STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 6, 2012
v FRANK BRIAN BENNETT, Defendant-Appellant.	No. 299829 Oakland Circuit Court LC No. 2010-230356-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v LEON JEFFREY SETTY, Defendant-Appellant.	No. 299830 Oakland Circuit Court LC No. 2010-230357-FH

Before: SAWYER, P.J., and SAAD and METER, JJ.

PER CURIAM.

These consolidated appeals stem from defendants' convictions of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b), against the same victim. In LC No. 2010-230356-FH, a jury convicted defendant Frank Bennett of four counts of CSC III and the trial court sentenced him to concurrent prison terms of 10 to 15 years for each conviction. In LC No. 2010-230537-FH, a separate jury convicted defendant Leon Setty of four counts of CSC III and the trial court sentenced him as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 26 years and 8 months to 60 years for each conviction. Defendant Bennett now appeals in Docket No. 299829, and defendant Setty appeals in Docket No. 299830. For the reasons set forth below, we affirm in both appeals.

I. AIDING AND ABETTING

Defendants both dispute the propriety of an aiding and abetting instruction that the trial court read to the juries. We review de novo claims of instructional error. *People v Bartlett*, 231

Mich App 139, 143; 585 NW2d 341 (1998). "'A criminal defendant has the right to have a properly instructed jury consider the evidence against him.'" *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000), quoting *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). We review jury instructions as a whole to determine whether error requiring reversal occurred. *Bartlett*, 231 Mich App at 143. The jury instructions must include all elements of the charged offenses, and must not omit material issues, defenses and theories that the evidence supports. *Id*. Even when somewhat imperfect, jury instructions do not qualify as erroneous provided that they fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *People v Knapp*, 244 Mich App 361, 376; 624 NW2d 227 (2001); *Bartlett*, 231 Mich App at 143.

A. DOCKET NO. 299829

Defendant Bennett complains that the prosecutor's failure to charge him before trial as an aider and abettor deprived him of due process. However, this Court has consistently rejected claims by defendants that because "the information filed by the prosecutor never included a charge of aiding and abetting, the charge . . . resulted in a denial of due process." *People v Clark*, 57 Mich App 339, 343-344; 225 NW2d 758 (1975), citing *People v Hooper*, 50 Mich App 186, 191-192; 212 NW2d 786 (1973).

B. DOCKET NOS. 299829 & 299830

Defendants additionally assert that the evidence did not support the trial court's decision to instruct the juries concerning each defendant's aiding and abetting of his codefendant. MCL 767.39 authorizes a defendant's conviction if he aided or abetted the commission of a charged crime. The statute provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

To support defendants' convictions pursuant to an aiding and abetting theory of guilt, the prosecutor had to show that (1) defendants or some other person committed the crime charged, (2) defendants performed acts or offered encouragement that assisted the crime's commission, and (3) either (a) at the time that each defendant gave aid and encouragement, he possessed (i) the requisite intent necessary to support his conviction of the charged crime as a principal, or (ii) knowledge that the principal intended the commission of the charged crime, or (b) "the criminal act committed by the principal is an incidental consequence which might reasonably be expected to result from the intended wrong." *People v Robinson*, 475 Mich 1, 6, 9; 715 NW2d 44 (2006) (internal quotations citation omitted); see also *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (internal quotations and citation omitted).

"To place the issue of aiding and abetting before a trier of fact, the evidence need only tend to establish that more than one person committed the crime, and that the role of a defendant

charged as an aider and abettor amounts to something less than the direct commission of the offense." *People v Vaughn*, 186 Mich App 376, 382; 465 NW2d 365 (1990). "The phrase 'aids or abets'" encompasses "any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). "In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime." *Id*. at 71. "[W]hether the defendant performed acts or gave encouragement that assisted" "must be determined on a case-by-case basis." *Id*. (internal quotations and citations omitted).

Regarding the first element to sustain an aiding and abetting charge, the prosecutor showed that defendant Bennett or some other person, defendant Setty, committed the crime charged. *Robinson*, 475 Mich at 6. The record contains evidence, primarily the victim's testimony, that both defendants sexually penetrated the victim on multiple occasions by force or coercion, MCL 750.520d(1)(b), or with "reason to know that the victim is mentally incapable." MCL 750.520d(1)(c).

Concerning the second aiding and abetting element, defendants performed acts or offered encouragement that assisted the crimes' commission. *Robinson*, 475 Mich at 6. The victim testified that over the course of her stay in defendant Bennett's cabin, both defendants committed repeated acts of physical abuse, repeatedly uttered threats of death or physical harm toward her, her family members, and others, and that the threats kept the victim from leaving the cabin and kept her from disclosing or seeking help to escape defendants' physical and sexual abuse. In light of the victim's testimony, both juries could reasonably find that defendants gave "assistance . . . to the [co]perpetrator of a crime by words or deeds . . . intended to encourage, support, or incite the commission of" the multiple counts of CSC III. *Moore*, 470 Mich at 63.

With respect to the intent element, given the consistent nature of both defendants' physical abuse of the victim, threats of death and physical harm to the victim and others, and repeated acts of penetration of the victim (separately and together) in the cabin's mostly open space, the juries could reasonably find that at the time defendants gave aid and encouragement, they knew that their codefendant intended to unlawfully sexually penetrate the victim.

For these reasons, the trial court correctly instructed the jury with respect to aiding and abetting because a rational view of the evidence established that more than one person was involved in committing the charged crimes, and the individual defendant's roles "in the crime may have been less than direct participation in the wrongdoing." *Bartlett*, 231 Mich App at 157.[1] Furthermore, the trial court correctly stated the elements required for defendants' convictions pursuant to an aiding and abetting theory. *Carines*, 460 Mich at 757-758.

[1] Defendant Bennett claims that, had he known the prosecutor might pursue an aiding and abetting theory of guilt, he would have moved for severance under MCR 6.121(C), which envisions, "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the

II. SUFFICIENCY OF THE EVIDENCE

Defendants also challenge the sufficiency of the evidence supporting their CSC III convictions.[2] In reviewing a criminal defendant's challenge to the sufficiency of the evidence, or a trial court's denial of a motion for a directed verdict of acquittal, we consider all the evidence presented in the light most favorable to the prosecution to determine whether a reasonable juror could find the defendant's guilt proven beyond a reasonable doubt. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). We must draw all reasonable inferences and make credibility choices in support of the jury's verdict, and this Court should not interfere with the factfinder's role in determining witness credibility or the weight of the evidence. *Nowack*, 462 Mich at 400; *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003).

The prosecutor premised the CSC III charges against defendants in part on MCL 750.520d(1)(b). Subsection (1)(b) contemplates that "[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and . . . [f]orce or coercion is used to accomplish the sexual penetration." See also *People v Eisen*, 296 Mich App 326, 332; 820 NW2d 229 (2012). Subsection (1)(b) further explains that "[f]orce or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v)." In MCL 750.520b(1), the legislature offered the following relevant examples of force or coercion:

> (f) . . . 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.

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defendant." He maintains that the trial court would have granted the motion for severance, given that "[t]he tension between Defendant [Bennett's] defense to aiding and abetting Mr. Setty and Mr. Setty's defense to either the CSC 3 counts or to aiding and abetting Defendant [Bennett] would be so great that the jury would have to believe one defendant at the expense of the other." Although a court must sever codefendants' trials if they intend to pursue inconsistent and "mutually exclusive or irreconcilable defenses," the trial record reflects that defendant Bennett and defendant Setty presented consistent defenses focused on discrediting the victim. *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). Because defendants presented consistent defenses, and the trial court and the parties took pains to separate the juries throughout the trial for the presentation of testimony and evidence admissible with respect to one defendant but not the codefendant, we find defendant Bennett's severance argument unpersuasive. See *People v Hana*, 447 Mich 325, 346 n 7; 524 NW2d 682 (1994).

[2] The question presented in defendant Setty's brief frames this issue as a challenge to the great weight of the evidence. However, the arguments presented substantively challenge the sufficiency of the evidence supporting his convictions.

> (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. . . .

The presence of force or coercion must take into account all the circumstances in a given case. *Eisen*, 296 Mich App at 333.

Although the prosecutor did not specifically cite in the second amended information MCL 750.520d(1)(c), which criminalizes sexual penetration if the defendant "knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless," each of the nine counts in the second amended complaint alleged alternatively that defendants "had reason to know the victim was mentally incapable." The Legislature has set forth that "'[m]entally incapable' means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." MCL 750.520a(i).

A. DOCKET NO. 299829

Ample evidence supported the jury's finding that defendant Bennett committed four counts of CSC III, two involving penetration of the victim's vagina and two premised on fellatio with the victim. The victim testified that defendant Bennett physically forced her to perform fellatio on at least five occasions, and forced the victim to have sexual intercourse with him on at least five occasions.[3] The victim's testimony describing the forced penetrations, together with her description of consistent acts of physical abuse by defendant Bennett during the entirety of the victim's approximately five-week residency in the cabin, permitted a rational jury to find beyond a reasonable doubt that defendant Bennett penetrated the victim by "overcom[ing] the victim through the actual application of physical force." MCL 750.520b(1)(f)(i); MCL 750.520d(1)(b). Furthermore, in light of the victim's description of repeated oral and vaginal penetrations by defendant Bennett during the several weeks she resided in the cabin, his repeated threats to kill or harm her or her family members, and her belief in the threats, a rational jury also could have found beyond a reasonable doubt that defendant Bennett penetrated the victim by coercion, in violation of MCL 750.520b(1)(f)(ii) ("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"). Moreover, the evidence was sufficient to establish beyond a reasonable doubt that defendant Bennett committed at least four acts of CSC III in violation of MCL 750.520d(1)(c) (criminalizing sexual penetration when the defendant "knows or has reason to know that the victim is mentally incapable"), and MCL 750.520a(i) ("'[m]entally incapable' means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct"), given (1) the victim's testimony regarding defendant Bennett's multiple penetrations

[3] To the extent that defendants impugn the victim's testimony as uncorroborated at trial, this Court has observed that "in a prosecution for CSC I or CSC III, . . . '(t)he testimony of a victim need not be corroborated.'" *People v Phelps*, 288 Mich App 123, 132; 791 NW2d 732 (2010), quoting MCL 750.520h.

of her; (2) testimony by a deputy sheriff that defendant Bennett conceded to knowing that the victim "was mentally challenged"; and (3) the testimony of several witnesses, Paul Martin, the man who helped the victim leave defendant Bennett's cabin, George Livingston, the longtime husband of the victim's cousin who had known the victim for most of her life, and Dr. Robert Lacoste, the psychiatrist who had most recently evaluated the victim, that the victim's mental handicap or incapacity was readily apparent.[4]

B. DOCKET NO. 299830

Ample evidence also established that defendant Setty committed four counts of CSC III, two instances of "sexual intercourse" with the victim and two instances of fellatio by the victim. The victim testified that defendant Setty placed his penis inside her vagina against her will "[m]ore than five times[,]" and forced her to perform oral sex "[m]ore than five times[.]" This testimony was sufficient to allow a rational jury to find beyond a reasonable doubt that defendant Setty penetrated the victim at least four times by applying physical force. MCL 750.520d(1)(b); MCL 750.520b(1)(f)(i). Additionally, in light of the victim's description of repeated oral and vaginal penetrations by defendant Setty during the several weeks she resided in defendant Bennett's cabin, defendant Setty's repeated threats to kill or harm the victim or her family members, and her belief in the threats, a rational jury also could have found beyond a reasonable doubt that defendant Setty penetrated the victim by coercion, in violation of MCL 750.520b(1)(f)(ii) and MCL 750.520d(1)(b). Further, the evidence was sufficient to establish beyond a reasonable doubt that defendant Setty committed at least four acts of CSC III in violation of MCL 750.520d(1)(c) and MCL 750.520a(i), given (1) the victim's testimony regarding defendant Setty's multiple penetrations of her and his references to her father as retarded; (2) testimony by Martin that during a game of dominoes at the cabin, defendant Setty spoke to the victim "like she was retarded"; and (3) the testimony of several witnesses, Martin, Livingston, and Dr. Lacoste, that the victim's mental handicap or incapacity was readily apparent.

