STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2017
v	No. 334608 Kent Circuit Court
MARVIN LOUIS PEATS, Defendant-Appellant.	LC No. 16-000020-FH

Before: MURRAY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(c) (engaging in sexual penetration with a mentally incapable person), and acquitted of two counts of CSC III. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 17 to 40 years' imprisonment. Defendant appeals by right. We affirm.

This case arises out of the sexual assault of the victim in late October and/or early November 2015. The victim, who was 27 years old at the time of the assault, suffers from cognitive disability. Defendant was a friend of the victim's mother.

On appeal, defendant argues that his conviction was not supported by sufficient evidence because the evidence failed to establish that the victim was mentally incapable. We disagree.

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Lane*, 308 Mich App 38, 57; 862 NW2d 446 (2014). "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 had proved the crime's elements beyond a reasonable doubt." *Id*. We must draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

MCL 750.520d(1)(c) provides that "[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if . . . [t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." " 'Mentally incapable' means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." MCL 750.520a(j). This "statutory language . . . is meant to encompass

not only an understanding of the physical act but also an appreciation of the nonphysical factors, including the moral quality of the act, that accompany such an act." *People v Breck*, 230 Mich App 450, 455; 584 NW2d 602 (1998).

A psychologist who evaluated the victim in 2011 testified that the victim had an IQ between 40 and 47, which put the victim at the moderate range of intellectual disability. The psychologist also testified that the victim generally functioned at the level of a five- or six-year-old child. According to the psychologist, in a room of 100 people, there would only be two or three people who had less capability than the victim. The psychologist testified that the victim's intellectual ability was unlikely to increase over time. The victim's mother testified that the victim was born with special needs and had attended special education classes until the age of 24. The victim's mother explained that the victim was able to do many household chores and hold a conversation, but the victim could not drive a car or handle money. The victim did not know how to make change. The victim's mother also testified that the victim could not determine whether someone was telling her the truth. The YWCA sexual assault nurse examiner who examined the victim testified that she could tell that the victim was cognitively impaired during the interview. Additionally, the investigating detective testified that it was immediately apparent to her that the victim was cognitively delayed. She conducted a forensic interview—which is generally used in cases with children under the age of 12—with the victim due to the victim's mental capacity. The jury also heard the victim's testimony. The victim did not know either her own address or the name of the school that she attended. She also had difficulty indicating when defendant had sex with her, but she believed that defendant was her boyfriend.

The victim's testimony indicated that she understood that defendant had sex with her. But viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the victim was mentally incapable, meaning that the victim was unable to appreciate the nonphysical factors of the sexual act. *Lane*, 308 Mich App at 57; *Breck*, 230 Mich App at 455. We must conclude that defendant's conviction for CSC III is supported by sufficient evidence.

Next, defendant argues that he was denied his due process right to reasonable notice of the charges against him because he was never provided specific dates for the charged offenses. We disagree.

Because defendant did not raise this claim of error before the trial court, it is unpreserved for appellate review. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence[.]" *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948). "A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). "A prosecution must be based on an information or an indictment." MCR 6.112(B). "To the extent possible, the information should specify the time

and place of the alleged offense." MCR 6.112(D); see also MCL 767.45(1)(b) (providing that the information shall contain "[t]he time of the offense as near as may be"). However, "[n]o variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.45(1)(b).

> In determining whether the failure to pinpoint the date of the offense denied defendant due process of law, [this Court] consider[s]: (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 Sabin*, 223 Mich App 530, 532; 566 NW2d 677 (1997), remanded in part on other grounds by 459 Mich 924 (1998) (quotation marks and citation omitted).]

"Where the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of his or her knowledge after undertaking a reasonably thorough investigation, we would be disinclined to hold that an information . . . was deficient for failure to pinpoint a specific date." *People v Naugle*, 152 Mich App 227, 234; 393 NW2d 592 (1986).

In the information, defendant was charged with three counts of CSC III for engaging in sexual penetration with a mentally incapable person. The information listed October 31, 2015, through November 7, 2015, as the dates of the offenses. "Time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim." *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). Additionally, "an alibi defense does not make time of the essence." *Id*. Although the victim was an adult, testimony indicated that the victim functioned at the level of a five- or six-year-old child.

Moreover, testimony showed that the victim was unable to specify the exact dates on which the charged offenses occurred and that the prosecution had attempted to pinpoint dates. At trial, the victim was unable to specify the dates that defendant had sex with her. The psychologist testified that she would not expect the victim to be able to read a calendar. The psychologist also believed that it would be very difficult for the victim to identify dates and times. While the victim would be able to recall events, she would probably not be able to recall when the events occurred. Furthermore, the nurse examiner and the investigating detective testified that the victim was unable to specify dates when they interviewed her. Under these circumstances, there was no clear or obvious denial of defendant's right to notice of the charges against him. *Carines*, 460 Mich at 763; see also *Sabin*, 223 Mich App at 532 (determining that the defendant was not "prejudiced by the prosecution's failure to establish an exact offense date" because "the prosecutor diligently attempted to pinpoint the date of the alleged criminal sexual conduct," but "the youthful victim could not recall the specific offense date").

