

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ATIBA MERIWEATHER,

Defendant-Appellant.

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UNPUBLISHED

March 17, 2011

No. 292133

Wayne Circuit Court

LC No. 08-016191-FC

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced to 25 to 45 years' imprisonment for each first-degree criminal sexual conduct conviction and 10 to 15 years' imprisonment for the second-degree criminal sexual conduct conviction. We affirm.

Defendant's first issue on appeal is that the evidence was insufficient to convict defendant of the charged crimes. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, this Court "must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

The elements of first-degree criminal sexual conduct are (1) the defendant engaged in sexual penetration with another person, and (2) that other person is under 13 years of age. MCL 750.520b(1)(a); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r); see *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

The elements of second-degree criminal sexual conduct are (1) a person engaged in sexual contact with another person and (2) that other person is under 13 years of age. MCL 750.520c(1)(a); *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). Sexual contact

is the “intentional touching of the victim’s or actor’s intimate parts ... if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) Revenge. (ii) To inflict humiliation. (iii) Out of anger.” MCL 750.520a(q); see *Piper*, 223 Mich App at 645.

Identity is an essential element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), citing *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecution must present sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crimes alleged. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). “The credibility of identification testimony is a question for the trier of fact that we do not resolve anew.” *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

In looking at the evidence in the light most favorable to the prosecution, and in determining whether a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt, sufficient evidence existed to sustain defendant’s convictions. The victim testified that defendant inserted his penis and finger into her vagina more than three times. The victim also testified that defendant licked her genital area with his tongue. The testimony of a victim alone is sufficient evidence to establish defendant’s guilt beyond a reasonable doubt. *Davis*, 241 Mich App at 700; *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). However, the victim’s testimony was corroborated by her foster mother and the doctor who examined her, both of whom testified that the victim told them defendant was the person who sexually abused her. On the other hand, the victim’s mother testified that she was not aware of defendant sexually abusing the victim and the victim denied she was sexually abused when the victim’s mother questioned her. Defendant testified that he did not sexually abuse the victim at his house or his barber shop, and that he felt the victim was being coerced by the police, the prosecution, and child protective services. The jury heard the evidence presented by each side and determined that the victim’s testimony was credible. It is the providence of the jury to determine the credibility of the proofs presented, *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998); *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008), and this Court will not resolve credibility determinations anew on appeal, *Davis*, 241 Mich App at 700. A rational jury would be able to find defendant committed the charged crimes.

Defendant argues his sentences constitute cruel and unusual punishment. We disagree. Unpreserved sentencing errors are reviewed for plain error affecting the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). For a plain error to affect the defendant’s substantial rights, the error must be prejudicial, meaning it must have affected the outcome of the proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). The defendant bears the burden of showing prejudice. *Id.*

Both the United States and Michigan Constitutions prohibit inflicting cruel and unusual punishment upon a defendant convicted of a charged offense. US Const, Am VIII; Const 1963, art 1, § 16; see *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). A sentence within the minimum statutory guidelines range is presumptively proportionate, and a proportionate sentence is not cruel and unusual punishment. *Powell*, 278 Mich App at 323; *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Defendant does not claim error in the calculation of his sentencing guidelines and admits that his sentences are proportionate, thus, his sentences are not cruel and unusual punishment on this basis.

Defendant argues that his sentences are cruel and unusual punishment because the evidence against him was insufficient and unreliable and, because he is 33 years old, a minimum sentence of 25 years will effectively result in defendant serving a life sentence. As previously discussed, the evidence was sufficient to uphold defendant's convictions. See *Powell*, 278 Mich App at 323 ("If the evidence was not legally sufficient, however, the remedy would be to vacate [the defendant's] conviction. [The remedy would not be to find the defendant's sentences to be cruel and unusual punishment]. In any event, as previously discussed, there was sufficient evidence to support defendant's conviction.").

Furthermore, a defendant's age is not a factor the trial court must account for when determining a defendant's minimum sentence. See *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997) ("[There is] no basis ... [requiring] that the trial judge tailor every defendant's sentence in relationship to the defendant's age. Persons who are sixty years old are just as capable of committing grievous crimes as persons who are twenty years old. We find no principled reason to *require* that a judge treat similar offenses that are committed by similarly depraved persons differently solely on the basis of the age of the defendant at sentencing where the Legislature has authorized the judge to impose life or *any* term of years.") (emphasis in original). Because sufficient evidence existed for defendant's sentences, and defendant's age is not relevant in determining his sentences, defendant's sentences are not cruel and unusual punishment.

Defendant, in his standard 4 brief, argues that he was denied his right to a public trial during jury voir dire. We disagree. This Court reviews unpreserved constitutional issues for plain error affecting a defendant's substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). The Sixth Amendment provides that a defendant has a right to a public trial. US Const, Am VI; Const 1963, art 1, § 20. "Although the right to an open trial is not absolute, that right will only rarely give way to other interests." *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). Thus, a trial court may only close jury voir dire to the public when it articulates its reasons for its ruling, and narrowly tailors the ruling. *Presley v Georgia*, \_\_\_ US \_\_\_, 130 S Ct 721, 725; 175 L Ed 2d 675 (2010); *In re Closure of Voir Dire*, 204 Mich App 592, 595-596; 516 NW2d 514 (1994). We have carefully reviewed the record from jury voir dire and it appears that the trial court never ordered the public to leave the courtroom during jury voir dire. Defendant has failed to show a plain error violation of his right to a public trial.

