

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARREN DEON JOHNSON,

Defendant-Appellant.

UNPUBLISHED

June 28, 2011

No. 296722

Kent Circuit Court

LC No. 09-003200-FC

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for first-degree home invasion, MCL 750.110a(2), and first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(c). The trial court sentenced defendant as an habitual offender, second offense, see MCL 769.10, to serve 10 to 30 years in prison for the first-degree home invasion conviction, and to serve 20 to 60 years in prison the CSC conviction. The trial court ordered defendant to serve the two sentences consecutive to each other and consecutive to a federal sentence for which defendant was on parole. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first argues that the trial court erred when it permitted a witness, Leotie-Jamillah Makura, to testify while wearing jail clothing. This error, he maintains, infringed on the presumption of innocence and deprived him of a fair trial. This Court reviews a trial court's decision regarding witness attire for an abuse of discretion. *People v Banks*, 249 Mich App 247, 256-257; 642 NW2d 351 (2002). However, because defendant did not specifically challenge the trial court's ruling on the ground that it infringed the presumption of innocence, we review the unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This Court has held that "handcuffing or shackling of a defense witness" does not "adversely and unfairly affect[] a criminal defendant's presumption of innocence, thereby undermining the fairness and impartiality of the trial." *Banks*, 249 Mich App at 259. This is because the appearance of the witness does not suggest that the defendant is predisposed to commit crimes, is dangerous, or cannot be trusted. *Id.* Consequently, defendant's claim that the trial court's decision infringed on his right to be presumed innocent is meritless.

In addition, we disagree that Makura's attire prejudiced defendant's trial. Unlike the facts in *Banks*, 249 Mich App at 260-261, defendant's entire defense was not premised entirely on Makura's testimony. Rather, Makura simply offered testimony that suggested that defendant might have been home at the time of the home invasion and rape at issue. Importantly, even if the jury believed Makura, it could nevertheless have concluded that defendant committed the offenses. Makura did not directly identify defendant as the person in the shower, may have been mistaken about the time, and defendant's theory of the case was that he did in fact meet the victim and have sex with her, but that it was consensual. In addition, the trial court took precautions to minimize the effect of the jury seeing the witness in jail clothes; it told the jury that Makura was arrested for "some misdemeanor traffic offense" and instructed it not to consider her attire. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Accordingly, any prejudice to defendant was not outcome determinative. *Banks*, 249 Mich App at 261.

Defendant next argues that his counsel was ineffective for several reasons. Because there was no hearing before the trial court, this Court's review is limited to errors apparent on the record. *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007). To establish ineffective assistance of counsel, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and, but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant argues that the victim could not be effectively cross-examined after certain text messages were excluded from evidence because of defense counsel's discovery violation. Defense counsel sought to use the text messages for several reasons relevant to the offered defense. However, testimony relating to those particular reasons was clearly set forth separate and apart from the text messages during the trial. Accordingly, even if defendant could show that defense counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, defendant cannot establish prejudice. *Toma*, 462 Mich at 302-303.

Defendant also asserts that defense counsel was ineffective for failing to provide a witness list to the prosecutor in a timely manner, which resulted in the witness list being excluded pursuant to MCR 6.201(A)(1). Defendant completely fails to argue or support that any specific witness, much less a relevant and necessary witness, was precluded from testifying. As such, defendant failed to establish the factual predicate for his claim of error. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In any event, it is clear that defendant was able to fairly present his theory of the case at trial—namely, that the victim fabricated the allegations because she was angry at defendant—through other witnesses and there is no evidence that additional witnesses would have lent decisive weight to this theory. Therefore, on this record, even if defendant could show that defense counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, defendant cannot establish prejudice. *Toma*, 462 Mich at 302-303.

In addition, defendant argues that defense counsel was ineffective for failing to file a notice of alibi witness. See MCL 768.20(1). Defense counsel's failure to file the notice likely fell below an objective standard of reasonableness, even though defendant contributed to the problems leading to this failure. But, given that defendant's alibi witness, Makura, actually testified at trial, defendant cannot establish prejudice. *Toma*, 462 Mich at 302-303.

Defendant next argues that defense counsel was ineffective because defense counsel did not interview Makura until the day before trial and because defense counsel did not adequately prepare for trial with defendant. The failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, the failure to interview witnesses does not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). On the record before us, defense counsel was clearly aware of the substance of Makura's testimony. Thus, defendant cannot show that defense counsel's decision to interview Makura on the day before trial fell below an objective standard of reasonableness under professional norms. *Toma*, 462 Mich at 302-303.

In addition, defendant claims that defense counsel did not adequately prepare with defendant. During opening statements, counsel indicated that the evidence would show that on December 30, 2008, defendant was at some time in that evening at "the victim's" and that defendant and the victim had consensual sexual intercourse; but, during the trial, defendant testified that he actually had sexual intercourse that evening with the victim in the victim's van at a park and not at the victim's apartment. This single discrepancy or misstatement by counsel does not demonstrate that defense counsel was unprepared, let alone that his lack of preparation fell below an objective standard of reasonableness under prevailing professional norms. *Toma*, 462 Mich at 302-303.

Defendant also argues that defense counsel was ineffective because he did not properly cross-examine the victim and Officer Kurt Burns regarding the victim's undergarments on the morning of the crimes. Specifically, the victim claimed she was not wearing undergarments, but Burns testified that undergarments were found next to the couch. Defendant suggests that his trial counsel should have questioned the victim about the discrepancy and should have asked Burns if the undergarments were torn. Defense counsel's "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

The mere fact that undergarments were found next to the couch, in what was described as a disorganized apartment, does not support that cross-examination would have revealed that the victim was being untruthful. Given that defendant's theory of the case was that he had consensual sex with the victim at a different location, it is difficult to see how exploring the presence of the undergarments by the couch in detail might further defendant's case. Indeed, if the undergarments were torn, the defense could have been damaged. As such, defendant has not demonstrated that counsel's failure to cross-examine the witnesses further about the undergarments was anything other than sound trial strategy. *Garza*, 246 Mich App at 255.

Defendant next claims that defense counsel was ineffective for not adequately impeaching the victim's testimony with regard to the apartment lease and for not introducing the lease into evidence as mitigating evidence. First, the record reflects only that defendant's name was written in on the victim's copy of the lease so defendant could provide a lease with his name on it to his federal probation officer. Thus, the record does not support that defendant was a party to the lease with the landlord. Second, introducing the lease on which defendant's name appeared into evidence would have undoubtedly resulted in the jury learning that defendant was on federal probation, which defense counsel clearly wanted to avoid. Accordingly, it was a matter of sound trial strategy to avoid introduction of the lease into evidence. *Garza*, 246 Mich App at 255. Accordingly, this decision did not amount to ineffective assistance. *Toma*, 462 Mich at 302-303.

Defendant next argues that the cumulative effect of his defense counsel's errors warrants a new trial. No errors were unfairly prejudicial to defendant, let alone rose to the level of being seriously prejudicial, even in the aggregate. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Finally, defendant argues that the prosecutor committed misconduct by allowing the victim to offer perjured testimony about the lease. This misconduct also, he maintains, amounted to a violation of due process rights and denied him a fair trial. We review these unpreserved claims for plain error that affected defendant's substantial rights. *Carines*, 460 Mich at 763. The record contains clear evidence that defendant was not actually a party to the lease, but was added to the victim's copy in order to make it appear that defendant had met a condition of his federal probation. Thus, the victim's testimony about the lease was not inaccurate and there was no plain error.

Affirmed.

/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly