprisonment for each CSC III conviction, and to time served for his assault conviction. We affirm.

I. FACTS

This case arose when Gardner forced a male complainant to perform cunnilingus on a female complainant, and then stabbed the male complainant four times in the buttocks.

The complainants in this case testified that they lived together in the residence in which the incident took place, were roommates, and their relationship was platonic. The female complainant testified that she was a heroin addict and had used heroin "off and on" for about 20 years, but that she had attended a methadone clinic and was not using heroin at the time of the incident. The male complainant testified that he had used heroin from 1969 to 1972, and resumed using heroin in 2009. He testified that he was probably using heroin at the time of the incident.

¹ MCL 750.520d(1)(b).

² MCL 750.81(1).

³ MCL 769.12.

The female complainant testified that she knew Gardner for about one year before the incident. The male complainant testified that the female complainant received a disability check on the first of each month, and that he received a disability check on the third of each month. The female complainant testified that Gardner would give her a ride to pick up her disability checks on the first of each month so that she could pay Gardner for heroin. She testified that she owed Gardner between \$250 and \$400 for heroin at the time of the incident, and that she had been unable to pay Gardner because she was paying for drug rehabilitation. The male complainant testified that in November 2009, he promised to pay Gardner for the female complainant's debt if she did not pay him.

The male complainant testified that at some time in May 2010, Gardner and Gardner's nephew approached him from behind, knocked him down, knocked his phone from his hand, and demanded money. The female complainant testified that some time before June 2010, Gardner had hit her on the head while in the parking lot of a party store, and that she had given him money on that occasion. She testified that on June 1, 2010, Gardner "kicked [her] door in," grabbed her by the hair, and yelled that he wanted his money. The female complainant testified that Gardner hit her, and stabbed the male complainant three times in the arm with a knife. The male complainant testified that Gardner "scratched" his arm with the knife.

The female complainant testified that between 9:00 p.m. and 10:00 p.m. on the evening of July 1, 2010, her seven-year-old grandson responded to a knock on the residence's front door. She testified that as her grandson opened the door, she ran in front of him and grabbed it. She testified that Gardner and Gardner's nephew then entered the residence, and Gardner asked if the male complainant was home. She told Gardner either that she did not know or that she did not think so, but testified that she knew the male complainant was actually in the residence.

The female complainant testified that Gardner then walked to the back of the residence, where the bedrooms were located, approached the male complainant's door, and stated that "[y]ou know what I'm here for." She testified that Gardner's nephew stood by the door, and that she sat on the couch, holding her grandson. She testified that at some point she stood up, but Gardner's nephew told her to sit back down.

The male complainant testified that the incident occurred between 10:30 p.m. and 11:00 p.m. in the evening. The male complainant testified that Gardner entered his bedroom, took \$30 from him, and ordered him to remove his clothing. The female complainant testified that she sat on the couch for about 15 minutes, and that during that time she did not hear anything from the bedroom area. She testified that Gardner then called for her to come to the male complainant's room. The female complainant testified that she saw the male complainant sitting naked on his bed. She testified that Gardner hit her with his open hand on her head a couple of times, and yelled at her for lying about the male complainant's presence in the residence.

The female complainant testified that Gardner told her to remove her clothing. The male complainant testified that the female complainant first refused, but complied after Gardner struck her again. The female complainant testified that she complied because she assumed that Gardner would hurt her if she did not.

The female complainant testified that Gardner removed \$20 to \$30 from the pockets of her jeans, and instructed her to sit down and spread her legs. She testified that she sat on the edge of the male complainant's bed. Both complainants testified that Gardner instructed the male complainant to perform cunnilingus on the female complainant. Both complainants testified that they did not want to engage in that activity. The male complainant testified that he followed Gardner's instruction to prevent Gardner from hurting them.

The female complainant testified that the incident lasted for a few minutes, but stopped when Gardner called his nephew into the bedroom. The male complainant testified that the incident lasted for about a minute before Gardner then punched him in the head and told him to get up. He testified that while Gardner was "ranting about the money and stuff and beating on [the female complainant]," he had retrieved an awl from a box near his bed and swung it at Gardner. He testified that an awl is pointed, similar to a screwdriver. He testified that he and Gardner wrestled for the awl, that Gardner called for his nephew, and that Gardner's nephew stomped on his neck and shoulder. The male complainant testified that his whole body went numb because of a medical condition involving the nerves in his spine, and that Gardner removed the awl from his hand and stabbed him in his left buttock four times.

The female complainant testified that she saw Gardner pick up a screwdriver and stab the male complainant in the buttock five times while he was lying on his stomach on the bed. She testified that she believed Gardner had picked the screwdriver up from the dresser, but that she was confused about where he retrieved it from. She testified that Gardner and his nephew then hit the male complainant on his back, head, face, and neck. The complainants testified that Gardner threatened to tie up the complainants and the grandson, and then "torch" the residence.

The female complainant testified that she grabbed her clothing and ran into the hallway, dressed herself, ran to her grandson in the living room, and called her ex-husband to come and pick them up. The male complainant testified that the female complainant left the room after Gardner and Gardner's nephew left the room.

The complainants spoke before the female complainant left the residence. The female complainant testified that the male complainant wanted to call the police, but she told him not to call. In her statement to the police, the female complainant indicated that she told the male complainant not to tell the police "what really happened." She testified that she did not want him to call the police because she was afraid "they'd come back and get [her]." The male complainant testified that he called an ambulance.

Officer John Toth testified that he arrived at the residence at about 1:00 a.m. on July 2, 2010. Officer Toth testified that the male complainant told him that he did not want to speak with him because the complainant had called an ambulance, not the police. Officer Toth testified that the male complainant appeared distant, and eventually told him that a young male had approached and robbed him in a nearby park. Officer Toth testified that he observed tread marks on the male complainant's neck, and that the male complainant showed Officer Toth the stab wounds on his buttocks. Officer Toth testified that he did not believe the male complainant's story, and that he believed the incident had been drug related.

The male complainant testified that the next day, the female complainant told him to “go ahead and call the police.” The female complainant testified that she changed her mind because she wanted to return to the residence, but was afraid to do so.

Officer Dan Roulo testified that he responded to a call at the residence at approximately 2:41 a.m. on July 3, 2010. He testified that he was responding to a request to secure the residence because the male complainant feared to enter it. Officer Roulo testified that when he arrived, the male complainant immediately told him that the call had been a pretext and that he wanted to talk about what happened the evening before. The male complainant told Officer Roulo that he had lied about the robbery, and that the female complainant was afraid because of Gardner’s threat to burn down the residence. Officer Roulo recovered an awl from the residence.

Officer Toth testified that he went on vacation shortly after the incident, but when he returned, he found a written statement from the female complainant in his mailbox. He testified that he interviewed Gardner, and videotaped the interview, which the prosecution played into evidence. During the interview, Gardner did not indicate that he had an alibi for the evening of July 1, 2010.

Ronnie Gardner, Gardner’s brother, testified that on the evening of July 1, 2010, he went to Gardner’s home at about 8:30 p.m.. Ronnie testified that he and Gardner sat on the deck to prevent fireworks from spooking Gardner’s dogs. Ronnie testified that he did not know where the fireworks display had been located, and that it could have been located at a campground or at apartments off Grove Road. Ronnie testified that the fireworks display lasted for 30 minutes or longer.

Ronnie testified that he stayed at Gardner’s home until about 10:30 p.m., when Ronnie’s wife came to Gardner’s home to inform Ronnie that he was missing a wrestling match. Ronnie testified that he then returned home and arrived in time to watch the end of the wrestling match, which ended at about 11:00 p.m..

Officer Toth testified that he had interviewed Ronnie on January 3, 2011. Officer Toth testified that Ronnie told him that the golf course on Grove Road displayed the fireworks. Officer Toth testified that an apartment complex on Grove Road displayed fireworks on its golf course on July 2 and 3, 2010, but did not display fireworks on July 1, 2010. Officer Toth testified that he conducted an internet search for other possible locations, but found no notices of other fireworks displays near Gardner’s house on July 1.

