STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2022
v	No. 351289 Wayne Circuit Court
ALFRED HATCHETT, JR., Defendant-Appellant.	LC No. 19-003746-01-FC

ON REMAND

Before: BECKERING, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM.

In our previous opinion, we considered the sole issue raised by defendant's appellate counsel and concluded that the evidence was sufficient to prove one particular count of criminal sexual conduct in the first degree (CSC-I), MCL 750.520b, beyond a reasonable doubt.[1] Our Supreme Court remanded this case to us for consideration of defendant's Standard 4 brief,[2] which was presented to this Court through a motion for reconsideration and was therefore not timely filed.[3] After reviewing the issues presented in his Standard 4 brief, we affirm his convictions in their entirety.

I. BACKGROUND FACTS

[1] *People v Hatchett*, unpublished per curiam opinion of the Court of Appeals, issued April 15, 2021 (Docket No. 351289).

[2] *People v Hatchett*, 965 NW2d 547 (2021).

[3] See Supreme Court Administrative Order 2004-6, Standard 4 (providing that "[t]he defendant's filing *in propria persona* must be received by the Court of Appeals within 84 days after the appellant's brief is filed by the attorney").

Our previous opinion set forth a brief summary of the facts of the case:

> This case arises out of defendant's kidnapping and sexual assault of the victim on the night of April 30, 2019. That night, the victim and her sister, Destiny, went to a series of gas stations and party stores near their house. Eventually, Destiny and the victim arrived at Mega Liquor on McNichols at about 11:00 p.m. or 12:00 a.m.
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> Destiny went inside Mega Liquor while the victim remained in the car. After Destiny went into the store, defendant approached the car. He pulled out a handgun, opened the driver's side door, and got into the car. Defendant drove the car out of the parking lot, parked the car on a dark street, and sexually assaulted the victim inside the car. Defendant fled after the sexual assault, and the police were contacted by the victim's family shortly thereafter.
>
> The victim testified in detail about the kidnapping and sexual assault. . . . [*Hatchett*, unpub op at 1-2.]

The jury found defendant guilty of two counts of CSC-I; one count of kidnapping, MCL 750.349; one count of criminal sexual conduct in the second degree (CSC-II), MCL 750.520c; one count of felon in possession of a firearm (felon-in-possession), MCL 750.224f; and five counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 30 to 60 years for each CSC-I conviction, 5 to 15 years for the kidnapping conviction, 1 to 5 years for the CSC-II conviction, 1 to 5 years for the felon-in-possession conviction, and 2 years for each of the felony-firearm convictions, to be served concurrent with each other but consecutive with the remaining sentences.

II. PLEA OFFER

In his Standard 4 brief, defendant argues that trial counsel was ineffective because she advised him against accepting a plea offer during trial that would have required him to serve a minimum of 17 years in prison.[4] We disagree. "When reviewing an ineffective assistance of counsel claim, this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of law." *People v Shaw*, 315 Mich App 668, 671-672; 892 NW2d 15 (2016).

"Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." *Lafler v Cooper*, 566 US 156, 162; 132 S Ct 1376; 182 L Ed 2d 398 (2012). When a defendant rejects a plea offer and is subsequently found guilty, he or she is entitled to relief for ineffective assistance by showing "(1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People*

[4] According to defendant, trial counsel unreasonably informed him that he could possibly prevail on one of the CSC-I charges, and failed to inform him about his likely sentence if found guilty by the jury.

v White, 331 Mich App 144, 149; 951 NW2d 106 (2020) (quotation marks and citations omitted). With regard to the second prong,

> 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*, 566 US at 164.]

Defendant is not entitled to an evidentiary hearing or relief for two reasons. First, defendant avers in his affidavit that the victim "falsely claimed" that he sexually assaulted her, and that she was "not being truthful in what had occurred on the day in question." In other words, defendant avers that he is actually innocent of the charges.[5] If so, to successfully plead guilty to the charges required by the plea offer, one count of CSC-I and one count of felony-firearm, defendant would have had to provide false testimony to the trial court indicating that he was guilty of these charges. See MCR 6.302(D)(1) ("If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading."). Defendant is simply not entitled to a reopening of the plea offer, or even an evidentiary hearing on the matter, when the logical basis for his argument is that he would have provided false testimony to the trial court to induce it to accept his plea. Indeed, the trial court would have been duty-bound to reject his plea if it was aware that the plea was factually inaccurate. See *id*.

Second, the allegations in his affidavit are largely inconsistent with the record. For example, defendant avers that he was unaware of the 25-year mandatory minimum, and he indicates that had he been aware of this mandatory minimum, he would have accepted the plea offer. However, at the arraignment, the prosecutor noted that she was "alleging that [defendant] is a violent habitual with a mandatory minimum of 25 years." Similarly, at a July 16, 2019 pre-trial conference, the prosecutor again noted that defendant was charged as a "violent habitual fourth with a minimum mandatory of 25 years." Thus, the record shows that defendant was not entirely oblivious to the possible extent of his sentence after trial, contrary to the affidavit before us.

In addition, we note that defendant was quite emphatic at trial that he was unwilling to accept the plea offer:

> [*Prosecutor*]: Your Honor, the People would be requesting that the Defendant plead to one count of CSC in the First Degree. As well as one count of

[5] Defendant also contends in his Standard 4 brief that "[o]n numerous occasions Defendant informed his counsel prior to trial and at trial that he was innocence [sic] of the charges against him." Further, defendant maintained his innocence at sentencing.

Felony Firearm, dismiss the violent habitual mandatory minimum 25 years, and request a 15 plus -- 15 plus 2 to 30 year sentencing agreement.

The Court: And that's the offer you communicated to your client[?]

[*Trial Counsel*]: It is, your Honor.

The Court: Let's voir dire -- let's swear him in.

* * *

[*Trial Counsel*]: . . . . Mr. Hatchett, you've heard the offer in this case?

[*Defendant*]: Yes, ma'am.

[*Trial Counsel*]: You and I have had the opportunity to discuss that offer; is that correct?

[*Defendant*]: Yes. I'm not, I'm not willing to take that.

* * *

[*Defendant*]: I'm not willing to take the 15 years.

* * *

[*Trial Counsel*]: Okay. But with respect to the offer, do you want to take that offer?

[*Defendant*]: No, ma'am.

Defendant's present averment that he found the plea offer to be "reasonable" when it was originally presented to him is in stark contrast to his voir dire, in which he repeatedly disavowed accepting the plea offer.

Simply put, defendant's self-serving affidavit indicating that he would have accepted the plea offer if trial counsel had better informed him about his chances of prevailing at trial and his likely sentence if found guilty by the jury is both logically inconsistent and is not supported by the record.[6] Compare *Foster v United States*, 735 F3d 561, 566 (CA 7, 2013) ("Several of our cases have stated that a petitioner in Mr. Foster's position must offer objective evidence that he would have accepted the plea agreement but for his attorney's poor performance, and that a single self-serving statement is not enough to succeed in making this showing."). Thus, it would not be an

[6] Defendant does not specifically aver that he would have accepted the plea offer if trial counsel had given him better advice, but we acknowledge that this is the clear implication of his affidavit.

efficient use of judicial resources to remand this matter to the trial court to conduct an evidentiary hearing on defendant's allegations.

III. EXCULPATORY EVIDENCE

Defendant argues that the prosecutor violated his due-process rights by withholding exculpatory evidence from him, specifically "the DNA Swabs of the Mouth, Chest, and Vagina, from [the victim] and of the Defendant's Penis, and Finger." We disagree. "We review de novo a defendant's constitutional due-process claim." *People v Bosca*, 310 Mich App 1, 26-27; 871 NW2d 307 (2015) (cleaned up).

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). "[T]he components of a 'true *Brady* violation,' are that: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014) (citation omitted). The defendant bears the burden of proving these three elements. See *id*. at 160.

Defendant offers no proof that the prosecutor—or any other agent of government—possessed such DNA evidence referenced by defendant or that this hypothetical evidence would have been favorable to him. It is purely speculative and is not even remotely implied by any testimony or other evidence in the record. Thus, defendant has failed to prove the first two elements of his *Brady* claim, and for that reason alone we reject his argument.

Defendant alternatively argues that trial counsel was ineffective for failure to raise the *Brady* claim. We disagree. A defendant bears the burden of showing ineffective assistance. See *White*, 331 Mich App at 149. Because defendant has failed to prove that the prosecutor possessed favorable DNA evidence but did not disclose it to him, defendant has not sustained his burden of showing ineffective assistance.

IV. ADDICT INFORMER INSTRUCTION

Defendant argues that trial counsel was ineffective for failing to request the addict-informer instruction, M Crim JI 5.7. According to defendant, the victim was an "addict informer" because she admitted to using marijuana shortly before the crimes at issue. We disagree. We review claims of ineffective assistance de novo. *Shaw*, 315 Mich App at 671-672.

"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." *People v Clark*, 274 Mich App 248, 255; 732 NW2d 605 (2007) (citation omitted). "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses," but "[f]ailing to request a particular jury instruction can be a matter of trial strategy." *People v Thorne*, 322 Mich App 340, 347; 912 NW2d 560 (2017) (quotation marks and citations omitted).

M Crim JI 5.7 provides as follows:

(1) You have heard the testimony of _____, who has given information to the police in this case. The evidence shows that [he / she] is addicted to a drug, namely _____.

(2) You should examine the testimony of an addicted informer closely and be very careful about accepting it.

(3) You should think about whether the testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor using an addicted informer as a witness. You may convict the defendant based on such a witness's testimony alone if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.

(4) When you decide whether to believe [name witness], consider the following:

(a) Did the fact that this witness is addicted to drugs affect [his / her] memory of events or ability to testify accurately?

(b) Does the witness's addiction give [him / her] some special reason to testify falsely?

[(c) Does the witness expect a reward or some special treatment or has (he / she) been offered a reward or been promised anything that might lead (him / her) to give false testimony?

(d) Has the witness been promised that (he / she) will not be prosecuted for any charge, or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced (his / her) testimony?

(e) Was the witness's testimony falsely slanted to make the defendant seem guilty because of the witness's own interests or to remove suspicion from others, or because (he / she) feared retaliation from others in drug trafficking?

(f) Was the witness affected by the fear of being jailed and denied access to drugs?

(g) Does the witness have a past criminal record?]

(5) In general, you should consider an addicted informer's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

Initially, we doubt that the victim is an "informer" as contemplated by M Crim JI 5.7. Regardless, defendant's argument is meritless for two reasons. First, the victim's testimony that she used marijuana that night does not establish that she is an "addict," in the sense that she is dependent on marijuana. See *The American Heritage Dictionary of the English Language* (1996)

(defining "addict" as one who is "compulsively and psychologically dependent on a habit-forming substance"). Second, the addict-informer instruction "is to be used where the *uncorroborated* testimony of an addict informant is the only evidence linking the accused with the alleged offense." *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994) (emphasis in original). Here, the victim's testimony was corroborated by the video of the kidnapping, in which she was ambushed by defendant, and the DNA evidence indicating that his DNA was found on her breast. The addict-informant instruction was therefore inapplicable to this case, and trial counsel was not ineffective for failure to request it.

V. FALSE TESTIMONY

Defendant argues that the prosecutor knowingly failed to correct the false testimony of the victim when she testified that defendant inserted his finger into her vagina and forced her to perform oral sex. We disagree. We review this due-process claim de novo. See *Bosca*, 310 Mich App at 26-27.

"[A] State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . ." *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). "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).

Apparently, the sole basis for defendant's argument that the victim provided false testimony is the affidavit that he prepared in prison, in which he denies committing the charged offenses. "Affidavits by prisoners are typically viewed with a measure of skepticism, particularly when the affiant himself is serving lengthy sentences for felony convictions." *People v Hammock*, 506 Mich 870 (2020) (MARKMAN, J., *dissenting*). We decline to accord his affidavit credence here, particularly since the victim's testimony was corroborated by the video recording of the kidnapping and defendant's DNA on her breast, and where defendant's guilt has already been found beyond a reasonable doubt following a multiday trial. Regardless, even assuming that his affidavit is factually accurate, defendant has not shown that the prosecutor *knew* that the victim provided false testimony, so his due-process claim must fail for this reason as well. See *Napue*, 360 US at 269.

Defendant alternatively argues that trial counsel was ineffective for the failure to challenge the false testimony of the victim. We disagree. As noted previously, defendant has not provided any credible evidence to show that the victim provided false testimony and, in any event, trial counsel tested the victim's credibility on cross-examination. Thus, defendant has not shown that trial counsel performed ineffectively. See *White*, 331 Mich App at 149.

VI. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Finally, defendant argues that his original appellate counsel was ineffective for failure to raise the issues presented in his Standard 4 brief.[7] "[A] criminal defendant is entitled to the

[7] We note that on December 8, 2021, the trial court appointed the State Appellate Defender Office (SADO) to represent defendant. SADO has not filed a brief or motion in this Court.

effective assistance of appellate counsel in a first appeal as of right." *People v Johnson*, 144 Mich App 125, 130; 373 NW2d 263 (1985). Here, even assuming that appellate counsel was ineffective as argued by defendant, he cannot show prejudice because our Supreme Court remanded this case to this Court to address his Standard 4 brief, and we have rejected the issues presented therein as meritless.

VII. CONCLUSION

For the reasons explained in our previous opinion, we affirm defendant's conviction for count one, CSC-I. Further, for the reasons explained herein, we reject the arguments raised in his Standard 4 brief and therefore affirm his convictions in their entirety.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Riordan

Beckering, P.J., not participating.