

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 18, 2012

v

ANTHONY KEITH WILLIAMS,

Defendant-Appellant.

No. 305348
Wayne Circuit Court
LC No. 10-012811-FC

Before: O’CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349, and two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b.¹ The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 100 months to 200 months’ imprisonment for the kidnapping conviction, and to 200 months to 300 months’ imprisonment for each of the CSC I convictions. Defendant appeals as of right. We affirm defendant’s convictions, but vacate his sentences and remand for resentencing.

Defendant’s convictions arose from an incident in which he drove a woman to a secluded area, where he then sexually penetrated her. At trial, defendant contended that the complainant was a prostitute, that the activities were consensual, and that she had reported the incident to the police because he had declined to pay her. In contrast, the complainant—and other women who had separate but similar experiences with defendant—all testified at trial that defendant forced them to commit sexual acts.

On appeal, defendant argues that his trial counsel was ineffective. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must meet two requirements. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). “First, the defendant must show that counsel’s performance

¹ In his Standard 4 brief, defendant contends that these convictions violated the constitutional double jeopardy protections. Defendant’s contention is incorrect. See *People v Smith*, 478 Mich 292, 312-317; 733 NW2d 351 (2007).

fell below an objective standard of reasonableness.” *Id.* at 290. “In doing so, the defendant must overcome the strong presumption that counsel’s assistance constituted sound trial strategy.” *Id.* “Second, the defendant must show that, but for counsel’s deficient performance, a different result would have been reasonably probable.” *Id.*

Defendant first contends that his counsel was ineffective for failing to request a jury instruction on consent. We need not determine whether counsel should have requested an instruction on consent, because defendant cannot demonstrate any reasonable probability that the instruction would have altered the trial outcome. The prosecution presented significant evidence that the incident was not consensual: the complainant and three other women testified that defendant drove up to where they were standing on the street, convinced them to get into his car, and then forced them into sexual contact. Moreover, the trial court instructed the jury that the kidnapping charge required proof that defendant had restrained the complainant against her will. The jurors were fully apprised of the consent issue and were instructed that they could not convict defendant if they found the incident to be consensual. Accordingly, there is no indication that an additional specific instruction on consent would have altered the jury’s determination that defendant was guilty of kidnapping and of CSC I.

Defendant also claims that his trial counsel was ineffective for failing to call Eugene Langston as a witness. Langston was accompanying the complainant at the time defendant first drove up to her on the street. Failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy. *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). The failure to call a witness is ineffective assistance only when the lack of the witness deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

In this case, Langston’s testimony would not have provided a substantial defense for defendant. At trial, the complainant testified that as she was entering defendant’s car, defendant pointed a handgun at her. On appeal, defendant asserts that Langston would have testified that he did not see defendant point a gun. However, the other trial testimony established that Langston was not inside defendant’s car at the time defendant allegedly pointed the gun. Accordingly, testimony from Langston that he did not see the gun would not have negated the complainant’s assertion that defendant had a gun. In addition, the jury acquitted defendant of the felony-firearm charge. Given the jury’s decision, it is unlikely that additional testimony concerning a gun would have impacted the verdict.

In his Standard 4 brief, defendant argues that his counsel was ineffective for failing to investigate witness Kazee, failing to impeach witness Rose, failing to cross-examine witness Martin effectively, and failing to object to purportedly false testimony from witness James. Specifically, defendant contends that his trial counsel should have elicited testimony from Kazee, Rose, and Martin that might have impeached the complainant. However, the record demonstrates that trial counsel vigorously cross-examined the complainant and attempted to impeach her with her police statement and with her preliminary examination testimony. As a matter of trial strategy, defendant’s counsel could reasonably have determined that impeachment through cross-examination of the complainant was more effective than piecemeal attempts at

impeachment through various other witnesses. Regarding witness James, defendant contends that his counsel should have moved to strike allegedly false testimony that James saw defendant on television when defendant was accused of raping a child. The record contains nothing to indicate that the testimony was false; in addition, it appears that counsel attempted to diffuse James's testimony. We conclude that defendant has not demonstrated ineffective assistance of counsel with regard to these witnesses.

Defendant next argues that the trial court erred in scoring prior record variables (PRVs) 2 and 5 and offense variables (OVs) 10, 12, and 13. We review these arguments "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (citation and quotation marks omitted). "A trial court's scoring decision for which there is any evidence in support will be upheld." *Id.* (citation omitted).

On appeal, the prosecution concedes that the trial court erred by scoring points against defendant for PRVs 2 and 5.² The scoring of PRV 2 is limited by MCL 777.50, which states:

In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication. [MCL 777.50(1).]

The record indicates that more than 10 years elapsed from the discharge date of defendant's first conviction and the commission of his next offense. Therefore, PRV 2 was misscored.

Similarly, PRV 5 addresses "prior misdemeanor convictions or prior misdemeanor juvenile adjudications." MCL 777.55(1). Misdemeanors are scored under PRV 5 as follows:

Except as provided in subdivision (b) [concerning the operation of a vehicle under the influence], count a prior misdemeanor conviction or prior misdemeanor juvenile adjudication only if it is an offense against a person or property, a controlled substance offense, or a weapon offense. Do not count a prior conviction used to enhance the sentencing offense to a felony. [MCL 777.55(2).]

In this case, the basis of defendant's PRV 5 score was a conviction of driving with a suspended license. This misdemeanor conviction does not qualify as a ground to assess points against defendant under MCL 777.55(2). Therefore, PRV 5 was misscored.

