STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JORDAN HAROLD COOPER,

Defendant-Appellant.

UNPUBLISHED
December 17, 2020

No. 350945
Ingham Circuit Court
LC No. 18-000031-FC

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (sexual penetration of a victim less than 13 years of age and defendant 17 years of age or older). He was sentenced as a second-offense habitual offender, MCL 769.10, to 25 to 50 years in prison. We affirm.

I. BACKGROUND

The victim, JR, is defendant's biological daughter. In May 2017, JR spent the night at defendant's home. When JR returned to the home of her mother, MW, the following day, JR told MW something that prompted MW to take JR to Sparrow Hospital where JR was examined by a sexual assault nurse examiner (SANE). The nurse testified that, at the beginning of the physical examination, JR "turned prone, which means on to her belly, and she sort of put her butt up in the air and said, look at my butt first where daddy did it." The nurse testified that she found an anal fissure and anal tag on JR. Although the nurse could not date the anal fissure, she indicated that it could have resulted from a sexual assault or an "innocent" explanation such as a large bowel movement, constipation, or hard wiping. The nurse did not find any vaginal injuries. JR also participated in a forensic interview. The interviewer testified that, when asked about defendant, JR stated that she did not know about him, but later told the interviewer that she did not want the interviewer to know about defendant because "[defendant] would be mad."

As part of the police's investigation, two pairs of JR's underwear were collected; the pair of underwear that JR wore home from defendant's house and the pair she was wearing when she presented for the examination by the SANE nurse. However, only the pair of underwear that JR

wore home was analyzed, and spermatozoa was found in the interior of that underwear. DNA analysis revealed very strong support that defendant was a contributor to the sperm cells found.

Michigan State Police Detective Sergeant Nathan Horan interviewed defendant in January 2018. The prosecution presented a redacted recording of the interview, and it was admitted into evidence without objection and played for the jury. Detective Horan testified that, prior to the interview, defendant had spoken to his attorney and was advised of his *Miranda*[1] rights before he signed the waiver form.[2] During the interview, defendant admitted that his finger went inside of JR's vagina when he removed her underwear and that he subsequently ejaculated into her underwear.

The jury found defendant guilty of CSC-I, and defendant now appeals as of right.

II. PROSECUTORIAL MISCONDUCT

Defendant first argues that the prosecutor committed prosecutorial misconduct[3] when she allegedly made an incorrect statement about the prosecution's DNA evidence before trial. We disagree.

"In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Defendant did not object to the prosecutor's challenged conduct, so this issue is unpreserved.

Unpreserved challenges to prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Requirements for plain error are "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. An error affects substantial rights when "the error affected the outcome of the lower court proceedings." *Id*.

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). We "must examine the record and

---

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Prior to trial, the trial court denied defendant's motion to suppress his statements given in the interview, which was a postpolygraph interview, finding that defendant was properly given *Miranda* warnings and knowingly and voluntarily waived his *Miranda* rights. Defendant does not challenge this finding on appeal.

[3] This Court explained in *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015), that a fairer label for most claims of prosecutorial misconduct would be "prosecutorial error," while only the most extreme cases rise to the level of "prosecutorial misconduct." However, we will use the phrase "prosecutorial misconduct" because it has become a term of art.

evaluate a prosecutor's remarks in context." *People v Brown*, 294 Mich App 377, 382-383; 811 NW2d 531 (2011).

Defendant alleges that the prosecutor committed misconduct when she wrongly informed his former defense counsel that two pieces of evidence contained defendant's DNA. Defendant bases this argument on testimony he gave at a pretrial hearing, where defendant stated that defense counsel "told [defendant] that the prosecution had told [defense counsel] that there was [sic] two pairs of evidence with [defendant's] DNA on it," when in fact there was only one piece of evidence that was confirmed to contain defendant's DNA. According to defendant, the prosecution's misrepresentation denied him a fair trial because, based on the prosecutor's misinformation, defendant's counsel pressured defendant into submitting to a polygraph examination that yielded incriminating evidence that the prosecutor used at trial.

As an initial matter, defendant cites no authority to support his argument that a prosecutor's *pretrial* statements or behavior can amount to prosecutorial misconduct so as to deny defendant a fair trial. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Despite this inadequacy, we nevertheless address defendant's claim of prosecutorial misconduct and conclude that he has failed to establish that the prosecutor's alleged statements about what evidence was analyzed for DNA amounted to prosecutorial misconduct.

It is undisputed that the laboratory report showed that defendant was a contributor to the DNA on one pair of JR's underwear. Defendant contends that, based on statements he made at a pretrial hearing, the prosecutor misrepresented this lab report to defense counsel. In an affidavit submitted on appeal by the trial prosecutor with an accompanying motion to expand the record, the prosecutor averred that she indeed misinterpreted the lab report about the DNA evidence and incorrectly told defense counsel at trial that one of the pairs of JR's underwear had been tested for DNA when in actuality it had not been tested. The prosecutor further averred that defense counsel was in possession of the same lab report that the prosecutor had and also misinterpreted the report. Based on the information in this affidavit, it is clear that the prosecutor's statements did not deprive defendant of a fair trial; defense counsel at the time was given the same lab report as the prosecutor and misinterpreted the report in the same way, so it was not the prosecutor's statements that led defense counsel to encourage defendant to participate in the polygraph test.

Moreover, even ignoring the prosecutor's affidavit, we cannot conclude that the prosecutor's alleged misrepresentation of the DNA evidence deprived defendant of a fair trial. It defies logic to conclude that defense counsel believed that the damning portion of the lab report was that defendant's DNA was found on *two* pairs of underwear; clearly, the incriminating portion of the lab report was that *defendant's sperm was found on JR's underwear*. Moreover, nothing in the record suggests that defense counsel would have counseled defendant differently had the prosecutor not misrepresented what was in the report, so we have no basis to conclude that the prosecutor's pretrial statements "affected the outcome of the lower court proceedings," and defendant's claim fails. *Carines*, 460 Mich at 763.

Additionally, defendant's contention that the prosecutor's misrepresentations caused defense counsel to pressure defendant into taking the polygraph is belied by defendant's testimony at his pretrial hearing that he willingly participated in the polygraph examination. That is, regardless of whether defense counsel encouraged defendant to participate in the polygraph examination, defendant testified that he decided to participate in the polygraph examination on his own volition. In sum, based on the record before us, we cannot conclude that the prosecutor's actions amounted to prosecutorial misconduct that affected defendant's substantial rights.

III. EVIDENCE OF THE POLYGRAPH EXAMINATION

Next, defendant argues that the trial court erred when it admitted into evidence the post-polygraph interview and Detective Horan's testimony allegedly referring to the polygraph examination in the post-polygraph interview. We disagree.

To preserve improper-admission-of-evidence issues for appeal, "a party generally must object at the time of admission." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Defendant did not object to the admission of the post-polygraph interview at trial or Detective Horan's testimony; therefore, this issue is unpreserved. Unpreserved issues of improper admission of evidence are reviewed for plain error. *Id*. at 508.

Defendant argues that the trial court erred when it admitted the recording of defendant's post-polygraph interview into evidence and allowed Detective Horan's testimony because the evidence "suggested" that defendant had failed a polygraph examination. While defendant is correct that the results of a polygraph examination are not admissible at trial, *People v. Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), it is clear from the record that neither the post-polygraph interview that was admitted at trial nor Detective Horan's testimony about the circumstances surrounding that interview referred to defendant's polygraph examination or its results. Defendant does not identify any specific mention of defendant's polygraph examination or the results of the examination in the record, and all of the things that defendant argues could have suggested that defendant underwent a polygraph examination do not actually suggest that. For instance, defendant contends that Detective Horan's testimony that the interview took place at the Michigan State Police forensic laboratory would suggest to an "astute juror" that defendant "had just undergone a polygraph test and that he had failed that test," but that statement simply does not support such an inference.

Moreover, our Supreme Court has held that the admissibility of statements made during a post-polygraph interview is "to be resolved by a review as to whether in the 'totality of circumstances' the waiver of the Fifth Amendment right could be considered knowing and voluntary," *People v Ray*, 431 Mich 260, 276; 430 NW2d 626 (1988), and defendant does not challenge the trial court's determination that his post-polygraph interview statements were made after he knowingly and voluntarily waived his *Miranda* rights. Thus, defendant has not established that the trial court plainly erred when it admitted into evidence the post-polygraph interview and Detective Horan's testimony.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that he was denied the effective assistance of counsel because his defense counsel allowed him to participate in the polygraph examination and post-polygraph interview. We disagree. Defendant did not move for a new trial or request an evidentiary hearing; therefore, our review is limited to the facts contained in the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

"To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). "The inquiry into whether counsel's performance was reasonable is an objective one and requires the reviewing court to determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012) (quotation marks and citation omitted). The reviewing court must consider the range of potential reasons counsel may have had for proceeding as he or she did. *Id*. "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Therefore, there is "a strong presumption of effective assistance of counsel." *Id*.

For his ineffective-assistance claim, defendant asserts that there was no rational trial strategy for defendant's attorney allowing defendant to take the polygraph test and submit to the post-polygraph interview by himself. The record indicates, however, that defendant spoke with his attorney prior to signing a waiver form before the interview began, and there is no evidence in the record suggesting that defendant's decision to sign the waiver was not discussed and part of a trial strategy. Moreover, defendant does not argue that his defense counsel failed to adequately inform him of the potential consequences of signing the waiver or submitting to the polygraph examination and post-polygraph interview. On this record, defendant has failed to establish that his counsel's performance was objectively unreasonable, and therefore his ineffective-assistance claim fails.

V. OFFENSE VARIABLE 3

Finally, defendant argues that the trial court erred by assessing five points for Offense Variable (OV) 3. We disagree.

A trial court's factual findings underlying the scoring of an OV are reviewed for clear error, while the application of the trial court's factual findings to the law is reviewed de novo. *People v Hardy*, 494 Mich 430, 438-439; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Blevins*, 314 Mich App 339, 348-349; 886 NW2d 456 (2016). The trial court's factual determinations for scoring an OV "must be supported by a preponderance of the evidence." *Hardy*, 494 Mich at 438.

Five points for OV 3 is appropriate when "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). "[T]he term 'bodily injury' encompasses anything that

the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." *People v Lampe*, 327 Mich App 104, 112-113; 933 NW2d 314 (2019) (quotation marks and citation omitted).

The trial court did not err by assessing five points for OV 3. At defendant's trial, the SANE nurse testified that, at the beginning of her physical examination of JR, JR "turned prone, which means on to her belly, and she sort of put her butt up in the air and said, look at my butt first where daddy did it." During the examination, the nurse found an anal fissure and anal tag on JR. While the nurse could not date the fissure and recognized that there could be "innocent" explanations for it—like a large bowel movement or hard wiping—she also testified that it could be consistent with some type of sexual assault. Based on the nurse's testimony that JR "put her butt up in the air and said, look at my butt first where daddy did it," that JR had an anal fissure, and that an anal fissure could be consistent with some type of sexual assault, the trial court concluded that bodily injury not requiring medical treatment occurred to a victim. We are not definitely and firmly convinced that the trial court made mistake by making this factual finding, and the finding justified a score of five points for OV 5. MCL 777.33(1)(e). Therefore, defendant is not entitled to appellate relief.[4]

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford

[4] Even if the trial court erred by scoring OV 3 at five points, defendant would not be entitled to appellate relief because scoring OV 3 at zero points instead of five points would reduce defendant's total OV score from 25 points to 20 points, which would not alter his sentencing guidelines range. See MCL 777.62 (scoring grid for a Class A felony); MCL 777.16y (listing CSC-I as a Class A felony). "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).