STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORY DESHON CASEY,

Defendant-Appellant.

UNPUBLISHED
April 30, 2020

No. 347260
Kalamazoo Circuit Court
LC No. 2016-001048-FC

Before: MARKEY, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of first-degree criminal sexual conduct (CSC-I), MCL 750.520b. The trial court sentenced defendant, a fourth-offense habitual offender, MCL 769.12, to 35 to 60 years' imprisonment. We affirm.

I. FACTUAL BACKGROUND

On August 5, 2018, defendant and the victim agreed that defendant would drive the victim to her mother's house. En route, defendant stopped at a liquor store and purchased vodka. Defendant offered the victim a sip of the vodka, which the victim accepted. After drinking from the bottle, the victim claimed that her memory became blurred.

Instead of taking the victim to her mother's house, defendant hit the victim in the back of the head with an object, tied her up, and drove her to a secluded spot. There, defendant sexually assaulted her by penetrating her orally, vaginally, and anally with his penis. The victim recalled praying aloud and scratching defendant with her long nails in an attempt to stop the attack. Defendant continued to beat the victim after he was finished, administering one final blow to the back of her head. Defendant fled the area and left the victim behind.

The victim crawled to a nearby dirt road, where she found her cell phone. While attempting to call 911, a couple found the victim. The victim was transported to a hospital, where she underwent a sexual assault examination.

Defendant was convicted by a jury of CSC-I, and was sentenced as a fourth-offense habitual offender to 30 to 60 years' imprisonment. This appeal followed.

II. MOTION FOR A NEW TRIAL

In his brief on appeal, defendant first argues that the trial court erred by denying his motion for a new trial. We disagree.

> This Court reviews a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citation omitted). A mere difference in judicial opinion does not establish an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999). [*People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018).]

Defendant argues that he was entitled to a new trial because the jury's verdict was contrary to the great weight of the evidence. MCL 770.1 gives trial courts the discretion to grant a defendant a new trial under limited circumstances. The statute specifically provides:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs. [MCL 770.1.]

Similarly, MCR 6.431(B) provides:

> On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

A new trial may be granted when a jury's verdict is against the great weight of the evidence. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. *Id*. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647, 576 NW2d 129 (1998). Moreover, resolving issues of credibility is the province of the jury. See *People v Wolfe*, 440 Mich 508, 517-518; 489 NW2d 748 (1992) (holding that credibility determinations are ultimately the jury's decision).

Defendant's argument addresses a number of alleged inconsistencies in the victim's testimony. These inconsistencies range from video evidence that shows the victim entering and leaving a gas station to buy a bag of chips, that subsequent drug testing did not reveal MDMA or ecstasy in the victim's urine despite the victim's claims that she had been drugged, that the victim's phone records indicate that she was not detained during the alleged assault, and that the victim's testimony that she was hit in the head with a brick and bound was not consistent with the testimony of treating physicians.

However, we cannot agree with defendant that the jury's verdict was against the great weight of the evidence provided at trial. First, regarding the victim's phone activity, there were incoming and outgoing calls from the victim's cell phone at 11:12 a.m., 11:31 a.m., 11:36 a.m., 11:40 a.m., 11:44 a.m., and 11:46 a.m. However, Michigan State Police Detective Paul Gonyeau testified at trial, and clarified that there was an absence of data recovered from the victim's cell phone for approximately 45 minutes between approximately 12:31 p.m. and 2:13 p.m. This is not inconsistent with the victim's testimony that defendant was supposed to drive her to her mother's home, that defendant gave her his phone number earlier that day, and that the victim first "saw" defendant sometime before 12:42 p.m. Although defendant argues that it was impossible for defendant to have sexually assaulted the victim during such a narrow timeframe, this argument was explicitly presented to the jury. The jury's guilty verdict indicates that the jury resolved the believability of this evidence in favor of conviction. See *id.* at 517-518 (holding that credibility determinations are ultimately the jury's decision).

Second, defendant points to the absence of MDMA or ecstasy in the victim's body, despite her assertion that she had been drugged by defendant when she drank his vodka and was "physically paralyzed" during the assault. Although MDMA or ecstasy was not found in the victim's system, the victim did test positive for a cocktail of other drugs including marijuana, cocaine, and opiates. Given that the victim did test positive for some drugs, the absence of MDMA or ecstasy is not inconsistent with the victim's belief that she was drugged. Therefore, defendant's argument, that the absence of a single type of date rape drug impeached the victim's testimony, fails.

The remaining two arguments by defendant are that the video evidence and testimony of the victim's treating physicians impeached the victim's testimony that defendant hit her in the head with a brick before binding her and carrying her away against her will. However contrary to defendant's assertion, the medical professionals who examined the victim testified that, although they could not definitively identify the object used to bludgeon the victim, it was clear from the victim's injuries that she was struck with a large, hard object. This testimony is not inconsistent with the victim's statements that she was hit in the head with a brick.

However, we agree with defendant that the video evidence showing the victim entering a gas station, which was presented to the jury after the victim denied going into a gas station, tended to impeach the victim's testimony on that point. After the video was shown to the jury, the victim admitted she must have entered the gas station, but had no recollection of the event. The victim surmised that she was drugged and assaulted after going to the gas station, as the video did not show her with any injuries.

Although the victim's testimony was impeached, or at least conflicting on this specific point, her testimony as a whole was not implausible or physically impossible. See *Lemmon*, 456 Mich at 643-645. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* In this case, the jury was able to weigh the credibility of the victim's statement in light of her failure to recall this detail. Ultimately, the jury credited the victim's testimony. Because resolving issues of credibility is the province of the jury, a new trial on this basis is unwarranted. See *Lemmon*, 456 Mich at 637 (quotation marks and citation omitted), where our Supreme Court opined that "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses. As the trier of fact, the jury is the final judge of credibility."

III. SUFFICIENCY OF THE EVIDENCE

In his brief on appeal, defendant next argues that the prosecution did not present sufficient evidence to sustain his convictions. We disagree.

> "In determining whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the prosecution, and considers whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *People v Harris*, 495 Mich 120, 126; 845 NW2d 477 (2014). But more importantly, "[t]he standard of review is deferential: a reviewing court is *required* to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (quotation marks and citation omitted; emphasis added). "It is for the trier of fact, *not the appellate court*, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded [to] those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) (emphasis added). [*People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018).]

Defendant was convicted by the jury of CSC-I under MCL 750.520b, which provides in relevant part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:
>
> (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.

(*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

* * *

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

Our Supreme Court recognized that the statute requires that the defendant "(1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual penetration." *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004).

Defendant does not challenge any particular element, but instead cursorily identifies several inconsistencies in the victim's testimony, and argues that because the victim was not a credible witness, the evidence supporting defendant's conviction is insufficient. However, as discussed, the victim's testimony was not patently incredible, and regardless, the credibility of the victim's testimony is an issue solely for the jury. *Lemmon*, 456 Mich at 637.

Moreover, our review of the record supports the conclusion that the prosecution presented sufficient evidence to satisfy all elements of CSC-I. Trial testimony established that defendant physically injured the victim by striking her in the head with a large, hard object at least twice. Defendant did engage in sexual penetration of the victim, and used force to accomplish the act. Specifically, defendant hit the victim in the back of the head with an object, tied her up, and drove her to a secluded area where he penetrated her orally, anally, and vaginally. Additionally, there was some testimony that defendant may have drugged the victim in order to overpower her and accomplish his crime. Thus, we conclude that sufficient evidence was presented by the prosecution to support defendant's CSC-I conviction.

IV. OFFENSE VARIABLE 7

Third, in his brief on appeal, defendant challenges the trial court's assessment of 50 points for offense variable (OV) 7.

"A trial court's factual determinations under the sentencing guidelines must be supported by a preponderance of the evidence and are reviewed for clear error." *People v Wellman*, 320 Mich App 603, 605; 910 NW2d 304 (2017). "Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred." See *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015) (quotation marks and citation omitted). A preponderance of the evidence is "such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008).

"Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which

an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "When calculating the sentencing guidelines, a court may consider all record evidence . . . ." *Wellman*, 320 Mich App at 608 (quotation marks and citation omitted).

Defendant argues that the trial court erred by assessing 50 points for OV 7 because the facts do not indicate that the victim's injuries rose to the brutality and cruelty required by OV 7.

MCL 777.37(1) provides, in full:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with sadism, torture, or excessive brutality or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense ..... 50 points
>
> (b) No victim was treated with sadism, torture, or excessive brutality or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the ..... 0 points

Our Supreme Court has previously recognized that four categories trigger the assessment of 50 points under OV 7:

> A trial court can properly assess 50 points under OV 7 if it finds that a defendant's conduct falls under one of the four categories of conduct listed in subsection (1)(a). No party contends that any of the first three categories (sadism, torture, or excessive brutality) applies in these cases. Thus, our focus is on the fourth category—whether defendants engaged in conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. [*Hardy*, 494 Mich at 439-440.]

In *Hardy*, our Supreme Court elaborated that the relevant inquiries when determining whether defendant's actions were designed to substantially increase the fear and anxiety of a victim under OV 7 are "(1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id*. at 443-444. "For purposes of OV 7, excessive brutality means savagery or cruelty beyond even the usual brutality of a crime." *People v Rosa*, 322 Mich App 726, 743; 913 NW2d 392 (2018) (quotation marks and citation omitted).

At sentencing, the trial court found that defendant acted with excessive brutality and conducted the crime in a manner intended to increase defendant's fear and anxiety for the purposes of OV 7. As defendant viewed the evidence, the victim "had no broken bones, no sprains, no other injury and that was supported by Doctor Pfeifer and Nurse Wagner." However, the trial court did not err in its finding.

First, defendant's actions were conducted with excessive brutality. The victim testified that she was physically paralyzed after she took a sip of a drink from defendant. Despite the fact

that the victim was paralyzed, defendant then struck her in the head and bound her with cables. Later, defendant assaulted the victim a second time by striking her in the back of the head with some type of heavy object. While carrying out the assault, defendant repeatedly asked the victim "do you want me to shoot you? Do you want to live or do you want to die[?]" When the victim began praying aloud, defendant demanded that she stop and began to hit her again.

If the victim was truly paralyzed, as she claimed, defendant's other physical assaults were unnecessary for the completion of CSC-I. Moreover, the victim was effectively incapacitated by the first blow to her head and the binding of her limbs with cables. The victim even explicitly agreed to do whatever defendant said, but defendant continued to brutally physically attack her. Consequentially, we conclude that the methods used by defendant to commit CSC-I was "conduct beyond the minimum required to commit the offense . . . ." *Hardy*, 494 Mich at 443-440.

The record seems to indicate that defendant's violent assaults on the victim revolved around her prayers for mercy, and were executed despite her promise to cooperate. This conduct was clearly "intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy*, 494 Mich at 443-444. Similarly, defendant's repeated indications that he might kill the victim and his questioning whether she wished to live or die were intended to increase the victim's fear and anxiety. This testimony also highlights that there was "excessive brutality[, which] means savagery or cruelty beyond even the usual brutality of a crime." *Rosa*, 322 Mich App at 743 (highlighting threats to the victim's child and repeated assaults in upholding an OV 7 scoring). In light of this testimony, a preponderance of the evidence supported the trial court's ruling. See *Wellman*, 320 Mich App at 605.

V. STANDARD 4 BRIEF ON APPEAL

Defendant also raises three issues in a Standard 4 brief. We address each claim in turn.

A. PROSECUTORIAL ERROR

First, defendant raises an argument of prosecutorial error. However, defendant failed to preserve his claim by raising a timely and specific objection in the trial court. *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Thus, we review his claim for plain error affecting his substantial rights. *People v Norfleet*, 317 Mich App 649, 660 n 5; 897 NW2d 195 (2016). This standard requires a showing of prejudice, meaning defendant must show that the error affected the outcome of the lower court proceedings. *People v Putman*, 309 Mich App 240, 243; 870 NW2d 593 (2015). Reversal is not warranted unless the error resulted in the conviction of an actually innocent person, or the error seriously affected the fairness, integrity, or reputation of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The premise of defendant's argument is that the prosecutor elicited false testimony from sexual assault nurse Sherri Killah. Specifically, defendant argues that Killah failed in her role as an expert by not testifying that she was looking for ailments and injury during swabs of the victim's vaginal area. According to defendant, this misled the jury into believing that she completed a full vaginal exam of the victim. Defendant also argues that Killah "never talked about the results of her findings from the test that she conducted, her conclusions and how she came to her conclusions, information about known error rates for the procedure she conducted, and whether any controls

have failed." Defendant also claims that Killah was required to disclose whether her "method" would be published in "peer-reviewed journals" as required by MRE 702.

The test for prosecutorial error "is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Claims of prosecutorial error are evaluated "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's argument." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "It is inconsistent with due process when the prosecution allows false testimony from a state's witness to stand uncorrected." *People v Smith*, 498 Mich 466, 475; 870 NW2d 299 (2015). When a prosecutor knows a witness has testified falsely, the prosecutor has an affirmative duty to correct the testimony. *Id*. at 476. "[I]t is the effect of a prosecutor's failure to correct false testimony that is the crucial inquiry for due process purposes." *Id*. (citation and quotation marks omitted).

We conclude that defendant's claim of prosecutorial error lacks merit. First, there is no evidence that Killah falsely testified. Rather, defendant's argument appears to be that the prosecutor failed to correct the impression that Killah conducted a full vaginal exam of defendant. However, Killah explicitly testified that she did perform a sexual examination, and during the course of that examination she collected samples from the victim using a swab.

Defendant argues that Killah was required to disclose which tests and testing methodology she used. However, Killah did not conduct any testing. Rather, her testimony laid the foundation for an expert on DNA evidence to testify regarding her involvement in this case. Where Killah did not falsely testify, the prosecutor was under no affirmative duty to correct her testimony. See *Smith*, 498 Mich at 476.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that defense counsel was ineffective for failing to object to the certification of Lisa Ramos, a forensic scientist and DNA expert employed by Northeastern Illinois Regional Crime Laboratory, as an expert in serology and DNA analysis. Specifically, in his Standard 4 brief, defendant claims that defense counsel was ineffective for failing to object to Ramos testifying an expert witness because the prosecution failed to disclose her as a witness before trial, because Ramos lacked the proper qualifications for certification as an expert, and because Ramos' use of DNA evidence was inaccurate.

"The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). Absent an evidentiary hearing, we review defendant's claims of ineffective assistance of counsel for mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

"To establish that his or her lawyer provided ineffective assistance, a defendant must show that (1) the lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for the lawyer's deficient performance, the result of the proceedings would have been different." *People v Anderson*, 322 Mich App 622, 628; 912 NW2d 607 (2018). "A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Id.* (quotation marks and citation omitted). "[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

We review for an abuse of discretion a trial court's decision to admit expert testimony. See *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Id.* Even if admitted in error, the admission of evidence is not cause for reversal unless it affirmatively appears that it is more probable than not that the error was outcome-determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [MRE 702; *People v Dobek*, 274 Mich App 58, 93-94; 732 NW2d 546 (2007).]

We first address defendant's claim that the prosecution failed to disclose Ramos as a witness before trial. Our review of the record indicates that the prosecution filed a notice of additional witnesses to be produced at trial. This witness list included Lisa Ramos. Moreover, the prosecution disclosed this list before the 30 days required by statute. See MCL 767.40a(3). Defendant does not provide any other basis for why the notice was insufficient in this case. Therefore, his argument that his defense counsel should have objected because the prosecution failed to provide notice of Ramos's testimony is without merit because defense counsel's objection would have been futile. See *Ericksen*, 288 Mich App at 201.

Similarly, defendant's challenges to Ramos's qualifications are without merit. Defendant's argument is that Ramos was required to, at minimum, possess a "bachelor's in biology, a bachelor's in chemistry, or a forensic science-related field." Defendant cites the FBI's alleged qualifications for its analysts positions in support of his position. However, the FBI's qualifications are not binding on Michigan Courts.

MRE 702 requires that the trial court determine whether the expert witness possesses a "scientific, technical, or other special background" that will assist the trier of fact. In this case, the trial court determined that Ramos possessed a bachelor's degree in criminal justice and chemistry, a master's degree in science with a specialization in forensic biology, and had 12 years of experience as a forensic scientist. Thus, the trial court deemed Ramos sufficiently qualified to testify as an expert. We conclude that the trial court's decision did not fall outside the range of reasonable and principled outcomes, and thus it did not abuse its discretion by permitting her to testify as an expert. See *Adelman*, 486 Mich at 639. Having found that Ramos was appropriately

qualified as an expert in forensic science, defense counsel was under no obligation to object. *Ericksen*, 288 Mich App at 201.

Moreover, our review of the record shows that defense counsel extensively cross-examined Ramos on her failure to find sperm during DNA testing. Defense counsel went on to argue that the absence of sperm in the DNA samples procured from the victim's vagina weighed in favor of defendant's theory that the victim was lying about the sexual assault. In light of defense counsel's utilization of this evidence in support of defendant's case, defense counsel was not ineffective for failing to object to Ramos's qualification as an expert witness. See *Anderson*, 322 Mich App at 631.

Finally, defendant argues that Ramos' DNA-based evidence and testimony is not reliable because Ramos's testimony was based on her experience and hypotheticals. However, this Court has previously recognized that DNA identification is generally accepted to be accurate within the scientific community. See *People v Adams*, 195 Mich App 267, 274; 489 NW2d 192 (1992). Moreover, Ramos was permitted to offer her opinion on the basis of her experience and hypotheticals if the factual basis for these hypotheticals are in evidence. See MRE 703. Again, any objection to Ramos' testimony by defense counsel would have been futile. *Ericksen*, 288 Mich App at 201.

C. ACTUAL INNOCENCE

Finally, defendant raises a claim of actual innocence. However, a claim of actual innocence is a creature of collateral review after a defendant's direct appeal is exhausted. See generally *People v Swain*, 288 Mich App 609; 794 NW2d 92 (2010) (reviewing whether the defendant's claim of actual innocence acted as an exception to the procedural bar on successive motions). Rather than acting as an independent basis for relief from his conviction, a claim of actual innocence "is procedural, rather than substantive." *Schlup v Delo*, 513 US 298, 306; 115 S Ct 851; 130 L Ed 808 (1995) ("Schlup's claim of innocence, on the other hand, is procedural, rather than substantive."). Because defendant's case is still on direct review and no procedural bar exists, defendant's claim of actual innocence is premature. Therefore, defendant is not entitled to relief.

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Mark T. Boonstra