Defendant also argues that he was denied effective assistance of counsel at sentencing because defense counsel did not object to the scoring of prior record variable (PRV) 7 and offense variables (OVs) 2, 4, and 13. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of

counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin* (*On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." *Id*. Because no evidentiary hearing has been held on defendant's claim of ineffective assistance of counsel, our review of the claim is limited to errors apparent on the record. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

PRV 2 is "prior low severity felony convictions." MCL 777.52(1). According to defendant, PRV 2 should have been scored at five points, not 10, because under the 10-year gap rule, see MCL 777.50, his 1978 conviction for larceny over $100 could not be used to score the PRVs. Assuming but without deciding that defendant is correct regarding the scoring of PRV 2, we note that defendant cannot show that he was prejudiced by defense counsel's failure to object. If defendant's PRV score were reduced by five points, i.e., from 40 to 35 points, there would be no change to the guidelines range. See MCL 777.63. Thus, defendant has not shown that absent defense counsel's failure to object to the scoring of PRV 2, there is a reasonable probability that he would have received a different sentence. *Sabin* (*On Second Remand)*, 242 Mich App at 659.

OV 3 is "physical injury to a victim." MCL 777.33(1). A trial court must assess five points for OV 3 if a victim suffered "[b]odily injury not requiring medical treatment." MCL 777.33(1)(e). The victim reported to the sexual assault nurse examiner that defendant put his penis into her vagina and that "it hurt [her]." The nurse examiner observed three injuries to the victim's vaginal area. Based on this testimony, there was evidence for the trial court to find by a preponderance of the evidence that the victim suffered bodily injury that did not require medical treatment. See *People v Ambrose*, 317 Mich App 556, 560; 895 NW2d 198 (2016). Accordingly, defense counsel's performance in not objecting to the scoring of OV 3 was not deficient. "Ineffective assistance of counsel cannot be predicated on the failure to make [sic] a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

OV 4 is "psychological injury to a victim," MCL 777.34(1), and should be scored at 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim," MCL 777.34(1)(a). "[T]he fact that treatment has not been sought is not conclusive." MCL 777.34(2). The nurse examiner nurse testified that the victim reported that she attempted to run away from defendant, but he told her that she was "going to do this or [he was] going to hurt [her]." After the assault, defendant told the victim not to tell anyone. The nurse examiner also testified that the victim was terrified, "rocking back and forth, crying," during her examination. Moreover, the victim's mother reported that the victim received counseling at the "rape center" and that the victim was having "separation anxiety" because she believed that she was defendant's girlfriend. This evidence supports a finding by a preponderance of the evidence that the victim suffered a psychological injury requiring professional treatment. *Ambrose*, 317 Mich App at 560. Therefore defense counsel's performance in not objecting to the scoring of OV 4 was not deficient. See *Riley (After Remand)*, 468 Mich at 142.

OV 13 is "continuing pattern of criminal behavior," MCL 777.43(1), and should be scored at 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person," MCL 777.43(1)(c). "[A]ll crimes within a 5-year period,

including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Defendant was charged with three counts of CSC III, which is a crime against a person. MCL 777.16y. Although the jury acquitted defendant of two of those counts, the scoring of the guidelines need not be consistent with the jury verdict. *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003); see also *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993) ("[A]lthough the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing."). The victim testified that defendant had sex with her "a whole bunch of times," "[l]ike three times," and "a lot of times." According to the victim, defendant had sex with her on Halloween, and defendant had sex with her on more than occasion before Halloween. The victim also indicated to the nurse examiner that defendant had assaulted her twice that week. Based on this testimony, there was support for a finding, under the preponderance of the evidence standard, that defendant committed three acts of CSC III against the victim. See *Ambrose*, 317 Mich App at 560. Consequently, defense counsel's performance in failing to object to the scoring of OV 13 was not deficient. See *Riley (After Remand)*, 468 Mich at 142. Defendant was not denied effective assistance of counsel at sentencing.

In a Standard 4 brief, defendant argues that he was denied effective assistance of counsel because defense counsel failed to request a DNA test. We disagree.

Defendant voluntarily provided DNA samples to the investigating detective. But no fluids containing foreign DNA were discovered on the victim's clothing or on the swabs used to test the victim's body; consequently, the forensic scientist did not even open the package containing defendant's DNA swabs. So, because there was no DNA that could be compared to defendant's DNA, defense counsel's performance in not requesting a DNA test was not and could not be deficient. *Sabin* (*On Second Remand)*, 242 Mich App at 659.

Defendant also argues in his Standard 4 brief that defense counsel was ineffective for failing to object to "repeated prosecutorial misconduct;" however, defendant does not identify the alleged instances of misconduct. Because a "[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position," *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (quotation marks and citation omitted), he has abandoned this claim of ineffective assistance of counsel.

We affirm.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Jane E. Markey