Before trial, the prosecution notified Gardner that it intended to introduce evidence of other acts, including Gardner’s prior conviction for armed robbery, evidence of a sexual assault that occurred during the robbery, and evidence of Gardner’s prior assaults against the complainants in the months leading up to the incident. Defense counsel challenged the use of evidence of the prior armed robbery and sexual assault, arguing that there were too many differences between the prior assault and the present incident. The trial court’s ruling excluded any evidence of the prior sexual assault, but the trial court allowed the prosecution to admit evidence of Gardner’s other assaults against the complainants.

II. BAD ACTS EVIDENCE

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Generally, this Court reviews for an abuse of discretion the trial court's admission of bad acts evidence.⁴ The trial court abuses its discretion when its outcome is outside the range of reasonable and principled outcomes.⁵

However, a defendant may not raise issues for the first time on appeal absent extraordinary circumstances, but must instead properly preserve issues by raising them before the trial court.⁶ A defendant must challenge the issue on the same ground below that the defendant challenges the issue on appeal.⁷

Before the trial court, Gardner challenged only the admission of the prior robbery and sexual assault on the grounds that they were too dissimilar from the incident involving the complainants. Gardner argues that the trial court improperly admitted the evidence of his prior assaults against the complainants because the evidence was unfairly prejudicial and only marginally probative. Thus, this issue is unpreserved. We review unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights.⁸

B. LEGAL STANDARDS

The trial court must exclude bad acts evidence "if it's only relevance is to show the defendant's character or propensity to commit the charged offense."⁹ "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system."¹⁰

However, the trial court may not admit the evidence if the danger of unfair prejudice substantially outweighs the evidence's probative value.¹¹ Evidence is unfairly prejudicial if there

⁴ *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

⁵ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

⁶ *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

⁷ *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

⁸ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁹ *People v Watkins*, 491 Mich 450, 468; ___ NW2d ___ (2012); MRE 404(b)(1).

¹⁰ *People v Sabin (After Remand)*, 463 Mich 43, 62-63; 614 NW2d 888 (2000).

¹¹ MRE 403; MRE 404(b)(1); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

is a danger that the finder of fact will give the evidence undue or preemptive weight, or if it would be inequitable to allow the prosecution to use it.¹²

C. APPLYING THE STANDARDS

Gardner argues that some of the evidence was unfairly prejudicial because it was “drug profile” evidence. Irrelevant drug profile evidence may be unfairly prejudicial because it is likely to inflame or confuse the jury.¹³ Here, to the extent that the complainants testified that Gardner was specifically attempting to collect a drug debt, their testimony was permissible evidence of Gardner’s motive. Evidence of motive is evidence of the causes or reasons for the defendant’s actions, and is separate from impermissible propensity character evidence.¹⁴ Further, because Gardner’s case was a bench trial, there was no jury to confuse. We conclude that the complainant’s testimony that they owed Gardner a drug debt was not unfairly prejudicial “drug profile” evidence.

Gardner also argues that the trial court improperly admitted evidence of Gardner’s prior assaults against the complainants because it was “bad acts” evidence. The prosecution admitted evidence that Gardner assaulted the complainants in two prior months, and that the assaults involved Gardner attempting to obtain repayment of the drug debt.

Some of the evidence was permissible evidence of Gardner’s system of attempting to collect the drug debt from the complainants. The complainants testified that in June 2010, Gardner broke into the complainants’ residence on the first of the month, attempted to collect the drug debt, and then stabbed or scratched the male complainant with a knife. In July 2010, Gardner broke into the complainants’ residence, attempted to collect the drug debt, forced the male complainant to perform cunnilingus on the female complainant, and then stabbed the male complainant with an awl. Although the July 2010 incident involved aspects that were not present in the June 2010 incident, many of the aspects were the same. We conclude that the trial court did not clearly err when it determined that the June 2010 evidence was probative evidence of Gardner’s plan, system, or scheme to extort money from the complainants at the beginning of each month.

The individual assaults on the complainants in May 2010 did not share similar characteristics with the incident in July 2010, and we conclude that the trial court clearly erred in admitting this evidence. Although the prosecution argued that the evidence would show Gardner assaulted the complainants early in the month, the complainants actually testified that they could not remember when in May the assaults took place. However, we presume that the trial court in a bench trial makes its findings of fact based on the admissible evidence alone.¹⁵ The trial court

¹² *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

¹³ *Gainey v Sieloff (On Remand)*, 163 Mich App 538, 549; 415 NW2d 268 (1987).

¹⁴ *Sabin (After Remand)*, 463 Mich at 55-56; *People v Hoffman*, 225 Mich App 103, 107; 570 NW2d 146 (1997).

¹⁵ *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

did not mention the prior assaults in its findings of fact, and there is no indication that the trial court improperly considered the inadmissible evidence in determining the outcome of the case. Thus, we conclude that Gardner has not shown that this error affected his substantial rights.

We conclude that even though the trial court improperly admitted some bad acts evidence, Gardner has not shown any error requiring reversal.

III. SUFFICIENCY OF THE EVIDENCE OF CSC III

A. STANDARD OF REVIEW

A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law.¹⁶ Thus, this Court reviews de novo the sufficiency of the evidence on appeal.¹⁷ When reviewing a challenge to the sufficiency of the evidence, we review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the essential elements of the crime beyond a reasonable doubt.¹⁸ We will not interfere with the trier of fact's role to determine the weight of the evidence or the credibility of the witnesses.¹⁹

B. ELEMENTS AND LEGAL STANDARDS

A defendant has committed CSC III if that defendant has used force or coercion to engage in sexual penetration with another person.²⁰ Cunnilingus is a form of sexual penetration.²¹ A person who uses another person as an instrumentality to engage in sexual penetration is guilty as a principal.²² A defendant has used force or coercion if the defendant "did something to make [the complainant] reasonably afraid of present or future danger."²³

C. APPLYING THE STANDARDS

Gardner argues that the complainants' testimonies were so incredible that they could not support his conviction, and that the prosecution did not sufficiently disprove his alibi.

¹⁶ *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); see *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

¹⁷ *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

¹⁸ *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

¹⁹ *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

²⁰ MCL 750.520d(1)(b).

²¹ MCL 750.520a(r).

²² *People v Hack*, 219 Mich App 299, 303; 556 NW2d 187 (1996).

²³ MCL 750.520b(1)(f)(ii) and (iii); *People v Kline*, 197 Mich App 165, 166; 494 NW2d 756 (1992), quoting CJI2d 20.15.

The complainants testified that Gardner instructed them to engage in cunnilingus, that they did not want to do so, and that they only did so because they were afraid that Gardner was going to hurt them. The male complainant described the act of cunnilingus in detail. Ronnie testified that he was at Gardner's home on the evening of July 1, and that he and Gardner watched fireworks together that evening. Officer Toth testified that the location that Ronnie claimed displayed the fireworks did not display fireworks on July 1. Officer Toth also testified that he was unable to locate any other fireworks displays in the area of Gardner's home on the evening of July 1.

The complainants admitted they were drug addicts, admitted they lied to the police, admitted they had a motive to fabricate the story, and that their testimony contradicted at points. We also recognize that Ronnie testified that Gardner was at Gardner's home on the evening of July 1, 2010, because Ronnie and Gardner watched fireworks that evening. However, we must resolve conflicting evidence in favor of the prosecution and defer to the finder of fact's ability to determine witness credibility.²⁴ Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that Gardner committed CSC III on the evening of July 1, 2010.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Gardner raises this additional issue in his pro per supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. STANDARD OF REVIEW

An ineffective assistance of counsel claim "is a mixed question of fact and constitutional law."²⁵ A defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant's claim that his counsel was ineffective.²⁶ Gardner did not do so in this case. When a defendant has not moved the trial court for an evidentiary hearing, this Court's review is limited to "mistakes apparent on the record."²⁷

B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.²⁸ To prove that his defense counsel was not effective, the defendant must show that (1) defense

²⁴ *Id.*

²⁵ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

²⁶ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

²⁷ *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

²⁸ US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

counsel's performance was so deficient that it fell below an objective standard of reasonableness, and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant.²⁹ A defendant has been prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.³⁰

The defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy.³¹ We give defense counsel wide discretion in matters of trial strategy because counsel may be required to take calculated risks to win a case.³² Defense counsel's decisions to call and investigate witnesses are matters of trial strategy.³³ "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work."³⁴ This Court will not substitute its judgment for that of defense counsel, or review this issue with the benefit of hindsight.³⁵

C. APPLYING THE STANDARDS

First, Gardner argues that defense counsel was ineffective because counsel failed to meaningfully consult with Gardner before trial, and specifically failed to consult with Gardner concerning his alibi witness. Although the lower court record contains a handwritten request from Gardner for new trial counsel because defense counsel had not investigated Gardner's alibi witness, the trial court subsequently allowed Gardner's first defense counsel to withdraw, and appointed Gardner new counsel. Any failure of Gardner's second counsel to consult with Gardner is not apparent from the lower court record.

Second, Gardner argues that defense counsel was ineffective because counsel failed to impeach the complainants with their prior convictions. There is no evidence in the lower court record concerning what criminal backgrounds the complainants had, if any. Further, defense counsel impeached the credibility of the complainants in other ways, including impeaching their ability to recall events and their motives to testify. Counsel's strategy to impeach the complainants was not unreasonable simply because it did not work.

Third, Gardner argues that defense counsel failed to thoroughly investigate his alibi, particularly concerning the accuracy of Ronnie's statements about the fireworks. Gardner's

²⁹ *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

³⁰ *Id.*

³¹ *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007); *People v Mitchell*, 454 Mich 145, 150; 560 NW2d 600 (1997).

³² *Pickens*, 446 Mich at 325.

³³ *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

³⁴ *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

³⁵ *Odom*, 276 Mich App at 415.

second defense counsel called and thoroughly questioned Gardner's alibi witness. The record indicates that defense counsel did elicit testimony that a different location than the golf course could have displayed the fireworks. Gardner does not indicate what additional evidence defense counsel could have unearthed to support his alibi. And although Gardner argues that his defense counsel should have anticipated a rebuttal alibi witness, the record indicates that Gardner's second defense counsel *did* anticipate the prosecution's rebuttal alibi witness, Officer Toth. Defense counsel obtained copies of Ronnie's report to Officer Toth and "the investigation conducted by [the prosecution's] police officers regarding the alibi[.]" and thoroughly cross-examined Officer Toth. Thus, from the record it appears that Gardner's second defense counsel acted with objective reasonableness under the circumstances.

Fourth, Gardner argues that defense counsel was ineffective because counsel unreasonably advised Gardner to have a bench trial, rather than a jury trial. The lower court record does not support Gardner's assertion because Gardner stated on the record that it was "my idea" to have a bench trial.

Thus, we conclude that there are no mistakes are apparent from the record to indicate that that Gardner's trial counsel did not effectively assist him.

V. RIGHT TO TRIAL TRANSCRIPTS

Gardner also raises these additional issues in his pro per supplemental brief.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

Generally, this Court will not consider unpreserved claims of error on appeal.³⁶ A defendant must preserve an issue by challenging it in the trial court, so that the trial court has an opportunity to correct the error.³⁷ We review unpreserved issues for plain error affecting a defendant's substantial rights.³⁸

Here, Gardner argues in his Standard 4 brief that he moved the trial court in pro per to provide him with the trial transcripts. Gardner further indicates in an affidavit attached to his Standard 4 brief that he requested a complete copy of the transcripts from the trial court. The trial court record is complete through June 4, 2012, including post-conviction correspondence from Gardner and the lower court's Register of Actions reflecting other motions that Gardner has filed in pro per. But the record does not indicate that Gardner filed any motion with the trial court requesting a copy of his trial transcripts. We conclude that Gardner's claim that the trial court failed to provide him with his transcripts after he requested them is unpreserved, and thus review these issues for plain error affecting Gardner's substantial rights.

³⁶ *Carines*, 460 Mich at 761.

³⁷ *Id.* at 761-762.

³⁸ *Id.* at 763.

B. CONSTITUTIONAL RIGHT TO TRIAL TRANSCRIPTS

“[D]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts[.]”³⁹ However, a state must only provide an indigent defendant “with means of presenting his contention to the appellate court which are as good as those available to a nonindigent defendant with similar contentions.”⁴⁰

The United States Constitution and Michigan Constitution provide that an accused is entitled to counsel to assist in his defense.⁴¹ The right to counsel encompasses the right to self-representation.⁴² Our Constitution provides that “[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.”⁴³ Because the word “or” is conjunctive, “a defendant has a constitutional entitlement to represent himself or to be represented by counsel—but not both.”⁴⁴ Thus, neither indigent nor nonindigent defendants are constitutionally entitled to *both* represent themselves and have counsel represent them.

Here, Gardner asserted his right to representation on appeal. The trial court gave Gardner’s appellate counsel a copy of Gardner’s transcripts at public expense. Gardner also elected to file a pro per Standard 4 brief. When the defendant has asserted his right to representation at trial, but to an extent chooses to represent himself, it is a hybrid or standby counsel situation.⁴⁵ In that situation, defendant has essentially elected for counsel to represent him or her.⁴⁶ We conclude that this situation—where a defendant has requested to be represented by appellate counsel, but to an extent elects to represent himself through a Standard 4 brief—is analogous to a hybrid or standby counsel. Thus, the invitation to file a Standard 4 brief is closer to a matter of grace than a matter of right.⁴⁷

We conclude that a trial court adequately protects defendant’s constitutional rights to trial transcripts at public expense when the defendant has exercised his or her right to representation on appeal and the trial court provides a copy of the trial transcripts to the defendant’s appellate counsel. The trial court adequately protected Gardner’s constitutional rights by providing Gardner’s appointed appellate counsel a copy of the trial transcripts at public expense.

³⁹ *Draper v Washington*, 372 US 487, 488; 83 S Ct 774; 9 L Ed 2d 899 (1963), quoting *Griffin*, 351 US at 19; *Caston*, 228 Mich App at 295.

⁴⁰ *Draper*, 372 US at 496; *Caston*, 228 Mich App at 296.

⁴¹ US Const, Am 6; Const 1963, Art 1, § 20.

⁴² *Faretta v California*, 422 US 806, 818; 95 S Ct 2525; 45 L Ed 2d 562 (1984).

⁴³ Const 1963, Art I, § 13.

⁴⁴ *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994).

⁴⁵ *Id.* at 440-441.

⁴⁶ *Id.* at 443-444.

⁴⁷ See *Dennany*, 445 Mich at 443.

C. RIGHT TO TRIAL TRANSCRIPTS UNDER THE MICHIGAN COURT RULES

As discussed above, an indigent defendant is entitled to a copy of the trial transcripts at public expense in order to pursue the appeal of a conviction.⁴⁸ Our court rules provide that an indigent defendant may obtain trial court transcripts and documents on written request:

(A) Appeals of Right. An indigent defendant may file a written request with the sentencing court for specified court documents or transcripts, indicating that they are required to pursue an appeal of right. The court must order the clerk to provide the defendant with copies of documents without cost to the defendant, and, unless the transcript has already been ordered as provided in MCR 6.425(G)(2), must order preparation of the transcript.^[49]

As noted by this Court in the unpublished opinion of *People v Bennett*, this court rule does not clearly state whether a defendant who is presenting claims in propria persona in a Standard 4 brief is entitled to a copy of the transcript if the trial court has already provided his or her appellate counsel with one.⁵⁰

The prosecution urges us to read an exception into MCR 6.433, that the defendant is only entitled to one copy of the transcripts, and if the defendant's appellate counsel has that copy, then the indigent defendant is not entitled to another copy.⁵¹ Gardner argues that this rule's plain language contains no such exception. However, because the record contains no indication that Gardner did file a written request with the trial court in compliance with this rule, we decide this case on narrower grounds.

We conclude that Gardner's claim must fail. The party seeking reversal on appeal has the burden to provide the court with a record which establishes the factual basis of his argument.⁵²

⁴⁸ *Griffin*, 351 US at 19; MCR 6.433.

⁴⁹ MCR 6.433.

⁵⁰ *People v Bennett*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 17, 2009 (Docket No. 284887), slip op at 7 (considering whether appellate counsel's failure to provide the defendant with a copy of the trial transcripts violated the defendant's constitutional rights to equal protection).

⁵¹ We note that to reach the prosecution's conclusion, we would have to omit the conjunction "and" from MCR 6.433. Further, the Michigan Supreme Court's decision in *Larkin v Kent Circuit Judge* does not control our decision. In that case, our Supreme Court held that under the language of GCR 1963, 785.13—the precursor to MCR 6.433—"an indigent defendant is entitled to facsimile copies to facilitate his pursuit of *post-conviction remedies*" only if he was not represented by counsel and his appeal of right had concluded, or if he did not exercise his right to appeal. *Larkin v Kent Circuit Judge*, 397 Mich 611; 246 NW2d 827 (1976). Here, Gardner is not pursuing post-conviction remedies, but is instead pursuing his appeal of right.

⁵² *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000).

We will not consider an affidavit that a defendant attached to his or her appellate brief because our review is limited to the record of the trial court, and we generally do not allow enlargement of the record on appeal.⁵³ As indicated in the issue preservation section above, Gardner has not established that he actually requested a copy of the transcript from the trial court. Nor has Gardner moved to supplement the record on appeal to provide proof on this point. Because MCR 6.433 only entitles an indigent defendant to his or her trial transcripts after a written request, we conclude that Gardner has not established the factual basis of his allegation of error.

Further, after a careful review of the record, we can find no errors that are clear and obvious concerning whether trial counsel effectively assisted Gardner, and these are the claims that Gardner argues that he would have raised in his Standard 4 brief if he had access to the second transcript. To prevail on an unpreserved claim, the defendant must show that the error was outcome determinative. Here, Gardner has not shown that his lack of access to the trial transcript would affect the outcome of his appeal. Thus, we conclude that Gardner's claim must fail because he has not established the factual basis underlying his argument, the argument is unpreserved, and Gardner has shown no clear error affecting his substantial rights.

D. EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Finally, Gardner asserts that his appellate counsel was ineffective for failing to provide him with the trial transcripts. In order to establish that appellate counsel was ineffective, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for appellate counsel's error, the result of the proceedings would have been different.⁵⁴ We presume that appellate counsel's decision was sound strategy.⁵⁵ When determining whether counsel's performance was deficient, we must "affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did."⁵⁶

Here, Gardner must demonstrate that appellate counsel's decision not to provide Gardner with the missing trial transcript was objectively unreasonable. Appellate counsel may have still required the transcripts to write his own brief, may have required the transcripts to prepare for oral arguments, or may have been professionally required to maintain the transcripts until counsel's work on the case was complete. Further, Gardner has not provided any authority for the proposition that appellate counsel is required to give the defendant the trial transcripts on the

⁵³ *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990); see MCR 7.210(A)(1).

⁵⁴ *People v Uphaus (On Remand)*, 278 Mich App 174, 185-186; 748 NW2d 899 (2008).

⁵⁵ *Id.* at 186.

⁵⁶ *People v Vaughn*, ___ Mich ___, slip op p 27; ___ NW2d ___ (2012), quoting *Cullen v Pinholster*, 563 US ___, ___; 131 S Ct 1388, 1407; 179 L Ed 2d 557 (2011) (internal quotations omitted).

defendant's request, and we can find no such authority. We conclude that Gardner not overcome the presumption that appellate counsel's decision was reasonable.

VI. CONCLUSION

We conclude that sufficient evidence supported Gardner's CSC III convictions. Gardner has not shown that the trial court's improper admission of the complainant's bad acts testimony violated his substantial rights, or that his trial or appellate counsel was ineffective.

We conclude that Gardner's constitutional rights were adequately protected when the trial court provided a copy of his trial transcripts to his appellate counsel. Finally, the lower court record does not reflect that Gardner actually requested his transcripts from the trial court, and therefore we conclude that Gardner has not established the necessary factual basis for his claim that the trial court violated MCR 6.433.

We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck