STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 20, 2013
v	No. 310188 Oakland Circuit Court
DEQUNNE LYNN HERRON, Defendant-Appellant.	LC No. 2011-237951-FC

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct, MCL 750.520b(1)(f)[1] (force or coercion used to accomplish sexual penetration), and assault with intent to do great bodily harm less than murder, MCL 750.84.[2] The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to 40 to 80 years' imprisonment for the first-degree criminal sexual conduct conviction, and 12 to 20 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, with 255 days' jail credit. We affirm.

I. JURY INSTRUCTIONS

Defendant contends that the trial court improperly instructed the jury. We disagree.

Defendant waived this issue as a result of trial counsel affirmatively expressing satisfaction with the trial court's jury instructions. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). Defendant's waiver extinguished any error for appellate review. See *People v Loper*, 299 Mich App 451; 830 NW2d 836 (2013).

[1] Amendments to MCL 750.520b became effective on April 1, 2013. The judgment of sentence cites only MCL 750.520f, which involves sentencing for second or subsequent offenses under MCL 750.520b.

[2] Amendments to MCL 750.84 became effective on April 1, 2013.

Even if this issue were not waived, we would find no error in the challenged jury instruction. At a minimum, defendant failed to preserve this issue by raising it in the trial court. See *People v Gratsch*, 299 Mich App 604, 615; __ NW2d __ (2013). We review an unpreserved claim of instructional error for plain error affecting substantial rights. *Id.*

> This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. [*People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000) (citations omitted).]

Defendant argues that the following instruction to the jury was improper: "It is enough force if the defendant used force to induce the victim to submit to the sexual act or to seize control of the victim in a manner facilitating commission of the sexual act without regard to the victim's wishes." Defendant claims this instruction was improper because no threats or force were used before the sexual penetration and the victim had not indicated that she did not wish to engage in sexual intercourse.

Force is an element of the charged offense. MCL 750.520b(1)(f). The Michigan Supreme Court used the language at issue in explaining the requisite force under MCL 750.520d(1)(b), which incorporates the definition of force from MCL 750.520b(1)(f). *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002). CJI2d 20.24(7) includes that same language as part of the definition of sufficient force and instructs trial courts to provide such definition to the jury when it is applicable. The instruction was supported by the evidence in this case. Before the sexual penetration, defendant snatched the victim's cellular telephone, ordered her into the living room, ordered her to take off her clothing, and punched her twice in the lower stomach. He then penetrated her with his fingers. The jury could have found that these acts constituted force sufficient to induce the victim to submit to the sexual act or to seize control over the victim in a manner facilitating commission of the sexual act. See *Carlson*, 466 Mich at 140. Thus, this instruction sufficiently protected defendant's rights and did not constitute plain error affecting substantial rights. See *Gratsch*, 299 Mich App at 615; *Canales*, 243 Mich App at 574.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also contends that trial counsel rendered ineffective assistance. We disagree.

"In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing." *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Defendant failed to make a motion for a new trial or evidentiary hearing. Therefore, the issue is unpreserved. Because defendant failed to move for a new trial or evidentiary hearing, our review is limited to the record. *Id.* at 659.

> To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and this performance caused him prejudice. To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different. [*People v Nix*, __ Mich App __; __ NW2d __ (Docket No. 311102, issued May 23, 2013) (slip op at 6) (citations omitted).]

Defendant's first claim of ineffective assistance of counsel is that trial counsel failed to object to the allegedly erroneous jury instruction regarding force. As discussed in Issue I, *supra*, there was no error in the instruction. Trial counsel was not ineffective for failing to make a futile objection. *People v Crews*, 299 Mich App 381, 401; 829 NW2d 898 (2013).

Next, defendant argues that trial counsel incorrectly informed him that the maximum sentence he faced for the first-degree criminal sexual conduct charge was 5 to 14 years' imprisonment and that, as a result of trial counsel's misleading advice, he was deprived of the opportunity to enter a plea and receive a sentence of seven to eight years' imprisonment under the terms of the plea offer. "A claim of ineffective assistance of counsel may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer." *People v Douglas*, 296 Mich App 186, 205; 817 NW2d 640 (2012), lv gtd 493 Mich 876 (2012), lv held in abeyance ___ Mich ___; 828 NW2d 381 (2013). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Id.* at 206 (internal quotation marks and citation omitted). There is no evidence in the existing record that trial counsel erroneously informed defendant regarding the possible sentence. Defendant attempts to improperly expand the record with his handwritten notes to his appellate counsel and offer of proof. See *Nix*, __ Mich App at __ (slip op at 4). Further, defendant has failed to establish the requisite prejudice. In order to show prejudice,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Lafler v Cooper*, 566 US ___, ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012).]

Even if trial counsel gave defendant misleading advice, there is no evidence in the record that defendant would have accepted a plea to first-degree criminal sexual conduct. In fact, the record at sentencing indicates that defendant would not have accepted a plea to the charge of first-degree criminal sexual conduct. At sentencing, defendant stated, with regard to the alleged sexual misconduct, "I wasn't never [sic] going to take a plea to that because I don't feel like I'm guilty of that."

Next, defendant argues that trial counsel failed to move for a mistrial after the jury was made aware of defendant's prior imprisonment. Trial counsel was not ineffective. Trial counsel may not have wanted to draw more attention to the comment. Defendant has failed to overcome

the presumption that trial counsel's performance was sound trial strategy. *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). This Court will not substitute its judgment for that of trial counsel on matters of trial strategy or use the benefit of hindsight when assessing trial counsel's competence. *Id.* at 242-243. Moreover, the trial court immediately instructed the jury to disregard the statement and jurors are presumed to follow their instructions. *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011). Defendant has failed to establish that he would have been granted a mistrial. Thus, defendant has failed to establish prejudice.

Defendant briefly mentions the following two arguments in the argument section of his amended brief, but more fully develops them in the statement of facts section. We note that defendant's statement of facts contains argument and bias, in violation of MCR 7.212(C)(6). Nonetheless, defendant's arguments fail.

First, defendant argues that trial counsel failed to elicit from the victim that in her written statement she said that she requested to return home after defendant punched her in the chest, while she testified at trial that she did not think much about defendant punching her in the chest. "The questioning of witnesses is presumed to be a matter of trial strategy." *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). This Court will not substitute its judgment for that of trial counsel on matters of trial strategy. *Unger*, 278 Mich App at 242-243. Defendant cites *People v Brown*, 491 Mich 914, 914-915; 811 NW2d 500 (2012), in which the Michigan Supreme Court found that trial counsel was ineffective for failing "to point out any of the inconsistencies in the complainant's trial testimony" and failing "to develop the point that her trial testimony was inconsistent in some respects with her preliminary examination testimony and with her initial statement to the police." However, here, trial counsel did not fail to reveal any inconsistencies in the victim's statements. For example, trial counsel elicited from the victim that in her written statement, she said defendant apologized, while at trial she testified that he never apologized. Moreover, defendant fails to show prejudice because the victim's statement was admitted at trial and thus the jury was aware of any inconsistencies between her written statement and trial testimony.

Defendant also argues that trial counsel failed to elicit from the victim that she brought night clothes with her, as she had testified at the preliminary examination. Again, trial counsel's questioning is presumed to be trial strategy for which this Court will not substitute its judgment. *Petri*, 279 Mich App at 413; *Unger*, 278 Mich App at 242-243. Moreover, defendant has failed to establish that but for trial counsel's failure to elicit this fact the result of the trial would have been different. See *Nix*, __ Mich App at __ (slip op at 6). The victim testified that she initially intended to be intimate with defendant that night. Thus, the fact that she brought night clothes would not have affected the outcome of the trial.

Second, defendant argues that trial counsel failed to call two witnesses—Maria (the woman driving the car) and Dequan Edward Chapman (the man who took defendant and the victim to the store). Defendant also argues that trial counsel failed to present any defense by calling no witnesses.

> An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy. A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy. In

> general, the failure to call a witness can constitute ineffective assistance of counsel only when it "deprives the defendant of a substantial defense." [*People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citations omitted).]

"A substantial defense is one that might have made a difference in the outcome of the trial." *Chapo*, 283 Mich App at 371 (internal quotation marks and citation omitted). Defendant argues that Maria would have testified that defendant did not punch the victim while they were in the car and about her observations of the victim in the car, which would have diminished the victim's credibility regarding whether the sexual act was consensual. Defendant argues that Chapman would have testified regarding the victim's behavior after the alleged sexual assault and his testimony would have shown that the victim exaggerated and fabricated her testimony. The existing record does not reveal what the testimony of Maria or Chapman would have been and defendant attempts to improperly expand the record with his offer of proof. See *Nix*, __ Mich App at __ (slip op at 4). Thus, defendant cannot establish that trial counsel's performance was deficient or prejudiced him. Moreover, this Court will not substitute its judgment for that of trial counsel on matters of trial strategy. *Unger*, 278 Mich App at 242-243. Further, defendant has failed to establish that the purported testimony of Maria or Chapman would have affected the outcome of the trial. Although their testimony may have contradicted the victim's testimony, the jury could have still believed the victim. In addition, other than affecting the victim's credibility, their testimony would not likely have affected the outcome because neither Maria nor Chapman were present when the alleged sexual assault occurred.[3]

Finally, defendant argues that trial counsel did not allow him to testify and failed to inform him that closing argument is not evidence. There is no evidence in the existing record that trial counsel failed to inform defendant about the effects of closing argument or prevented him from testifying. Defendant again attempts to improperly expand the record with his offer of proof. See *Nix*, __ Mich App at __ (slip op at 4). The record reveals only that defendant waived his right to testify. Moreover, even if defendant had testified, there is no reasonable probability that his testimony would have affected the outcome of the trial given the victim's testimony. See *id.* at 6.

Affirmed.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Christopher M. Murray

[3] Defendant also argues that although Chapman had a criminal record, his testimony would still have been beneficial. However, Chapman's criminal history is not part of the existing record and defendant attempts to improperly expand the record. See *Nix*, __ Mich App at __ (slip op at 4).