

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COLLIN DENNARD PITTMAN,

Defendant-Appellant.

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UNPUBLISHED

June 28, 2011

No. 297391

Oakland Circuit Court

LC No. 2009-226631-FC

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(ii), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(ii). The trial court sentenced defendant as a fourth habitual offender, MCL 769.13, to concurrent sentences of 273 to 480 months in prison for each conviction. For the reasons set forth below, we affirm.

I. MOTION TO DISMISS

Defendant argues that the trial court erred when it denied his motion to dismiss. The record reflects that the Department of Corrections (DOC) failed to comply with MCL 780.131(1), which provides:

Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

The only statutory trigger for the running of the 180-day period is the DOC's notice to the prosecutor. *People v Williams*, 475 Mich 245, 256, 259; 716 NW2d 208 (2006). Defendant contends that the DOC's failure to notify the prosecutor violated his right to a speedy trial because the 180-day rule was never triggered. Because defendant did not raise a due process

argument before the trial court,<sup>1</sup> our review is limited to plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Due process requires that a criminal defendant be given reasonable notice of the charge against him and an opportunity to be heard. *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). "Whether an accused is accorded due process depends on the facts of each case." *Id.* at 700. To establish a due process violation requiring reversal, a defendant must prove prejudice to his defense. *Id.* Defendant does not claim that his defense was prejudiced as a result of the DOC's failure to comply with MCL 780.131, nor do the facts support that conclusion. Defendant's case moved forward promptly and he went to trial 6-1/2 months after charges were filed. Under the circumstances, defendant has not shown he was prejudiced as a result of the DOC's failure to comply with MCL 780.131. Therefore, the trial court correctly denied his motion to dismiss. *McGee*, 258 Mich App at 700.

## II. PRIOR INCARCERATIONS

Defendant contends that repeated references to his prior incarcerations were unnecessary and deprived him of a fair trial. Defendant concedes, however, that evidence of his incarcerations was a critical part of his alibi defense. We review defendant's claim for plain error affecting his substantial rights. *Knox*, 469 Mich at 508. Defendant cites as one example of a reference to his incarceration the victim's remark, "He was still out; he was still around." However, defendant acknowledges that references to him "being away" or "making it home" were non-prejudicial and the victim's remark is the same kind of indirect reference to his incarceration. Defendant complains that the subject of his incarceration again arose during testimony about defendant's exchange of letters with the victim. However, this was a subject raised by defendant. Thus, defendant opened the door and cannot now claim error on appeal. *People v Riley*, 465 Mich 442, 448; 636 NW2d 514 (2001). For the same reason, defendant cannot now claim that mention of his incarceration during defense counsel's examination of Detective McDougal or the prosecutor's closing argument was error.

Defendant also claims his attorney's failure to object to the incarceration evidence amounted to ineffective assistance of counsel. Because he did not raise it before the trial court, our review is limited to mistakes apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defense counsel has wide discretion as to matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

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<sup>1</sup> An objection on one ground is insufficient to preserve an appellate attack based on a different ground. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

Here, defense counsel questioned witnesses about letters exchanged between defendant and the victim in an attempt to discredit her, which was sound trial strategy. Also, from the record, it appears that the prosecutor, defense counsel, and witnesses made a concerted effort not to refer to defendant being in prison. We further observe that the decision not to object to oblique references appears to have been a strategic decision to avoid highlighting defendant's incarceration. *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008). Accordingly, the record does not support defendant's claim of ineffective assistance of counsel.

### III. PROSECUTORIAL MISCONDUCT

Defendant raises several prosecutorial misconduct claims. We review de novo defendant's preserved claims of prosecutorial misconduct to determine if he was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). The issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Id.* We review the unpreserved claims for plain error affecting defendant's substantial rights. *Knox*, 469 Mich at 508.

Defendant claims that the prosecutor elicited impermissible other-acts evidence when she questioned the victim's mother about defendant's violent behavior. To be admissible under MRE 404(b), other-acts evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *Knox*, 469 Mich at 509. Evidence is relevant and admissible if it is helpful in shedding light on any material point. *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009). The credibility of witnesses is always a material issue. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005).

Throughout the trial, defendant attempted to attack the victim's credibility because of her delay in disclosing his conduct. The forensic interviewer explained that fear of the offender could be a reason for a victim's failure to immediately report a crime. The victim testified that one of the reasons she did not disclose the abuse was because she was afraid of defendant. She testified that defendant acted crazy and often got into trouble. The prosecutor offered the testimony of the victim's mother to show that the victim had witnessed defendant's violent behavior and that, therefore, her fear of defendant was rational. This testimony was both relevant and was offered for a proper purpose. Further, it had significant probative value as corroboration for the victim's fear of defendant. A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

Defense counsel objected when the prosecutor cross-examined defendant's brother about defendant's assault and drug-related convictions and he argues that this constituted misconduct. Under MRE 405(a), the accused can present favorable character evidence in the form of reputation or opinion evidence. To rebut this evidence, the prosecutor may cross-examine the defendant's witness in order to test his knowledge and candor. For that purpose, he may be asked if he has heard of specific acts of misconduct. *People v Champion*, 411 Mich 468, 471; 307 NW2d 681 (1981) (quotations and citation omitted). Here, to test his credibility and the basis of his favorable opinion of defendant, the prosecutor asked defendant's brother whether he was aware of defendant's involvement with drugs, assaultive behavior, and related convictions.

This was permissible under MRE 405(a), and there was no misconduct. *Dobek*, 274 Mich App at 70.

Defendant makes the unpreserved claim that the following remark by the prosecutor during closing argument constituted misconduct: “Now, do we know if it’s because he just got home, was he out on a night of partying, was there drugs involved? I don't know. I don't know.” A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Unger*, 278 Mich App at 236. There was evidence that defendant had been sent to prison more than once for drug-related offenses, but not that he had used drugs. Nevertheless, given the victim’s testimony that defendant was not acting like himself the night he molested her, a reasonable inference could be made that defendant was possibly under the influence of drugs at the time. Therefore, this did not rise to the level of misconduct. Because there was no error, defendant’s corresponding ineffective assistance of counsel claim is without merit. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

#### IV. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his convictions because evidence showed that he was incarcerated when the victim claimed the offenses occurred. In reviewing a challenge to the sufficiency of the evidence, we review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Harrison*, 283 Mich App 374, 377-378; 768 NW2d 98 (2009).

To prove defendant committed first and second-degree criminal sexual conduct, the prosecutor had to show that defendant engaged in sexual penetration and sexual contact with the victim, who was at least 13 but less than 16 years of age at the time of the offense and related by blood to defendant. MCL 750.520b(1)(b)(ii); MCL 750.520c(1)(b)(ii). Time is not a material element of CSC charges involving a child victim, even if the defendant presents an alibi defense. *Dobek*, 274 Mich App at 83. The victim gave conflicting testimony regarding when the offenses occurred. However, some of her testimony coincided with periods defendant was not incarcerated. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Further, a reviewing court must “draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The jury could have determined that the victim was confused about the precise date of the offenses because they occurred years before her disclosure in 2007 and the trial in 2009. In any event, it was reasonable for the jury to conclude that the offenses occurred at a time when defendant was out of prison and the victim’s conflicting testimony was not fatal to the prosecution’s efforts to establish the elements of the offenses. Accordingly, defendant’s challenge to the sufficiency of the evidence fails.

#### V. SENTENCE

Defendant claims that the trial court erroneously scored offense variable 4 (OV 4) at ten points. We review a scoring decision to determine whether the sentencing court properly exercised its discretion and whether there was any evidence to adequately support the score. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). The court should score

ten points for OV 4 if the victim suffered serious psychological injury that may require professional treatment. However, the fact that treatment is not sought is not conclusive when scoring the variable. MCL 777.34(1)(a); MCL 777.34(2). The trial court may consider a victim's demeanor while testifying to determine whether the victim suffered a serious psychological injury. See *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005).

Here, the young teenage victim was molested by her favorite uncle, with whom she had a close relationship. Afterwards she found blood on her nightgown and underwear. She blamed her significant behavioral problems, to which her mother testified, on defendant's assault. Also, at trial, the victim appeared to become so overwhelmed while testifying about the assault that she simply stopped answering questions and cried. Further, the victim's mother indicated that the victim would not provide an impact statement because it was still very hard for her to talk to anyone about what happened. Based on the foregoing, it was reasonable for the trial court to deduce that the victim suffered a serious psychological injury. Therefore, it did not abuse its discretion in scoring OV 4 at ten points.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Henry William Saad