STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 10, 2013
v	No. 308409 Wayne Circuit Court
EMAD SAGBAN ALZUBAIDY, Defendant-Appellant.	LC No. 11-008512-FC

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c) (penetration during commission of a felony), assault with intent to commit CSC, MCL 750.520g, kidnapping, MCL 750.349, and third-degree CSC (CSC-III), MCL 750.520d(1)(b) (force or coercion). Defendant was sentenced to 15 to 50 years' imprisonment for CSC-I, 6 to 10 years' imprisonment for assault with intent to commit CSC, 135 months' to 50 years' imprisonment for kidnapping, and 10 to 15 years' imprisonment for CSC-III. Defendant appeals his convictions by right. We affirm.

This case arises out of a sexual assault that occurred in Dearborn in 2004. The complainant and her niece, both intoxicated, left a club that evening by car; the complainant's niece was driving. The car was stopped by the Dearborn police, who arrested the niece, impounded the car, and inexplicably took the complainant to a gasoline station, where they abandoned her. The complainant attempted to use a public telephone, but it was not operational, so she entered the station store. After several customers paid and left, one of the remaining men locked the doors behind the complainant. Another man, who the complainant identified as defendant, attempted to "console" the complainant by touching her shoulders, talking to her, and wiping her face with tissue paper.

The complainant next recalled finding herself in an alley behind the station, with no memory of how she got there. Defendant attempted to take her clothes off and touch her; she "did not want him to do that," but her "willpower wasn't there" to push defendant away. She did not remember whether she physically indicated to defendant that she did not want to be touched, but she told him either "stop" or "no." Defendant continued trying to pull her pants and underwear down, and was "trying to look and see, [to] make sure nobody was coming." After the attempted rape, defendant and complainant walked to the front of the station and got into a

waiting cab. The complainant testified that she did not want to get into the cab, but she did not tell the driver that she was under duress, and she did not feel free to leave defendant's presence. The cab drove them to a house a few blocks away and they went inside and to a back room. The complainant testified that she "kind of just gave up," thinking that defendant was going to do "whatever he [was] going to do, if he's going to kill me or whatever, the fight was just gone." Defendant removed both of their clothes, and "[p]ut his penis in [the complainant's] vagina," while she was "turning [her] head telling him to stop." Afterwards, she walked away and eventually found a cab that took her home.

The complainant took a shower and slept until she was due to start her afternoon shift at a hospital in Detroit. She did not call the police. At the hospital, she told her supervisor about the assault, and went to the emergency room, where she was examined. She did not tell the examiner every detail she remembered about the assault, because she feared that her coworkers at the hospital would "be able to read the information that was in the report." She gave more details to Alan Levielle, the police officer who was called to the hospital to speak with her, but did not include the cab ride in that statement. In 2004, the complainant initially attempted to determine defendant's identity, but "at some point[, she] just wanted to . . . stop thinking about it."

In 2008, the original officer in charge of the case, Patricia Penman, a detective with the Dearborn Police Department, asked the Dearborn Police Department crime lab to send complainant's rape kit to the Michigan State Police crime lab for analysis. Amy Altesleben, a forensic scientist employed at the Michigan State Police Crime Lab, testified that an unidentified subject's DNA was discovered in a swab sample taken from the complainant's examination. Altesleben used the FBI's Combined DNA Index System to match the unknown DNA profile to defendant's profile. She requested and received a reference sample of defendant's DNA, and the reference sample matched the DNA profile on the swab. In 2010 or 2011, Sergeant Kenneth Muscat, a detective with the Dearborn Police Department, contacted the complainant, and she identified defendant from a photographic lineup. Muscat interviewed defendant, who denied knowing who the complainant was after viewing a photograph of her. Muscat told defendant that his "semen was found inside of [the complainant's] vagina," and defendant said "that [was] impossible[,] because[,] since he'd been divorced[,] he only masturbates for sexual relief or visits gay bars and has sex with men."

Relevant to the instant appeal, by the time of the renewed investigation, the physical portion of Penman's original case file had been lost and Muscat was unable to find it despite searching. In 2004, no standard or policy existed dictating how long the department would retain records of closed cases. Therefore, although the contents of the complainant's handwritten statements had been entered into the computer system, the statements themselves were missing. More notably, Penman had obtained from the manager of the gasoline station a surveillance video recording, which was also lost. By the time of trial, Penman no longer had any first-hand recollection of the tape, but she had recorded her observations at the time she watched it. She wrote that she

> observed [the complainant] in the store at [4:37 a.m.] on the 29th of August, 2004[,] on camera number four. She leaves the store at [4:49 a.m. At]

> approximately [4:38 a.m.] she asked to use the phone[,] and then at [4:55 a.m.,] what looked to be an orange cab pulled into the lot.

Penman said that she did not remember seeing the complainant use the phone. In her notes, she observed three people in the store besides the complainant, one of whom was a clerk. She did not write, or remember, whether she saw the complainant with someone else. Penman called Checker Cab and learned that the company does not have a license to pick up fares in Dearborn.

Defendant argued in a pretrial motion to dismiss the charges, and argues on appeal, that the original case file contained the surveillance footage and the complainant's written statements, both of which contradicted the complainant's testimony at the preliminary examination, and that "[w]ithout that evidence, [he would] be denied a fair trial." He argues that his due process rights were violated because the prosecution lost or destroyed the disk containing the gas station surveillance footage from the morning of the alleged assault, which the prosecution knew was helpful to the defense. Defendant cites *California v Trombetta*, 467 US 479, 489; 104 S Ct 2528; 81 L Ed 2d 413 (1984), which holds that the government violates a defendant's due process rights if it fails to preserve evidence that possesses an exculpatory value that was apparent before the evidence was destroyed, and that is of such a nature that a defendant would be unable to obtain comparable evidence by other reasonably available means. We find the trial court's denial of defendant's motion to dismiss proper.

"[D]ue process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the evidence." *People v Jackson*, 292 Mich App 583, 590-591; 808 NW2d 541 (2011) (citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963)). "A criminal defendant can demonstrate that the state violated his or her due process rights under the Fourteenth Amendment if the state, in bad faith, failed to preserve material evidence that might have exonerated the defendant." *People v Heft*, 299 Mich App 69, 79; 829 NW2d 266 (2012). "In order to warrant reversal on the claimed due process violation, a defendant must prove that the missing evidence was exculpatory or that law enforcement personnel acted in bad faith." *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). "Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993) (citing *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988)).

As an initial matter, we find it difficult to perceive how the loss of the recording could have been in bad faith; the loss necessarily occurred prior to the complainant giving *any* testimony in court, and so it would have been impossible to know that the recording could have contradicted any testimony. Absent a showing a bad faith on the part of the police or prosecution, which defendant does not argue, the misplacement of potentially exculpatory evidence is not a violation of due process. See *Hanks*, 276 Mich App at 95; *Hunter*, 201 Mich App at 677.

Furthermore, the inconsistencies were thoroughly brought to the jury's attention through Penman's notes and testimony. More significantly, nothing in the recording allegedly proves that defendant was not guilty. At most, the discrepancies merely confirm the complainant's testimony that she was intoxicated and could not remember certain details. Consequently, the

recording was only *potentially* exculpatory and would not have been significantly more pertinent to the complainant's credibility than were Penman's notes and testimony. The weight of evidence, the credibility of witnesses, and what inferences can be fairly drawn from the evidence are to be decided by the jury. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012); *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011).

It is pure speculation to surmise that the jury would have acquitted defendant had it viewed the tape itself, rather than hearing Penman's summary of the tape's contents. The evidence introduced against defendant was otherwise nearly overwhelming: the forensic evidence that defendant's DNA was found in the complainant's vagina, coupled with defendant's denial of knowing the complainant and insistence that he could not possibly have had sex with her. Because the missing tape was at most potentially exculpatory, and there is no evidence that the police or prosecution acted in bad faith, reversal was not appropriate.

Defendant additionally argues that he cannot be convicted of kidnapping or CSC-I because the prosecution failed to prove that the complainant was moved against her will and because the trial court failed to instruct the jury that asportation was an element of the kidnapping charge. We disagree as to the former and decline to consider the latter.

Pursuant to the most-recent enactment of the kidnapping statute, "[a] person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to . . . [e]ngage in criminal sexual penetration or criminal sexual conduct with that person." MCL 750.349(1)(c).[1] Therefore, there is no asportation requirement formally mandated by the statute. Under the prior enactment of the kidnapping statute, asportation of the victim was not facially required, but the courts interpreted it as requiring asportation "to sustain its constitutionality by distinguishing true kidnapping from common-law false imprisonment and lesser crimes." *People v Jaffray*, 445 Mich 287, 298; 519 NW2d 108 (1994). "Asportation" means "some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime." *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). "[T]here is no requirement that the movement itself be forcible. Rather, the only requirement for establishing asportation is that the movement not be incidental to committing an underlying offense." *Id.*

We do not at this time decide whether asportation remains an element of kidnapping under the revised MCL 750.349. Rather, for purposes of resolving this appeal, we will presume that it is a required element, because as we will discuss, whether or not it is an element is irrelevant to the outcome of this matter. The issue is therefore moot or abstract, so it would not be proper for us to rule on it at this time. See *Sullivan v State Bd of Dentistry*, 268 Mich 427, 429; 256 NW 471 (1934). The doctrine of judicial restraint discourages courts from considering, inter alia, the constitutionality of a law "so long as it appears that the case can be disposed of in only one way, whether the law is held valid or not." *Weimer v Bunbury*, 30 Mich 201, 218 (1874), see also *People v McNally*, 470 Mich 1, 7 n 4; 679 NW2d 301 (2004).

[1] This subsection has not been cited in a published opinion since its enactment in 2006.

The complainant testified that she did not call for a cab nor did she know who did. When she was asked how she knew to get into the cab, she said that defendant, who was standing "very close" to her, told her to get in, although she did not want to do so. She could not locate the house after the assault, saying only that the cab traveled "a few blocks" before letting her and defendant out, suggesting that defendant had ordered the cab and directed its driver to stop at the destination of his choice. The jury could have concluded that defendant imposed his will on the obviously intoxicated complainant, based on her testimony that he told her to get into the cab, that he ordered her to "come with him" from the cab to the house, and that she did not feel free to leave or disobey defendant. Asportation need not be forcible; it must only be more than movement incidental to the underlying crime, in this case CSC. *Spanke*, 254 Mich App at 647. Defendant's movement of the complainant from the gas station to the cab, from the cab to house, and from the house to the street, is not incidental to CSC. Defendant chose to move her to a more private location to assault her; which is not a necessary feature of all CSC offenses, making separate punishment permissible.

Consequently, we reject defendant's argument that the prosecution failed to prove asportation beyond a reasonable doubt.

Because defendant did not object at trial to the trial court's failure to instruct the jury on the element of asportation, the alleged error is not preserved. MCL 768.29; *People v Sabin*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Although it is an "error of constitutional magnitude" for the trial court to omit an instruction as to an element of a crime, *People v Vaughn*, 447 Mich 217, 226 n 2; 524 NW2d 217 (1994), if the claim is not preserved, it is reviewed for plain error. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Only if *none* of the elements of a crime are given to the jury is reversal automatic. See *People v Duncan*, 462 Mich 47, 56-57; 610 NW2d 551 (2000). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, 460 Mich at 763-764.

As discussed above, any reasonable jury would have found the element of asportation satisfied based on the evidence in the record. In any event, defendant's theory of the case was mistaken identity, not that the crimes had not occurred. Defendant's factual defense was that he did not know and had never met the complainant and that the evidence of his DNA in the complainant's vagina must be erroneous. The only question was whether the jury found the complainant credible and based on its verdicts, the jury believed her. Because asportation was never challenged, it would be implausible to believe that the jury would have changed its verdicts had the trial court given an instruction on asportation. Therefore, presuming—but, again, not deciding—that the omission of that instruction was plain error, it did not affect the outcome of the trial. Reversal is not warranted.

For these reasons, we also reject defendant's contention that he received ineffective assistance of counsel. To establish that defense counsel was ineffective, defendant must show that "(1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). As discussed above, there is no "reasonable probability" that,

had the jury been instructed on the asportation element of the kidnapping charge, its verdict would have changed. Therefore, defendant cannot show that his trial counsel was ineffective, and it is not necessary to reach the question whether counsel's performance fell below an objective standard of reasonableness.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause