STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES HARGRAVE,

Defendant-Appellant.

UNPUBLISHED
March 19, 2002

No. 228536
Wayne Circuit Court
LC No. 00-000905

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (sexual penetration occurring during commission of other felony) unarmed robbery, MCL 750.530, and unlawfully driving away an automobile, MCL 750.413 (UDAA). Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of forty to sixty years for the CSC I convictions, ten to fifteen years for the robbery conviction, and three to five years for the UDAA conviction. We affirm.

On appeal, defendant first argues[1] that he was denied a fair trial because the prosecutor mentioned defendant's decision not to testify during closing argument. We review de novo claims of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Issues concerning prosecutorial misconduct are reviewed case by case, and we must "examine the pertinent portion of the record and evaluate the prosecutor's remarks in context." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

[1] To the extent that defendant challenges the prosecutor's statement regarding the absence of the rape kit, and any favorable effect it would have had on the prosecution's case, this issue is not properly preserved because defendant did not raise it in the statement of the issues in his brief on appeal. MCR 7.212(C)(5); *Weiss v Hodge (After Remand)*, 223 Mich App 620, 634; 567 NW2d 468 (1997). Although a prosecutor may not argue facts not in evidence, *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001), the prosecutor did not do so here. He merely stated that the rape kit, although not essential, would have been useful in resolving the case. Thus, there was no error.

In *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965), Justice Douglas, writing for the majority of the United States Supreme Court, observed that "the Fifth Amendment . . . in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is *evidence of guilt*." (Emphasis supplied.) See also MCL 600.2159; *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995); *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), aff'd 460 Mich 55 (1999). In determining whether defendant's Fifth Amendment right against self-incrimination was violated in the present case, we must view the challenged comment in context. *Fields, supra* at 110.

Although the prosecutor did state during closing argument that defendant had chosen not to testify, he did not imply that the jury should view defendant's decision as substantive evidence of his guilt. Rather, the challenged comment was directly responsive to defense counsel's opening statement and the recurrent theme throughout trial that the jury should question the complainant's credibility, and not accept her version of the events leading to defendant's convictions. Under the circumstances, where "it is evident that the prosecutorial comment did not treat . . . defendant's silence as substantive evidence of guilt," *United States v Robinson*, 485 US 25, 32; 108 S Ct 864; 99 L Ed 2d 23 (1988), but merely responded to defense counsel's assertions that the complainant was not worthy of belief, we are not persuaded that reversal is warranted. See also *Portuondo v Agard*, 529 US 61; 120 S Ct 1119; 146 L Ed 2d 47, 55-56 (2000) (recognizing that *Griffin, supra*, prohibits comments that suggest the defendant's silence is indicative of guilt); *Fields, supra* at 110-111 (where the prosecutor's comment on the defendant's failure to provide a witness were responsive to the defendant's argument that the witness was the perpetrator of crime, there was no error).[2] Even assuming error, the trial court's cautionary instruction cured any prejudice.

Next, defendant argues he was denied his Sixth Amendment right to a fair and impartial jury because the complaining witness allegedly made eye contact with jurors, sent one juror signals, and made a joke to defendant about forgetting his handcuffs. Defendant raised this issue at the close of proceedings on May 24, 2000. Concerning the contact with the jurors, after indicating that it had not observed any such behavior, the trial court questioned the prosecutor, the sheriff, the court clerk, and the court reporter regarding their observations. All replied that they did not witness such conduct. On appeal, defendant contends that the trial court failed to undertake a proper inquiry into his allegations.

A defendant has the right to a fair and impartial jury not influenced by extraneous facts not in evidence. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). However, the defendant must establish that a juror was exposed to an extraneous influence[3] and that the extraneous influence "created a real and substantial possibility that [it] could have affected the jury's verdict." *Id.* at 88-89.

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[2] It is also noteworthy that the trial court gave an appropriate cautionary instruction to the jury. See *People v Balog*, 56 Mich App 624, 628-629; 224 NW2d 725 (1974).

[3] The record reveals that the complainant's challenged remark to defendant occurred outside the jury's presence. Hence, we agree with the trial court that the jury was not exposed to any extraneous influence in this regard.

As defendant observes in his brief on appeal, "[w]hen possible juror misconduct is brought to the trial judge's attention he has a duty to investigate and to determine whether there may have been a violation of the [S]ixth [A]mendment." *United States v Shackleford*, 777 F2d 1141, 1145 (CA 6, 1985). After reviewing the pertinent portion of the record, we reject defendant's claim that the trial court's decision regarding "the scope of proceedings" necessary to investigate this matter was an abuse of discretion. *Id.* In any event, defendant has failed to establish a substantial possibility that the jury's verdict was affected by any extraneous influence. *Budzyn, supra* at 89.[4] Specifically, defendant has not demonstrated that any extraneous influence was "substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.*

Defendant's next argument relates to two statements made by witnesses during trial regarding other crimes defendant allegedly committed. Evidence of other acts is admissible for purposes other than to show criminal propensity, and the risk of unfair prejudice must not substantially outweigh the probative value. MRE 404(b)(1); MRE 403; *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The first statement at issue concerned testimony from witness Terry Wilson, who testified that he went to the police "[b]ecause it's like you know, it's a lot of crimes that had seen [defendant] do, you know . . . ." When objecting, defendant argued that this statement was "pure speculation," but did not assert that the admission of the evidence violated MRE 404(b)(1). Thus, any issue concerning MRE 404(b)(1) was not properly preserved because an objection on one ground does not preserve a challenge on another ground for appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Therefore, we need only reverse if there was a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We are satisfied that the admission of this evidence did not amount to plain error, since the statement was offered to explain why Wilson contacted the police, rather than to demonstrate defendant's propensity to commit crimes, and its probative value was not outweighed by any prejudicial effect.

Another witness, Roberto Garza, testified that he was afraid of defendant "because he's been involved in crimes before that he's bragged about." Garza made the statement during redirect examination by the prosecutor after defense counsel questioned him about his fear of defendant. Defendant did not object to this statement, and we are not persuaded that the evidence was admitted to show defendant's criminal propensity, or that it was unduly prejudicial. *VanderVliet, supra* at 55.

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[4] Defendant also claims that two jurors slept during trial. We need not address this issue because it was not included in defendant's questions presented. MCR 7.212(C)(5); *Weiss, supra* at 634. In any event, when the trial court addressed this issue it noted that it had not observed any of the jurors asleep during the proceedings. Thus, we reject defendant's allegation of error in this regard.

Next, defendant argues that the trial court erred in its response to the jury's transcript request. A trial court cannot refuse a jury's reasonable request to review testimony or evidence. MCR 6.414(H); *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974); *People v Carter*, 462 Mich 206, 213, n 10; 612 NW2d 144 (2000). However, the trial court can instruct the jury to deliberate further without the requested review if the instruction does not foreclose the possibility of review in the future. *Id.*

In the instant case, the trial court informed the jury that a transcript could be prepared but would take some time, and that in the interim the jury should rely on its collective memory. While the trial court's response did not specifically state that the jury could make another request in the future, the trial court did not foreclose this possibility. Likewise, it appears defendant waived review of this issue when his counsel expressed his approval of the trial court's instruction. *Id.* at 215-216.

Finally, defendant argues that he was denied effective assistance of counsel because his counsel failed to preserve several issues for review. "The right to counsel encompasses the right to the effective assistance of counsel." *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Counsel's performance is presumed to meet this guarantee, and a defendant has a heavy burden of proving otherwise. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). This Court may reverse a conviction on the basis of ineffective assistance of counsel only when counsel's performance fell below an objective level of reasonableness and the defendant was denied a fair trial as a result. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Counsel's actions are presumed to be sound trial strategy, *id*. at 302, and we will not second-guess counsel's decisions on appeal with the benefit of hindsight even if the strategy is unsuccessful. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant did not preserve this issue by moving for a new trial, and because a *Ginther*[5] hearing was not held, our review is limited to errors apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). After a review of the record we are satisfied that defense counsel's decision to not raise timely objections to the witnesses' testimony and prosecutor's statements was reasonable trial strategy, given that an objection would likely have only drawn the jury's attention to the brief, vague remarks. Likewise, we are not persuaded that counsel's approval of the court's response to the jury's request to review testimony was not sound trial strategy. See, e.g., *Rice*, *supra*; *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996).

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper

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