STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2002
v	No. 229562 Houghton Circuit Court
ANDREW GREGORY STANSBURY, Defendant-Appellant.	LC No. 99-001639-FH

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of first-degree home invasion, MCL 750.110a(2), and third-degree criminal sexual conduct, MCL 750.520d(1)(c) (sleeping victim). The trial court sentenced him as a second-offense habitual offender to concurrent terms of 12½ to 20 years' imprisonment. We affirm, but remand for the ministerial task of correcting the judgment of sentence.

Defendant first argues that the trial court improperly instructed the jury on the defense of consent by failing to read the last sentence of CJI2d 20.27, which states, "If you find that the evidence raises a reasonable doubt as to whether [the complainant] consented to the act freely and willingly, then you must find the defendant not guilty." Defendant failed to object to the instructions at trial; therefore, we review this issue for plain error. To avoid forfeiture under the plain error doctrine, three requirements must be met: 1) an error must have occurred; 2) the error must have been plain, i.e. clear or obvious; and 3) the plain error must have likely affected the outcome of the case. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The trial court gave the following instruction:

> There's been evidence in this case about the defense of consent. A person consents to a sexual act by agreeing to it freely and willingly without being forced or coerced. It is not necessary to show that [the complainant] resisted the Defendant to prove that the crime was committed, nor is it necessary to show that [the complainant] did anything to lessen the danger to herself. In deciding whether or not [the complainant] consented to the act, you should consider all of the evidence, and it may help you to think about questions like these: Was she free to leave and not take part in the sexual act? What was said between she [sic]

> and the Defendant, if anything, at the bar? What was said, if anything between them at the [complainant's] residence?

The trial court further stated, near the beginning of the jury instructions:

> You must have a high level of confident [sic] in the Defendant's guilt, and that confidence must come from a careful examination of the evidence in the case, and nothing else.
>
> If you have a reasonable doubt about the Defendant's guilt, you cannot be said to have the required high level of confidence and must acquit.

This Court must evaluate jury instructions as a whole, rather than extract instructions piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even partially imperfect instructions do not require reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Keeping these rules in mind, we discern no clear or obvious error with regard to the instructions as given. Indeed, by referring to the "defense of consent" and by stating that "[i]f you have a reasonable doubt about the [d]efendant's guilt, you cannot be said to have the required high level of confidence and must acquit," the trial court adequately informed the jury that a reasonable doubt regarding consent would mandate acquittal. Reversal based on this unpreserved issue is unwarranted.

Next, defendant argues that the trial court erred by giving its own instructions on reasonable doubt and the presumption of innocence instead of using CJI2d 3.2. Once again, defendant failed to object at trial to the instructions he now challenges on appeal, and therefore our review is for plain error. We discern no clear or obvious error that likely affected the outcome of the case. *Carines*, *supra* at 763. Indeed, the trial court stated:

> A person accused of a crime is presumed innocent. You've heard that again and again. The presumption of innocense [sic] can only be overcome by proof which is convincing beyond a reasonable doubt. That is a very high burden of proof. Because that standard is an ancient and honored aspect of our criminal justice system, it is essential that no Defendant ever be convicted on any lesser proof. It is also essential that the standard not be increased. A higher standard would be impossible to meet, making the criminal justice system ineffective. The presumption of innocense [sic] has been overcome if, based on the evidence, you have a high level of confidence in the Defendant's guilt. It is not sufficient if the proofs only satisfy that the Defendant might be guilty. Nor is it enough if the proofs satisfy that he's probably guilty. Not even a strong probability of guilt is enough. You must have a high level of confident [sic] in the Defendant's guilt, and that confidence must come from a careful examination of the evidence in the case and nothing else.
>
> If you have a reasonable doubt about the Defendant's guilt, you cannot be said to have the required high level of confidence and must acquit. If you do not have a reasonable doubt, you have that high level of confidence and may convict. A reasonable doubt is an actual doubt arising from the evidence, the lack of

> evidence, or what inferences reasonably follow. A reasonable doubt is not a doubt based upon the mere possibility of the Defendant's innocense [sic]. Everything relating to human affairs is opened to the possibility of doubt. Nor is it a doubt based on sympathy for the Defendant, or the like, a reasonable doubt. Such a doubt is not based on reason. Certainty is not required because it is unattainable. Whenever there is a dispute about the particulars of some event, unassailably accurate knowledge is not possible, given human nature. The best evidence cannot produce more than a high degree of confidence. So that is what is required. Not more, not less.

These instructions fairly presented the issues and sufficiently protected the defendant's rights. See *Davis, supra* at 54. As noted in *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996), use of the standard jury instructions is not mandatory. No clear or obvious error occurred, and reversal is therefore unwarranted.

Defendant additionally contends that his attorney rendered ineffective assistance by failing to object to the jury instructions challenged on appeal. To establish ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient under an objective standard of reasonableness and that the deficiency likely affected the outcome of the case. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Given the substantially correct nature of the instructions, defendant has not met this burden. The failure to object to the instructions did not likely affect the outcome of the case.

Next, defendant argues that the trial court erred in denying his motion for a new trial because the jury allegedly viewed him in handcuffs while being transported between the jail and courthouse. We review de novo a trial court's decision with regard to a motion for a new trial. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). We find no abuse of discretion here. Indeed, the restrictions on shackling do not apply to precautions taken when a defendant is transported between the jail and courthouse. *People v Panko*, 34 Mich App 297, 300; 191 NW2d 75 (1971). Reversal is unwarranted.

Next, defendant argues that the trial court erred in denying his motion for a new trial because two jurors allegedly spoke about the case in a restaurant on the first day of trial. Again, we disagree. This Court will not grant a new trial for juror misconduct if no harm was done to the defendant, even though the conduct may have garnered rebuke from the trial court had it learned of the conduct during trial. *People v Fetterley*, 229 Mich App 511, 544-545; 583 NW2d 199 (1998). Defendant cannot demonstrate any prejudice resulting from the innocuous discussion[1] by the two jurors. Accordingly, reversal is unwarranted.

Finally, defendant contends that his judgment of sentence must be corrected because it mistakenly shows that he has been "convicted" of being a third-offense habitual offender. We

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[1] The discussion allegedly involved the expected length of the trial and a brief mention of the definition of penetration.

agree. The trial court improperly gave defendant a third sentence for being an habitual offender. Habitual offender status is a sentence enhancer, not a separate offense. See *People v Zinn*, 217 Mich App 340, 345; NW2d (1996). Accordingly, the judgment of sentence must be corrected to reflect that defendant is serving two, not three, enhanced terms of 12½ to 20 years' imprisonment.[2]

Affirmed, but remanded for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Jane E. Markey
/s/ Patrick M. Meter

[2] Although not raised by defendant on appeal, it appears that an incorrect habitual offender citation is listed on defendant's judgment of sentence. Indeed, the prosecutor sought, and the trial court evidently imposed, enhancement as a second-offense habitual offender, for which the appropriate citation is MCL 769.10. The correct citation should be noted on the judgment on remand.