

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
February 21, 2013

v

STEVEN TYRON MILNER,  
Defendant-Appellant.

No. 306593  
Wayne Circuit Court  
LC No. 11-004194-FC

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Before: MURRAY, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(d), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(d). Defendant was sentenced to 22 to 80 years' imprisonment for each first-degree criminal sexual conduct conviction and 5 to 15 years' imprisonment for the second-degree criminal sexual conduct conviction. We affirm.

Defendant first argues his trial counsel provided ineffective assistance of counsel because he failed to object to testimony regarding the use of defendant's mug shot from an unrelated arrest in the photographic line-up. Because defendant did not file a motion for a new trial or evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this issue is unpreserved. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). This Court's review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The determination whether a defendant received ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error and its constitutional determinations are reviewed de novo. *Id.*

To establish that he received the ineffective assistance of counsel, a criminal defendant must satisfy the two-part test first articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 US at 687. In this respect, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. Second, the defendant must show that trial counsel's

deficient performance prejudiced his defense. *Id.* 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.” *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing *Strickland*, 466 US at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Defendant argues that his trial counsel was ineffective for failing to object to the admission of the photographic line-ups, which included defendant’s mug shot from an unrelated arrest. However, defendant failed to specify the rule of evidence on which his trial counsel should have based his objection. Based on his argument – that the evidence was irrelevant and prejudicial – we assume defendant believes the appropriate bases for his trial counsel’s objections would have been MRE 402 (irrelevant evidence inadmissible) and MRE 403 (exclusion of relevant evidence on grounds of prejudice). Because neither rule precludes admission of the evidence and defendant cannot overcome the presumption that trial counsel’s performance constituted sound trial strategy, defendant’s trial counsel did not provide ineffective assistance.

The decision whether to object to evidence is a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). This Court is reluctant to second-guess trial counsel on matters of trial strategy, even if the strategy backfired. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). This Court has acknowledged that “there are times when it is better not to object and draw attention to an improper comment.” *Horn*, 279 Mich App at 40, quoting *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). The same is true for unfavorable evidence. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Here, evidence that defendant was arrested for an unrelated offense at the same location as the assault was unfavorable to defendant. Defense counsel may have made the conscious choice not to object and draw the jurors’ attention to the unfavorable evidence. This presumption is bolstered by the fact that defense counsel filed a pretrial motion to suppress the identification evidence outside the presence of a jury. In light of this reasonable explanation and defendant’s failure to provide any legal authority to the contrary, defendant has not overcome the strong presumption that defense counsel’s performance was sound trial strategy.<sup>1</sup>

Defendant also argues that the prosecution presented insufficient evidence to establish defendant’s identity beyond a reasonable doubt. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). This Court examines the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Id.* at 196. “All

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<sup>1</sup> Defendant also cannot show that his counsel’s failure to object prejudiced his defense. Even if defense counsel had objected to the evidence under MRE 402 and MRE 403, the objections would have been overruled because the photo array of defendant, from which the victim observed and identified one of her attackers, was highly relevant and probative to the issue of identification at trial.

conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

Eyewitness testimony identifying the defendant as the assailant, if believed, is sufficient to establish guilt beyond a reasonable doubt. *People v Drohan*, 264 Mich App 77, 89; 689 NW2d 750 (2004) aff'd 475 Mich 140 (2006). Defendant argues that the victim's testimony is too unreliable to base a conviction on because, according to her testimony, she attempted to block the incident out of her mind. According to defendant, the victim, in fact, succeeded in blocking the incident out and only identified defendant because she had previously met him at the location of the crime several times before. In short, she associated defendant with the location of the crime and, therefore, the incident itself.

This argument is unavailing because it essentially requires this Court to reevaluate testimony based on the credibility (or lack thereof) of the complainant witness. The jury heard this argument and had a better opportunity to evaluate the value of her testimony. In fact, the jurors were instructed to consider prior contacts between the victim and defendant and the nature of the offense. Credibility is an issue for a jury, and to argue that a witness lacked credibility is an insufficient basis to overturn a conviction on appeal. *People v Hughes*, 217 Mich App 242, 248; 550 NW2d 871 (1996). Viewing the evidence in the light most favorable to the prosecution, and deferring to the jury's determinations regarding the credibility and weight of testimony, we conclude that a rational jury could have found the element of identification was proven beyond a reasonable doubt.

Finally, defendant argues that his sentences for first-degree criminal sexual conduct constitute cruel or unusual punishment under the United States and Michigan Constitutions. Because defendant failed to raise this issue below, it is unpreserved for appellate review. *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010). This Court reviews unpreserved claims of constitutional error for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant's argument focuses on the purportedly disproportionate nature of his sentences for his three first-degree criminal sexual conduct convictions. Although our state<sup>2</sup> constitution's prohibition against cruel or unusual punishment does include a prohibition on grossly disproportionate sentences, *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011), a sentence that is proportionate is not cruel or unusual, *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). A sentence within the guidelines is presumptively proportionate. *Id.* Thus, because defendant's sentences are within the sentencing guidelines, in order to demonstrate his sentences are cruel or unusual, defendant must first overcome the presumption that his sentences are proportional.

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<sup>2</sup> We assess defendant's argument under the state constitutional standard because, if defendant's punishment "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011).

Defendant argues that his sentences are disproportionate, and therefore cruel or unusual, because of his young age, the ineffective assistance of counsel he received at trial, and the insufficient evidence presented at trial. None of these factors are relevant in considering the proportionality of defendant's sentence, which is a function of (1) the seriousness of the crime and (2) the defendant's criminal history. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003); see also, e.g., *Powell*, 278 Mich App at 323 (stating that if the evidence was insufficient, the remedy is to vacate the conviction, not find the defendant's sentence cruel or unusual). Because defendant does not argue that the seriousness of the crime or his criminal history require a finding of disproportionality, he cannot overcome the presumption that his sentences are proportional. Because defendant has not overcome the presumption of proportionality, and because a proportionate sentence is not cruel or unusual, defendant's argument is without merit. *Powell*, 278 Mich App at 324.

Affirmed.

/s/ Christopher M. Murray

/s/ Kurtis T. Wilder

/s/ Donald S. Owens