Defendant argues that the information lacked specificity regarding the time and place of the charged offenses. Defense counsel waived review of this issue by stating he did not have any objections to the amended information, and we decline to address it. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant argues that he was denied the effective assistance of counsel. We disagree. A defendant must make a testimonial record in the trial court with a motion for a new trial that will evidentially support his claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When there is no evidentiary hearing or motion for a new trial at the trial level, review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). Defendant did not make a motion for a new trial or seek an evidentiary hearing at the trial level; therefore, review is limited to errors apparent on the record. The determination of whether a defendant has been deprived of the effective assistance of counsel

presents a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's assistance fell below an objective standard of professional reasonableness, and that but for counsel's ineffective assistance, the result of the proceeding would have been different. *Noble*, 238 Mich App at 662. To succeed in his claim that he was denied the effective assistance of counsel, the "defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Claims of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal are without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). To evaluate whether specificity of the information is adequate, this Court examines "(1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986). "An information is presumed to be framed with reference to the facts disclosed at the preliminary examination." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). We find the victim's testimony from the preliminary examination provided adequate specificity for the amended information; thus, counsel was not ineffective for failing to object to the amended information. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Regarding counsel's failure to object to hearsay statements, defendant has failed to identify what testimony was improperly introduced into evidence, and thus, has abandoned this issue on appeal. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Moreover, the evidence presented at trial provided ample support for defendant's convictions. Because it is not reasonably probable that, but for defense counsel's failure to object to the amended information or to the admission of evidence the results of the proceedings would have been different, any deficiency in counsel's performance did not constitute ineffective assistance of counsel. See *Noble*, 238 Mich App at 662.

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Counsel's decisions regarding whether to call or question witnesses and what evidence to present are presumed to be trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Thus, the failure to call witnesses constitutes ineffective assistance of counsel only when it deprives defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one "that might have made a difference in the outcome of the trial." *Kelly*, 186 Mich App at 526.

In reviewing the existing record, defendant has not proven that counsel's failure to call several witnesses, introduce other evidence, or object during trial constituted deficient performance. The existing record provides no basis for concluding that defendant was deprived a substantial defense. Counsel competently and extensively cross-examined each of the prosecution's witnesses and defendant took the stand in his own defense. Defense counsel could

have had numerous reasons for deciding to only call defendant to the stand, how to cross-examine the prosecution's witnesses, what evidence to present to the jury, and when to object, including the need to maintain consistency in defense counsel's theory that defendant was innocent because the victim was not a credible witness. Defendant has not overcome the presumption that counsel's actions constituted sound trial strategy; and thus, defendant has not established that a new trial is warranted. Furthermore, given the evidence against defendant, as previously discussed, any deficiency in counsel's performance did not prejudice defendant. Counsel was not ineffective on any of these bases.

Defendant claims that he was denied a fair trial due to the cumulative effect of counsel's ineffective assistance throughout the entire trial process. However, counsel was not ineffective on any basis claimed by defendant. Because there were no errors of consequence that combined to deprive defendant of a fair trial, the cumulative error doctrine is inapplicable. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

Finally, defendant argues several instances of prosecutorial misconduct occurred throughout trial. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. To avoid forfeiture of the issue under plain error, the defendant must show that: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003), citing *Carines*, 460 Mich at 763-764. To show plain error affecting the defendant's substantial rights, the defendant must prove prejudice occurred, meaning that the error must have affected the outcome of the lower court proceedings. *McLaughlin*, 258 Mich App at 645. If the defendant satisfies all three factors, "this Court must then exercise discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

Regarding the prosecution's alleged failure to provide specificity in the information, as previously discussed, we find the information provided adequate specificity. Regarding the prosecution's alleged misconduct in arguing that defendant committed the charged crimes without reliable evidence being presented at trial, as previously discussed, there was sufficient evidence to support defendant's convictions. Prosecutors are allowed to make arguments based on admissible evidence and may argue all reasonable inferences that arise from the evidence. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). We find no misconduct.

Regarding the prosecution's alleged misconduct in allowing into evidence uncharged acts occurring at the same time as the charged offenses, "the facts and circumstances surrounding the commission of a crime are properly admissible as part of the *res gestae*," *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979), even when those circumstances involve other criminal acts, *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). When evidence regarding the other bad or criminal acts is so blended or connected with the charged crimes that it explains the circumstances of the charged crimes, the evidence is admissible. *Id.* In other words, the jury is entitled to hear the complete story, instead of only isolated incidents in a transaction. *Id.* The prosecution properly told the jury the complete story when it presented evidence to the jury suggesting defendant sexually abused the victim multiple times over the course of approximately one year. Furthermore, prosecutorial misconduct cannot be predicated

on good-faith effort to admit evidence. *Noble*, 238 Mich App at 660. Nothing in the record suggests the prosecution offered evidence in bad faith; thus, we find no misconduct.

Regarding the prosecution's alleged misconduct in allowing known, false testimony into evidence, defendant's assertion is without factual support. The mere existence of conflicting statements does not establish that the prosecutor knowingly permitted false testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Nothing in the record suggests the prosecution knew any witness was giving false testimony. Additionally, a prosecutor is permitted to argue from the evidence that a witness is credible. See *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). The prosecution properly argued that the witnesses were credible based on the testimony they provided. We find the prosecution did not commit misconduct.

Affirmed.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Karen M. Fort Hood