The prosecution also concedes that the trial court erred in scoring points against defendant under OV 12, which addresses contemporaneous felonious criminal acts. MCL 777.42. Contemporaneous felonious criminal acts are not scored if the acts resulted in separate

² The prosecution raises other sentencing issues on appeal. We need not address these issues, because we have determined that a remand for resentencing is necessary.

convictions. MCL 777.42(2)(a)(ii). Felony-firearm is also not scored under OV 12. MCL 777.42(2)(b). In this case, the record contains no basis for assessing points against defendant under OV 12. Accordingly, the trial court erred by assessing points against defendant under OV 12.

Regarding OVs 10 and 13, we find no error. OV 10 involves the “exploitation of a vulnerable victim.” MCL 777.40(1). The sentencing court must assess 15 points under OV 10 if predatory conduct was involved. MCL 777.40(1)(a). Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). In *People v Huston*, 489 Mich 451; 802 NW2d 261 (2011), our Supreme Court explained that “predatory conduct may render *all* persons uniquely susceptible to criminal exploitation and transform all persons into potentially ‘vulnerable’ victims.” *Id.* at 461.

In this case, the testimony at trial supported the trial court’s conclusion that defendant engaged in predatory conduct. The testimony from the complainant and three other women established that defendant used a similar strategy to exploit each of the women. The testimony indicated that defendant made a concerted effort to gain each woman’s trust and to encourage each one to enter his car. Once the woman was in the car, defendant drove to a secluded area and forced her to perform sexual acts. Predatory conduct of this nature rendered the complainants vulnerable to criminal exploitation. *Huston*, 489 Mich at 461. Accordingly, we find no error in the scoring of OV 10.

There was also no error in scoring OV 13, which involves a “continuing pattern of criminal behavior.” MCL 777.43(1). A trial court must assess 25 points if the offense was part of a pattern of criminal activity involving three or more crimes against a person. MCL 777.43(1)(c). All crimes that occurred within a five-year period, including the sentencing offense, must be counted regardless of whether they resulted in conviction. MCL 777.43(2)(a). Defendant correctly contends that conduct that is scored under OV 11 cannot be scored for either OV 12 or OV 13. MCL 777.43(2)(c). Here, however, the score for OV 13 is not based on defendant’s multiple penetrations against the complainant in this case. Rather, the OV 13 score is based on defendant’s offenses against two other women. The evidence at trial indicated that defendant committed an offense against one woman in 2009 and against another woman in 2008. Both of those offenses occurred within five years of the offense at issue in this case. Therefore, OV 13 was properly scored.³

In his original brief and in his Standard 4 brief, defendant argues that he was denied a fair and impartial trial because of prosecutorial misconduct. We disagree.

“[T]o preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction.” *People v Bennett*, 290 Mich App

³ In his Standard 4 brief, defendant challenges the habitual offender enhancement of his sentence. The record before us indicates that the enhancement was proper. According to the record, defendant was convicted of a felony in 1988. The 1988 conviction supported the habitual offender enhancement in keeping with MCL 769.10.

465, 475; 802 NW2d 627 (2010). At trial, counsel objected to some of the prosecutor's statements, but did not request curative instructions. Therefore, the issues were not preserved for appeal. "Unpreserved issues are reviewed for plain error affecting substantial rights." *Id.* "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 475-476 (internal quotation marks omitted; citation omitted). There is no error requiring reversal if a curative instruction could have alleviated any prejudicial effect. *Id.* at 476 (citation omitted).

Defendant raises three instances of alleged prosecutorial misconduct. None of these instances warrants reversal. First, defendant challenges the prosecutor's assertions during closing argument that defendant had lied at trial. We find no impropriety in the prosecutor's assertions. A prosecutor may argue that a defendant is unworthy of belief when the defendant's credibility is related to the evidence and is at issue in the case. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). Second, defendant contends that the prosecutor improperly bolstered witness Ortiz's testimony during closing argument. Again, we find nothing improper in the prosecutor's statements about Ortiz's testimony. The prosecutor presented a legitimate and relevant argument concerning Ortiz's investigation of whether the complainant was a prostitute. That the prosecutor objected to one of defense counsel's questions on this topic during trial did not preclude the prosecutor from referencing the topic during closing argument. A prosecutor may present argument based on the evidence and all reasonable inferences in relation to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Lastly, defendant argues that the prosecutor engaged in misconduct by stating during rebuttal that witness Langston was imprisoned out of state. On appeal, defendant presents an affidavit showing that Langston was imprisoned in Detroit. Defendant maintains that the prosecutor's misrepresentation about Langston's location was prejudicial, because the misrepresentation "very conveniently explained" why the prosecution had not presented Langston as a witness. We conclude that nothing in the prosecutor's statement warrants reversal of defendant's convictions. A curative instruction could have cured any prejudicial effect of the statement. *Bennett*, 290 Mich App at 476. In addition, defendant was not prejudiced by the prosecutor's statement. There was significant evidence against defendant at trial. The complainant and three other women testified that defendant approached them on the street in his vehicle, convinced them to get into his car, and then forced them to engage in sexual conduct with him. Moreover, Langston was not a critical witness to the case. Even assuming the prosecutor's statement amounted to misconduct, there is no reasonable likelihood that the result of trial would have been different but for the prosecutor's statement.

Convictions affirmed, sentences vacated because of incorrect scoring on PRVs 2 and 5, and OV 12. Remanded for resentencing. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio
/s/ Jane M. Beckering