STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 8, 2012
v	No. 300169 Ottawa Circuit Court
KEVIN JAMES GERSTENSCHLAGER, Defendant-Appellant.	LC No. 10-034314-FH

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of third-degree criminal sexual conduct ("CSC"), MCL 750.520d(1)(a) (victim 13 to 16 years old), and fourth-degree CSC, MCL 750.520e(1)(a) (victim 13 to 16 years old and defendant is 5 or more years older than victim). Defendant was sentenced to 48 to 180 months in prison for the third-degree CSC conviction and to 13 to 24 months for the fourth-degree CSC conviction. We affirm.

I. MOTION FOR ADJOURNMENT

Defendant argues that the trial court abused its discretion in denying his motion for an adjournment. This Court reviews a trial court's rulings on motions for an adjournment or a continuance for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

MCR 2.503(D)(1) provides that "[i]n its discretion the court may grant an adjournment to promote the cause of justice." In order to invoke the trial court's discretion to grant an adjournment, "a defendant must show both good cause and diligence." *Coy*, 258 Mich App at 18. And factors a court may consider when evaluating whether a defendant had good cause include the following: (1) whether defendant asserted a constitutional right, (2) whether defendant had a legitimate reason for asserting the right, (3) whether defendant was negligent, and (4) whether defendant requested previous adjournments. *Id.* However, even if good cause and due diligence are established, a trial court's denial of a request for an adjournment is not grounds for reversal unless the defendant also demonstrates prejudice. *Id.* at 18-19.

Here, the trial court did not abuse its discretion when it denied the motion to adjourn because defendant failed to establish good cause. While on its face it may appear that defendant had a legitimate reason to request the adjournment, in reality, there was no evidence to establish the legitimacy of the request. Defendant purported to seek an adjournment in order to have the tape recording of his interview with the police analyzed after an alleged preliminary analysis indicated a "gap" in the recording. But, as the trial court aptly noted, "the Court does not have before it an affidavit or a report from the expert or any kind of evidence to bolster those claims or to establish the claims."

Moreover, defendant is not entitled to any relief because he cannot show that he was prejudiced by the denial of his motion. Defendant suffered no prejudice because, even if he was given more time to further analyze the recording, the jury still would have heard the tape, which included defendant confessing to digitally penetrating the victim, and both the detective who conducted the interview and defendant still would have testified regarding their own characterization of the events, including the detective's interview technique and defendant's explanation of his allegedly false confession. Therefore, we conclude that, in addition to the trial court not abusing its discretion, defendant was not prejudiced by the denial of his motion, and reversal is not warranted.

II. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that insufficient evidence existed to sustain his convictions. In reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt. *People v Harrison*, 283 Mich App 374, 377-378; 768 NW2d 98 (2009). And any conflict in the evidence is to be resolved in the prosecutor's favor. *Id*. at 378.

A person is guilty of third-degree CSC if the person engaged in sexual penetration with another person who is between the ages of 13 and 16 years old. MCL 750.520d(1)(a). A person is guilty of fourth-degree CSC if the person engaged in sexual contact with another person who is between the ages of 13 and 16 years old, and the actor is five or more years older than the victim. MCL 750.520e(1)(a). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the victim's testimony established beyond a reasonable doubt that defendant engaged in both sexual penetration and sexual contact with her, contrary to MCL 750.520d(1)(a) and MCL 750.520e(1)(a).

There is no dispute that the victim was 13 years old and defendant was more than five years older than her at the time of the incidents at issue. The "sexual penetration" element of the third-degree CSC conviction was satisfied by the victim's detailed testimony that defendant penetrated her vagina with his penis while they were in his truck on the night she snuck out of her house. The "sexual contact" element of the fourth-degree CSC conviction was satisfied by the victim's testimony that on one occasion, defendant slapped her buttocks; on another occasion, defendant put his hand up her shirt and touched her breast and nipple; and on another occasion, defendant put his hand up her shirt, got underneath her bra with his hands, and put his mouth on her breast. From this evidence, the jury could reasonably conclude that defendant sexually assaulted the victim. A victim's testimony alone is sufficient to support the convictions.

People v Taylor, 185 Mich App 1, 8; 460 NW2d 582 (1990). Therefore, the evidence was sufficient to support defendant's convictions of third- and fourth-degree CSC.

III. ISSUES RAISED IN DEFENDANT'S STANDARD 4 BRIEF

A.

Defendant argues, in his Standard 4 brief, that defense counsel was ineffective for failing to object to the trial court not hearing his motion to adjourn on the date for which it was originally scheduled. Our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). In order to prevail on his claim, defendant must demonstrate that defense counsel's performance fell below an objective standard of reasonableness and that the deficiency so prejudiced defendant as to deprive him of a fair trial, *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994), so that there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the trial would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

A review of the record reveals that defendant initially filed his motion to adjourn on June 29, 2010, on the basis that defense counsel had been substituted approximately 1-1/2 weeks before trial. The motion was scheduled for hearing on July 6, 2010, which was two days before trial. On that day, however, the parties appeared before the trial court and discussed entering into a plea agreement, which defendant ultimately rejected. At the end of the hearing, without mentioning the pending motion, defense counsel acknowledged that trial was starting "next Thursday," July 8, 2010. Then, on the first day of trial, defense counsel stated that, following the plea hearing, defendant informed him of a gap in a recording of an interview between defendant and the police. Defense counsel orally moved for adjournment related to further investigating the gap.

Defendant's claim that defense counsel was ineffective for failing to object to the trial court not hearing his motion to adjourn on July 6, 2010, is without merit. Even though we do not believe that defense counsel's performance fell below an objective standard of reasonableness, assuming arguendo that counsel was deficient for failing to pursue the motion to adjourn two days before trial, defendant cannot show that, but for counsel's "error," the outcome of the trial would have been different. Even if an adjournment had been granted, during which time defendant might have conducted more investigation into the break or gap in the recording, defendant would still have been heard on the recording admitting to sexual contact with the victim. More importantly, whatever was on the recording would not have altered the victim's testimony at trial. Accordingly, the jury would not have been presented with any additional evidence warranting a change in its verdict.

Defendant also argues that defense counsel was ineffective for failing to call an expert to testify regarding the interview recording. Defendant attaches to his Standard 4 brief on appeal the affidavit of an audio video forensic expert averring that he found a gap in the recording. The affidavit is not a part of the lower court record and, therefore, is not considered. *People v Seals*, 285 Mich App 1, 20-21; 776 NW2d 314 (2009); MCR 7.210(A). Given that there was no evidentiary hearing on the matter and nothing in the record supports what the expert's testimony

might have been, there are no mistakes apparent on the record with respect to defense counsel's failure to call an expert to testify. Defendant has not demonstrated that counsel's performance fell below an objectively reasonable standard and, but for counsel's error, the result of the proceeding would have been different.

B.

Defendant also argues in his Standard 4 brief that his Fifth Amendment rights were violated when he was not apprised of his *Miranda*[1] rights before the recorded interview. We review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[A] defendant has a right against self-incrimination . . . pursuant to the Fifth Amendment of the United States Constitution, US Const, Am V." *People v Roberts*, 292 Mich App 492, 504; ___ NW2d ___ (2011). However, "*Miranda* warnings are not required unless an individual is subject to custodial interrogation." *Id*. Defendant was not in custody; the interview took place on defendant's property in his barn. Furthermore, both he and the interviewing detective testified that he was not under arrest at the time of the interview. Thus, *Miranda* was not implicated.

C.

Defendant also argues that his statement was involuntary and, therefore, inadmissible. We disagree. Defendant never raised this issue at the trial court; therefore, we review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

"The test of voluntariness [is] whether . . . the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). Whether a defendant's statement was voluntary is determined by examining the totality of the circumstances. *Id.* at 333.

In this case, defendant was 38 years old at the time of the offense; had prior experience with the police due to a prior larceny conviction from approximately 20 years earlier; was interviewed for approximately 45 to 90 minutes, during which time he was repeatedly questioned regarding whether he had intercourse with the victim; and was not in custody when he gave the statement in question. Although defendant testified that he was scared while he was being interviewed and that he lied when he said he digitally penetrated the victim so that the detective would stop accusing him of having sexual intercourse with her, he testified that he did so to protect his fiancée and to avoid having her discover the allegations against him. Thus, the record reveals that defendant was not led to state that he digitally penetrated the victim because the police overcame his free will, but instead, defendant made his statement freely and without being coerced to do so. Based on the record, "the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id*. at 334. Therefore,

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

defendant has failed to establish plain error, let alone any error, affecting his substantial rights regarding the voluntariness of his statement.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello