STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES A. EVANS,

Defendant-Appellant.

UNPUBLISHED
December 26, 2000

No. 217947
Wayne Circuit Court
LC No. 98-007098

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) (penetration of a child, aged thirteen to sixteen). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to six to fifteen years' imprisonment. We affirm.

I

Defendant first argues that the trial court erred in admitting hearsay testimony from an investigating police officer. Defendant did not object to the proffered testimony at trial and thus this issue is unpreserved, *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994), and is reviewed only for plain error. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Three requirements must be met to withstand forfeiture under the plain error rule: (1) the error must have occurred, (2) the error must have been plain, i.e., clear or obvious, and (3) the plain error must have affected substantial rights. *Id.* at 763. Reversal is required only if plain error resulted in the conviction of an actually innocent defendant, or where the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

At trial, the officer refreshed her memory by referring to a police report, then testified with regard to what the complainant told her occurred.[1] The officer's testimony contained

[1] Defendant contends that the witness improperly read from the police report, but on the existing record, we cannot reach this conclusion.

hearsay statements made by the complainant. See MRE 801(c). Contrary to plaintiff's argument on appeal, we do not conclude that the excited utterance exception to hearsay, MRE 803(2), applies, because the complainant was not still under the stress of the startling event. See *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Her statement was made the day following the assault, after she had already discussed the incident with two of her friends and a police officer. It was error for the court to allow the statement; however, reversal is not required.

When, as here, an issue is unpreserved, reversal will be ordered only if the defendant shows prejudice. *Carines, supra* at 763. In determining prejudice, this Court reviews the entire record, including the evidence. *Id.* at 772 n 18. The emergency room physician who examined the complainant testified that the complainant had trauma to her vaginal region that was consistent with sexual assault occurring within the time frame given for the assault. She also found evidence of trichomonas, a parasite transmitted through sexual contact. Given the physical evidence of penetration, circumstantial evidence placing defendant alone with the complainant when the assault was alleged to have occurred, testimony that the complainant, while still under the stress of the event, told two of her friends and the school security officer that she was assaulted, and complainant's own in-court testimony of the assault, we cannot find that the error affected defendant's substantial rights. *Carines, supra* at 763; *Smith, supra* at 554-555.

II

Defendant next contends that counsel was ineffective for failing to object to the officer's hearsay testimony. Because defendant did not preserve this issue by moving in the trial court for an evidentiary hearing or a new trial, our review is limited to mistakes apparent from the record on appeal. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; ___ NW2d ___ (2000). We conclude that defendant was not denied the effective assistance of counsel. Defendant has not shown that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant cannot meet the second requirement for a showing of ineffective assistance of counsel because, as we concluded above, the officer's improper testimony caused defendant no prejudice given the remaining evidence against him.

III

Defendant next contends that the complainant's friend testified to improper other acts evidence in derogation of MRE 404(b) and that his counsel was ineffective for failing to object on this ground. We find no mistake apparent on the record to support review of this contention. Counsel discussed this issue with the court off the record prior to admission of the evidence, and it is not apparent that defense counsel did not object to the evidence.

In any event, the record reflects that the trial court considered whether the impeachment of the witness with a prior statement involved prohibited MRE 404(b) evidence and held that it did not. We are unconvinced that the evidence was improper for the purpose of showing bias, and, given that the trial court issued a ruling, counsel cannot be faulted for failing to object. Counsel is not ineffective for failing to advocate a meritless position or make a futile objection.

People v Snider, 239 Mich App 393, 425; 608 NW2d 502 (2000), *People v Sharbnow*, 174 Mich App 94, 106-107; 435 NW2d 772 (1989). Moreover, as discussed above, defendant has failed to show that he was prejudiced by the evidence of his physical encounter with the complainant's friend, in light of the independent evidence of the assault of the complainant.

IV

Defendant next contends that counsel was ineffective for failing to object to inadmissible hearsay testimony by the doctor who examined the complainant. The doctor testified that the complainant identified defendant as the one who assaulted her. We agree with defendant that his counsel should have objected to this testimony as inadmissible hearsay. *People v Hackney*, 183 Mich App 516, 528; 455 NW2d 358 (1990). We further decline to characterize this inaction as trial strategy. See *Sabin, supra* at 659. However, as in *Hackney*, because the complainant identified the defendant as her attacker, we cannot conclude that, under the circumstances, any corroborating effect significantly prejudiced the defendant. *Hackney, supra* at 529-530.

Defendant further contends that his counsel failed to adequately cross-examine the doctor's testimony that she found evidence of trichomonas in the complainant's vagina. Defendant misinterprets the doctor's testimony to indicate that she diagnosed the complainant with chlamydia, a point which the doctor denied. Because defendant misunderstood the doctor's diagnosis, his arguments, if raised, would not have been outcome determinative. Counsel is not required to raise a futile motion. *Snider, supra* at 425.

V

Defendant also raises several issues of ineffective assistance of counsel that depend on facts not apparent from the record. Defendant contends that counsel was ineffective for failing to move for the discovery of the rape kit used on the complainant and for failing to order tests to prove that he did not have any sexually transmitted diseases. Defendant also contends that trial counsel was ineffective for failing to investigate and secure the presence of important witnesses and to interview them before trial. Unlike the above claims of ineffective assistance of counsel, these issues require a determination of facts not apparent on the record. This Court will not review a claim of ineffective assistance of counsel on the basis of allegations not supported on the record where no motion for a *Ginther*[2] hearing has been made, or where defendant has failed to move for a new trial, or a where a timely motion for a remand has not been filed with this Court. *People v Moore*, 129 Mich App 354, 358; 341 NW2d 149 (1983); *People v Lawson*, 124 Mich App 371, 373; 335 NW2d 43 (1983). These issues are forfeited. See *Snider, supra* at 423.

VI

Finally, defendant contends that trial counsel misled and "misadvised" him, such that he waived his right to a jury trial. The existing record reflects that defendant was apprised of the

[2] *Ginther, supra* at 442-443.

charges against him, that he could possibly receive a life-sentence, and that he made a knowing and intelligent waiver of his right to a jury trial.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald