STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS DELL CARTER, JR.,

Defendant-Appellant.

UNPUBLISHED
October 29, 2020

No. 350429
Oakland Circuit Court
LC No. 2018-267022-FC

Before: BOONSTRA, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, two counts of unlawful imprisonment, MCL 750.349b, two counts of carrying a concealed weapon with unlawful intent (CCW), MCL 750.226, one count of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a third-offense habitual offender, MCL 769.11, to 20 to 50 years' imprisonment for the CSC I and armed robbery convictions, 10 to 30 years' imprisonment for the unlawful imprisonment convictions, 5 to 10 years' imprisonment for the CCW convictions, and two years' imprisonment for the felony-firearm conviction. Except for the felony-firearm sentence, which was consecutive to one of the CSC I sentences, all sentences were concurrent. Defendant appeals by right. Having found no error, we affirm.

I. FACTUAL BACKGROUND

This case involves sexual assaults that occurred at the same location, but on different dates and against different individuals. The first sexual assault occurred on August 12, 2017. The victim testified that defendant sent her a text and offered her money to meet and potentially have sex. She further testified that there was a clear understanding that she and the defendant would only have sex if she desired to. The victim went to the address that defendant provided her, but upon entering the home realized that it was an abandoned home and immediately wanted to leave. Defendant then falsely told the victim that he had just moved in, and that unlike the main floor, the upstairs was finished. Defendant guided the victim upstairs and into a room with a cot on the floor. The victim testified that she tried to leave, but that defendant put a knife to her throat and

forced her to engage in oral and vaginal sex. Afterwards, the victim asked defendant about the "money situation," at which point defendant struck the victim in the face. Defendant then fled the scene.

Approximately seven months after the first assault, on March 18, 2018, defendant contacted the second victim through an online advertisement that the victim had posted. Defendant and the victim discussed payment in return for sex, and thereafter, defendant provided the victim the same address that he had provided the first victim. Upon entering the house, the second victim also immediately recognized that it was abandoned and tried to leave. The victim testified, however, that defendant brandished a gun and forced her to stay. Defendant took money from the victim's purse, and led her to a room where he forced the victim to engage in oral and anal sex.

With respect to the first victim, DNA evidence was gathered both at the scene and during a sexual assault examination of the victim. A forensic analysis revealed a match to defendant's DNA profile, and later, the victim identified defendant in a photographic lineup. Similar DNA evidence was gathered with respect to the second victim, which also revealed a match to defendant's DNA profile. After the detective assigned to the second case discovered the police report and evidence of the first victim's assault—and noticed the striking similarities between the cases—defendant was arrested. Defendant was ultimately convicted as described above.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues on appeal that he was denied the effective assistance of counsel because counsel failed to request a jury instruction on consent as a defense to CSC I. We disagree.

Defendant did not request a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Thus, the issue is not preserved for appeal and review is limited to mistakes apparent on the record. See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Generally, a claim of ineffective assistance of counsel is a mixed question of fact and constitutional law, and this Court must review the trial court's findings of fact for clear error and questions of constitutional law de novo. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). However, unpreserved claims are reviewed for plain error affecting the substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plain error requires a showing that (1) error occurred, (2) the error was clear or obvious, and (3) the error affected the defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *Carines*, 460 Mich at 763. An error affects a defendant's substantial rights when it prejudices him, or when it "affect[s] the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

In order to find merit in a defendant's claim of ineffective assistance of counsel, the defendant must establish: (1) that the attorney made an error, and (2) that the error was prejudicial to the defendant. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 311, 314; 521 NW2d 797 (1994). That is, first, a defendant must show that trial counsel's performance fell below an objective standard of

reasonableness. *People v Russell*, 297 Mich App 707, 715-716; 825 NW2d 623 (2012). We must analyze the issue with a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and defendant must overcome the presumption that the challenged action or inaction might be considered sound trial strategy. *People v Leblanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Notably,"[f]ailing 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). Second, a defendant must show that, but for trial counsel's deficient performance, a different result would have been reasonably probable. *Russell*, 297 Mich App at 715-716. A reasonable probability is one that was sufficient to "undermine confidence in the outcome of the trial." *Pickens*, 446 Mich at 327.

"A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories *that are supported by the evidence*." *Id*. (emphasis added). "In the context of the CSC statutes, consent can be utilized as a defense to negate the elements of force or coercion." *People v Waltonen*, 272 Mich App 678, 689-690; 728 NW2d 881 (2006). However, an instruction on consent is required only if there is evidence of consent. See *People v Stull*, 127 Mich App 14, 19; 338 NW2d 403 (1983). Stated differently,

> [i]f, for example, a defendant raises a defense but fails to present evidence from which a reasonable jury could conclude that the elements of the defense have been met, then the defendant is not entitled to the defense instruction and the jury is precluded from considering the defense. [*People v Kolanek*, 491 Mich 382, 411; 817 NW2d 528 (2012), superseded by statute on other grounds as stated in *People v Hartwick*, 498 Mich 192, 231; 870 NW2d 37 (2015).]

"This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred. There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002) (quotation marks and citations omitted).

The evidence in this case did not support a jury instruction on consent with respect to either of the assaults. Both victims testified that, even though they initially met with defendant for the purpose of at least possibly exchanging money for sex, they immediately sought to leave after entering the house. The evidence indicated that defendant prevented both victims from leaving the house by use of weapons and physical force. The evidence further indicated that defendant forced the victims to engage in multiple sexual acts. Both victims testified that they did not want to engage in the acts, and they both testified that they complied out of fear. The mere idea that the victims might have been open to engaging in sexual acts at one time—without more—simply does not support the necessity of a jury instruction on consent. Accordingly, defendant's counsel did not err by failing to request such an instruction.

Moreover, we note that the trial court did instruct the jury that in order to convict defendant of the CSC I charges, it had to find that the prosecution proved beyond a reasonable doubt that defendant engaged in sexual penetration while he was armed with a weapon, or led a victim to reasonably believe that he was armed with a weapon. The evidence at trial established that

defendant did indeed engage in sexual penetration while armed with a weapon. Even if the jury had been instructed on consent as a defense, it is not reasonably probable that a different result would have occurred.

With all of the above in mind, we conclude that defendant has not established that he was denied the effective assistance of counsel, and certainly has not established plain error affecting his substantial rights.

III. DUE PROCESS

Defendant next argues that he was denied due process when the charges from both assaults were joined, and he was tried jointly. We disagree.

Again, defendant failed to preserve this issue by raising it before the trial court, and we therefore review for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. We review de novo the interpretation and application of court rules. *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018).

Joinder of cases involving a single defendant is governed by MCR 6.120, which states:

> (A) Charging Joinder. The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
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> (B) Postcharging Permissive Joinder or Severance. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

(C) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

MCR 6.120 creates a distinction between "Charging Joinder" in subsection (A) and "Postcharging Permissive Joinder" in subsection (B). On appeal, both parties analyze the issue under subsection (B). However, a review of the record indicates that the first information, filed on March 23, 2018, included four counts of CSC I, two for each of the two victims. This indicates that the prosecution initially filed an information charging a single defendant with two or more offenses stated in separate counts, as directed by subsection (A). Because the prosecution did exactly what MCR 6.120(A) allows for, we conclude that defendant has not demonstrated plain error affecting his substantial rights.[1]

Affirmed.

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Karen M. Fort Hood

[1] As an aside, we note that we would reach the same conclusion were we to analyze the issue under subsection (B), which allows for permissive joinders of related claims. MCR 6.120(B)(1). Our Supreme Court has indicated that charges are related when, "even if the charges were tried separately, evidence from each crime would have been admissible in the trial of the other because of the common scheme or plan." *People v Williams*, 483 Mich 226, 237; 769 NW2d 605 (2009) (quotation marks and citation omitted). Here, the evidence points strongly to such a common scheme. In both cases, defendant contacted the victims under the guise of paying them for sex, and instructed them to go to the same location. Upon arrival at the location, both victims attempted to leave and defendant prevented them from doing so by brandishing weapons. Both victims were then led into a room in the house where they were forced to engage in sexual acts. Suffice it to say, we would conclude that joinder was appropriate under MCR 6.120(B).