The verdict form that the jury prepared concerning defendant Setty contained checks in the "guilty" boxes next to each of the four CSC III counts on which he stood trial. Next to the "guilty" boxes for each count, the jury handwrote, "Note: Aiding & Abetting." To the extent that the jury found defendant Setty guilty of the four charged CSC III counts as an aider and abettor only, ample evidence supported defendant Setty's guilt as an aider and abettor, for the reasons discussed in section I, *supra*.

III. DEFENDANT BENNETT'S REMAINING ISSUES IN DOCKET NO. 299829

A. SUPPLEMENTAL INSTRUCTION

[4] Defendants do not dispute the victim's qualification as a mentally incapable victim, nor that they "kn[e]w or ha[d] reason to know that the victim is mentally incapable." MCL 750.520d(1)(c).

Defendant Bennett contends that the trial court improperly instructed the deliberating jurors to use their common sense, in response to a jury note asking whether jurors could consider their observations of defendants' courtroom behavior during the trial. Defendant Bennett's attorney affirmatively expressed that defendant Bennett had no objection to the trial court's responses to several notes the jury sent during deliberations, thus extinguishing any error and waiving appellate review of his contention concerning the supplemental instruction. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

In a related contention, defendant Bennett avers that his counsel was ineffective for failing to object to the supplemental jury instruction. Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689. A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

We hold that defendant Bennett's trial counsel did not render ineffective assistance when she neglected to object to the substance of the trial court's supplemental jury instruction to use common sense. The circumstances in which the trial court's instruction to defendant Bennett's deliberating jury arose are similar to a postdeliberation instruction at issue in *People v France*, 436 Mich 138; 461 NW2d 621 (1990). In *France*, our Supreme Court examined the appropriate remedy when a court "communicat[ed] with a deliberating jury outside the courtroom and the presence of counsel." *Id*. at 142. The present trial court's response that the jurors should rely on their common sense constitutes a "[s]ubstantive communication," which our Supreme Court defined as a "supplemental instruction on the law given by the trial court to a deliberating jury." *Id.* at 163. The Supreme Court explained that "[a] substantive communication carries a presumption of prejudice in favor of the aggrieved party regardless of whether an objection is raised," and that the "presumption may only be rebutted by a firm and definite showing of an absence of prejudice." *Id*. The Court observed that a prosecutor "may rebut the presumption of prejudice with a showing that the instruction was merely a recitation of an instruction originally given without objection, and that it was placed on the record." *Id*. at 163 n 34.

The criminal jury instructions, including several given by the trial court in this case, repeatedly exhort a jury to rely on its common sense. In relevant part, the trial court instructed defendant Bennett's jury that (1) reasonable doubt was "a doubt based on reason and common sense," see CJI2d 1.9(3); (2) concerning the concept of evidence for the jury's consideration, jurors "should only accept the things the lawyers say that are supported by the evidence or by

your own common sense and general knowledge," see CJI2d 3.5(5); (3) jurors "should use your own common sense and general knowledge in weighing and judging the evidence, but . . . should not use any personal knowledge you may have about a place, person or event," see CJI2d 3.5(9); and (4) "[i]n deciding which testimony . . . [jurors] believe you should rely on your own common sense and every day experience," see CJI2d 2.6(2). In response to the jury's query, "Can we consider our direct observations of the defendant's behavior in the courtroom[,]" the trial court restated the principle that jurors "may use your common sense" in deciding whether to consider defendant Bennett's courtroom behavior. The record gives rise to "a firm and definite showing of an absence of prejudice," because the trial court's supplemental instruction merely recited the concept of common sense inherent in jury deliberations and inherent in several instructions already given. Further, defendant Bennett did not object to the trial court's original instructions in any respect, and the court "placed on the record" the content of the supplemental instruction. *France*, 436 Mich at 163 n 34. Because the trial court properly reiterated that the jurors should use their common sense, defendant Bennett's trial counsel need not have objected to the supplemental instruction. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

B. EVIDENCE OF PRIOR ACCUSATIONS OF SEXUAL ABUSE

Defendant Bennett additionally claims that the timing of the trial court's ruling on a defense motion to introduce prior false allegations of sexual abuse by the victim "deprived Defendant [Bennett] of a full opportunity to present his defense," by precluding him from having an "opportunity to forecast th[e] evidence [of the victim's false abuse allegations] in his opening statement." We review "for an abuse of discretion a circuit court's decision concerning the admission of evidence," but consider de novo preliminary legal questions. *People v Dinardo*, 290 Mich App 280, 287; 801 NW2d 73 (2010).

"By enacting a general exclusionary rule [in MCL 750.520j], the Legislature recognized that in the vast majority of cases, evidence of a rape victim's prior sexual conduct with others, and sexual reputation, when offered to prove that the conduct at issue was consensual or for general impeachment is inadmissible." *People v Hackett*, 421 Mich 338, 347-348; 365 NW2d 120 (1984). However, "in certain limited situations, . . . evidence [of a victim's sexual conduct] may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation." *Id*. at 348. For example, "the defendant should be permitted to show that the complainant has made false accusations of rape in the past." *Id*. A defendant seeking to introduce evidence of "a prior false allegation" must present a sufficient offer of proof. *People v Adamski*, 198 Mich App 133, 142; 497 NW2d 546 (1993).

Before the victim testified on the second day of trial, the court held a brief hearing to address defendants' offer of proof regarding the victim's allegedly false accusations of sexual abuse by her husband. At the hearing, defendants questioned the victim about her interactions with a Department of Human Services worker, Natalie Anderson, and the victim denied that her husband had ever sexually assaulted her, or that she ever told Anderson of sexual abuse by her husband. The trial court found that defendants had established "cause to permit pursuit of this claim from the defense of prior false allegations," and that the parties would later address "[t]he method and the specifics . . . [of] who would be called" at trial to testify concerning the victim's false allegations of sexual assault by her husband. During the defense cases, defendants called Anderson, who recounted that (1) in August 2008, she investigated allegations that the victim's

husband had "raped and assaulted [the victim] and forced [the victim] into prostitution"; (2) she interviewed the victim, who had stated "that . . . [her husband] hit her and held her down and had sex with her"; and (3) she had deemed the victim's allegations against her husband as "not substantiated."

We reject defendant Bennett's contentions of error for several reasons. First, in light of the trial court's admission of Anderson's testimony to the victim's unsubstantiated claims of sexual assault by her husband, and defendant Bennett's reference to the victim's false allegations in his closing argument, we hold that defendant Bennett received a full opportunity to present this defense at trial. Further, although defendant Bennett questions why "the matter was the subject of any pre-trial uncertainty" and cites MRE 401 and MRE 402, he does not reference the rape-shield statute, MCL 750.520j, or any case law interpreting the statute. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007) ("[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment of an issue with little or no citation of supporting authority") (internal quotations and citations omitted). Moreover, defendant Bennett does not elaborate on appeal how the trial court's "limitation during trial of . . . [his] ability to examine witnesses with respect to those false and unsubstantiated allegations [by the victim] was an abuse of discretion." *Schumacher*, 276 Mich App at 178. Accordingly, we reject this claim of error.

C. GREAT WEIGHT OF THE EVIDENCE

Defendant Bennett submits that the jury's verdict is against the great weight of the trial evidence. We review for an abuse of discretion the trial court's ruling on a defendant's motion for a new trial challenging the verdict as against the great weight of the evidence. A verdict qualifies as 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 McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

A new trial premised on "the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (internal quotations and citation omitted). "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *Id*. at 642, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). "Unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Lemmon*, 456 Mich at 645-646 (internal quotations and citation omitted).

The record reveals that sufficient, competent evidence supports defendant Bennett's conviction, and the evidence does not preponderate against the verdict or result in any miscarriage of justice. Over the course of an entire day of testimony at trial, the cognitively and emotionally impaired victim gave some inconsistent and confused responses. However, she remained steadfast during her lengthy trial testimony concerning the details of defendants' physically and sexually abusive acts and the nature of their continued threats to kill or harm her,

her family members, and others. Other evidence of record, the testimony by a nurse examiner of sexual assault victims, corroborated the victim's trial testimony about her fellatio with defendants and their penetrations of her vagina, both digitally and with their penises. The nurse's examination of the victim's body revealed (1) bruising on the victim's back and near her buttocks, and (2) two reddened, painful areas of the victim's vaginal tissue, areas where the nurse did not expect to see injury several days after the last reported instance of sexual contact. Because the victim's trial testimony to the details of defendants' sexual penetrations was not "so far impeached that it was deprived of all probative value . . . that the jury could not believe it," and did not defy physical realities," the trial court acted within its discretion in denying defendant Bennett's motion premised on the victim's unbelievability and properly left "the test of credibility where statute, case law, common law and the constitution repose it, in the trier of fact." *Lemmon*, 456 Mich at 645-647 (internal quotations and citation omitted).

Defendant Bennett further suggests that Martin lacked any credibility because he nonsensically testified that "he found it proper and unremarkable to have a beer and get some sleep" after encountering the "drunken, incapacitated, raped, beaten, vomiting, mentally deficient woman, upon whom he was coarsely invited to vent his own sexual wants for free." However, we detect nothing inherently incredible about Martin's trial testimony, including his account that he had arrived at defendant Bennett's cabin tired from a long day of driving, conversed with defendants briefly while having a beer, noticing the inebriated victim lying on the floor, and was overcome by fatigue and fell asleep in a recliner, shortly after having seen defendant Bennett rouse the victim and slap her several times while taking her upstairs.

D. THE PROSECUTOR'S CONDUCT

Defendant Bennett asserts that the prosecutor engaged in misconduct during jury voir dire "by emphasizing the traumatic nature of sexual assault." We review alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). But defendant Bennett failed to preserve his prosecutorial misconduct claim because he lodged no timely, contemporaneous objection to the prosecutor's allegedly improper questions *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Therefore, we review this claim only to determine whether any plain error affected defendant Bennett's substantial rights. *Id*. at 329-330.

As reflected in the voir dire transcript excerpt, the prosecutor's questions regarding the traumatic nature of sexual assaults were intended solely to uncover the potential bias of prospective jurors with acquaintances who had endured sexual assaults, and thus might operate under a bias against the defendants charged with CSC III in this case. Because the prosecutor's line of inquiry served the purpose of prospective juror voir dire, defendant Bennett's claim of misconduct lacks merit. *People v Manser*, 250 Mich App 21, 24; 645 NW2d 65 (2002) (observing that "[t]o assure a fair trial, it was necessary for the trial court to use the voir dire to eliminate from the jury pool anyone who could not be fair and objective in hearing the evidence and determining guilt or acquittal"), overruled in part on other grounds in *People v Miller*, 482 Mich 540, 561 n 26; 759 NW2d 850 (2008). Defendant Bennett has not demonstrated that any error, let alone plain error, occurred during jury voir dire.

E. CUMULATIVE EFFECT OF MULTIPLE ERRORS

Defendant Bennett argues that the cumulative effect of errors during his trial deprived him of a fair trial. As we have held, however, the trial court correctly instructed defendant Bennett's jury on aiding and abetting and its obligation to use common sense, the prosecutor properly questioned potential jurors about their personal experiences with sexual assault, and defendant Bennett's trial counsel was not deficient in any respect. Because none of the errors raised by defendant Bennett occurred, no cumulative unfair prejudice exists. *LeBlanc*, 465 Mich at 591-592 n 12.

F. SCORING OF OFFENSE VARIABLE 8

Defendant Bennett complains that the trial court incorrectly assigned 15 points under offense variable (OV) 8, MCL 777.38, of the sentencing guidelines, on the ground that no evidence showed that he maintained the victim in captivity or asported her. The interpretation and application of the sentencing guidelines present questions of law subject to de novo appellate review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). We review "for clear error a [trial] court's finding of facts at sentencing." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). A trial court's scoring decision does not qualify as clearly erroneous "if the record contains any evidence in support of the decision." *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012) (internal quotations, citation, and emphasis omitted).

In MCL 777.38(1)(a), our Legislature has instructed that a court should score 15 points for OV 8 when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." Defendant Bennett argued at his sentencing hearing that the trial court should score no points for OV 8 because the record contained "no testimony that [the victim] was kept against her will." The prosecutor responded that "given the nature of the threats that the victim testified to, this victim did not feel that she could leave." The court found OV 8 "appropriately scored at 15 points," explaining:

> [C]oncerning the evolution of the habitation by the complaining witness, . . . whether or not it was initiated innocently, it doesn't matter. Ultimately the court finds that there was asportation or captivity, either or both.

We hold that the trial court did not clearly err in finding that defendant Bennett held the victim captive "beyond the time necessary to commit the offense," MCL 777.38(1)(a), in light of the evidence that (1) defendants' sexual assaults of the victim occurred repeatedly over the course of more than a month (early October 2009 to early November 2009); and (2) the cognitively and emotionally impaired victim consistently testified that she remained in defendant Bennett's cabin and advised no one of her physical and sexual abuse by defendants because they repeatedly threatened to harm or kill the victim, her family, and others.

IV. DEFENDANT SETTY'S REMAINING ISSUES IN DOCKET NO. 299830

A. RIGHT OF CONFRONTATION

Defendant Setty argues that the trial court violated his constitutional right of confrontation by allowing forensic scientist Glen Hall to testify about the content of a serology report prepared by a different scientist, Jennifer Summers. Defendant Setty also contends that his counsel was ineffective for failing to object to Hall's testimony. Defendant Setty's counsel affirmatively expressed at trial that he had no objection to the admission of the serology report prepared by Summers during Hall's testimony, and defendant Setty did not thereafter object to any of the prosecutor's direct examination of Hall. Accordingly, defendant Setty waived any objection to the admission of Summers's serology report, and forfeited any unpreserved appellate claims of error pertaining to Hall's testimony about Summers's report. *Carter*, 462 Mich at 215; *Carines*, 460 Mich at 763.

Hall testified that a laboratory in Sterling Heights had performed serology testing, which Hall described as testing "to identify biological fluids such as blood, semen, saliva," of samples obtained during the victim's sexual assault examination and portions of carpet, comforter, rug and shirt recovered from the cabin. Hall summarized the results in Summers's report, including that she found no evidence of seminal fluid, and possible saliva "on the carpet and the rug," and possible blood on the comforter. Hall's subsequent DNA testing identified only the victim's saliva profile on the carpet and rug, and no profiles of defendants or the victim on the comforter.

It plainly appears that the portion of Hall's trial testimony regarding Summers's laboratory report, which the prosecutor offered into evidence to prove the matters asserted in Summers's serology report, MRE 801(c), violated defendant Setty's constitutional right of confrontation in US Const, Am VI. *People v Lonsby*, 268 Mich App 375, 387-393 (opinion by SAAD, J.); 707 NW2d 610 (2005) (explaining that the trial court's admission of a witness's testimony about the contents of another's out-of-court laboratory report and notes violated the defendant's right of confrontation); see also *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009) (approving Judge SAAD's analysis in *Lonsby*). But we can discern from Hall's testimony about Summers's report no adverse impact on defendant Setty's substantial rights. To the contrary, Summers's inability to locate any sperm cells or seminal fluid on the samples from the victim's sexual assault examination or the items removed from the cabin arguably assisted defendant Setty's defense, a fact that his counsel emphasized in his closing argument. Because the contents of Summers's serology report did not prejudice the defense, defendant Setty's counsel was not ineffective for failing to object to the report's admission or Hall's testimony regarding the report. *Solmonson*, 261 Mich App at 663-664.

B. PHOTOGRAPHIC LINEUP

Defendant Setty asserts that the police assembled an unduly suggestive photographic lineup that deprived him of a fair trial. Appellate courts generally review for clear error a trial court's ruling whether to admit identification evidence. *People v Kurylczyk*, 443 Mich 289, 303 (GRIFFIN, J.), 318 (BOYLE, J.); 505 NW2d 528 (1993). However, given defendant Setty's failure to challenge the photographic lineup containing his photo, we review this unpreserved claim of error only to detect whether any plain error affected his substantial rights. *Carines*, 460 Mich at 763.

Our review of the record reveals no introduction of the photographic lineup containing defendant Setty or any testimony suggesting that the victim or another witness had identified

defendant Setty on the basis of the photographic lineup. Defendant Setty's elaboration of his claim of error references no portions of the trial record in which any references to the photographic lineup occurred. Defendant Setty did not question or dispute at trial the victim's ability to identify him, and did not mention the lineup in either his opening statement or closing argument. Because defendant Setty's lineup played no part at his trial and did not prejudice him in any respect, he cannot show his entitlement to relief. MCL 769.26.

Furthermore, the lineup attached to defendant Setty's brief on appeal shows six middle-aged men of similar proportions, all of whom have facial hair, appear in similar attire (five of the six are wearing t-shirts), and four of the six have little to no hair on their heads. We hold that the photographs comprising defendant Setty's lineup contain no readily observable physical differences so apparent to a potential identification witness that they "substantially distinguish the defendant from the other lineup participants." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

C. THE PROSECUTOR'S CONDUCT

Defendant Setty complains that the prosecutor made "repeated attempts to elicit sympathy . . . for the" victim in his rebuttal closing argument. The prosecutor made the following disputed remarks:

> The evidence in this case has allowed you, the jury, a unique opportunity. You get to say to a vulnerable adult—you get to say to [the victim], "We know what happened—
>
> * * *
>
> I'm not asking you to do anything other than what the evidence allows you to do, and the evidence allows you to believe [the victim], to know what happened to [the victim], to say, "Despite your limitations, we know—the evidence has shown us what happened. And for that, you will receive justice." It's a unique opportunity. Take it. Find [defendant Setty] guilty.

We hold that, where defendant Setty stood trial in part for sexually penetrating a mentally incapable victim, MCL 750.520d(1)(c), and the record contained trial testimony by several witnesses referencing the victim's mental shortcomings, the prosecutor's comments concerning a vulnerable adult with mental limitations appropriately urged the jury to convict in light of the evidence presented at trial and the charges he faced. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The prosecutor's challenged arguments also constituted a proper response to extended portions of defendant Setty's closing argument characterizing the victim as unworthy of belief due to her mental illness. *Id.* Finally, in the midst of the conclusion of the prosecutor's rebuttal argument quoted above, the trial court instructed, "Ladies and gentlemen, just understand that the lawyer's [sic] arguments are not evidence; only the testimony from the stand [and] the exhibits are exhibits [sic]. Were we to find any error in the prosecutor's remarks, "the trial court's instructions dispelled any prejudice

arising from the prosecutor's comment, and defendant received a fair and impartial trial." *Callon*, 256 Mich App at 331.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Patrick M. Meter