STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2013
v	No. 305939 Oakland Circuit Court
WILLIE EARL SIMON, III, Defendant-Appellant.	LC No. 2010-231624-FC

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendant Willie Earl Simon, III appeals as of right his jury conviction of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b)(*ii*) (victim older than 13 but less than 16 years and related to defendant). The trial court sentenced defendant to 135 months' to 30 years' imprisonment and ordered that defendant submit to lifetime electronic monitoring. We affirm.

The victim's mother testified that defendant, her daughter's half-brother, stayed at her home for two weeks in August 2009 after a birthday party. The victim was 14 years old at the time, has cognitive impairments, and has a history of seizures. The victim testified that defendant was her brother because they both have the same father, Willie Simon, Jr. The victim also testified that, while defendant was staying at her house, he repeatedly raped her both vaginally and anally. The victim did not understand sex and did not know that she had become pregnant. The victim's mother explained that her daughter's lack of a period over the next few months was attributed to being taken off a seizure medicine that she had been on for a long period of time. Because the victim was suffering from prolonged stomach pains, the victim's mother took her to see her pediatrician in January 2010 when the pregnancy was discovered. Shortly thereafter, the victim underwent a late-term abortion procedure that took two days to complete. DNA evidence was taken from the fetal tissue and turned over to the police. Police took buccal swab samples from both defendant and the victim. These DNA samples confirmed that defendant was the father of the aborted fetus. Police also took a buccal swab sample from Simon, Jr. The DNA taken from Simon, Jr. showed that he was the father of both defendant and the victim. After a jury trial, defendant was convicted of first-degree criminal sexual conduct and now appeals as of right.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first contends that his trial counsel was ineffective for failing to request a jury instruction on third-degree criminal sexual conduct at trial. Defendant preserved the claim of ineffective assistance of counsel by moving for a remand with this Court; however, because this Court denied defendant's motion and an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973) was not held, review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and law, which matters are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). This requires that the defendant establish that counsel made serious errors, overcome the presumption that counsel's performance was a matter of trial strategy, and show that counsel's errors prejudiced the defense. *Id*. at 600, citing *Strickland*, 466 US at 687. "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id*., citing *Strickland*, 466 US at 694.

An instruction on a necessarily included lesser offense is proper if "a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Third-degree criminal sexual conduct is a necessarily included lesser offense of first-degree criminal sexual conduct. *People v Mosko*, 441 Mich 496, 501; 495 NW2d 534 (1992). In order for the jury to convict defendant of third-degree criminal sexual conduct in this case, it would have had to find that defendant engaged in sexual penetration with a person at least 13 years of age but less than 16 years of age. MCL 750.520d(1)(a). Because the testimony and evidence in this case supported a jury instruction on third-degree criminal sexual conduct, the trial court would have been obligated to give the instruction if defense counsel had requested it. *Cornell*, 466 Mich at 361.

However, after reviewing the record, it is patently clear that defense counsel's decision not to request the necessarily included lesser offense instruction was based on a decision to pursue an "all or nothing" defense. A defense attorney's decision whether to request an instruction on a lesser included offense is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). The decision to forgo a charge on a lesser included offense and instead force the jury into an "all or nothing" decision is a legitimate trial strategy. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982); *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981). The decision to argue one defense over another is also considered a matter of trial strategy. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

In this case, even if the jury believed the victim's testimony and the DNA evidence that defendant fathered the fetal tissue but determined that defendant was not related to the victim by

blood or affinity to the fourth degree as required by the first-degree criminal sexual conduct statute, MCL 750.520b(1)(b)(*ii*), it was obligated to acquit defendant of the first-degree criminal sexual conduct charges. Again, "[t]he decision to proceed with an all or nothing defense is a legitimate trial strategy." *Nickson*, 120 Mich App at 687. Further, the record evidence in this case left seemingly only one viable option for defense counsel's choice of defense strategy considering the fact that: (1) there was no dispute that the victim was less than 16 years old at the time of the rapes; and (2) the DNA evidence taken from the victim, defendant, and the fetal tissue confirmed that defendant impregnated the victim, and, therefore, that defendant had sexually penetrated the victim. It seems reasonable that the only feasible defense theory of the case, under these facts, was for defense counsel to exploit the possibility that defendant and the victim were not blood related as required in the statute.

In fact, our review of the record reveals that defense counsel made the most of this defense by highlighting and attempting to focus the jury on the following evidence: the victim and defendant did not grow up together and did not have a "normal" sibling relationship; Simon, Jr.'s testimony that he always questioned his paternity of the victim after he saw the victim's mother and his brother having sex; and the admission of the victim's mother that she did have a relationship with Simon, Jr.'s brother in the past. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). Accordingly, defendant has failed to establish that defense counsel's performance fell below an objective standard of reasonableness. In any event, even if we were to assume that defense counsel's performance was deficient, considering the overwhelming evidence presented in this case, defendant cannot demonstrate prejudice. *Strickland*, 466 US at 687, 694.

II. PROSECUTORIAL MISCONDUCT

Next, defendant argues that prosecutorial misconduct denied defendant a fair trial when the prosecutor shifted the burden of proof during her questioning of witnesses and closing argument. Defendant failed to preserve the issue for appellate review because he did not object to the prosecution's questions or comments. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Claims of prosecutorial misconduct are generally reviewed de novo to determine whether the defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005). However, unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. To avoid forfeiture of the issue under plain error, the defendant must show that: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To show plain error affecting substantial rights, the defendant must prove prejudice occurred, meaning that the error must have affected the outcome of the lower court proceedings. *Id*. If the defendant satisfies all three factors, "this Court must then exercise discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id*. (internal citations omitted).

"Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotations and citation omitted). "To determine if a prosecutor's comments were improper, we evaluate the prosecutor's remarks in context, in light of defense counsel's arguments and the relationship of these comments to the admitted evidence." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). If "a timely objection and curative instruction could have alleviated any prejudicial effect of the improper prosecutorial statement, we cannot conclude that the error denied defendant a fair trial or that it affected the outcome of the proceedings." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

Defendant specifically asserts that the prosecutor repeatedly and improperly commented that defendant was unable to provide DNA or other evidence to substantiate the defense theory that Simon, Jr.'s brother was the victim's real father, which effectively shifted the burden of proof. In particular, defendant assigns error to the prosecution's questioning of police officers, as well as the questioning of Simon, Jr., with regard to the existence of Simon, Jr.'s brother and whether Simon, Jr.'s brother gave a DNA sample. Defendant maintains that the questioning was for the sole purpose of focusing the jury's attention on the lack of DNA evidence defendant provided.

At trial, during his opening statement, defense counsel set out his theory of the case — that it was not clear whether defendant and the victim were blood related. Then, during his cross-examination of the victim's mother, defense counsel asked her multiple questions about her previous relationship with Simon, Jr.'s brother. The victim's mother admitted that she dated Simon, Jr.'s brother, but not during the time she was dating Simon, Jr. Defense counsel also asked the victim if she ever made a statement to anyone that her father's brother was really her father, which she denied.

Clearly, through both his argument and questioning of witnesses, defense counsel was attempting to advance the theory that Simon, Jr.'s brother was really the victim's father in order to establish doubt in the minds of the jurors that defendant and the victim were not actually half-siblings sharing Simon, Jr. as a father. The prosecutor responded to the defense theory by asking questions of the police involved in the matter about whether during their investigation any of them had heard about the notion that Simon, Jr.'s brother was actually the victim's father. Later, defense counsel garnered direct testimony from Simon, Jr. that the reason he and the victim's mother broke up was because he saw her having sex with his brother in his apartment while he was dating her, before she gave birth to the victim. Simon, Jr. also testified that thereafter he always questioned his paternity of the victim. The prosecutor responded by asking Simon, Jr., about why he never told police that someone should question his half brother.

"Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). "[B]y commenting on the nonproduction of corroborating [evidence, the prosecutor] is merely pointing out the weakness in defendant's case," not shifting the burden of proof. *Id*. at 112 (internal quotations and citation omitted). Here, in the context of the case, the prosecutor's questions were squarely responsive to defense counsel's theory of the case and did not shift the burden of proof.

Defendant also assigns error to the prosecution's closing, arguing that the prosecutor was clearly not commenting on evidence produced at trial, or the reasonable inferences that follow from that evidence, but rather she was again arguing to the jury about the lack of evidence defendant provided. Indeed, "[a] prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). However, we are not convinced that the prosecutor actually implied that defendant needed to prove anything, DNA or otherwise. Taken in context, it is clear that the prosecutor was merely raising issues of credibility and the jury's role in making those determinations. The prosecutor argued that any evidence presented by defendant was subject to a credibility determination. There was no implication that defendant must prove something or present a reasonable explanation for damaging evidence. The prosecutor did not shift the burden of proof. In fact, the prosecutor very clearly stated directly to the jury that "it's my burden of proof, it's not his, it is absolutely my burden of proof[.]"

In any event, even if the prosecutor's comments could be perceived as improperly shifting the burden of proof, the trial court cured any prejudice by giving the following instructions:

> Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.
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> The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. The lawyers' questions to witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

The trial court's instructions to the jury emphasized the prosecution's burden and also clearly instructed the jury that counsels' arguments were not evidence. Because this Court presumes that the jury follows such instructions during deliberations, defendant has failed to establish prejudice. *Fyda*, 288 Mich App at 465. Defendant has failed to show that any alleged error requires reversal.

III. OFFENSE VARIABLES 10 AND 13

Defendant also argues that the trial court erred when it scored OV 10, exploitation of a vulnerable victim, at 10 points, and OV 13, continuing pattern of criminal behavior, at 25 points at sentencing. A trial court's scoring of the sentencing guidelines is reviewed to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010).

When challenged, a sentencing factor need only be proved by a preponderance of the evidence. *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010). This Court must uphold a scoring decision "for which there is any evidence in support." *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010).

MCL 777.40 governs the scoring of OV 10 and directs a trial court to assess 10 points where "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). MCL 777.40(3)(c) defines "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation," and MCL 777.40(3)(b) defines "exploit" as "to manipulate a victim for selfish or unethical purposes." Accordingly, to merit a score of 10 points for OV 10, a defendant must manipulate a young, elderly, or disabled victim for a selfish or unethical purpose and the victim's vulnerability must be readily apparent.

Here, there is ample record evidence to support the scoring of OV 10 at 10 points. The victim was only 14 years old at the time of the rape and her mother testified that she is cognitively impaired. At the time of trial, when the victim was 16, her mother testified that she functioned at an 11-year-old age level. While the victim was in high school at the time of trial, she attended the special education program and her courses were at a third-grade level. Nearly two years after the rapes occurred, the victim testified that she did not know what "sex" was and could not explain it. The victim's testimony demonstrated that she is a naïve, young girl, and was an especially easy target for defendant. Defendant is the victim's older half brother and he was staying at her house for an extended period of time. Defendant took advantage of his access to the victim while no one was around, and he manipulated her when he told her not to tell anyone about the rapes because her mother would put her on the streets if she got pregnant. We conclude that the trial court did not clearly err when it scored 10 points for OV 10, because there was evidence that defendant exploited the victim's youth and cognitive impairment. MCL 777.40(1)(b).

With regard to OV 13, MCL 777.43(1)(c) directs that 25 points should be scored if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(2)(a) provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." In the instant case, the record supports the trial court's scoring of 25 points under OV 13. The victim specifically testified that defendant sexually assaulted her vaginally and anally more than three times and that it "kept going on and on" even though she asked him to stop. Because there is no doubt that the repeated rapes occurred within the same five-year period, the trial court did not clearly err when it scored 25 points for OV 13. MCL 777.43(1)(c). Defendant is not entitled to resentencing.

IV. LIFETIME ELECTRONIC MONITORING

Finally, defendant argues that because defendant was convicted of offenses against a complainant who was not less than 13 years of age, lifetime electronic monitoring was not a permissible sentence condition and defense counsel was ineffective for failing to object. "Whether defendant is subject to the statutory requirement of lifetime electronic monitoring involves statutory construction, which is reviewed de novo." *People v Johnson*, 298 Mich App

128; 826 NW2d 170, 174 (2012), quoting *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010).

This exact legal issue was recently decided in a published opinion by this Court in *Johnson*, 298 Mich App 128; 826 NW2d at 174-175. The *Johnson* Court held that, regardless of the defendant's and the victim's age, MCL 750.520b(2) requires lifetime electronic monitoring for first-degree criminal sexual conduct offenses when the defendant has not been sentenced to life in prison without parole. Here, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(*ii*), and the trial court sentenced defendant to 135 months' to 30 years' in prison, not life in prison without parole. Therefore, pursuant to the holding of *Johnson*, and pursuant to MCL 750.520b(2), the trial court properly sentenced defendant to lifetime electronic monitoring.

Because the trial court properly sentenced defendant to lifetime electronic monitoring, defense counsel was not ineffective for failing to object. Defense counsel cannot be deemed ineffective for failing to raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Douglas B. Shapiro